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Source:
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[zRPz]TAFUMA v TUDOR HOUSE CONSULTANTS (PVT)LTD 2002 (2) ZLR 1 (H)
2002 (2) ZLR p1

Citation	2002 (2) ZLR 1 (H)
Case No	Judgment No. HH–153–02
Court	High Court, Harare
Judge	Chinhengo J
Heard	14 May 2002*
Judgment	14 May 2002
Counsel	*G M Mabuye,* for the applicant *O Ziweni,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

[zFNz]Flynote
D **Employment** —contract —termination —employee suspended without pay and benefits pending application for order to terminate employment — benefits including motor vehicle —employee resigning whilst suspended — suspension not challenged —employee not entitled to retain use of motor vehicle during period of suspension
[zHNz]Headnote
E The applicant was suspended without pay and benefits, pending the approval of the Ministry of Labour for his dismissal. The Ministry had not responded to the application for the applicant's dismissal and the applicant, anxious to finalise the matter, then resigned and returned the motor vehicle which had been part of his benefits. He claimed his salary F and other benefits which would have accrued during his period of suspension. The respondent claimed that the applicant had resigned as an employee on suspension and thus was not entitled to his salary or other benefits. The respondent also deducted an amount for the insurance and depreciation of a company vehicle which the applicant had continued to use during the period of his suspension.
G *Held,* that the suspension of an employee does not have the effect of terminating the contract of employment.
Held, further, that a contract of employment is not mutually terminated if the employee tenders his resignation: it is terminated by the employee's
2002 (2) ZLR p2
Chinhengo J
unilateral act of resignation. The employer has no option but to accept A the resignation.
Held, further, that an employee is entitled to challenge his suspension without awaiting the proceedings for dismissal. However, if an employee does not challenge his suspension the suspension takes effect with all its consequences. *In casu,* the applicant remained on suspension without B pay or benefits until his resignation and the respondent was therefore justified in not paying him his salary or for benefits which accrued during the period of his suspension, and in

deducting the amount for depreciation and insurance of the vehicle which the applicant had retained although he was not entitled so to do.
Held, further, that the application for the dismissal of the applicant had not C been abandoned and even though the applicant had subsequently resigned, the labour relations officer had no reason not to deal with the matter and determine it. It was open to either party to apply for a *mandamus* to compel the labour relations officer to discharge his duties in terms of the Act notwithstanding the subsequent resignation of the employee. D
[zCAz]Cases referred to
Blending Entprs (Pvt) Ltd v Min of Labour HH–213–01
Chisipite School Trust (Pvt) Ltd v Clarke 1999 (2) ZLR 324 (S)
Gladstone v Thornton's Garage 1929 TPD 116 E
Mashonganyika v Lena NO & Anor HH–127–01
Mushonga v NRZ 1986 (1) ZLR 111 (H)
Muzengi v Standard Chartered Bank & Anor 2000 (2) ZLR 137 (H)
Rutunga & Ors v Chiredzi Town Council & Anor HH–130–01
Zimbabwe Sun Hotels (Pvt) Ltd v Lawn 1988 (1) ZLR 143 (S) F
[zSTz]Legislation considered
Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985), s 3(h) and (i) and s 93(4)
[zCIz]Case information
G M Mabuye, for the applicant G
O Ziweni, for the respondent
[zJDz]Judgment
Chinhengo J: This case is concerned with the failure by both parties to tie up all the loose ends when the applicant's employment with the respondent H
2002 (2) ZLR p3
Chinhengo J
A was coming to an end. At the hearing on 14 May 2002, I dismissed the application with costs. These were my reasons.
On 2 October 2000. the applicant was, in terms of s 3(h) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985 ("the regulations"), suspended from employment without pay or other benefits. He however went away with the B company vehicle which had been allocated to him for use as an employment benefit. The suspension was to enable the respondent to obtain authority from the Ministry of Labour to dismiss the applicant. The reason for the suspension was that the applicant had been adjudged by the employer to be incompetent and generally a poor performer at work. The application to a C labour relations officer for authority to dismiss the applicant was made on 24 October 2000. No response to the application had been received by 4 December 2000, and by that time, it seems, the applicant had become impatient that the dispute with his employer was not being expeditiously resolved. He wanted the dispute to come to an end, so he said, so that he could be paid his terminal benefits and carry on with his life. He discussed the C matter with the respondent's administration director. The latter said that no discussion of any substance was held: the applicant only indicated or otherwise intimated that he wanted the dispute to be brought to an end quickly. This resulted in the respondent's legal practitioners writing the following letter to the applicant's legal practitioners:
E "re Tudor House Consultants (Pvt) Ltd v Mr L D Tafuma: We refer to the above matter.
Our client advises us that on 4 December your client asked the Administration Director whether there was a quick way of resolving this matter. In the event that he still wishes to resolve the matter as suggested, our client advises that a letter of resignation coupled with the return of F the motor vehicle will suffice.
Kindly let us know your client's position as soon as possible."
On 2 January 2001 the applicant resigned from employment and returned the motor vehicle. On 19 January 2001 the respondent accepted the applicant's G resignation and gave the respondent a cheque in the sum of $1 793,96 representing his terminal benefits. Attached to the letter enclosing the cheque was a computation of the terminal benefits. The computation had figures for cash in lieu of leave ($18 201,60), AIDS (HIV) Levy deduction ($546,05), a deduction of the cost of depreciation of, and insurance premiums paid by H the respondent over the three months during which the applicant retained the
2002 (2) ZLR p4
Chinhengo J
motor vehicle against the respondent's wishes ($15 437.50 and $9 525 A respectively).

When the respondent received the cheque he returned it. disputing that it represented the correct amount of his terminal benefits. This resulted in the present application wherein the applicant seeks an order for the payment to him by the respondent of his salary for the months of October. November and B December 2000. without any loss of benefits and including his bonus payment. In substance, therefore, the applicant disputes the deduction of the cost of depreciation of the motor vehicle, the deduction made in respect of the insurance premiums aforementioned and he claims, without specifying it, a sum representing cash in lieu of leave in respect of the leave days which he would have accumulated during the period October to December 2000. He C also claims payment of his salary for those three months. His claim is founded on the contention that he remained an employee of the respondent until 2 January 2001 when he resigned.

The question which this case poses for me is whether the applicant's resignation and the employer's acceptance of it had the effect of invalidating or neutralising his suspension. As is already clear, the applicant was on suspension pending the approval of the Ministry of Labour of his dismissal. His status *vis–a–vis* his employer was that of an employee under suspension without pay and benefits. It is with that status that he resigned. The respondent accepted the resignation and both the applicant and the respondent do not seem to have pursued to finality the application before the labour E relations officer. The respondent has argued in this application that when the applicant resigned he did so as an employee on suspension and one who was not in receipt of, or entitled to, his salary and other benefits. The loose ends which the parties did not tie up are all too apparent. It seems from the submissions made for both parties in the heads of argument that it is the shared view that the respondent abandoned the proceedings before the labour F relations officer. The only difference between them is that whilst the applicant simply states that the respondent has abandoned those proceedings, the respondent states that it abandoned them at the instance of the applicant who tendered his resignation before those proceedings were finalised. Further, there is nothing on the affidavits to indicate that the respondent abandoned the proceedings or that by virtue of the applicant's resignation the proceedings have *ipso facto* been abandoned. The question is whether the applicant resigned with the status of one employed but on suspension or with the status of employee *simpliciter* — an employee unaffected by any antecedent events such that it may be said that the suspension had no effect one way or the other. H

2002 (2) ZLR p5

Chinhengo J

A The suspension of an employee does not have the effect of terminating the contract of employment. When an employee is on suspension he is barred from doing his work — and barred by the employer — but he must hold himself available to perform his duties if called upon to do so. This was recognised in *Gladstone v Thornton's Garage* 1929 TPD 116 at 119 where it was stated that:

B "When an employee is 'suspended' it appears to me that apart from any express instructions he must hold himself available to perform his duties if called upon; though for the time being he is debarred from doing his work. It appears to me that that is distinct from dismissal – the use of the term 'suspended' is an indication that, while he is not to perform his duties, he must still remain bound to his employer under his contract of C service."

See also *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (S) at 151C where Gubbay CJ said:

"Plainly the obligation of an employee who is placed under suspension to hold himself available to performing his duties if called upon to do so, D is one which arises by operation of law. It is of no consequence therefore that no provision in that regard is contained in the contract of service: and it is not necessary for the employer at the time of suspension to so inform the employee."

In this case, therefore, the applicant remained an employee of the respondent right up to the time that he tendered his resignation. There is, however, a twist E in this case which engenders a difference in how the matter must be viewed. The applicant's suspension was without pay and benefits. He terminated the contract of employment whilst on such suspension. The crisp question arises whether on resignation he became entitled to the salary and benefits to which he was not otherwise entitled during the period from his suspension until his resignation. It must be noted that there is no suggestion that the applicant F tendered his resignation to avoid a dismissal. He avers that he was, as it were, fed up with the delay in having his dispute with the respondent finalised. He wanted to get on with his life and to be paid his terminal benefits. The respondent averred that the applicant resigned on his own accord and does not allude to any intention to resign in order to avoid the adverse consequences G of a dismissal.

In *Mushonga v National Railways of Zimbabwe* 1986 (1) ZLR 111 (H) the principle is laid down that if an employee tenders his resignation he cannot, generally speaking, later assert that his contract of employment was wrongfully terminated. The same case also laid down the principle that where

the parties to a contract mutually agree to terminate it such an agreement overrides H formal and substantive restrictions placed on the termination of the contract

2002 (2) ZLR p6

Chinhengo J

by the original contract itself. I think that the learned judge overstated the A position somewhat. A contract of employment is not mutually terminated if the employee tenders his resignation i.e. if he resigns. And if he resigns he may later assert the wrongfulness of the termination if he can show that the resignation was a constructive dismissal because he was coerced into resigning. This aside, counsel for both parties seemed to think that the B contract of employment in the present case was mutually terminated. It was not. The contract of employment was terminated by the applicant's unilateral act of resignation. The respondent accepted the resignation. It had no option.

In *Muzengi v Standard Chartered Bank & Anor* 2000 (2) ZLR 137 (H) Smith J, relying on the decision in *Rustenburg Town Council v Minister of Labour & Ors* 1942 TPD 220 held that a letter of resignation constitutes a C final act of termination by an employee the effects of which he cannot avoid without the employer's consent. He also held that the employer cannot refuse to accept the resignation, nor can he decline to act upon it: he really has no option.

The situation the respondent found itself in here was that it had no option but D to accept the employee's resignation when that same employee was on suspension pending authority to dismiss him. And so the question whether the applicant had a right to the salary and benefits was one which could only be tackled in the light of the resignation having been accepted. An employee who is suspended without pay and benefits in terms of s 3(h) of the Labour Relations (General Conditions of Employment) Termination of Employment) E Regulations, 1985 (SI 371 of 1985) is not entitled to hold on to his benefits nor is he entitled to his salary during the period of such suspension. *Chisipite School Trust (Pvt) Ltd v Clarke* 1999 (2) ZLR 324 (S) is solid authority for this proposition. In that case, after being suspended without pay and benefits in terms of s 3(h) and (i) of the Regulations, the employee refused to vacate a house belonging to the employer and to surrender the employer's motor F vehicle, both of which were part of her employment benefits. She did not challenge her suspension but awaited the outcome of the employer's application to the Ministry of Labour for her dismissal. At 328A–B Gubbay CJ in an *obiter dictum* expressed the following opinion:

"On the facts of this case it is strictly unnecessary to decide whether it is G open to an employee to challenge a suspension from employment by referral of the dispute under s 93(1) of the Act (the Labour Relations Act *Chapter 28:01).* Nonetheless I would venture the opinion that if able to show that the suspension was vitiated by bad faith, or was not based on any grounds of misconduct specified in s 3(1) of the regulations, or *ex facie* the allegations made did not constitute the ground of misconduct relied upon, the employee will be entitled to have the withdrawal of pay H

2002 (2) ZLR p7

Chinhengo J

A and other benefits immediately set aside without having to await the conclusion of the investigation held in terms of s 3(2) of the Regulations."

This statement would seem to contradict what I said *in Alford Rutunga & 126 Ors v Chiredzi Town Council & Anor* HH 130/2001 where at p 8–9 I said:

"The relief which the applicants herein seek is that the suspension letters be declared null and void. It must be emphasised that the applicants B persisted in seeking this relief well after the first respondent had taken further steps in the matter and actually dismissed them. It was therefore idle for the applicants to persist with this application after their dismissal. They should instead have withdrawn this application and filed another application challenging their dismissal. By persisting with this application the impression is created, and rightly so. that the applicants are relying C on technicalities relating to their suspension and not on the merits and that they are unwilling and unprepared to deal with their dismissal on the merits. This tends to weaken their case grievously. Where an employee has been suspended from employment pending investigations by the employer into any alleged act of misconduct with a view to his dismissal, it is hardly the correct thing for the employee to approach the court or D other adjudicating authority before the employer has concluded its investigation and determined whether or not the employee will be dismissed. Whereas in this case the court should have been seized with the question whether or not the dismissal was warranted, it is now constrained to deal with an earlier stage in the dispute and constrained further, in order to determine the matter, to have regard to the employer's E reasons for dismissing the applicants.

What prompted me to make this observation was that the applicants in *Rutunga*'s case *supra,* had persisted in the challenge to their suspension when the employer had gone beyond the stage of suspension and had actually determined that the applicants were dismissed. On these facts I think that I was right to hold that it was futile in the circumstances of those applicants to F pursue the

challenge to the suspension when they had been dismissed and the employer had given its reasons for dismissing them. *Rutunga*'s case cannot be construed as being contradictory to Gubbay CJ's *obiter dictum* in *Clarke*'s case *(supra).* In *Mashonganyika v Lena NO & Anor* HH 127/2001, I did not take issue with the fact that an employee can in fact challenge his suspension without awaiting the outcome of the disciplinary hearing to determine the question of dismissal. I am in agreement with Gubbay CJ's *obiter dictum* that an employee may, if so minded or advised and on good grounds, challenge his suspension G without awaiting the outcome of the proceedings for his dismissal.
If an employee challenges his suspension then a court may determine if the H suspension is justified, and if it is not the court may set it aside. The failure
2002 (2) ZLR p8
Chinhengo J
by the employee to challenge the suspension means that the suspension takes A effect with all its consequences. In terms of the Regulations an employer is permitted to suspend an employee, without pay or benefits and the employee unless he challenges such suspension, shall remain so suspended and suffer the attendant effects, until the question of his dismissal is determined. In *Clarke's* case *supra* at 328C–D Gubba y CJ discussed the effect of such a suspension:
"Pending the removal of the suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation of the headmistress' house and the use of the motor vehicle. A labour relations officer cannot order the respondent to surrender these particular benefits. Consequently the appellant being unable to resort to self–help, C approached the High Court for relief. I consider it was justified in doing so.
Whether the acts of misconduct relied upon are ultimately proved and so result in the termination of her contract of employment, was an issue awaiting decision by a labour relations officer; and until made the enjoyment of all benefits remained lost to the respondent." D
Just, in *Clarke*'s case, the applicant in *casu* did not challenge the suspension without pay and benefits. He was quite entitled to approach this court for an order to set aside the suspension of his enjoyment of the motor vehicle benefit. He did not do so and so he was not entitled to retain the motor vehicle and to continue to use it for his personal benefit. He was retaining it wrongfully and his use of it was therefore unlawful. The respondent's E charges in respect of the cost of depreciation and the cost of insurance cover were legitimate. When the applicant resigned and the application for authority to dismiss him remained unresolved and, for so long as that was the position, the respondent's action was justified.
The respondent has not abandoned the application for the applicant's F dismissal. The labour relations officer has no reason not to deal with the matter and determine it. The matter is still pending before the Ministry of Labour. A labour relations officer is enjoined by s 93(4) of the Labour Relations Act to dispose of any matter referred to him as soon as possible, and in any case not later than twelve calendar months from the date when he is first seized of the matter. The Labour Relations Act does not provide for what G happens if he has not disposed of the matter within that time. But it seems to me that it is open to either party to apply for a *mandamus* to compel the labour relations officer to discharge his duties in terms of the Act, see *The Blending Enterprises (Pvt) Ltd v The Ministry of Public Service Labour and Social Welfare* HH 213/2001). There is no indication on the papers in this application that either party has sought to compel the labour relations officer to finalise H
2002 (2) ZLR p9
Chinhengo J
A the matter. There is, however, no point in pursuing this course even though the position remains that the matter of the applicant's dismissal has still not been resolved. The applicant remained on suspension without pay or benefits until his resignation. The respondent's action was therefore justified.
After I disposed of the matter in these terms Mr *Mabuye* submitted a letter to me on 17 May 2002 in which he implored me to take into account certain B developments which had taken place. I was already *functus officio* and I could not consider those developments.
These are the reasons for my order on 14 May 2002 dismissing the applicant's case with costs.
C *Mabuye & Company,* applicant's legal practitioners.
Ziweni & Company, respondent's legal practitioners.

* This judgment was received too late to be included in the 2002 (1) ZLR—*Editor*

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Source:
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[zRPz]DAPI & ANOR v MUTARE & ANOR 2002 (2) ZLR 10 (H)
2002 (2) ZLR p10

Citation	2002 (2) ZLR 10 (H)
Case No	Judgment No. HH–108–02
Court	High Court, Harare
Judge	Smith J
Heard	3 July 2002
Judgment	3 July 2002
Counsel	*L M Kabote,* for plaintiffs *P Mwarewangepo,* for the defendants
Case Type	Civil action
Annotations	No case annotations to date

[zFNz]Flynote
Damages —assessment —damages arising from death of breadwinner — approach to —effect of inflation —right of children to claim only up to D the age of their majority
[zHNz]Headnote
The plaintiffs sued the defendants for damages arising out of the death of their mother, a member of the Zimbabwe Republic Police, who was killed whilst on duty by another officer who was also on duty. Liability E was admitted but the quantum of damages was in dispute. It was submitted that hyper–inflation should be taken into account.
Held, that damages for loss of support could only be claimed by the plaintiffs in respect of the period between the death of the parent and the date on which each reached the age of majority.
Held, further, that in calculating damages suffered, two portions of the F deceased's net income should be allocated to each parent and one portion to each child.
Held, further, that inflation was a factor which had to be taken into account.
Held, further, that where the court has to assess damages arising out of the death of a breadwinner the court must make an estimate of the present value of the loss. The fact that the assessment will to some degree G involve guesswork does not mean that the court may adopt the approach that it cannot make an award at all. Damages should be awarded as the sense of equity of the judge may determine, account being taken of the maintenance which the deceased would have been able to afford and had usually afforded to his dependa nts. H
2002 (2) ZLR p11
Smith J
[zCAz]Cases referred to A

Arendse v Maher 1936 TPD 162
Baptista v BP & Shell Marketing (Pvt) Ltd & Anor HH–52–90
Hulley v Cox 1923 AD 234
Martin v Blair & Anor HH–57–00
Mavela v Makoni & Ors HH–119–01
B *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2
Southern Ins Associates v Bailey NO 1984 (1) SA 98 (A)
Wigham v British Traders Ins Co Ltd 1963 (3) SA 151 (W)
[zCIz]Case information
L M Kabote, for plaintiffs
C *P Mwarewangepo,* for the defendants
[zJDz]Judgment
Smith J: The plaintiffs, duly assisted by their guardian, sued the defendants for damages arising out of the death of their mother (hereinafter referred to as "the Deceased"). The Deceased was a member of the Zimbabwe Republic Police. On 9 May 1999, when she was on duty at the Avondale Police Station, D she was shot and killed by the first defendant, who was also a member of the Zimbabwe Republic Police and on duty at the time. She was 33 years old when she was killed and was earning a net salary of $4000 a month. The plaintiffs claimed damages in the sum of $862 400. The defendants admitted liability and tendered payment of a lump sum of $85 562,33, plus a monthly E pension of $2 229,29 to the estate of the Deceased, and $891,72 to the plaintiffs.
The Deceased joined the Zimbabwe Republic Police on 9 April 1985, and so had served for 14 years at the time of her death. In terms of her conditions of service she could have been requested to retire after serving for 20 years. That would have meant that she would have served for a further six years. If she F was not required to retire after 20 years service, she would have had to retire on attaining the age of 50 years. In that case, she would have served for a further 17 years. At the time of the death of the Deceased the first plaintiff was 13 years old and the second plaintiff was nine years old.
Mr *Kabote* submitted that the Deceased had 17 years service ahead of her. If G one multiplied the Deceased's net annual salary of $48 000 by 17, subtracted 10 percent for contingencies, and added $68 000 (a bonus of $4 000 for 17 years), the resultant figure of $802 499 was an appropriate measure of the damages suffered by the plaintiffs. He cited the case of *Martin v Blair & Anor* HH 57–2000 and *Baptista v BP& Shell Marketing (Pvt) Ltd & Anor* HH 52– 1990 as being relevant as regards quantum and argued that the amount H claimed was likely to be insufficient, having regard to the "horrendous

decline in the value of money: "see *Mavela v Makoni & Ors* HH 119–2001. A
Mr *Mwarewangepo* submitted that the defendants had subsequently tendered payment of $200 000, and that amount was reasonable and met the justice of the case. The plaintiffs are only entitled to the benefit of loss of support until they attain the age of majority. It is wrong for the plaintiffs to claim the entire net salary of the Deceased for 17 years. As has been held in many cases, two B portions of the Deceased's net income are allocated to each parent and one portion to each child. Therefore, in this case, the Deceased and her spouse should each be allocated a third share and each child should be allocated a sixth share. The share of the first plaintiff, calculated on the five years until he attains majority, would amount to $43 333. That of the second plaintiff, who has nine years to go before attaining majority, would amount to $52 000, C if one argued that the Deceased would only serve until she had completed 20 years service, and to $78 000 if she would have served until she attained the age of 50 years. The highest award, using the above formulae, amounts to $121 333 and consequently the tender of $200 000 is more than generous. Mr *Mwarewangepo* argued that the plaintiffs cannot succeed in their submission with regard to the issue of hyper–inflation because the defendants offered D plaintiffs $200 000 in their plea that was filed on 4 July 2000. The plaintiffs were unreasonable in turning down the offer and cannot be heard to complain now.
In *Arendse v Maher* 1936 TPD 162 the court was dealing with the quantum of damages claimed by a wife arising from the death of her husband. At p 162– 163 Greenberg J said:
"The material we have is extremely scanty. No actuarial or expert evidence has been put before us, and in my opinion evidence of this kind is of very great assistance to the Court. The Court is not bound by this evidence — its discretion and its assessment of certain contingencies is still necessary. But in a fundamental question such as assessing how F much capital must be paid to a person at this stage in order to enable that person to have a fixed sum per month for life the evidence of an expert is invaluable. It may be that, if the Court itself were possessed of the

mathematical ability and of the material by way of text books or tables, it could work it out, but speaking for myself I am incapable, and counsel was equally incapable, of doing so. One requires to arrive at a sum which G will give the plaintiff a periodic payment, when the loss of a periodic payment is the basis of the plaintiff's claim, and this sum must be worked out at such a figure that at the end of the period there will be no capital sum left."

Then at p 165 the learned judge continued:

"Mr *Schwartz* contends – and there is some force in it – that in the H circumstances we ought to grant absolution, and he refers to the decision

2002 (2) ZLR p13

Smith J

A of *Hersman v Shapiro & Co* (1926, TPD 367). In that case Stratford J, at p 379 said: 'Monetary damages having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not B so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance'. I think the learned Judge was dealing more with the cases of commercial claims for damages where, had the proper evidence been before the Court, the Court would have a sure guide, but, even if this be not the whole ambit of the rule, I am not prepared to apply it to a case such as the present where, with the C best evidence, we would have had to conjecture to a great extent, and where we are to some extent in the same position as where damages are claimed for *contumelia.* It is true the present is a different class of damage, but in both these classes of case the assessment depends largely on the discretion of the Judge".

D In this case, the material is also very scanty. With regard to the method of computing damages in such cases, Innes CJ in *Hulley v Cox* 1923 AD 234 at 243–244 said:

"Some authorities consider that the calculation should be based upon the principle of an annuity (See *Grotius* 3.33.2. *Matthaeus de Criminibus* 48.5.11). *Voet* on the other hand favours a more general estimate. Such E damages, he thinks, should be awarded as the sense of equity of the judge may determine, account being taken of the maintenance which the deceased would have been able to afford and had usually afforded to his wife and children. *(Ad Pand.* 9.2.11). That would seem the preferable view as giving a greater latitude to deal with varying circumstances. It is at any rate desirable to test the result of an actuarial calculation by a G consideration of the general equities of the case. As pointed out in *Jameson's Minors v CSA Railways,* where the whole question was fully investigated, 'maintenance is not confined to the mere necessaries of life. The dependants are entitled to be compensated for the pecuniary loss involved in a reduced income and a restricted provision for the supply of what they had been accustomed to'''.

G These views so ably expressed by Innes CJ were quoted with approval by Ramsbottom J in *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2 at 15–16.

The method of calculating the damages that was put forward by Mr *Mwarewangepo* is sound in so far as it relates to the position that pertained at the time the Deceased was shot. That was before inflation had set in at the H levels that have now been reached in this country. He submitted that the

2002 (2) ZLR p14

Smith J

$200 000 offered by the defendants is more than generous. That may well A have been so in 2000 but that is not the case now. In *Wigham v British Traders Insurance Co Ltd* 1963 (3) SA 151 at 156 Bekker J said:

"In *Sigournay v Gillbanks,* 1960 (2) SA 552 (AD) at p 557, Schreiner, JA held:

'Where there has been a change in the situation between the date of the B delict and the date of the judgment this change may affect the amount of damages to be awarded. But in respect of the claim for loss of earnings in this case no relevant change took place between those dates. There was no income actually lost, in the sense of being earned but not received. In respect of the period before the judgment the contingency of the plaintiff's death before reaching his expected terminal age *had pro tanto* C been removed from the picture, but for the rest the enquiry was the same'.

It seems to me, accordingly, that it would in fact be wrong not to assess the amount in the first manner suggested, and this, I think, is clearly demonstrated by the contention advanced by Mr *Kentridge* to the effect that if in a given case the trial in an action such as the present is heard, say two or three years after the actuarial expectation of life has run but D the plaintiff still happens to be alive, it would be inconceivable that the Court in assessing her actuarial loss will confine itself to the assessment based on the expectation accorded to her by the actuary and ignore the fact that she has outlived that period by two or three years."

Inflation is a factor that must be taken into account, especially in the circumstances that pertain in Zimbabwe today. This was confirmed in E *Southern Insurance Associates v Bailey NO* 1984 (1) SA 98 (A) at 116 B–D where Nicholas JA said:

"The practice of the South African Courts, however, has generally been to take inflation into account. It is a practice which was recognised by this Court in *Legal Insurance Co Ltd v Botes* 1963 (1) SA 608 (A). In that case, the trial Court had declined to take into account the probability that F the value of money in this country would continue to depreciate. It regarded this factor as being too speculative. Holmes JA, who delivered the judgment of the Court, said at 619F that on the evidence of an actuary who had been called as a witness, the point was established as a reasonable possibility which should be borne in mind. He added (619G– H):

'...in seeking to compensate her there should be taken into account the G depressing but reasonable possibility that the value of money will continue its sorry abatement with its constrictive tendency on the brave efforts of those with fixed incomes to make ends meet. It is of course impossible to calculate any allowance therefor with precision, but it is a factor which must be borne in mind along with all the others. It will H be taken into account later in this judgment'"

2002 (2) ZLR p15

Smith J

A In the *Bailey* case, *supra,* at p 113 Nicholas JA at p 113–114 had the following to say about ascertaining quantum with regard to a claim for damages consequent on bodily injury:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court B can do is to make an estimate, which is often a very rough estimate, of the present value of the loss:

It has open to it two possible approaches..

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, C a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

D It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. See *Hersman v Shapiro & Co* 1926 TPD 167 at 379 *per* Statford J:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. E There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages'. And in *Anthony and Another v Cape Town Muncipality* 1967 (4) SA 445 (A) Holmes JA is reported as saying at 451B–C:

'I therefore turn to the assessment of damages. When it comes to F scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N) at 287 and *Turkstra Ltd v Richards* 1926 TPD at 282 *in fin–283'"*.

G I agree with Mr *Mwarewangepo* that the plaintiffs are not entitled to claim for loss of support for a period of 17 years. The plaintiffs can only claim in respect of the period between the death of the Deceased and the date each attains majority. In assessing the amount that should be awarded, the court must have regard to the horrendous decline in the value of money — see *Mavela's* case, *supra.* I consider that the amount of $802 400 claimed is H excessive. An appropriate amount would, in my view, be $500 000.

2002 (2) ZLR p16

Smith J

As regards interest, the plaintiff claims that it should run from 9 May 1999. A Had the damages been assessed having regard to the value of money as at that date, then it would be appropriate to order that interest runs from the date of the shooting of the Deceased. However, I have determined the amount of damages having regard to the present day value (or rather lack thereof) of money. Accordingly, it would be appropriate for interest to run from the date of this judgment. B

It is ordered that the defendants jointly and severally, the one paying the other to be absolved, pay the plaintiffs:

1. $500 000, with interest thereon at 30 per *cent per annum* from the date of this order to the date of payment;
2. costs of suit. C

L M Kabote & Co, legal practitioners for plaintiffs
Civil Division of the Attorney–General's Office, legal practitioners for defendants D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v BARROS & ORS 2002 (2) ZLR 17 (H)

[zRPz]S v BARROS & ORS 2002 (2) ZLR 17 (H)
2002 (2) ZLR p17

Citation	2002 (2) ZLR 17 (H)
Case No	Judgment No. HH–110–02
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	3 July 2002
Judgment	3 July 2002
Counsel	*J Samkange,* for the first applicant Miss *P Takavadii,* for the second applicant *B W Kahari,* for the third applicant *W Madera,* for the respondent
Case Type	Bail application
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure — bail —application —further application — change D in circumstances justifying reconsideration of bail — weakness of evidence led —postponement of trial —whether either constitute a change in circumstances justifying reconsideration of bail
[zHNz]Headnote
The applicants were in custody pending trial for robbery. They had previously– been refused bail by the High Court, although two of their co–accused E had, with the consent of the State, been admitted to bail. The fact that their co–accused were on bail was known to the High Court at the time bail was refused to the applicants. No appeal was noted against the refusal to grant bail at that time.
After the trial had started, and the evidence–in–chief of one out of three State F witnesses had been led, the trial was adjourned. Some two months later, before the planned date for resumption, the applicants applied for bail. It was argued that circumstances had changed, in that the evidence led so far was weak and did not implicate the applicants any more than it implicated their co–accused who were out on bail. The trial did not resume on the date planned; the defence sought a postponement, which G was granted on the grounds that the defence had not been properly

consulted about the date and were not in a position to resume the trial then. When the trial did resume, a further application was made for bail, it being argued that the postponement constituted a change in circumstances. *Held,* that the untested evidence of one out of three witnesses did not H constitute a change in circumstances justifying reconsideration of bail,
2002 (2) ZLR p18
Hlatshwayo J
nor did the weakness of evidence led. The prudent approach was to A assess the evidence either at the end of the State case, when an application might be made for the accused's discharge, or at the end of the trial.
Held, that a postponement of a trial is a change in circumstances entitling a court to reconsider the question of bail. It did not matter at whose B request the postponement took place. Whether bail should in fact be granted will depend on the circumstances of the case in question, the length of the postponement and the nature of the charges. In this case, the charge was a serious one; the applicants faced a lengthy term of imprisonment; and the postponement was not an inordinate one. Bail would accordingly not be reconsidered. C
[zSTz]Legislation considered
Criminal Procedure and Evidence Act [*Chapter 9:07*]*,* s 116(1)(c)
[zCAz]Cases cited
S v Lotriet & Anor 2001 (2) ZLR 225 (H) D
S v Dzawo 1998 (1) ZLR 536 (H)
S v Masuku HH–79–02
[zCIz]Case information
J Samkange, for the first applicant
Miss *P Takavadii,* for the second applicant
E *B W Kahari,* for the third applicant
W Madera, for the respondent
[zJDz]Judgment
Hlatshwayo J: This application is for bail pending the conclusion of a trial that has already commenced before me. The three applicants, Edward Morris Barros, Joseph Juma and Ray Chiro, are jointly charged with armed F robbery together with three other persons: Brian Mutiro, Manuel Savedo and Happymore Kundishora. Two of their co–accused, Brian Mutiro and Manuel Savedo, were, by consent of the State, admitted to bail pending trial on 22 October 2001. However, the three applicants, together with one other co– accused, Happymore Kundishora, were denied bail pending trial by the High G Court in November 2001 when the fact of the release on bail of their other two co–accused was already known. There was no appeal against this refusal of bail.
At the commencement of their trial on 18 February 2002, I confirmed the existing bail statuses of all the accused persons. The trial adjourned on 21 February after the evidence in chief of one out of a possible three State H witnesses had been led.
2002 (2) ZLR p19
Hlatshwayo J
A On 22 April, the three applicants, together with Happymore Kundishora, applied for bail before me on the basis that the evidence led thus far was either weak or did not implicate them any more than it implicated their co–accused who were out on bail and that this constituted changed circumstances necessitating their release on bail, as did the fact that their co–accused were attending trial from home. The State argued that the granting of bail to the B co– accused persons was known at the time of the consideration of the applicants' initial bail application and the justification for the differentiation was made then. I held that the untested evidence–in–chief of a single state witness out of a possible three was not a sufficient basis for me to make a finding of changed circumstances necessitating the granting of previously denied bail. C I also did not think that the weakness of evidence let at a trial could constitute a change in the circumstances contemplated in s 116 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The prudent approach should be to reserve any assessment of evidence to the appropriate stages such as applications for no case to answer at the end of the State case or judgment at the conclusion of the trial.
D The present application was made on the basis that there has been a change in circumstances in that the trial failed to resume on 17 June 2002. This postponement was granted at the request of the applicants' lawyers, who submitted that "there had been no proper consultation for this date between the Attorney–General's Office and the legal practitioners representing the accused persons"and that, therefore, the defence lawyers' availability and/ E or preparedness was not assured.
I deemed the request for postponement to be justified in the circumstances and rescheduled the hearing to the first week of the vacation, 5–9 August 2002, whereupon the applicants immediately

advised of their intention to apply for bail on the basis of the postponement just granted.
F Mr *Madera,* for the State, opposed the application for bail basically on the grounds that any change in circumstances has been a change for the worse in that, in his opinion, the evidence so far led incriminated the applicants and increased the risk that they might abscond. Mr *Samkange* submitted, and properly so in my opinion and in the light of what I have already said above, that it would be inappropriate to comment on the evidence at this stage. On G behalf of the applicants it was stated that the co–accused persons charged with the same serious offence had not absconded and that the applicants were prepared to be bound by even more stringent bail conditions than those applicable to their co–accused.
Section 116 (1) (c) of the Criminal Procedure and Evidence Act states in H proviso (ii) as follows:
2002 (2) ZLR p20
Hlatshwayo J
"where an application in terms of this subsection is determined by a judge A or magistrate, a further application in terms of this subsection may only be made, whether to the judge or magistrate who has determined the previous application or to any other judge or magistrate, if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination." B
The meaning of the above provision is quite clear. Where an application for bail has been refused, a further application for bail may only be made if such application is based on changed circumstances, that is, "facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination." The reason for this rule is obvious. It is meant, among other things, to obviate C the presentation and consideration of the same facts or variants thereof, over and over again, in a bid to obtain bail and helps in achieving finality in the matter. It is comparable to the rule limiting bail considerations to two stages only where the initial bail application was made at the magistrate' court and an appeal at the High Court has been unsuccessful. See *S* v *Dzawo* 1998 (1) ZLR 536 (S) at 539 D and S v *Lotriet & Anor* 2001 (2) ZLR 225 (H).
The differentiation between the accused persons who were granted bail and those who were refused is a factor that was known when the applicants were denied bail, and therefore does not constitute changed circumstances now. E am also cognisant of a further limitation I have as a trial judge in attempting to reconsider the distinction made between the two sets of accused persons, and it is that all the facts placed before the previous judge may not, for good reasons, be placed before me.
This then leaves the question as to whether a postponement, such as the one in this case, could be regarded as a change in circumstances justifying a F reconsideration of bail. Mr *Madera* submitted that the court should take into account that the postponement was at the behest of the defence and not through the fault of the state. However, I agreed with Mr *Samkange's* view that once a postponement has \ill\en deemed appropriate by the court, it matters not how it has come about. See also Chinhengo J in S v *Masuku* HH– 79–2002 at p 7 of the cyclostyled judgment. Whether a given postponement G would justify a reconsideration of bail depends on the circumstances of the case in question, the length of the postponement and the nature of the charges.
In casu, the applicants faces a serious charge punishable by a lengthy period of incarceration and the length of the postponement is not inordinate. Accordingly, this postponement is not sufficient ground for the reconsideration H of bail. It is, however, appropriate to sound a word of warning here that while
2002 (2) ZLR p21
Hlatshwayo J
A it is open to an accused person to seek to be released on bail at any time from arrest through trial to dismissal of appeal, adjournments throughout all these processes are sought and granted in the interest of justice and should not be abused for speculative applications for bail at each turn.
Having decided that the postponement in this case does not constitute such a change in circumstances as would justify the reconsideration of bail, it was B not necessary for me to examine the various bail conditions which the three applicants have proposed. The lawyers for the applicants applied for leave to appeal against this decision, which I granted only out of abundance of caution for it seems to me that the there is no need to seek such leave since a bail order is not the kind of interlocutory order contemplated in s 44 (5) of the High C Court Act [*Chapter 7:06*]. (See J Reid Rowland *Criminal Procedure in Zimbabwe* p 6–13 para10(a)(ii)).
Byron Venturas & Partners, legal practitioners for the first applicant.
Atherstone & Cook, legal practitioners for the second applicant.
D *B WKahari,* legal practitioners for the third applicant.
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 2/LIQUIDATOR, ZECO LTD v REGISTRAR, PENSIONS AND PROVIDENT FUNDS & ORS 2002 (2) ZLR 22 (S)

[zRPz]LIQUIDATOR, ZECO LTD v REGISTRAR, PENSIONS AND PROVIDENT FUNDS & ORS 2002 (2) ZLR 22 (S)
2002 (2) ZLR p22

Citation	2002 (2) ZLR 22 (S)
Case No	Judgment No. S–42–02
Court	Supreme Court, Bulawayo
Judge	Cheda JA, Ziyambi JA & Malaba JA
Heard	26 March 2002; 8 July 2002
Judgment	8 July 2002
Counsel	*G S Wernberg,* for the appellant *P Ncube,* for the first respondent No appearance for the second respondent *R M Fitches,* for the third respondent
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Pensions —pension benefits — withholding of — when benefits may be D withheld —proof required before benefits may be withheld
[zHNz]Headnote
The third respondent had been an employee of the appellant company, which was placed in liquidation in 1995. After the company had been placed in provisional liquidation, the first respondent, the Registrar of E Pensions and Provident Funds, approved the withholding of pension benefits due to the third respondent, provided that the liquidator showed that the third respondent had actually been convicted of the crimes of fraud and theft which the appellant alleged against him. Several months later, as no such evidence had been provided and as the charges against F the third respondent were withdrawn in court, the Registrar instructed that the third respondent's pension benefits be paid to him. An application by the appellant to set aside the Registrar's instruction was refused by the High Court. The liquidator appealed against the High Court's decision.
Held, that it was clear from the legislation that pension benefits should not G be interfered with unless the person has voluntarily–ceded or pledged his benefits, or has been involved in clear and proven acts of dishonesty which have caused pecuniary loss to his employer. The liquidator had failed to provide proof of the standard required.
Held, further, that the Registrar, having initially approved the withholding H
2002 (2) ZLR p23

Cheda JA
A of the pension, could not be said *be functus officio* when he revisited his decision, as it was clear that his original decision was conditional.
[zCAz]Cases cited
Muchakata v Netherburn Mine 1996 (1) ZLR 153 (S)
Nissan Zimbabwe (Pvt) Ltd v Hopitt (Pvt) Ltd 1997 (1) ZLR 569 (S)
[zSTz]Legislation considered B
Pensions and Provident Funds Act [*Chapter 24:09*], s 36(2)(i)
Pensions and Provident Funds Regulations 1991 (SI 323 of 1991), ss 51 &52
[zCIz]Case information
G S Wernberg, for the appellant
P Ncube, for the first respondent
No appearance for the second respondent
R M Fitches, for the third respondent
[zJDz]Judgment
D **Cheda JA:** The appellant is the liquidator of ZECO Limited ("ZECO"), a company with limited liability, incorporated according to the laws of Zimbabwe, which was provisionally liquidated by order of the High Court on 25 August 1995, and which order was made final on 8 December 1995. The first respondent is the Registrar of Pensions and Provident Funds E appointed in terms of s 3 of the Pensions and Provident Funds Act [*Chapter 24:09*]. The second respondent is the manager of Old Mutual Employee Benefits Division who administered the Pension Fund. The third respondent is a former employee of ZECO, who was a contributor to the ZECO Pension Fund.
F After ZECO was placed under provisional liquidation, the first respondent wrote, in reply to the second respondent, on 9 August 1996 as follows:
"RE: WITHHOLDING OF BENEFITS: MR E L VENABLES, ZECO PENSION FUND: $22 491.102
I acknowledge receipt of your letter referenced REMT/km dated 1 August 1996 in which you were seeking the Registrar's approval to withhold withdrawal of benefits due to the above–named member in terms of section 52 of the Pensions and Provident Funds Regulations, 1991.
Please be advised that your request has been approved. However, the benefits should not be utilised until the case has been finalised by the H Court of Law."
2002 (2) ZLR p24
Cheda JA
On 29 January 1998, the first respondent ("the Registrar") wrote to the A appellant and said, among other things:
"However, before approval to with hold Mr E L Venables pension benefits is granted, you are required to submit to this office documentary evidence in the form of the Court judgment or summary jurisdiction proving that Mr Venables was actually tried in (a) court of law and was found guilty of the alleged crimes of fraud and theft resulting in the B employer suffering pecuniary loss."
By 19 March 1998, the appellant's legal practitioner had responded to the above, expressing surprise as authority to withhold the benefits had been granted in the letter dated 9 August 1996. In the same letter it was admitted that there was no judgment against the third respondent ("Venables"), as the C matter had not been finalised. The letter also said if further documentary evidence in support of the charges of theft and fraud against Venables were required, the writer should be advised of the nature of the evidence and documentation required. On 1 September 1998 the Registrar advised the appellant as follows:
"Please be advised that in the absence of any Court judgment or summary D jurisdiction proving Venables guilty of dishonesty or fraud resulting in a pecuniary loss to ZECO Limited, the Registrar is directing you to release the member's pension benefits."
A letter dated 4 January 1999 was sent to the appellant's legal practitioners, advising that they should allow Old Mutual to pay Mr Venables' pension E benefits, as the documents fell short of what was required by SI 323 of 1991 (Pension Regulations of 1991).
The above events led to a court application, in which the appellant sought an order setting aside the later decision of the Registrar pending the determination of the loss attributed to Venables in case no. 2518/98. The application was heard by Kamocha J, who upheld the decision of the Registrar. The appellant F now appeals against this decision.
The appellant alleged that ZECO had to be placed under liquidation because during its operations Venables had carried on the business of ZECO for a fraudulent purpose, alternatively recklessly, alternatively with gross negligence, as envisaged in s 318(1) of the Companies Act [*Chapter 24:03*] G and was knowingly a party to the carrying on of the business in the manner aforesaid.
Section 36 of the Pensions and Provident Funds Act authorises the Minister of Finance, "or any other Minister to whom the President may, from time to time, assign the administration of this Act", to

make regulations to include among other things the following: H
2002 (2) ZLR p25
Cheda JA
"(i) subject A to the Maintenance Act [*Chapter 5:09*] and the Children's Protection and Adoption Act [*Chapter 5:06*]. the prohibition or control of the cession, pledging or hypothecation of benefits payable by a registered fund and the protection of such benefits on insolvency or assignment or from attachment or execution under a judgment or order of a court, B
(j) the withholding of any benefits payable by a registered fund where the member concerned —
(i) has borrowed and not fully repaid money from the fund or from his employer and has pledged his rights to benefits from the fund as security therefore; or
(ii) has been discharged because of dishonesty which has resulted in his employer suffering loss;
C and the person to whom such benefits or portion thereof may be paid."
In accordance with the above, the Minister of Finance made the Regulations in Statutory Instrument 323 of 1991. The relevant parts of the Regulations read as follows:
"51(2) Subject to the Maintenance Act [*Chapter 5:09*] and the Children's D Protection and Adoption Act [*Chapter 5:06*] and subsection (1) of section 52 —
(a) no right to a benefit payable from a fund shall be capable of being ceded, pledged or hypothecated or be liable to be attached or be subject to any form of execution under a judgment or order of a court; and E
(b) any purported cession, pledge or hypothecation of a right to any benefit payable from a fund shall be ignored by the trustees.
(3) If the estate of a member of a fund or any beneficiary of a former member is sequestrated or assigned, his right to any benefit from the fund shall not form part of the assets of his insolvent or assigned estate."
F The request to withhold the benefits of Venables was made in terms of s 52 of the Regulations, which reads as follows:
"52(1)The Rules of a fund shall provide that if the Registrar is satisfied that a member of a fund –
(a) who has left the service of his employer and has not fully repaid any loan such as is referred to in subsection (4) of section 18 of G the Act from the fund or from his employer and has pledged his rights to benefits from the fund as security therefor; or
(b) has left the service of an employer because of dishonesty which has resulted in the employer suffering loss;
he may authorise the fund to withhold any benefits payable to that member until such time as the loan, together with interest, has been H repaid or the loss has been made good, as the case may be."
2002 (2) ZLR p26
Cheda JA
The Regulations go on to set out what is required in order to satisfy the A Registrar that there is good cause to withhold benefits of a member in section 52(3), which reads as follows:
"(3) All claims submitted for authorisation in terms of this section shall be accompanied by the following documents –
(a) a cession form or such other documents signed by the member B for a loan such as is referred to in subsection (4) of section 18 of the Act, or for a similar kind of loan granted by his employer or granted by a person registered in terms of the Banking Act [*Chapter 24:01*], the Building Societies Act [*Chapter 24:02*] or the Insurance Act [*Chapter 24:07*];
(b) the court judgment or summary jurisdiction proving the member guilty of dishonesty or fraud involving a pecuniary loss to the C employer;
(c) a statement indicating the amount being claimed and the amount of benefits due to the member; and
(d) any other documents or information the Registrar may subsequently require."
The above subsection clearly lays down the standard of proof required before D the Registrar can authorise any interference with a member's benefits from a pension fund. It shows also that a pension fund should be treated as sacred, and is not to be interfered with lightly. This is because it is a contribution by a person during their active working life as preparation for their future or old age. The benefits are not to be interfered with unless the person has voluntarily ceded or pledged his benefits, or has been involved in clear and E proven acts of dishonesty which have caused pecuniary loss to his employer.
It is clear from the facts of this case, and the affidavits of the parties, that the request of the appellant did not meet the above strict requirements. None of the required documents were supplied

to support the request or justify the withholding of the benefits. There was neither a cession document, nor a F court judgment, nor summary jurisdiction proving the member guilty of dishonesty or fraud involving a pecuniary loss to the employer.

Even when asked for such documents, the appellant could not provide any, except to argue that the matter was still pending.

Whether the appellant would be able to prove the allegations against G Venables later or not is irrelevant. What is important is that, at the time of the request, there was no proof that he could place before the Registrar for consideration. His allegation remained a mere allegation.

On the other hand, the Registrar was aware of what was required and that the requirements set out in the Regulations were not met. H

2002 (2) ZLR p27

Cheda JA

A The appellant took issue with the Registrar for having previously approved the request and submitted that the Registrar was not entitled to revisit and change his decision. This argument was based on the fact that once he had made the decision authorising the withholding of the benefits, the Registrar was then *functus officio.*

It was also argued that this issue had not been raised in the notice of appeal, B but was being raised for the first time in the heads of argument. On the other– side, it was argued that this being a matter of law, it could be raised at any time.

Indeed, authorities such as *Nissan Zimbabwe (Pvt) Ltd v Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S) and *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S)C support the argument that a point of law may be raised for the first time even on appeal, if it goes to the substance of the dispute and its consideration involves no unfairness to the other party. In this case I do not believe there is any unfairness to the other party. In any event, the resolution of the matter does not depend entirely on this issue.

There is an alternative way of looking at this same issue. In his reply to a letter D from Old Mutual, the second respondent, in agreeing to the withholding of the pension benefits of the third respondent, added the following:

"However, the benefits should not be utilised until the case has been finalised by the Court of Law."

We have not seen the letter from Old Mutual to the Registrar, but this seems E to suggest that in making the request the appellant could have indicated that there was a case pending before a court of law. This letter from the Registrar is dated 9 August 1996.

On 29 January 1998 the Registrar, in reply to yet another letter from the appellant, stated the following:

F "However, before approval to withhold Mr E L Venables pension benefits is granted, you are required to submit to this office documentary evidence in the form of the Court judgment or summary jurisdiction proving that Mr Venables was actually tried in (a) court of law and was found guilty of the alleged crimes of fraud and theft resulting in the employer suffering pecuniary loss. I now await your further submission G so that we can finalise this matter."

The above was in reply to the letter from the appellant dated 25 November 1997.

Again we do not have that letter and its exact contents remain unknown. But what is clear is that the issue of withholding Venables' benefits continued to H be discussed between the Registrar and the appellant.

2002 (2) ZLR p28

Cheda JA

The letter of 9 August 1996 suggests that the authorisation by the Registrar A was conditional upon the case against Venables being finalised by a court of law. Obviously this condition was never met.

The Registrar's letter of 29 January 1998 again advises the appellant of the requirements of the Registrar's office before the withholding could be approved. He again mentioned the documentary proof required to prove that B Venables was tried in a court of law and was found guilty of the alleged crimes of fraud and theft resulting in the employer suffering pecuniary loss.

Again these conditions were not met by the appellant. The appellant must have passed this letter to his legal practitioners who then wrote to the Registrar saying that the Registrar had already granted authority to withhold the benefits. C

In their letter they admitted that there was no judgment in respect of charges against Venables. They then ask the Registrar to advise the nature of evidence and documentation the Registrar required, despite his detailed letter of 29 January 1998.

A letter from the legal practitioners to the Registrar dated 26 August 1997 D advises the Registrar that on that same date the charges against Venables had been withdrawn in the magistrates court. Faced with this development, it is clear that the Registrar realised then that the conditions he had insisted on could not be met.

Accordingly, the Registrar had good reason to revisit the matter. One has to E take into account also the fact that even his original authority was conditional upon this requirement being met. Between the first letter wherein he granted the conditional authority and the final decision, the appellant seems to have engaged the Registrar on the matter. The letter from his legal practitioners asks for any further evidence that the Registrar required. This clearly supports the view that the appellant appreciated that the Registrar's decision F was not final but conditional.
In view of the court case against Venables being withdrawn, the Registrar was therefore entitled to revisit and finalise the matter. He cannot be regarded as having become *functus officio.*
In addition the first conditional decision did not render the Registrar *functus* G *officio* as there is no evidence to show that Venables was heard on the matter. Neither is there anything to show that the discussions and decisions made were communicated to him. The Registrar was therefore entitled to change his decision on realising that the conditions he had set were not being met by the appellant. He must have concluded, and correctly so, that once the court H
2002 (2) ZLR p29
Cheda JA
A case was withdrawn, there was no further basis for the appellant to hold onto Venables' pension benefits.
In view of the above. I agree with the court *a quo* in holding that the appellant had failed to prove his allegation against Venables which would have entitled him to withhold his pension benefits.
B Accordingly, the appeal cannot succeed and it is dismissed with costs.
Ziyambi JA & Malaba JA concurred
Ben Baron & Partners, appellant's legal practitioners
C *Coghlan & Welsh,* first respondent's legal practitioners
Webb, Low & Barry, third respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/MUROIWA v DELTA OPERATIONS LTD & ANOR 2002 (2) ZLR 30 (S)

[zRPz]MUROIWA v DELTA OPERATIONS LTD & ANOR 2002 (2) ZLR 30 (S)
2002 (2) ZLR p30

Citation	2002 (2) ZLR 30 (S)
Case No	Judgment No. S–135–01
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ebrahim JA & Malaba JA
Heard	1 October 2001; 8 July 2002
Judgment	8 July 2002
Counsel	Appellant in person Miss *E K Mushore,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Review —application —grounds —grounds given being effectively grounds of appeal — application dismissed D
[zHNz]Headnote
In February 1998 the appellant was charged with two counts of misconduct arising from the misuse of his employer's vehicles. The inquiry by the first respondent's motor vehicle committee revealed several other instances: no less than twelve accidents in the previous two years. The committee dismissed the appellant. He appealed under the code of E conduct, and fresh proceedings were ordered on the grounds that the disciplinary committee had not been properly constituted. Although a new code of conduct had in the meantime been introduced, the fresh proceedings were held the next month (March 1998) under the previous code. The appellant's dismissal was once again ordered. He appealed to F the appeals committee, which dismissed his appeal in April 1998. More than two years later, in September 2000, the appellant launched review proceedings in the High Court. The judge dismissed the application on the ground that it was made out of time and that there was no basis for granting the application for condonation. The appellant appealed against the decision of the High Court. G
Held, that where a party appeals against a refusal to grant condonation for the late noting of review proceedings, he must show either than the judge misdirected himself or that the decision was grossly unreasonable. The judge had considered all the relevant factors and had not misdirected himself in refusing to grant condonation. The delay was inordinate and the grounds given — that he could not proceed without a copy of the H
2002 (2) ZLR p31
Chidyausiku CJ
A record of the proceedings before the appeals committee — were unsatisfactory. The grounds given for review were effectively grounds of appeal. The court *a quo* had exercised its discretion properly and there were no grounds for interfering with its decision.
[zCIz]Case information
Appellant in person
B Miss *E K Mushore,* for the respondents
[zJDz]Judgment
Chidyausiku CJ: The appellant in this case was employed by the first respondent as a buyer. In February 1998 the appellant was charged with two counts of misconduct. In the first count, the appellant was charged with C misuse or negligent use of company property. In the second count, the appellant was charged with disobeying company rules and regulations.
An enquiry into the allegations against the appellant was conducted by the first respondent's motor vehicle committee. It was established during this enquiry that the appellant was involved in no less than twelve accidents and/ or incidents with his employer's motor vehicles from 1996 to 1998. The D employer lost three vehicles completely through the appellant's accidents. In answer to the list of allegations against him the appellant admitted that he was wrong. The committee explained to the appellant the gravity of the allegations against him and invited him to reflect on the matter and submit a written response.
E The appellant reflected on the matter and responded in writing. His response in part reads as follows:
"I am deeply concerned and worried about the occurrence *(sic)* of the past six months, which involve company vehicles. As minutes will show, I agree that I was at fault and accept disciplinary action taken by the motor vehicle committee (to me, the Company)."
F The motor vehicle committee thereafter dismissed the appellant from employment. The appellant appealed against the dismissal, as was his right in terms of the code of conduct ("the Code") to the divisional chief executive. The ground of appeal was that his transgression was minor and did not warrant dismissal.
G On 25 February 1998 the managing director of the first respondent wrote to the chairman of the motor vehicle committee informing him that there had been a procedural error in the proceedings against the appellant, in that both the managing director and the motor vehicle committee chairman should not have participated in the proceedings and that, in terms of the Code, the industrial relations manager should have chaired the proceedings. Accordingly, H and with the intention of adhering to the laid down procedure, the managing

2002 (2) ZLR p32
Chidyausiku CJ
director recommended that the dismissal letter be revoked and a properly A constituted disciplinary committee rehear the matter.
By letter dated 26 February 1998 to the appellant, the first respondent revoked the dismissal and advised the appellant that he was to be reheard. At the same time, the first respondent advised the appellant that because the offences were committed whilst the old code of conduct was in place, the old B code would be applied.
On 12 March 1998 a rehearing of the appellant's case was conducted by a properly constituted disciplinary committee. The appellant was charged with the same counts of misconduct, namely, misuse and negligent use of company property and violation of company rules and regulations. During these proceedings the appellant admitted using various company vehicles on C various occasions without authority; using a vehicle without the company knowing where he would use the vehicle as he never mentioned where he was taking the vehicle to; wanton destruction of company property; suspicious circumstances leading to the first respondent's vehicle under the appellant's control being damaged and requiring repairs totalling $10 000; failure to D report accidents to the police; leaving another vehicle in an unsecured place, leading to it being stolen; being granted permission to use a vehicle to undertake a certain task and then abandoning that task in order to go joyriding; and visiting a girlfriend, during which visit a company vehicle was stolen. The last incident occurred on the first occasion a ban on the appellant to use company motor vehicles had been lifted. In his defence, all that the E appellant could state was that those incidents had happened against his will and he did not consider them serious.
The disciplinary committee found the appellant guilty and terminated his contract of employment with the first respondent. In the letter of termination of employment, details of the appellant's transgressors and reasons for termination were set out. F
The appellant appealed to the appeals committee on the grounds that the second disciplinary committee was biased and that the committee should not have looked at every offence but should only have looked at one offence. The appellant also contended that the punishment was severe and that the hearing by the committee was out of time. On 2 April 1998 the appeals committee G dismissed the appeal and confirmed the appellant's dismissal from employment.
After a lapse of some eighteen months and on 19 September 2000, the appellant launched review proceedings in the High Court against the determination of the appeals committee of 2 April 1998. In the application H for review the following two grounds for review were advanced:

2002 (2) ZLR p33
Chidyausiku CJ
(1) the A appeals committee took a globular approach in coming to its decision without going to the merits of the matter; and
(2) that the new Code should have been used as opposed to the old Code which was used.
The court *a quo* dismissed the application for review on the basis that it was B made out of time and that there was no basis for granting the application for condonation.
It is this decision that the appellant now appeals against. The grounds of appeal are set out in the notice of appeal, which read as follows:

"1. It is submitted that the trial judge misdirected himself by considering the circumstances of the first dismissal of the appellant instead of C relying on the proceedings of the appellant's appeal to the second respondent in the prosecution of the matter before him.

2. It is further submitted that the trial judge erred in concluding that the reasons for the delay in bringing the matter up for a review were unsatisfactory, especially when he could not proceed with the matter without the record of proceedings. D

3. With regards to the proceedings, the trial judge overlooked fundamental facts on the merits of the matter. It is submitted that the decision of the second respondent, as set out by letter of 2nd April 1998, is totally different from the proceedings which clearly show at least two important areas of agreement with the appellant."

Rule 259 of the High Court Rules provides that review proceedings must be E brought within eight weeks of the date of the determination being brought on review. The same Rules also confer on the High Court the discretion to condone a delay in the launching of review proceedings on good cause being shown.
In a case where the court *a quo* has refused to grant condonation to a party, F that party, to succeed on appeal against such a refusal, has to establish either a misdirection or that such refusal was grossly unreasonable.
In dismissing the application for condonation, the learned judge in this case took into account:
(1) the duration of the delay;

(2) the explanation for the delay; and
(3) the appellant's prospects of success on the merits.

The above factors were relevant to the issue the learned judge had to determine. Accordingly there was no misdirection.

The learned judge concluded that the delay in this case was inordinate. It is H common cause that the determination sought to be reviewed was made on 2 April 1998 and the review was launched in August 2000. There is no doubt

2002 (2) ZLR p34
Chidyausiku CJ

that the learned judge was correct in concluding that this delay, in excess of A two years, was inordinate.

The appellant's explanation for the delay is that he had to institute court action to obtain a record of proceedings of the appeals committee. The appellant does not explain how or on what basis he contends he could not commence review proceedings without the record. It would appear from the B record that he was demanding the record in order to institute an appeal to the Labour Relations Tribunal and not to institute review proceedings. Indeed, it would also appear that the record of the proceedings of the appeals committee only became available to the appellant after review proceedings had been launched. In my view, the learned judge in the court *a quo* was correct in concluding that the explanation for the delay was unsatisfactory. C

Apart from the above, the learned judge considered the appellant's prospects of success on the merits and concluded that there was no possible ground upon which the determination of the appeals committee could be set aside on review. Again I find myself in agreement with the learned judge in this regard.

The grounds for review set out in the application for review are, as D Miss *Mushore* correctly submitted, grounds of appeal. The only ground that has a semblance of a ground for review is that the appellant was charged and tried under a wrong code of conduct. I do not think there is substance in this contention. Accordingly, the court *a quo* was correct in concluding that the application for review had no prospects of success on the merits. E

It also follows from the above that the court *a quo* exercised its discretion properly in refusing condonation. This court will not, therefore, interfere with the exercise of that discretion.

In the result, the appeal is dismissed with costs. F

Ebrahim JA & Malaba JA concurred.

Wintertons, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/TSVANGIRAI & ORS v REGISTRAR–GENERAL 2002 (2) ZLR 35 (H)

[zRPz]TSVANGIRAI & ORS v REGISTRAR–GENERAL 2002 (2) ZLR 35 (H)
2002 (2) ZLR p35

Citation	2002 (2) ZLR 35 (H)
Case No	Judgment No. HH–111–02
Court	High Court, Harare
Judge	Makarau J
Heard	10 July 2002
Judgment	10 July 2002

Counsel	*B W Elliot,* for the applicants Miss *C Mudenda,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

[zFNz]Flynote
Election — voter — voters' roll — copies of — supply by Registrar–General D — copies must be in printed, not in electronic format
[zHNz]Headnote
The applicants sought an order compelling the respondent to supply, on payment of a fee. copies of the voters' roll on CD. The respondent argued that while he could supply a printed version of the roll, he could E not be required to supply the roll on CD.
Held, that the legislation under which copies of the voters' roll could be obtained clearly referred to printed copies or extracts therefrom. The law was behind the times, and remained in the pre–computer age, but was clear.
Held, further, that the fact that the respondent had previously consented to F the granting of a similar order did not mean that he could not now be heard to oppose such an order.
[zSTz]Legislation considered
Electoral Act [*Chapter 2:01*], s 18
G Electoral Regulations 1992 (SI 58 of 1992), s 14
[zCIz]Case information
B W Elliot, for the applicants
Miss *C Mudenda,* for the respondent
[zJDz]Judgment
Makarau J: On 9 April 2002, the applicants filed a court application H praying for an order compelling the respondent, on payment of $1 200 000, to make available to the applicants the complete voter's roll, together with the
2002 (2) ZLR p36
Makarau J
two supplementary voters' rolls used during the presidential election of 9–11 A March 2002. on compact discs to be supplied by the applicants in a comma delimitated ASCII format. The applicants proceeded further in the draft order to specify and clarify the particulars of the voters' rolls whose copies they seek, when the respondent should be ordered to comply with the order of the court, an order safeguarding the effectiveness of such an order in the event of an appeal and costs. B
No notice of opposition was filed on behalf of the respondent.
Following the filing of the court application, Hlatshwayo J granted an order by consent that the above court application be determined on an urgent basis. In the application before Hlatshwayo J, the respondent had filed a letter in which he stated as follows: C
"We are pleased to advise that the respondent is willing to supply applicants with copies of the voters' rolls upon payment of the prescribed fees. The rolls are available. Respondent cannot supply the rolls on compact disks as there is no such requirement in law. Applicants can capture the data from the printed rolls onto compact disks on their own."
The matter was subsequently set down for hearing before me as an opposed D matter. When the matter was called up I enquired as to the basis upon which Miss *Mudenda* was appearing before me in the absence of a notice of opposition, an opposing affidavit and heads of argument. *Mr Elliot* submitted that since the issue at hand is of national importance, the respondent be allowed to make his submissions. With reservations, I allowed Miss *Mudenda* E to make submissions, which were to the effect that the respondent stands by the contents of his letter submitted to Hlatshwayo J.
I have had occasion in another judgment to express my concern at what I perceived in that matter as the failure on the part of the Attorney–General's office to assist the courts in matters of national importance by filing papers and making detailed submissions that will reveal the legal essence of the F State's position in such matters. I repeat my concern in this matter.

The issue that falls for determination in the application before me is whether or not the applicants are entitled to the requested voters' rolls on computer diskettes. It is common cause that the respondent has indicated that the requested voters' rolls are available in printed form or hard copy. The application by the applicants has been brought in terms of s 18 of the Electoral Act [*Chapter 2:01*]. This section provides as follows:

"(1) The voters roll for every constituency shall be open for inspection by the public, free of charge, at the office of the constituency registrar during office hours.

(2) A person inspecting the voters roll for a constituency may, without H

2002 (2) ZLR p37

Makarau J

A payment, make copies thereof or extracts therefrom during office hours.

(3) A constituency registrar may, whenever he considers it to be desirable, have the voters roll for his constituency printed, and any person may obtain from the Controller of Printing and Stationery, on payment of such charges and subject to such conditions as may be B prescribed, copies of any voters roll printed.

(4) Where the voters roll for any constituency has been printed in terms of subsection (3) immediately before a general election or by– election or election to the office of President, and it contains the names of the voters who will be entitled to vote at that election, the Registrar–General may publish a notice in the *Gazette* declaring that C the printed voters roll shall be used for the purposes of the identification of voters at that election."

The applicant is proceeding by virtue of the provisions of subs (3) of the above section to lay claim to copies of the voters' rolls that it has requested. This subsection must be read together with s 14 of the Electoral Regulations 1992, as amended by the Electoral (Amendment Regulations) 1999 (No. 6) D and as further amended in 2002 by SI 8A of 2002. This law prescribes the payment that must be made before one is entitled to a copy or to copies of the voters rolls. It provides as follows:

"Copies of the printed roll for any constituency or ward may be obtained from the offices of the Registrar–General upon payment of a fee of ten thousand dollars for each constituency roll or three thousand five E hundred dollars in the case of a ward voters roll."

A reading of the law I have set out in full above is clear that the copies referred to in the law are printed copies or extracts therefrom.

Mr *Elliot,* for the applicant, has argued that, because the respondent consented to the granting of a similar order in *Tsvangirayi v Registrar–General of* F *Elections,* case HC 12092/01, he cannot now be heard to oppose an order which is identical to the one he previously consented to. While this submission makes common sense, I have searched in vain for a legal principle that compels common sense in a situation where the law is clear and which would have aided me to accept the argument advanced by Mr *Elliot.* Mr *Elliot* has further argued that the electoral law was first enacted some 23 G years ago, when the computer age was unknown. Since 1990, we have had what amounts to a computer revolution and this revolution has affected the production of letters and documents in commercial and public offices. It would be far more convenient for the applicant to have the voters' roll on compact disks rather than in printed form, as the applicants can make far more H use of it in that form and use it more efficiently. Again, this argument is grounded in common sense and not in the law. The law has remained in the

2002 (2) ZLR p38

Makarau J

pre–computer age era and it is the law in this case and not common sense that A binds me.

Finally, Mr *Elliot* argued that the word "copy" in the relevant electoral law should be read to include a copy held in electronic form. I would have considered this argument further if the electoral law did not expressly describe the copy that it provides for. There is no ambiguity in the law and B therefore I am not called upon to make an interpretation of the word "copy". The law expressly provides for a printed copy.

On the basis of the foregoing. I find no legal basis to the applicants' application. With regards to costs, the respondent was not properly before me and was only allowed to address the court on the basis of the letter he submitted to Hlatshwayo J. It is my view that he is not entitled to any costs C even if the applicants have not succeeded in their application.

Accordingly, I make the following order:

1. The application by the applicants is dismissed.
2. There shall be no order as to costs. D

Gill, Godlonton & Gerrans, applicants' legal practitioners

Civil Division, Attorney–General's Office, respondent's legal practitioners E

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Source:
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[zRPz]TSVANGIRAI v MUGABE & ORS 2002 (2) ZLR 39 (H)
2002 (2) ZLR p39

Citation	2002 (2) ZLR 39 (H)
Case No	Judgment No. HH–114–02
Court	High Court, Harare
Judge	Gowora J
Heard	10 May 2002; 19 June 2002; 10 July 2002
Judgment	10 July 2002
Counsel	*P Nherere,* for the petitioner *A Kara* and *T Hussein,* for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

[zFNz]Flynote
D **Election** — election petition — recognizance for payment of costs — whether affected by criminal charges faced by petitioner or surety — whether surety must execute bond or cession — quantum — whether court has power to interfere with Registrar's discretion in setting — signing of recognizance in presence of Registrar — whether this must appear ex facie the document — effect of defect in recognizance
[zHNz]Headnote
E The respondents in an election petition filed an objection in terms of s 135 of the Electoral Act [*Chapter 2:01*] to a recognizance (security for costs) given in terms of s 133 of the same Act, firstly, on the basis that the recognizance was defective in form, as it did not appear *ex facie* the document that it had been signed in the presence of the Registrar and F that the surety to the recognizance had not executed any bond or cession agreement; and, secondly, on the basis that it was insufficient. The latter assertion was based upon the claimed inadequate quantum of the recognizance set by the Registrar and the belief that criminal charges faced by the petitioner and surety might render them unable to meet their obligations in terms of the recognizance. These defects, it was G claimed, rendered the recognizance a nullity.
Held, that since the form of recognizance is approved by the Registrar, in the absence of anything to the contrary in the Act, there is no need that it appear *ex facie* the document that it was signed in front of the Registrar H as per s 133(4) of the Act.
2002 (2) ZLR p40
Gowora J

Held, further, after considering various definitions of recognizance, that it A is not a requirement that a recognizance be accompanied by a deed of cession, pledge or bond.
Held, further, that pending criminal charges or a criminal conviction do not automatically affect a person's ability to pay a debt and thus have no effect on the recognizance as surety. *Held,* further, that given the likely duration and complexity of the hearing. B the surety set by the Registrar should be increased. *Held,* further, that the court may interfere with the discretion exercised by the Registrar and determine the quantum of the recognizance. *Held,* further, that, in any event, s 135 of the Act allows a petitioner time to rectify a defect or insufficiency in a recognizance and such defect does D not therefore render the recognizance a nullity.
[zCAz]Cases cited
Cone Textiles (Pvt) Ltd v Pettigrew (Pvt) Ltd & Anor 1984 (1) ZLR 274 (S)
Ebrahim Wholesalers (Pvt) Ltd v Crown Clothing Co (Pvt) Ltd 1966 RLR 398 (A). D
Galante v Galante 2000 (2) ZLR 453 (S)
Marais & Anor v McIntosh & Anor 1978 (3) SA 414 (N)
TA Hldgs Ltd v Maceys Consol (Pvt) Ltd & Anor 1988 (2) ZLR 453 (S)
Wood v Assistant Registrar of the General Division & Anor 1971 (1) RLR 147 E
Zantis & Ors v Odendaal & Ors 1974 (4) SA 173 (E)
[zSTz]Legislation considered
Electoral Act [*Chapter 2:01*], ss 133(4) and 135 F
[zCIz]Case information
P Nherere, for the petitioner
A Kara and *T Hussein,* for the first respondent
[zJDz]Judgment
Gowora J: On 17 April 2002, the petitioner and three others, in terms of ss 133 (3) and (4) of the Electoral Act [*Chapter 2:01*] (hereinafter referred G to as "the Act") entered into a recognizance for the payment of all costs, charges and expenses in relation to this matter in the sum of $500 000. The amount of $500 000 was set by the Registrar of this court. The recognizance has been signed by the petitioner and the three sureties. Each of the sureties has underneath his signature written out his name and his address. The recognizance bears the High Court stamp for 17 April 2002. H
2002 (2) ZLR p41
Gowora J
A The first respondent and the fourth respondent, separately, filed notices of objection to the security provided. At the date of hearing of the matter, however, only the first respondent was represented. The grounds of objection are as follows:
1. The amount tendered for the costs of all persons named in the petition and the first respondent is insufficient. B
2. The petitioner and one of the sureties, Welshman Ncube, are facing criminal charges which may render them unable to meet their obligations in terms of the surety. The sureties are therefore insufficient.
3. No amount, deed of cession, pledge or bond has been deposited with the Registrar and as such, the recognizance is defective.
C At the hearing before me, the first respondent added another ground as a basis for objection: that the recognizance which was filed on behalf of the petitioner did not show *ex facie* the document itself that it had been signed before the Registrar or a magistrate. It was submitted by the respondent that the defect on the recognizance was such that it was rendered a nullity by D operation of law and the defect could not be cured by the leading of *viva voce* evidence.
The petitioner, on the other hand, contended that the first respondent had not raised this as a ground of objection when he filed his notice of objection. In addition, it was submitted, on behalf of the petitioner, that if the objection had been raised as a ground in the notice, then the petitioner's legal practitioner E would have attested to an affidavit. This particular objection was raised only by the fourth respondent in its notice of objection.
Subsequent to the hearing, the petitioner filed a certificate by the Acting Registrar, one WNLA Mazabane, to the effect that the recognizance had been signed in her presence. Section 133(4) of the Act provides the following:
F "Security given in terms of subsection (3) shall be by recognizance entered into by the petitioner and sureties not exceeding four in number in a form approved by the Registrar of the High Court, which recognizance shall be signed in the presence of the Registrar of the High Court or a magistrate."
The Acting Registrar has confirmed that the Form of Recognizance was G signed in her presence in accordance with s 133(4) of the Act. Bearing in mind that the Form of Recognizance is approved by the Registrar, in the absence of a specific requirement in the Act that the recognizance should show

ex facie the document itself that it was signed in the presence of the Registrar, I find that there was compliance with the provisions of s 133(4) of H the Act. I was referred to the South African cases of *Marais & Anor* v

2002 (2) ZLR p42

Gowora J

McIntosh & Anor 1978 (3) SA 414 (N) and *Zantsi & Ors v Odendaal & Ors* A *Mtoka & Ors v Sebe & Ors* 1974 (4) SA 173 (E). In *Marais'* case McIntosh had brought a petition, upon certain alleged illegal practices against Marais. one Jones and the returning officer, to have the election of Marais and Jones declared invalid. Accompanying the petition brought by McIntosh was a notice bearing the names and addresses of two sureties. Five days thereafter, B a form of recognizance signed by the two sureties was filed for the payment of all costs and expenses, *in solidium* with McIntosh, up to the sum of R2 000. McIntosh himself did not enter into any form of recognizance. Marais and Jones filed an objection on the basis of non–compliance with the Act. in that McIntosh had not entered, or even purported to enter into, the required recognizance, that the suretyship entered into was irregular and should be set C aside and that as a consequence, his petition should be dismissed by reason of his failure to comply with the provisions of the South African Electoral Act. In the alternative, they prayed that the court should declare the suretyship invalid or defective and allow McIntosh a further seven days to remove the objection by a deposit with the Registrar of R15 000 or such other sum as might be deemed appropriate in cash or security. Section 142 of the South D African Electoral Act, which was the subject matter of the objection was almost on all fours with s 133(3) and (4) of the Electoral Act [*Chapter 2:01*]. Similarly s 144 of the South African Electoral Act (relating to objections and the removal thereof) is not much different to section 135. At 418 F of the judgment Leon J stated:

"In the context of the present legislation, I apprehend that the true enquiry E is not whether the provisions of s 142(d) and (e) are peremptory or directory but rather whether the Legislature intended that non–compliance therewith should be visited with nullity. In seeking an answer to this enquiry the court must try to ascertain the real intention of the Legislature and in so doing must have regard to the scope and object of the enactment as a whole *(Charlestown Town Board & Anor v Vilakazi* 1951 (3) SA 361 (A)." F

Section 135 of the Act provides:

"(1) The respondent may, by notice in writing served upon the petitioner; within such period as may be prescribed in rules of court, object to any recognizance given in terms of section *one hundred and thirty three* on G the ground that —

(a) the sureties or any of them are insufficient; or
(b) a surety is dead or cannot be found; or
(c) the recognizance has not been signed by the person named therein; or
(d) recognizance is otherwise invalid or defective. H

2002 (2) ZLR p43

Gowora J

A (2) An objection in terms of subsection (1) shall be heard and determined by the High Court and if the objection is allowed —

(a) the petitioner may, within a further period to be fixed by the High Court not exceeding ten days, remove the objection by a deposit of such sum of money as may be considered necessary by the High Court to make the security sufficient: B

(b) if the petitioner does not remove the objection in the manner specified in paragraph (a), no further proceedings shall be heard on the petition."

On a proper construction of the section, the clear intention of the Legislature was to afford a petitioner an opportunity to have the challenge to the election result determined by a court of law and at the same time to ensure that the C party whose election is being disputed has been sufficiently covered and secured in respect of the costs that he is likely to incur as a result of the challenge. A reading of subs (2) clearly conveys the conclusion that in the event that the objection is upheld on any or all of the grounds mentioned therein, that is not the end of the road for the petitioner. He is afforded a chance to remove the objection. There is therefore no basis for holding the D recognizance invalid or defective. The form of recognizance filed by the petitioner is consequently not defective or invalid.

The second ground for objection by the first respondent is that the amount tendered for costs is insufficient. The first respondent submitted that the petitioner is challenging the result of a nationwide election, that for the E President of the country. The first respondent also contended that there has been no amount, deed of cession, pledge or bond deposited with the Registrar and as such the recognizance is defective.

In submissions on behalf of the first respondent, Mr *Kara* said that for the parliamentary elections, an amount of $15 000 was set by the Registrar as security for costs in petitions challenging the election result. The petitioner F herein has challenged the election of the President which is a national election involving one hundred and twenty constituencies. The costs involved are bound to exceed $500 000 because more witnesses would be called than in the parliamentary elections. In addition, in the absence of a bond or a cession by the sureties, there is no guarantee that the costs would be paid.

G Mr *Nherere,* on behalf of the petitioner, submitted that no basis had been laid by the first respondent to suggest that there would be an increase in the number of witnesses called in this petition and that the Act did not require that the sureties enter into a bond or pledge. All that the Act required was that the H recognizance be signed by the petitioner and the sureties.

2002 (2) ZLR p44

Gowora J

In *Bell's South African Legal Dictionary* recognizance is defined as follows: A

"a written obligation executed before a magistrate or some other proper official, whereby a person binds himself, under some specified penalty, to perform some particular act or appear at some particular court or place, within a time or on a day named in the obligation."

In the *Oxford Dictionary of Current English* a recognizance is defined as: B

"1) a bond by which a person undertakes before a court or magistrate to observe some condition, e.g. to appear when summoned. 2) sum pledged as surety for this."

In *Halsbury's Laws of England* 4 ed vol. 15 para 867 the following is said in relation to recognizance:

"A recognizance must be acknowledged before a person authorised to C take affidavits under the Commissioners for Oaths Act 1889 to 1891, and must be filed forthwith after being acknowledged. The recognizance must be accompanied by an affidavit sworn by each surety, stating that after payment of all his debts he is worth a sum not less than that for which he is bound by his recognizance, and a copy of the affidavit must forthwith be served by the petitioner on the respondent." D

I have not been referred to any authority by either of the parties which would support the submission by the first respondent that the petitioner and his sureties should enter into bonds or cessions in order to give effect to the recognizance. The Act does not require it and going by the definition of the word, a recognizance is no more than a written obligation whereby a person E binds himself either to pay a certain sum of money or to perform some specific act or appear at a specified court or place. The view I take is that it is not a requirement in terms of our law that a recognizance be accompanied by a deed of cession, pledge or bond. The recognizance is therefore not defective in that respect.

In so far as the sufficiency of the amount tendered, the first respondent, F submitted that it is wholly inadequate for the purpose intended.

In *Marais & Anor v McIntosh & Anor supra* at 419A Leon J stated:

"The manifest object of s 142(d), (e) and (f) was to ensure that adequate security would be provided for all costs, charges and expenses that may become payable by the petitioner to the respondent and to any person G summoned as a witness on behalf of the petitioner. Subsections (e) and (f) sought to achieve that object by the machinery provided for therein, *viz* (1) the amount of the security must be fixed by the Registrar of the Court, (ii) it must not be less than £500, (iii) it must be given by recognizance to be entered into (a) by the petitioner himself and (b) by not more than four sureties, (iv) in a form approved by the Registrar of H

2002 (2) ZLR p45

Gowora J

A the Court, (v) the recognizance must be signed in the presence of the Registrar or a magistrate."

The amount of $500 000 was set by the Registrar of the High Court, in terms of s 133(3) of the Act. In terms of subs (3) the amount of the security should not be less than $1 000. The petitioner has submitted that in view of the sum of $15 000 which was set by the Registrar as security for the 2000 Parliamentary B Election petition, the sum of $500 000 was reasonable. It was further submitted that in assessing the amount of security required in terms of subs (3) the Registrar was acting like a taxing Master and exercising his discretion and the court could not interfere with the exercise of that discretion.

The first respondent, on the other hand, contended that the Acting Registrar C was clearly wrong when she made the assessment and that the court was in as good a position as she was to make the decision. I was referred to the following authorities: *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor* 1984 (1) ZLR 274 (S); *TA Holdings Ltd v Maceys Consolidated (Pvt) Ltd& Anor* 1988 (2) ZLR 453 (S); *Wood v Assistant Registrar of the General Division & Anor* 1971 (1) RLR 147. and *Ebrahim Wholesalers (Pvt) Ltd* v D *Crown Clothing Co (Pvt) Ltd* 1966 RLR 398 (A).

In *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor (supra)* Goldin AJA said at 278G – 279B:
"In my view, the correct position is, therefore, that the court has power to interfere with or alter a Taxing Master's ruling on two grounds. Firstly, E on the application of common law rights on review which involve a finding that he was grossly unreasonable or erred on a point of principle or law. In such a situation the court would be at large and entitled to substitute its opinion for that of the Taxing Master. It should not be overlooked that even when such grounds for interference exist it need not follow that the Taxing Master's decision must be set aside or altered. He F may have arrived at the correct decision for a wrong or even improper reason.
Secondly, regardless of the absence of any common law ground for interference, the court has a duty to interfere if satisfied that the Taxing Master was clearly wrong in regard to some item. In such a case the court will substitute its own opinion for that of the Taxing Master even if it is G a matter involving degree."
In an earlier case, *Wood v Assistant Registrar of the General Division & Anor (supra)* Goldin J, as he then was, had stated at 150D:
"It is clearly the duty of a court, in a case of this nature, to examine and consider the decision of the Registrar, so as to determine whether he has H performed the task allotted to him in a proper manner, and to ascertain
2002 (2) ZLR p46
Gowora J
whether he has arrived at a correct decision. In ordering the amount to A be determined by the Registrar', the judge did not confer such a discretion on him with which the court will only interfere on the grounds stated in *Shidiack's* case, but in fact ordered him. so far as it is possible on the facts and by the application of his specialised knowledge of costs, to arrive at a correct amount of security. Accordingly, despite the B absence of a rule of court on this subject, I am of the view that, for the reasons mentioned, the court has the power to correct the registrar's ruling, not only on the grounds mentioned in *Shidiack*'s case, but also on the ground mentioned by Potgieter JA *(supra),* namely, when the court is clearly satisfied that he was wrong; but it will only interfere on this ground when it is in the same or in a better position than the registrar to C determine the point in issue."
The first respondent contended that the petitioner has challenged the election on three main grounds: corrupt practices, illegality and violent conduct which was allegedly pervasive throughout the entire country. The first respondent has further contended that there is likely to be a verification exercise in respect of a number of constituencies which is likely to take a D number of days. It was further contended that the Registrar would have had the petition before her and that in view of the extent of the challenge, she was wrong in fixing the sum of $500 000 as security for costs.
In challenging the sufficiency of the amount fixed by the Registrar as security for costs in the petition, the first respondent has requested that this court E substitute its own discretion for that of the Registrar. The Act does not require that the Registrar be cited as a party and as a consequence this court does not have the benefit of the views of the Registrar as to how the amount of $500 000 was decided upon as adequate security for the due payment of all costs and charges arising out of the petition. It is an added misfortune that the Act does not require that the objector file an affidavit setting out the basis of F the challenge. The court is therefore left to rely on the submissions by the parties.
The first respondent has contended that when fixing the amount of the security required one would expect that the Registrar applied her mind to the task before her. It is further contended that the amount that she fixed is G insufficient if regard is had to the evidence which is likely to be called by the first respondent to rebut the case of the petitioner. The court's attention was drawn to Annexure "C" which is attached to the petitioner's papers. Annexure "C," is the MDC's Northern Region Report Back. It is a document comprised of some twelve pages and has summaries on alleged corrupt practices, acts of violence and illegalities. It is the case of the first respondent that in order H
2002 (2) ZLR p47
Gowora J
A to substantiate the claims in Annexure "C" the petitioner would have to call a large number of witnesses and that the first respondent would in turn similarly call a large number in rebuttal.
In addition the first respondent contends that the challenge to the election results is nationwide. The petition is not confined to specific areas and that as the country is divided into 120 constituencies, it is likely that evidence will B be produced based on the number of constituencies. The first respondent submitted that as the basis of the security for costs was the petition, and that had the Registrar applied her mind, taking into account all the factors referred to above, and further the amount set in the petitions challenging the 2000 Parliamentary results, she would have fixed an amount in excess of $500 000.

C It was submitted on behalf of the first respondent that in the 2000 election petitions the Registrar had set the amount for security for costs at $15 000. There are 120 constituencies in the country and as the election being challenged is a national election, the 120 constituencies would translate to the sum of $1.8 million and that if that amount would have been the appropriate amount in the year 2000, the amount of $500 000 fixed by the Registrar, two D years later, was inadequate.

The petitioner has submitted that one can only assume that the Registrar fixed the amount after applying her mind and that there is no basis laid for an increase in the number of witnesses being called.

This court has had occasion to peruse the petition. The founding affidavit E makes allegations of wholesale rigging of votes by ZANU–PF. It further speaks of a "sustained, multi–pronged and vicious attack on all elements of Zimbabwean society who do not fully support them." It further alleges that since February 2000 ZANU–PF has subjected MDC leaders, MDC members of Parliament and MDC supporters to a massive, continuing campaign of violence and intimidation which has been planned and systematically F implemented with the support and connivance of its leader, the first respondent. It is alleged that over 100 MDC party officials and supporters have been hunted down and slaughtered by ZANU–PF militias. Many more have had their houses and other property destroyed or damaged in violent acts. Large numbers of MDC supporters have had to flee their home areas because of G violence and intimidation. It is further alleged that the militias have set up torture centres all around the country to which MDC supporters have been abducted and tortured. The petitioner has also alleged that over a million people have been forced to buy ZANU–PF cards, not because they support that party, but because they fear that they will be beaten up if they cannot produce these cards. It is also alleged that ZANU–PF leaders and officials H have warned people in the rural areas that it would be known who they voted

for and that they stood to face terrible reprisals if they did not vote for the first A respondent. The petitioner has also made allegation of extensive use of bribery. He has further alluded to the alleged disenfranchisement of non– citizen permanent residents. Needless to say that these are allegations made by the petitioner, the proof of which will necessitate the adduction of evidence by a significant number of witnesses – thereby prolonging the proceedings and increasing the cost of trial. B

The above are a minor reflection of the aspects that the petitioner will be using as a basis for the challenge. In relation to the rigging of votes, Mr *Hussein* opined that there might be need for verification exercises. He pointed out that during the petition challenging the poll result in the Seke constituency in the 2000 election, the verification exercise took four days. In the instant case, the C verification exercise was likely to take longer. Mr *Nherere* gave it as his opinion that it was unlikely that the verification exercise would be conducted in all 120 constituencies.

From an objective assessment of the submissions on behalf of both parties, it seems common cause that both accept that this is likely to be a lengthy trial. D Both accept that of necessity it is a nation–wide exercise. Both accept that a large number of witnesses are to be called on behalf of both. The only dispute is whether or not the petitioner will call witnesses from each of the 120 constituencies to establish the grounds of the challenge.

In my view the decision of the sufficiency of the security does not depend on whether or not all the 120 constituencies will be subject to scrutiny. The mere E fact that the election being challenged is a nationwide election is decisive in concluding that the trial will be prolonged and the witnesses called numerous. The papers which have been filed by the opponents certainly bear testimony to that.

The purpose of s 133(3) of the Act is to ensure that sufficient security has been F provided for the payment of all costs, charges and expenses which may become payable by the petitioner to the objector. That purpose is further reflected in the provisions of s 135(2) where the court has been empowered to order a deposit by the petitioner to the Registrar of such sums as may be determined appropriate by the court to make the security sufficient. I am persuaded therefore that that there is nothing to stop this court in interfering G with the discretion of the Registrar, if the Registrar were found to have been wrong in her assessment of the amount required for security for costs.

In 2000, the security fixed in each of the election petitions was $15 000. That amount was set by the Registrar. It must be accepted, I think, that the costs of services, including legal fees, have gone up considerably since the year 2000. Additionally, this is a nationwide exercise, which is much more H

A involved than the petitions filed against the Parliamentary poll results of 2000. Mr *Nherere* opined that the fees for counsel would average $40 000 for the first day and thereafter S20 000 for each subsequent day. In the matter of *Galante v Galante* 2000 (2) ZLR 453 (S) in which the court was

considering an appeal against the order of $50 000 in favour of the respondent for a B contribution towards her costs for divorce. McNally JA at 456C–D stated:
"Even though $20 000 has already been paid as a contribution, and even though the question whether Mrs Galante had disposable assets was uncertain, I cannot hold that an order to pay a further $50 000 in the circumstances is unreasonable."
This court is in the same or better position than the Registrar to determine the C issue of the security for costs. It has had the benefit of representations from both parties. It has had occasion to peruse the papers filed on behalf of the petitioner and to arrive at a fair assessment that the trial is likely to be prolonged. Even in the event the petitioner does not challenge the election results in all the 120 constituencies, the trial is still set to be lengthy and protracted. I am therefore of the view that the Registrar's assessment of D S500 000 for security for costs is very low. A fair amount in my view would be the sum of $2.5 million. The security assessed by the Registrar is therefore insufficient and the petitioner will be required in terms of s 135(2) to make the security sufficient by depositing an amount of $2 million with the Registrar of the High Court.
E The last issue for determination is whether or not the sureties are insufficient by reason of the petitioner and one of the sureties. Welshman Ncube, facing criminal charges. It was the submission on behalf of the first respondent that the criminal charges that the two are facing may render them unable to meet their obligations in terms of the surety.
The first respondent has not advanced any authority for the submission that F the suitability of someone standing surety is affected by pending criminal charges. I do not accede to the submission. Indeed, even a criminal conviction does not necessarily affect a person's ability to discharge his debt. Accordingly it is my finding that the petitioner and Welshman Ncube can stand as sureties. In respect of costs the parties agreed they should be in the cause. G In the result I make the following order:
(a) The objection in para 1 of Notice of Objection to Security Provided is upheld and the petitioner be and is hereby ordered to deposit the sum of $2 million with the Registrar of the High Court within ten (10) days of the date of this order; H
(b) That the objections in paras 2 and 3 of the First Respondent's Notice
2002 (2) ZLR p50
Gowora J
of Objection to Security Provided be and are hereby dismissed. A
(c) That costs be in the cause.
Gill, Godlonton & Gerrans, applicant's legal practitioners
Hussein Ranchod & Co, first respondent's legal practitioners B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/CHAUMBA v CHAUMBA & ORS 2002 (2) ZLR 51 (S)

[zRPz]CHAUMBA v CHAUMBA & ORS 2002 (2) ZLR 51 (S)
2002 (2) ZLR p51

Citation	2002 (2) ZLR 51 (S)
Case No	Judgment No. S–15–02
Court	Supreme Court, Harare
Judge	Ebrahim JA, Sandura JA & Cheda JA
Heard	18 March 2002; 11 July 2002

Judgment	11 July 2002
Counsel	*D Kanokanga,* for the appellant No appearance for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

[zFNz]Flynote
Customary law —succession —intestate succession —governed by customary law —grandson succeeding to estate —daughter having no right to D succeed
[zHNz]Headnote
The deceased, who died intestate, had a son and a daughter. After the deceased died, his children attended the community court at Chivhu. The court appointed his daughter, the appellant, as heir. Subsequently E the deceased's son also died. The respondent, the deceased's son's son, appealed to the magistrates court against the community court's decision. The magistrates court held that the estate had to go to the respondent.
Held, that where an African dies intestate, his estate is administered and distributed according to the usages and customs of his tribe. The parties in this case were of the Shona tribe. Under Shona customary law, a F female has no right to succeed. Under Shona customary law, the estate had to go to the son's son, not to the daughter.
[zCAz]Cases cited
Chihowa v *Mangwende* 1987 (1) ZLR 228 (S)
Magaya v *Magaya* 1999 (1) ZLR 100 (S)
[zCIz]Case information
G *D Kanokanga,* for the appellant
No appearance for the respondent
[zJDz]Judgment
Cheda JA: The appellant appeals against the decision of the magistrates court in which the respondent, the son of her late brother, was appointed heir H to the estate of the appellant's father.
2002 (2) ZLR p52
Cheda JA
The record used for the appeal is a reconstructed record which lacks a lot of A details concerning the background. However, based on the facts stated and submissions made by counsel, it is still possible to determine the matter.
For purposes of clarity I will refer to the appellant's father as Roderick, and the parties only as the appellant and the respondent.
Roderick died intestate on 16 February 1996. He left a son, Ishmael, who was B his only son, and the appellant, a daughter. The record says that Ishmael later died but does not state at what stage. Before Ishmael's death the appellant and Ishmael attended the community court in Chivhu where the appellant was appointed heiress to her father's estate. Ishmael then died. The respondent would not accept this and took the matter up to the provincial magistrates court. The provincial magistrate decided against the appellant. C He appointed the respondent as heir to his grandfather's estate. The question to be answered is: Was he right in doing so or was the decision of the community court correct?
To answer this question one has to look at customary law and the statutes. It seems to be common cause that the parties are of the Shona tribe. They D come from the Chivhu District. For that reason Shona custom and practice would apply. This approach is based on the provisions of s 68(1) of the Administration of Estates Act [*Chapter 6:01*] which reads as follows: *
"68. When estate of African to be dealt with according to usage of his tribe
(1) If any African who has contracted a marriage according to African E law or custom or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged."
In their book. *African Law and Custom in Rhodesia,* Goldin and Gelfand say F this on p 284.

"The principles and practice of rules and customs concerning succession are subject to variation and differences as is all customary law. There are, however, two broadly or generally similar systems, that which prevails among the Shona and secondly among the Ndebele. The most significant difference is that under Shona law a deceased's eldest son is G his heir but under Matabele law the heir is the eldest surviving son of the deceased's principal or 'great house'."
2002 (2) ZLR p53
Cheda JA
A Further down on the same page they say this:
"In Shona law, on the failure of sons and their male descendants — and of brothers and their male descendants — the estate is taken by the deceased's father, but if he is not alive then by his brothers. In the absence of relations on the male side the son of the deceased's eldest sister is the heir."
B Although Dumbutshena CJ in *Chihowa v Mangwende* 1987 (1) ZLR 228 (S) decided, with two Supreme Court judges concurring, that female children could be appointed heiresses following the coming into effect of the Legal Age of Majority Act which was then Act No. 15 of 1982, now s 15 of the General Law Amendment Act [*Chapter 8:07*], this decision was overruled by the full bench in *Magaya v Magaya* 1999 (1) ZLR 100 (S), where C Muchechetere JA pointed out that, although, according to the Constitution, it may appear as if it is wrong to discriminate against female children, there is an exception in the Constitution in the form of s 23(3). It reads as follows:
"Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of D the following matters —
(a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African E customary law ..."
In this case, and according to Shona custom, when Roderick died, his son Ishmael was to be heir to the estate. When Ishmael died, the estate would continue to devolve within the same line, that is, to his eldest male son.
It is on this basis that the respondent, who is Ishmael's son, claimed he should be the heir. Although he is not the eldest son, it is agreed that the elder son, F for some reason, did not want to be the heir.
In accordance with what Goldin and Gelfand said, it was not wrong to appoint the respondent.
The fact that Ishmael may not have been formally appointed heir before he died should not make any difference, as his death cannot change the custom. G In view of the above, I come to the conclusion that the provincial magistrate was correct in appointing the respondent as heir.
The appellant's claim is dismissed with costs.
H Ebrahim JA and Sandura JA concurred

* This was the wording of the subsection at the relevant time. This section was repealed and replaced by s3 of the Administration of Estates Amendment Act 6 of 1997. which came into effect on 1 November 1997 — *Editor*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/MCANINCH v MAISIRI & ANOR 2002 (2) ZLR 54 (S)

[zRPz]MCANINCH v MAISIRI & ANOR 2002 (2) ZLR 54 (S)
2002 (2) ZLR p54

Citation 2002 (2) ZLR 54 (S)

Case No	Judgment No. S–131–01
Court	Supreme Court, Harare
Judge	McNally JA, Muchechetere JA & Malaba JA
Heard	18 October 2001; 11 July 2002
Judgment	11 July 2002
Counsel	*A P de Bourbon SC,* for the appellant *J C Andersen SC,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Contract —condition —resolutive condition —what is —clause providing that if payment not made by a certain date, the contract would be D cancelled — effect — contract not automatically cancelled
[zHNz]Headnote
The appellant sold a property to the respondents. A clause in the contract provided that if the respondents did not pay the full purchase price by a certain date, stated in the contract, the contract would be cancelled. E There was a general provision that in the event of a material breach and failure to remedy the same within fourteen days' written notice, the innocent party had the right either to cancel the agreement and claim damages or, alternatively, to enforce it.
The price was not paid by the stated date. Subsequent to that date, however, F the parties continued negotiating about the method of payment of the purchase price. At no time during the negotiations was there any intimation that the contract had been cancelled on the stated date. The appellant subsequently purported to cancel the contract.
Held, that if the clause relating to cancellation was a resolutive condition, G it would show that the intention of the parties was to have the termination of the contract arise immediately and automatically from the failure by the respondents to pay the full price by the stated date. The clause would have contained words to the effect that on the happening of the event, the contract would be "considered" or "deemed" to have been cancelled. No act of cancellation would be required. H
2002 (2) ZLR p55
Malaba JA
A *Held,* further, that the words actually used showed that the intention of the parties was that the dissolution of the contract would be brought about by a deliberate act of cancellation by the innocent party. The appellant having failed to exercise that right, he could now cancel the contract only after giving fourteen days' notice.
[zCAz]Cases cited B
Agricultural Finance Corporation v Pocock 1986 (2) ZLR 229 (S)
Bessler, Waechter, Glover & Co v South Derwent Coal Co [1938] 1 KB 408; [1937] 4 All ER 552 (KBD) *National Chemsearch (SA) (Pty) Ltd v Borrowman & Anor* 1979 (3) SA 1092 (T)
C *Ogle v Vane (Earl)* (1868) LR 3 QB 272
Palmer v Poulter 1983 (4) SA 11 (T)
R v Katz 1959 (3) SA 408 (C)
[zCIz]Case information
A P de Bourbon SC, for the appellant
D *J C Andersen SC,* for the respondents
[zJDz]Judgment

Malaba JA: On 15 May 2000 the respondents, who are husband and wife, made an application to the High Court for an order declaring the agreement of sale they entered into with the appellant on 25 November 1999 a valid and enforceable contract. The order was to direct the appellant to take all E necessary steps within seven days of the date of its making to have Lot 2 of Subdivision A of Lot 33A Hillside in the district of Bulawayo transferred into their names, failing which the Deputy Sheriff of Bulawayo was authorised and directed to sign all the necessary documents on the appellant's behalf for the purpose of transferring the property to them. The appellant was to pay the costs of the application. The High Court granted the respondents the order. F This is an appeal against that judgment.

The application could have succeeded only if the facts stated by the respondents in the founding affidavit, together with such facts advanced by the appellant which were admitted by the respondents, justified the granting of the order. *(National Chemsearch (SA) (Pty) Ltd v Borrowman & Anor* G 1979 (3) SA 1092 (T) at 1095 B–C). It is necessary therefore to refer to the salient facts before considering the legal arguments advanced on appeal.

The dispute between the parties arose out of a written agreement signed by them on 25 November 1999, in terms of which the appellant sold to the respondents the immovable property commonly known as No. 7 Nairn Road, Hillside, Bulawayo ("the property"), for a purchase price of $2 300 000. The H agreement provided that:

"The purchase price of S2 300 000 plus assessed costs of $160 000, to be A paid to the legal practitioners Calderwood. Bryce Hendrie & Partners by 6 December 1999. subject to special conditions herein."(the underlining is mine)

The special condition was that the respondents obtained a loan of not less than $1 300 000 plus assessed costs of $160 000 from a reputable financial B institution, to be secured by a first mortgage bond to be registered against the property sold.

The agreement further provided that:

"Notwithstanding anything to the contrary contained in this agreement, should the full purchase price less the agent's commission and capital gains withholding tax not be released to the seller by the 6th December C 1999 the agreement will be cancelled on the 7th December 1999."(the underlining is mine)

Under the general conditions of the agreement there was a clause to the effect that in the event of a material breach and failure to remedy the same within fourteen days of written notice to do so. the innocent party had the right either to cancel the agreement and claim damages or alternatively enforce it. D

Clause 10 provided that:

"... no variations to this agreement or collateral agreements hereto shall be of any force and effect unless reduced to writing and signed by the parties hereto."

On 27 November 1999 the appellant and his wife were involved in a motor E vehicle accident in which they lost a daughter and received serious injuries. The respondents had applied to Central African Building Society ("CABS") before 7 December 1999 for the loan of $1 300 000. CABS was willing to give them the loan provided the seller of the property agreed to invest part of the money with them in paid up permanent shares. On 6 December 1999 the respondents paid $1 million to the appellant's legal practitioners. They failed F to pay the full purchase price and assessed costs within the time stipulated. They paid the assessed costs in the sum of $1 60 000 on 17 December 1999.

The appellant had, on 8 December 1999, signed a General Power of Attorney in favour of his sister authorising her to act on his behalf in the matter of the sale of the property to the respondents. On 10 December 1999 the appellant's G sister agreed with CABS to invest the sum of $1 300 000 advanced to the respondents as a loan in paid up permanent shares over two years. She said she reached the agreement to "facilitate the finalisation of the sale" of the property to the respondents.

On 25 February 2000 CABS made the offer of a loan of $1 300 000 to the respondents. They accepted the offer three days H later.

A On 18 February 2000 the appellant asked the estate agents to reallocate $2.2 million of the purchase price to the immovable property and $1 million to movables for capital gains tax relief. The request could not be granted because the purchase price had already been allocated to the value of the immovable property. The appellant asked that the sum of $1 million held by his legal practitioners be released to him before transfer. The request was B turned down.

On 17 January and 14 February 2000 the appellant's legal practitioners wrote to the estate agents asking for the agreement of sale for them to proceed C with the registration of the transfer of the

property to the respondents. On 3 March 2000 the estate agents instructed the legal practitioners to proceed with the registration of the transfer of the property. On 14 February 2000 the appellant's legal practitioners caused the respondents to sign a declaration by the purchaser. They also forwarded to the respondents a *pro forma* account of transfer fees in the sum of $157 076. On 3 March 2000 the legal practitioners representing CABS drew up documents for the registration of the mortgage bond. The registration of the bond was intended to take place at the time of D the registration of transfer of the property to the respondents on 10 March 2000.

At no time during these events and acts by the appellant or on his behalf was there an intimation that the contract had been cancelled on 7 December 1999. Alternatively, there was no suggestion that the appellant's right to cancel the E agreement because the respondents had failed to pay the full purchase price on 6 December 1999 had been reserved.

On 10 March 2000 the appellant indicated to the respondents that he no– longer wanted to proceed with transfer of the property into their names. He said he was cancelling the agreement of sale. The respondents refused to accept the appellant's unilateral repudiation of the contract and demanded F transfer of the property into their names. The appellant, on the advice of his legal practitioners, took the view that the agreement had been cancelled on 7 December 1999. He said there could be no valid agreement of sale of the property between the parties after 7 December 1999 without it having been in writing and signed by them.

G The learned judge held that the agreement of sale entered into by the parties on 25 November 1999 was not cancelled on 7 December 1999. Unfortunately, the learned judge did not address the legal effect of the conduct of the parties after 7 December 1999 in the light of the "no variation except in writing" clause.

On appeal Mr *de Bourbon* argued that the learned judge erred in his approach H to the matter. He said the learned judge failed to properly analyse the rights

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and obligations of the parties under the agreement of sale. It was his A submission that the provision of the agreement requiring the respondents to obtain the loan and assessed costs from a reputable financial institution and pay the full purchase price by 6 December 1999. failing which the contract would be cancelled on 7 December 1999. was a resolutive condition. According to Mr *de Bourbon,* the agreement of sale was brought to an end B on 7 December 1999 by the failure of the respondents to pay the purchase price within the time stipulated. The contention was that the parties attempted to negotiate a new agreement without success. He said in the absence of a written contract signed by the parties, there was no valid agreement on the basis of which the respondents could demand transfer of the property into their names. In other words, the conduct of the parties after 7 December 1999 C had no legal effect.

Mr *Andersen's* submissions were to this effect. The conduct of the parties demonstrated a common belief in the validity of the original agreement after 7 December 1999. The contention that the "no variation except in writing" clause precluded the continued validity of the agreement after 7 December 1999, in the absence of a new contract recorded in writing to the effect that D it remained in existence, overlooked the fact that it was necessary for there to be both a "non–variation clause" and a "non–waiver" clause. The "non– variation" clause in the agreement entered into by the parties on 25 November 1999 did not contain a "non–waiver" clause: *Agricultural Finance Corporation v Pocock* 1986 (2) ZLR 229 (S) at 234E. E

I consider first *Mr de Bourbon's* point that the clause requiring the respondents to pay the full purchase price by 6 December 1999, failing which the contract would be cancelled on 7 December 1999, was a resolutive condition.

The question whether or not a provision in a contract contains a resolutive condition is a question of the interpretation of the terms in which it is F expressed. A proper construction of a provision, the terms of which express a resolutive condition, would show that the intention of the parties was to have the termination of the contract arise immediately and automatically from the failure by the respondents to pay the full purchase price and assessed costs on 6 December 1999. The happening of the event would be the cause of the immediate dissolution of the agreement of sale. No act of cancellation G would be required to be done on 7 December 1999. See R v *Katz* 1959 (3) SA 408 (C) at 129.

If the intention of the parties was to have the contract cease to exist on the failure by the respondents to specifically perform their obligation on 6 December 1999 they would have used words to the effect that on the happening of that event the agreement would be "considered" or "deemed" H

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A cancelled. The words the parties used were "the agreement will be cancelled on the 7th December 1999". Their intention was to have the dissolution of the contract brought about by a deliberate act of cancellation by the innocent party.

The failure by the respondents to specifically perform their obligations on 6 December 1999 as stipulated in the contract entitled the appellant to cancel B the agreement without notice on 7 December 1999.

Having failed to cancel the contract without notice on 7 December 1999, the appellant could now do so only after giving the respondents written notice to remedy the breach within fourteen days. The facts show that the appellant did not enforce the right which had accrued to him to cancel the agreement of sale C on 7 December 1999. The reasonable inference is that he elected to abide the original contract. He was precluded from purporting to cancel the agreement after 7 December 1999 without placing the respondents *in mora.* If at all they were in breach of the contract on 10 March 2000 they were entitled to written notice to remedy the breach within fourteen days.

The learned judge correctly held on the facts that the original contract was D kept alive and binding on the parties after 7 December 1999.

I turn to consider the next point on the legal effect of the conduct of the parties after 7 December 1999. Mr *de Bourbon* argued that it was incumbent upon the respondents to show there had been a written variation of the original contract absolving them from the obligation to pay the full purchase price and E assessed costs by 6 December 1999 and that in some way by agreement recorded in writing that date was extended. He said the respondents had failed to establish that particular aspect.

I agree with Mr *de Bourbon* that the facts do not prove an oral agreement between the parties to vary any of the terms of the contract of sale before or F after breach by the respondents. I accept that if there was such an agreement it would have had to be in writing and signed by the parties.

I do not accept his argument that the conduct of the parties after 7 December 1999 was legally inoperative. The submission was based upon a misconception of the nature and extent of the waiver on which the respondents based their case. An examination of the founding affidavit shows that they based their G case on a voluntary forbearance by the appellant to enforce his accrued right to cancel the original contract on 7 December 1999. By his failure to cancel the agreement, the appellant gave the respondents time, without binding himself to give the time, to perform their obligations and complete the contract. Clause 10 did not preclude the respondents from relying on this H form of waiver by the appellant for their convenience.

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In *Ogle v Earl Vane* (1868) LR 3 QB 272, the defendant contracted to sell to A the plaintiff 500 tons of iron to be delivered by 25 July 1865. He failed to deliver on the due date but held out to the plaintiff that he would deliver at some future date. He never delivered up to February 1866 when the plaintiff sued for damages for breach of contract. The plaintiff had gone to the market in February 1866 and bought the iron at a price which was higher than the B contract price on 25 July 1865. He sought to recover the difference. It was argued on behalf of the defendant that the contract of sale between the parties was broken on 25 July 1865. The contention was that the measure of damages had then been fixed on 25 July 1865 and nothing subsequent could alter that, except a fresh contract which had to be in writing as required by the Statute of Frauds. It was said that the conduct of the parties after 25 July 1865 was C inoperative altogether as it did not constitute a fresh written contract.

Blackburn J dismissed the argument. At pp 281–282 he said:

"There is no evidence the plaintiff ever bound himself to wait for a later delivery, or that he ever made a fresh contract... The plaintiff, instead of insisting on his strict rights, consented to treat the defendant leniently and said, 'I'll wait, but I do not bind myself to wait". This distinction D between waiting and not binding oneself to wait, is the same as that between a mere licence and a contract, or as that between giving time to a principal by mere forbearance and binding oneself for a good consideration to give time, in which latter case only is the surety released. The question in such cases being, 'Have you ever bound yourself?'."

As the seller failed to complete the sale by delivering the iron in February E 1866 notwithstanding the voluntary forbearance by the buyer, breach of the original contract was considered to have taken place at the end of the extended time.

The same principle was stated by Goddard J (as he then was) in *Besseler Waechter Glover & Co v South Derwent Coal* Co [1938] 1 KB 408 at pp 416– F 417; [1937] 4 All ER 552 at 556 when he said:

"... if as a matter of contract the parties agree that the terms of the original agreement shall be varied the variation must be in writing. But if what happens is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the written contract the original

contract remains unaffected and the obligation to deliver and to accept the full G contract quantity still continues ... What is of importance is whether it is a mere forbearance or a matter of contract."
In *Palmer v Poulter* 1983 (4) SA 11 (T) the parties concluded a written agreement of sale on 29 July 1980, in terms of which the appellant sold to the respondent immovable property for a purchase price of R49 000. A deposit of R2 000 was payable on signature of the agreement and the balance of H

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A R47 000 against registration of transfer. In terms of para 1(6) of the agreement the respondent was obliged to furnish a guarantee for the sum of R47 000 on or before 10 August 1980. Clause 15 of the agreement provided that any agreement between the parties to alter or add to the "offer to purchase" would not be binding and of no force or effect unless reduced to writing and signed by the parties. The respondent paid the deposit of R2 000 required by B para 1(a) of the agreement, but failed to furnish the guarantee on or before 10 August 1980. The appellant accepted payment of R2 000 as part of the purchase price on 2 September 1980. On 29 August 1980 the appellant's legal practitioner had invited the respondent to his office to sign the declaration by purchaser. The respondent tendered also transfer costs. On 19 September 1980 the appellant purported to cancel the agreement on the C ground that the respondent had failed to furnish the guarantee on or before 10 August 1980.
Ackerman J held that the "no variation except in writing" clause did not preclude the respondent from basing his case on the waiver by the appellant of her *accrued right to cancel the agreement* on 10 August 1980. Upholding D the order by the court *a quo* directing the appellant to transfer the property to the respondent after the latter provided the necessary guarantee, his Lordship, with the concurrence of Theron J and Moll J. said at pp 17H–18B:
"In the instant case the reliance on waiver does not effect any variation of any term of the agreement. The respondent was still obliged to furnish the necessary guarantee. The right to cancel arising from the respondent's E failure to furnish the guarantee by 10 August 1980 was solely for the appellant's benefit and it was merely this right, and nothing else, that she is alleged to have waived. Such waiver had no effect on the parties' rights or obligations, *in future,* in terms of the agreement. In my view, the respondent's contention, that the waiver relied upon by him involves no variation of the agreement and is therefore not subject to the non– F variation clause, is squarely supported by the decision in *Impala Distributors v Traunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T)."
In this case the appellant did not cancel the original contract on 7 December 1999 on failure by the respondents to perform their obligation within the stipulated time. He knew that the respondents had taken steps to obtain the G loan of $1 300 000 from CABS. He gave his sister a General Power of Attorney to finalise the sale of the property to the respondents. His sister acted on the authority granted to her and entered into an agreement with CABS to invest the money advanced to the respondents into paid up permanent shares. The appellant's sister knew that such an agreement would meet the condition H set by CABS for granting the respondents the loan. In the letter to CABS dated 10 December 1999 she said she entered into the agreement with CABS

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to "facilitate finalisation of the sale" of the property to the respondents. As A the seller's agent she was not under any obligation to assist the purchaser to obtain a loan to pay the purchase price.
The appellant received the payment of assessed costs on 17 December 1999 without demur. He knew that the costs were tendered for the purposes of transfer of the property to the respondents. B On 14 February 2000 *a pro forma* invoice of transfer costs was sent to the respondents by the appellant's legal practitioners. They expressed their readiness to register transfer of the property. In that regard they asked the respondents to sign the declaration by purchaser. On 18 February 2000 the appellant asked the estate agents to reallocate the purchase price for capital gains tax relief. He could have done so only if he was still selling the property C in terms of the original contract. There is no purchase price when one is not selling property. The purchase price he addressed his mind to had been fixed under the original agreement.
The appellant would not have said he was cancelling the agreement on 10 March 2000 if he believed that it had been cancelled on 7 December 1999. He must be taken to have been aware of the existence of the original contract at the time he purported to cancel it. At that time the respondents were not in breach of the agreement. They had in fact completed the contract. In any case the appellant would have been bound to give them written notice to remedy their breach within fourteen days if they had been in breach of the contract. E
The appeal is accordingly dismissed with costs.

McNally JA and Muchechetere JA concurred. F
Coghlan & Welsh, appellant's legal practitioners G
James, Moyo–Majwabu & Nyoni, respondents' legal practitioners

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[zRPz]MABHENA v P G INDUSTRIES 2002 (2) ZLR 63 (H)
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Citation	2002 (2) ZLR 63 (H)
Case No	Judgment No. HH-115-02
Court	High Court, Harare
Judge	Mungwira J
Heard	September 2001; 17 July 2002
Judgment	17 July 2002
Counsel	Miss *E Mushore*, for the applicant *P Nherere*, for the respondent
Case Type	Civil Application
Annotations	Link to case annotations

[zFNz]Flynote
D **Employment** —contract —termination —on notice —code of conduct in existence —requirement to follow procedures set out in code of conduct — dismissal unlawful if such procedures not followed fully
[zHNz]Headnote
The applicant was dismissed from his employment on notice. The grounds given for his dismissal were his inadequate performance and the fact E that the employer was re-organising its structures. Apart from alleging that his dismissal was unlawful, the applicant claimed that for various periods he had not been properly paid. The respondent argued that as there was a registered code of conduct in force, it was entitled to dismiss employees on notice in terms of the code of conduct.
Held, that the existence of the code implied some essential procedural F requirements to be observed and that failure to observe them might result in dismissal being declared to be void. The code of conduct was more than an embodiment of contractual terms governing the applicant's employment with the respondent. It represented a product of the statutory provisions contained in the codes of conduct regulations. Implementation of the provisions of the code of conduct is in turn a G process of effecting compliance with the provisions of the code of conduct regulations. The

existence of these regulations placed the applicant's case on an entirely different plane from the ordinary master and servant category. Acceptance of the fact that the code of conduct was applicable to the applicant necessarily implied that the employer in H dismissing the applicant acted after exhausting the set procedures. There was no evidence that this was the case.

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Held, further, that if reorganisation required the discharge of staff, the A retrenchment procedures must be followed.

[zCAz]Cases cited

Carrara & Lecuona (Pty) Ltd v van der Heever Invstms Ltd & Ors 1973 (3) SA 716 (T)

Chivinge v Mushayakarara & Anor 1998 (2) ZLR 500 (S) B

Commercial Careers College (1980) (Pvt) Ltd v Jarvis 1989 (1) ZLR 344 (S)

Cook v Thomas & Sons Ltd [1977] 1 RLR 132

Machiya v BP Shell Marketing Service (Pvt) Ltd 1997 (2) ZLR 473 (H)

Masundire v Willowvale Mazda Motor (Ind) (Pvt) Ltd (HC-H 6.12.95) C

Seloadi & Ors v Sun Intl (Boph) Ltd 1993 (2) SA 174 (B)

Winterton, Holmes & Hill v Paterson 1995 (2) ZLR 68 (S)

[zSTz]Legislation considered

Labour Relations Act [*Chapter 28:01*] D

Labour Relations (General Conditions of Employment)(Termination of Employment) Regulations (SI 371 of 1985), s 1A

Labour Relations (Retrenchment) Regulations (SI 404 of 1990). ss 2 & 10

[zCIz]Case information

Miss *E Mushore*, for the applicant

E *P Nherere*, for the respondent

[zJDz]Judgment

Mungwira J: The applicant was prior to his dismissal on 31 July 2000 an employee of the respondent.

It is the applicant's case that by a letter dated 8 May 2000 the respondent F purported to dismiss the applicant on notice, with effect from 31 July 2000. The applicant in his papers chronicles the history of his employment with the respondent from March 1996 when he assumed the position of Exports Manager, through to his promotion to the post of Sales and Marketing Manager, which post he held until his dismissal from the respondent's employ. G

The applicant complains of having been underpaid from 1 September 1997 to the date of his dismissal, more specifically in that:

i) On 1 January 1997 he was promoted to the position of Sales Manager, P.G. Timbers, Harare, a position classified as Grade D2 and was at the time in receipt of a salary of $15 000. Upon assuming, on 1 September H 1997, a Grade D4 position as Customer Services Manager in the

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A respondent's manufacturing division, his salary was not adjusted until 10 January 1998 when the respondent, in attempting to rectify the situation, determined that he be paid a salary of $24 000 per month. The respondent however paid him the increase with effect from 1 November 1997, as opposed to 1 September 1997 with the result that he was for the months of September and October underpaid by an amount of B $12 000.

(ii) On 1 February 1998 he was promoted to Regional Exports Manager, a Grade D5 position, entitling him to a salary of $42 500 per month, but the respondent maintained his previous salary of $24 000. As a result of the failure to adjust his salary he, in June 1998, was paid a bonus of C only $72 000 whereas if the bonus had been calculated on the basis of the actual amount which he should have been earning, his bonus should have amounted to $127 500.

(iii) From 1 August 1998 to the date of dismissal he was employed as a Sales and marketing Manager, Grade E1. He should in that post have been earning $74 000 per month, but respondent had continued to pay him D a salary of $42 000.

The applicant claims that as a result of the various underpayments he was prejudiced in the sum of $3 192 807,00, which figure is inclusive of amounts underpaid in respect of a motor vehicle scheme to which he became entitled when he was promoted to the position of sales and marketing manager. Grade E E1 employees were according to the applicant entitled to a motor vehicle scheme of $30 000 per month, while Grade D4 employees were under the same scheme entitled to payment of $15 000 per month. Accordingly it is the applicant's case that for the period 1 August 1998 to 30 June 2000 he is owed a sum of $195 000, being the difference between the D4 scheme and his dues as an E1 employee.

F The respondent has, according to the applicant, despite demand failed to pay him the sum of $5 605 500,00 which he is owed in terms of unpaid salary, incorrectly paid bonuses, 13th cheque and incorrectly calculated vehicle benefits.

The applicant avers that the termination of his employment is unlawful and G "that even assuming that the respondent had the power to terminate on notice, a point admitted but not conceded," such power cannot be exercised without first affording the applicant the right to be heard. This is as a result of the operation of both the common law and the principles of natural justice, and also that such right is protected by section 18(9) of the Constitution of Zimbabwe.

H The applicant further contends that the respondent could not terminate his

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employment without due cause. He therefore seeks an order directing the A applicant to pay him the amount of $3 192 803 together with interest, and a declaration that the purported termination of his employment is unlawful and is thus null and void with the respondent being ordered to pay him all his arrear salary and benefits from 1 June 2000 to the date of reinstatement.

Annexed to the applicant's founding affidavit is a letter of the applicant's B appointment to the post of Customer Services Manager dated 10 January 1998. The letter sets out the applicant's grade as D4 at a salary of $24 000 per month with effect from 1 November 1997.

Annexure "B" is a schedule of the underpayments and is as follows:

"CALCULATIONS C

Position/Comment/ Period	**Actual paid p/month**	**Total**	**Grade used**	**Should have been**	**Correct grade**	**Total**
1. Customer Services Manager			D4		D4	
1.09.97 – 31.1.98						
2. Regional Exports Manager			D4		D5 D	
1.2.98 – 31-7.98						
Salary from 1.2.98 – 31.6.98	24.000	120.000		42.500x5		212.500
Salary from 1.7.98 – 31 -7.98	29.700	29.700		52.700x1		52.700
(Annual Increment 24%)						
Bonus May – June	72.000	72.000		127.500		
3. Sales & Marketing Manager						
Grade should have been E1			D4		E1 E	
Salary from 1.8.98 –	29.700	238.030		70.000 ×		560.000

31.3.99				8		
Salary from 1.4.99 – 315. 2000	42.500	595.000		98.700 × 14		1.381.809
13th cheque Dec 1998	24.000	24.000		70.000		70.000
13th cheque Dec 1999	29.760	27.760		98.700		98.700
Bonus May/June 1999	89.280	89.280		167.100		157.100
Vehicle allowance	15.000 × 14	120.000		30.000 × 14		420.000 F
1.5.99 – 1.6.2000						
Total		**1,396.274**				**3,192.807**

1. Difference claimed $ 1 796 533 plus interest
2. Retrenchment package to he calculated on Grade E1 and a salary of $98.700per month -Minimum $5 600000"

Annexure "C" is the notice of termination of employment. Annexure "C" is framed as follows:

"Re: TERMINATION OF EMPLOYMENT

Following upon your discussions with the Chief Executive Officer, I write to you of the following:

1. As a result of reorganised structures and your *performance,* we are unable to place you within our operations.

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2. You A are therefore put on notice to terminate your services with PG Industries (Zimbabwe) Limited on 31 July 2000.

3. Your salary and benefits will continue to be paid until 31 July 2000. Should you, during the notice period, get employment from elsewhere, we undertake to pay your salary until 31 July 2000.

4. Housing B

4.1 You are required to vacate 35 Montague Heights into Glenside Gardens where you will be accommodated until 31 July 2000.

I would like to thank you for the time that you spent with PG Industries (Zimbabwe) Limited and wish you every success in your future endeavours.

C Yours sincerely

P.G. Industries (Zimbabwe) Limited

D *R. S. Ndhlovu*

Group OD Executive"

In the opposing affidavit deposed to by the respondent's Human Resources Director it is stated that it is the respondent's policy in most cases where an employee is promoted, is to place the employee on probation for a period of two to three months and that the period may be shorter or longer depending E on the circumstances of each particular case, and that when that occurs the employee's salary is not immediately adjusted, with the adjustment only being effected upon successful completion of probation. In exceptional circumstances however salary increases are effected immediately.

With specific reference to the applicant it is averred that although he may F have assumed the post of Customer Services Manager on 1 September 1997 he was officially confirmed in that position with

effect from 1 November 1997 and was paid accordingly. The applicant according to the respondent accepted that that was the position by signing the copy of the letter advising him of the increase and by so doing signified his consent, thus waiving any right he may have had, assuming that there was any underpayment, which G underpayment is denied.

It is denied that the applicant was promoted to the post of Regional Export Manager as if that was the case the appointment would have been confirmed in writing. According to the respondent the grade D5 does not exist in its grading system. In support of this averment the respondent has annexed to the H opposing affidavit the P.G. Industries Grading List, Annexure "A,"which

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makes reference to Grades A1 to E4. This annexure reflects in the D grade A only four categories ranging from Grade D1 to D4. The respondent however adds that certain jobs may not be specifically listed but that depending on the nature of the jobs they are fitted within the respective existing grades.

Issue is taken with the figure of $42 500 which applicant states was due to him as a Grade D5 employee, as the grading system merely sets out a range of B salaries for employees in a particular grade, and not all employees in the same grade receive the same salary. The applicant is challenged on the basis upon which he fixes his salary at a figure of $42 500.

It is the respondent's contention that what actually occurred was that the applicant was given a lateral transfer and as such assumed a job which was within the same grade as his previous job. It is the respondent's assumption C that the applicant may have mistakenly believed that the different job title meant that he had been promoted.

Note is taken of the fact that whilst the applicant is alleging that he was underpaid he does not claim any sums as due in respect of the underpayment but simply claims a bonus which he claims was calculated using the wrong D salary scale.

It is stated that the amount of bonus paid to the applicant was not wrongly calculated, and further the bonus payment having been made gratuitously, the applicant is not entitled to sue for the bonus.

Turning to the aspect of the applicant's position as Sales and Marketing E Manager, it is the respondent's case that the applicant has failed to attach to his papers any document confirming his appointment to that position. Again, issue is taken with the applicant's failure to explain the basis upon which he arrives at a figure of $74 000 as the monthly salary that was due to him. The respondent points out that although the applicant has stated that he was earning $42 000 from 1 August 1998 up to the date of termination of F employment in a letter from the Human Resources Manager to the applicant dated 20 July 1998, Annexure "B", the applicant was advised that his salary with effect from 1 July 1998 was $29 760,00. The schedule to the applicant's affidavit Annexure "B", it is said, also contradicts the factual allegations in the affidavit.

The respondent argues that if it is correct that the applicant was promoted, G then that would mean that the applicant worked for only six months as a Regional Export Manager before being promoted to the position of Sales and Marketing Manager. This in the respondent's view is highly improbable and could never have been the case as the E Grade is restricted to Executives. The applicant never having been employed in an executive capacity could H therefore not have enjoyed the benefits of a Grade E employee.

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A The respondent queries the failure by the applicant to raise the matter of underpayment at the relevant time.

An inter-office memo dated 3 September 1999 from the applicant to the Human Resources Manager, Annexure "C," is said to be indicative of the applicant having misconceived a lateral transfer to be a promotion. The applicant has, it is averred, not since his promotion to the post of Customer B Services Manager been the subject of any further promotions. The improbability of his having been promoted thrice within a year is highlighted. The court's attention is drawn to the content of paragraph 2.3 of Annexure "C", the inter-office memo, wherein the applicant does not state categorically that he was promoted but instead states that he "was made to believe" that he C had been promoted to the post of Regional Export Manager. This according to the respondent is evidence of a belief entertained by the applicant, which belief is not supported by any facts.

The respondent further avers that the fact that an employee is promoted does not necessarily mean that there is a corresponding increase in salary and that in the absence of an agreement as to salary an employee cannot arbitrarily fix D a figure from the air.

The amount claimed, it is contended, fails to make allowance for the payment of taxes.

In conclusion it is stated that the respondent has a registered code of conduct and that the applicant's contract may be terminated by either side giving E notice in terms of the contract.

The respondent refers to a copy of the contract of employment, Annexure "D," where it is in the first paragraph set out that the period of notice of termination will be a full calendar month either way. The respondent considers itself to have been generous in that it gave the applicant three F months' notice.

It is in the circumstances disputed that the termination was unlawful and that even it it be found that the termination was unlawful it is contended that reinstatement would not be the appropriate remedy in that the applicant can sue for damages arising from the unlawful termination.

In a copious answering affidavit the applicant's assertion is that in his G interview for the post of Customer Services Manager it was agreed that his salary be adjusted with effect from 1 September 1997.

He describes himself as having been an exceptional performer who on three occasions received awards and who had in June 1995 received an exceptional performance appraisal from his superior.

As to his having been on probation H for the period September to October 1997 the company managing director

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had apologised to him for the error in failing to pay him the increase in salary A for those two months and had promised that the balance would be paid. It is on that basis that he had signed the letter of 14 January 1998 some five months after assuming his new post.

The applicant confirms in the answering affidavit that no letter was ever written to him confirming his promotion to the position of Regional Export B Manager but refers to a board memorandum as having confirmed the appointment. This court has not been furnished with a copy of such memorandum. He did however append to this affidavit various annexures pertaining in the form of letters and the minutes of Executive Committee meetings held by the board of the running of the affairs of Zimboard. In one of the documents, at page 36, it is stated that the applicant "now heads the C Zimboard Sales Department". An organogram of the Regional and Local Sales Structure (August 1995) describes the applicant as the Sales and Marketing Manager (page 43 of the record) as do several other documents.

The bonus being based upon a percentage of his salary, the applicant avers that had his salary been paid correctly from 1 February 1998 to 31 July 1998 D at $42 500 instead of $24 000 his quarterly bonus would have been $42 400x3 and not $24 000x3. The former Managing Director Mr Clegg had agreed with him that his $74 000 expectation was within the range and acceptable. He gives the example of a Grade D4 sales and operations manager who was appointed to the post of Customer Services Manager and who received no formal letter of confirmation to his appointment in that post.

He denies that E a letter was in July 1998 written to him confirming his salary as being $29 766 but admits that from that month he was paid a salary of $29 760 which figure merely reflected an annual increment.

The applicant states that he had consistently and persistently raised with the respondent the complaints which are the subject matter of this case but to no avail. As to the notice period given he disputes that the three month notice F period given was an act of generosity on the part of the respondent, this being the period of notice applicable to all employees in grades D1 and above.

A preliminary point to the effect that the applicant ought not to have approached this court for relief without first having exhausted his domestic remedies was raised by the respondent. The applicant submits that this point G is without merit as the applicant was not dismissed on allegations of misconduct in terms of respondent's Code of Conduct but was dismissed on notice. The application it is argued is one for reinstatement on the grounds of unlawful termination with the relief sought by the applicant being a *declaratur.* The applicant contends that the application does not purport to be one of review and that consequently the issue of whether the applicant ought to have H

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A exhausted his domestic remedies provided for under the respondent's Code of Conduct does not arise.

The applicant has in this case opted to follow the common law route. The provisions of the Labour Relations Act do not according to my understanding exclude the jurisdiction of the courts from dealing with a matter where an employee seeks redress from the courts in respect of a course of action based B upon an unlawful termination.

The first issue which I shall deal with is that pertaining to the dismissal. The point which the respondent seeks to make is that there being in existence a registered code of conduct, and the respondent not having disputed that he is covered by such code of conduct, the fact that he was given due notice in C terms of his contract of employment suffices.

This argument is premised upon s 1A of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, SI 371 of 1985 which reads:

"Sections 2 and 3 shall not apply to employees to whom the provisions of D an employment code of conduct, registered in terms of section 3 of the Labour Relations (Employment Codes of Conduct) Regulations, 1990, apply."

The statutory position regarding termination of employment prior to the introduction of s 1A by means of SI 377 of 1990 was that a contract of employment could only be terminated on notice with the prior written E approval of the Minister as provided for in the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, SI 371 of 1985, and that is the position which still prevails in cases where there is in existence no registered code of conduct. The applicant contends however that the fact that the respondent has a registered code of conduct which dispenses with the necessity of obtaining the prior written approval of F the Minister as provided for in SI 371 of 1985, does not permit the respondent to dismiss the applicant or any other employee other than in terms of the code of conduct.

In *Chivinge v Mushayakarara & Anor* 1998 (2) ZLR 500 (S) Gubbay CJ in reference to the judgment of Bartlett J in *Masundire v Willowvale Mazda* G *Motor (Ind) (Pvt) Ltd* (an unreported judgment dated 6 December 1995) stated:

"In *Masundire v Willowvale Mazda Motor (Ind) (Pvt) Ltd*- Bartlett J was of the opinion that a literal interpretation of s 1A is so illogical as to lead to absurdity. I am not sure he was right. It could be argued fairly strongly that the introduction of employment codes of conduct in December 1990 H heralded a clear shift in labour policy from direct state control to an

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increase in labour autonomy. It may well be that it was considered that A if employees in a particular undertaking were competent to negotiate a code of conduct, the indication was that they had reached a position where they were capable of looking after their own interests and solving their own problems.

Secondly, employees were now being encouraged to negotiate collective bargaining agreements dealing comprehensively with their conditions B of service. (See, for instance, *Collective Bargaining Agreement: Commercial Sectors,* SI 45 of 1993; which in s 24 clearly envisages that notice may be included in individual contracts). Then again it may have been thought that, as dismissal for misconduct was a major area of contention, once a code of conduct was put in place, the need to regulate misconduct would be covered, hence if there was no longer the necessity C in that area for the protection which existed under the Regulations, the other subsidiary protections might just as well be repealed. Finally, there is no ambiguity in what s 1A provides. It clearly specifies that, once a code of conduct has been registered, ss 2 and 3 do not apply. Nothing could be clearer."

The learned Chief Justice did not in that case attempt to resolve the question D as he did not deem such resolution necessary on the facts of the particular case.

Counsel for the applicant is in my view correct in her submission that the foregoing comments were made *obiter* and are not binding on this court. The applicant submits that the logical and practical effect intended by the E Legislature in enacting SI 377/90 was to permit employers and employees who have negotiated a code of conduct to deal with all matters of labour dispute, including dismissal, previously dealt with by a labour relations officer or the Minister in terms of their own procedures as laid down in the Code and that to hold otherwise would negate the entire purpose of labour laws. F

This court was referred to the long title of the Labour Relations Act [*Chapter 28:01*] which states that the purpose of the Act is:

"to declare and define the fundamental rights of employees; to define unfair labour practices; to regulate conditions of employment and other related matters; to provide for the control of wages and salaries; to G provide for the appointment and functions of workers committees; to provide for the formation, registration, certification and functions of trade unions, employers organisations, employment councils and employment boards to regulate the negotiations scope and enforcement of collective bargaining agreements; to provide for the establishment and functions of the Labour Relations Board and the Labour Relations Tribunal; to provide for the prevention of trade dispute, and unfair labour H

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A practices; to regulate and control collective job action; to regulate and control employment agencies; and to provide for matters connected with or incidental to the foregoing."

It is submitted that the Legislature's purpose of enacting labour laws was to alter the common law position under strutted by the doctrine of freedom of contract, by redressing the obvious

discrepancies in the employer and B employee's respective bargaining power, and making allowance for the real value of the income generated from the contract if employment to the respective parties. As codes generally deal with questions of discipline and the procedures leading up to dismissal there is to my mind soundness in the argument that the Legislature could not have envisaged of a situation wherein if there was in existence a registered code of conduct the employer could C simply dismiss an employee on notice without reference to or compliance with the provisions of a code. Compliance with code provisions on matters of discipline and appeal structures and any action taken ought clearly to be in accordance with the agreed rules.
In other words the existence of the code implies some essential procedural D requirements to be observed and failure to observe them may result in dismissal being declared to be void.
Chatikobo J in *Machiya v BP Shell Marketing Service (Pvt) Ltd* 1997 (2) ZLR 473 (H) at 479 (G) comments thus:
"The Labour Relations Act, [*Chapter 28:01*] (the Act) provides in s 3 E thereof that all employers and employees not provided for under the Constitution shall be governed by that Act. The suspension and dismissal of employees is in turn specifically regulated in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371/85) (the termination regulations) which provide that no employer shall terminate the contract of employment F of an employee unless he has obtained the prior written approval of the Minister responsible for the administration of the Act. Section 1A of the termination regulations provides that ss 2 and 3 thereof which deal with dismissal, shall not apply to those employees to whom the provisions of a registered employment code of conduct apply. Codes of conduct are prepared and registered in terms of the Labour Relations (Employment Codes of Conduct) Regulations, 1990 (SI 379/90) (Codes of conduct G regulations). Section 4(1) of the codes of conduct regulations stipulates nine specific matters which should be provided in a code of conduct. In s 4(1)(f), (g) and (h) it is provided as follows:
"4 (1) A code shall provide for the following matters:
(a) ... H
(b) ...
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(c) ... A
(d) ...
(e) ...
(f) the notification in writing to any person who is alleged to have breached any of the rules or procedures of the code of the nature of the misconduct or breach alleged against him *and the date when proceedings* B *are to be convened against him:* and
(g) the right of a person referred to in paragraph (f) to have his case heard by the appropriate person, committee or authority referred to in paragraph (e) *before any decision in his case is made;* and
(h) *a written record or summary to be made of any proceedings and decisions* taken in terms of the code, which record or summary shall be C made at the time such proceedings and decisions are taken, and shall be kept for a period of not less than 12 months:"(my emphasis)
Two things emerge clearly from these provisions. The first is that the code of conduct in terms of which the applicant was dismissed is more than an embodiment of contractual terms governing applicant's employment with respondent. It represents a product of the statutory provisions contained in D the codes of conduct regulations. Implementation of the provisions of the code of conduct is in turn a process of effecting compliance with the provisions of the code of conduct regulations. The existence of these regulations places the applicant's case on an entirely different plane from the ordinary master and servant category. The regulations give to the applicant E a status buttressed by statute. The situation in this case is analogous to that in *Malloch (supra)* where Lord Wilberforce, relying on Lord Reid's *dictum* in *Ridge v Baldwin* [1964] All ER 66 HL) at 71, observed that:
"first, there are pure master and servant cases - these are governed by the law of contract and there is no right to be heard; but this kind of case can resemble dismissal from an office where the body employing the man is F under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss him;
''
That is so here. The relationship between applicant and respondent in so far as it is governed by the codes of conduct regulations, is of a sufficiently public character to be said to have an administrative law G element. As such it is one to which the administrative law remedy of review is available."

The learned judge in that case went on to consider the question of the propriety of arriving at a decision adverse to a person without granting an oral hearing to such a person and at 481E remarked: H

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A "One must look to the codes of conduct regulations to discover if an oral hearing was obligatory. To my mind, it matters not how the code of conduct itself is worded. It is the regulations to which one must turn for an answer because the code of conduct cannot curtail the peremptory provisions of the regulations."

With reference to grounds of dismissal, respondent has in its opposing B affidavit avoided or failed to address the grounds of dismissal after the applicant has albeit in bare terms in his founding affidavit complained of his having been dismissed without cause.

In cases where the competence of an employee is in issue the principle which emerges from my reading of such authors as Benedictus & Bercusson on C *Labour Law;* and Smith & Wood is that a system of warnings has become an integral part of modern employment procedures, particularly where there is a possibility of dismissals and that there is a general requirement for them in cases where there are allegations of lack of capacity.

At p 388 of *Labour Law Cases and Materials,* Benedictus and Bercusson state:

D "that the procedure to be followed in cases of termination for incompetence falls between the adversarial hearing required in misconduct cases and the paternalist consultation of employees who are ill. What emerges from the case-law is an emphasis on the desirability of warnings and opportunities for the employee to explain and to improve his performance. This was spelled out by Donaldson J in *James v Waltham Holy Cross* E *U.D.C.* [1973] IRLR 202 (N.I.R.C.), adding the familiar qualifications (para 23):

'An employer should be very slow to dismiss upon the ground that the employee is incapable of performing work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of F dismissal on this ground and giving him an opportunity of improving his performance. But those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent. Again, cases can G arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapability. In such circumstances, exceptional though they are a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business.'"

Similarly, Kilner Brown J in *Sutton & Gates (Luton) Ltd v Boxall* [1987] H I.R.L.R. 486 (E.A.T.) states -

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"It is our unanimous view ... that these cases have to be approached along A such lines as these. A man is falling down in his work to the extent that it is detrimental to the employers business. In those circumstances, because it is something over which he has no control, he should be warned of it. probably several times, and given plenty of opportunity to improve his performance. If it reaches the stage that it becomes obvious that he is incapable - perhaps due to some illness or disability – of B reaching his former standard, the employer, provided he handles the matter sensibly, is entitled to say to that man 'We cannot keep you any longer. You are a liability.' But the employer should not dismiss the man at sight *(sic)* once he has made up his mind that that is the position. Still more so where the employer is satisfied that it is sheer idleness or sheer negligence on the part of the employee, should he not dismiss him C without giving some opportunity and, it may well be, a final opportunity [to improve his performance]."

All that is before this court is an opinion expressed in the letter of Annexure "A" to the applicant's founding affidavit.

In dealing with the question of incompetence Phillips J stated in *Cook v Thomas Linnell & Sons Ltd* [1977] I RLR 132: D

"When one is dealing with routine operations which may be more precisely assessed, there is no real problem. It is more difficult when one is dealing with such imponderables as the quality of management, which in the last resort can only be judged by the competent in the field. In such cases there may be two extremes. At one extreme is the case where it can be demonstrated, perhaps by reason of some calamitous performance, E that the manager is incompetent. The other extreme is the case where no more can be said than that in the opinion of the employer the manager is incompetent, that opinion being expressed for the first time shortly before his dismissal.

In between will be cases such as the present where it can be established that throughout the period of employment concerned the employers had progressively growing doubts about the ability of the F manager to perform his task satisfactorily. If that can be shown, it is in our judgment some evidence of his incapacity. It will then be necessary to look to see whether there is any other supporting evidence It is important that the operation of the legislation in relation to unfair dismissal should not impede employers unreasonably in the efficient management of their business, which must be in the interest of all. G Certainly, employees must not be sacrificed to this need; and employers must act reasonably when removing from a particular post an employee whom they consider to be unsatisfactory."

Although the above matter involved a case of unfair as opposed to wrongful dismissal I find these remarks to be pertinent in regard to the circumstances of this case where the applicant has averred that he was dismissed without H

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A cause as the employer has not sought to lay a basis upon which it can be determined that the employer's conduct was reasonable.

The employee in this case has alleged that he was dismissed without cause and the employer has ignored or overlooked that aspect in his opposing papers and as such there is no basis upon which this court might find in favour of the employer in that it acted in the honest belief on reasonable grounds that B the applicant was incapable or incompetent. Acceptance of the fact that the respondent's code of conduct was applicable to the applicant necessarily implies that the employer in dismissing the applicant acted after exhausting the set procedures. The respondent has not armed this court with any information upon which this court might determine that this case falls within C a definite class of case where a warning or a hearing would normally be inappropriate.

The other ground of dismissal is reorganisation. This ground alone would not suffice given the provisions of the Labour Relations (Retrenchment) Regulations SI 404 of 1990. In s 2 of these regulations "retrench" is defined D as follows:

"'retrench", in relation to an employee, means to terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological change, closing down or reorganising the undertaking in which the employee is or was employed, or for similar reasons."

Reorganisation clearly falls within the scope of the definition.

E In such a case it was incumbent upon the employer to follow the procedures as set in the regulations. The employer's silence is indicative of its failure to follow the set procedures. S 10 of SI 404/1990 reads:

"10. For the avoidance of doubt, it is declared that any purported retrenchment of an employee which is carried out otherwise than in F accordance with an approval granted in terms of these regulations shall be of no effect whatsoever."

Dismissal on the ground of reorganisation is in this case therefore not sustainable.

This court would for the foregoing reasons conclude that the dismissal was unlawful.

G The respondent has submitted that in the event of nullification of the decision to dismiss this court should grant damages in lieu of reinstatement.

In *Winterton, Holmes & Hill v Paterson* 1995 (2) ZLR 68 (S) Gubbay CJ referred to *Seloadi & Ors v Sun Intl (Boph) Ltd* 1993 (2) SA 174 (B) where Lawrence AJ reaffirmed that where a contract of employment has been H wrongfully terminated the court has a discretion to grant specific performance

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(reinstatement) or not. having regard to all the circumstances. A

In *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S) the Supreme Court observed at 349F - G that:

"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 has broken down to the B extent that trust in one another has been lost. For a court to order reinstatement against such a backdrop of animosity and ill-will, ... 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."

There is in this matter no averment of a breakdown in the relationship C between the applicant and the respondent such that there is no degree of trust or respect remaining on either side. The applicant has expressed his desire to be reinstated. There is no evidence to show that the blame for his dismissal is attributable to the applicant. The respondent has spoken of a monetary settlement.

There is no suggestion on the papers that reinstatement would not D be practicable in the circumstances. The respondent in this case is not a small firm. Bercusson and Benedictus state at p 397 that the larger the company, the more likely it is to employ industrial relations or personnel staff, to operate more impersonal procedures and therefore, to be more dispassionate in its judgment of any re-employment proposal.

The circumstances of this case are not such that reinstatement is not E practicable.

Turning to the issue of the applicant's claim for payment of shortfalls and of salary and bonus, the parties were agreed that there exists a real and substantial dispute of facts which is not resoluble on the papers. Ms *Mushore* has argued that the issues of unlawful termination and underpayment are F severable and has urged this court to refer the second issue to trial.

Mr *Nherere* for the respondent has opposed strongly the adoption of such a course for the reason that the existence of the dispute of fact became obvious once the opposing papers had been filed. The applicant he states failed to in respect of this claim provide any supporting documentation. He argues that G it is only in the answering affidavit that the applicant sought to make out his case.

I am satisfied from my reading of the papers that there does indeed exist such dispute of fact. The applicant claims to have been promoted to various positions, which promotions entailed a change of work and salary, whereas the respondent claims that in some instances the change in job description H

A amounted to nothing more than lateral transfers on the same conditions and salary as the posts previously held. The applicant did not furnish the court with any documentary evidence to prove his entitlement to increases in salary and only in his answering affidavit does he refer to discussions with a former Chief Executive Officer of the respondent. In the absence of evidence of renegotiation of salary and conditions of service this court cannot without B recourse to oral evidence determine the issue.

The question which then arises for determination is whether this is an appropriate case for referral to trial. There can be no doubt that the applicant in proceeding on motion ran the risk that a dispute of fact might be shown to exist. In matter of fact the annexures to the applicant's application for C condonation of late filing of heads of argument in the form of correspondence between counsel and the instructing practitioner is evidence of awareness as to the existence of such dispute in that specific reference is made in such correspondence to the need to sever the two issues and the need to proceed by way of action on the issue relating to underpayment. In *Carrara & Lecuona (Pty) Ltd v van der Heever Investments Ltd & Ors* 1973 (3) SA 716 D (T) at 720 Colman J states:

"It is a well-established rule of practice in this Division, that dismissal of the application with costs is the proper course to follow if the applicant knew or should have known before the proceedings were instituted, that there was likely to be a dispute of fact which the court would not be able to resolve on affidavit. This is such a case. The first respondent's E contentions were clearly reflected in correspondence before the application was brought. It is brought, it seems to me, in a mistaken belief that the question whether the applicant had completed the sub-contract or not, was irrelevant. I have no reason to doubt that the applicant's attorneys were *bona fide* in that regard. But as I think I have shown, they were mistaken. And the result has been to burden the first respondent and F the court with an unjustified and fruitless application. It seems to me that in these circumstances I cannot deny the first respondent the relief which it pressed for, namely, that the application be dismissed with costs. I would add, although that is not the reason for my decision, that in my view the applicant may well be in a better position if it starts the litigation afresh, unhampered by the ill-conceived claims with which it is saddled G in the application."

The nature and history of this matter are such that in my opinion the applicant should have foreseen that a genuine dispute of fact might arise and that he took a risk in opting to proceed by way of motion.

In awarding costs I shall take into account that the applicant has in this H application succeeded only in respect of the claim for unlawful termination.

In the result it is ordered that: A

1. The respondent's decision to terminate the applicant's contract of employment be and is hereby declared to be null and void.
2. The applicant be reinstated without loss of salary and benefits from 1st June 2000 to the date of reinstatement.
3. The applicant's claim for payment of the sum of $3 192 803 being in B respect of underpayment of salary and bonuses be and is hereby dismissed.

4. The respondent is to pay 50% of the applicant's costs of suit.
Honey & Blanckenberg, applicant's legal practitioners.
Atherstone & Cook, respondent's legal practitioners. C

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[zRPz]DUBE NO & ANOR v LOGAN & ORS 2002 (2) ZLR 81 (H)
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Citation	2002 (2) ZLR 81 (H)
Case No	Judgment No. HH-117-02
Court	High Court, Harare
Judge	Ndou J
Heard	11 July 2002; 17 July 2002
Judgment	17 July 2002
Counsel	*E W W Morris,* for the applicants Mrs *J B Wood,* for the first and second respondents
Case Type	Civil application
Annotations	Link to case annotations

[zHNz]Headnote
[zFNz]Flynote
Contract —donation —*inter vivos* —formation —what must be shown — D burden on person alleging the donation made to him
Will — validity — subsequent marriage of testator — effect on will
[zHNz]Headnote
In April 1991, the deceased made a will in which he left certain items to the first respondent. The items in question — share certificates and motor E cars — were handed to the first respondent at some time before the deceased died. In October 1992, the deceased married the second applicant. Although the marriage was unhappy and a divorce was contemplated, it had not been dissolved before the deceased died in May 1999.
F The first applicant, executor dative of the deceased's estate, applied for an order compelling the first respondent to hand over all assets which he could have inherited. The respondent argued that the will was valid and that the marriage was not, having been induced by, *inter alia,* duress and that it was never consummated. He also claimed that the assets had been donated to him before the deceased died.

G *Held,* that, as the marriage was properly solemnised, the peremptory provisions of s 16 of the Wills Act [*Chapter 6:06*] applied. The will became void when the deceased married the second applicant.
Held, further, that there was nothing in the papers to show that the marriage was a nullity. There was no merit in the respondents' attempts to impeach the validity of the marriage.
H *Held,* further, that a donation or *schenking* is a contract whereby one person,
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who is not under any legal obligation so to do, but out of liberality, A promises to give another person something without receiving or stipulating for anything in return. The donee must be enriched and the donor correspondingly impoverished. To constitute a gift *mortis causa,* the donation must be given or promised in contemplation of death, i.e. the thought of death must be its moving cause. Even a gift made by a B dying man is not necessarily a donation *mortis causa,* unless it is made in contemplation of death. The respondents' averments pointed in the direction of a donation *inter vivos.* There was no mention of the donor's liability to die. Where, therefore, there is no mention of the donor's liability to die, the donation is clearly *inter vivos,* though the mere mention of it, as where the donor gives "after his death", does not C change the character of the donation but simply postpones its effect.
Held, further, that the intention to make a donation must be clearly and distinctly proved. No person is presumed freely to divest himself of his own property without receiving some consideration in return. It is an inference which may be drawn rather than a rebuttable presumption. All contracts of donation are interpreted strictly to lay the least possible D burden on the donor.
Held, further, that the executor of a decreased estate has a very strong duty. His duty is not only a statutory one as set out in the Administration of Estates Act [*Chapter 6:01*], but also a moral duty. That duty is to step into the shoes of the deceased and collect all the assets of the estate in whatever form they may take and in the possession of whomsoever they E may be. The executor's position is disadvantaged by the fact that he has none of the knowledge of the deceased. Accordingly, in such circumstances, normal incidence of evidentiary proof is altered and considerations of fairness and public policy enter the arena. Determining the incidence of the onus of proof is merely a question of policy and F fairness based on experience in the different situations.
Held, further, that the evidence given by the respondents was characterised by its total lack of particularity as to time and the circumstances of the alleged donation. The executor of the estate met with a failure to co- operate by the respondents who must have peculiar knowledge of facts about the assets in their possession. The only inference that could be G drawn was that the property forming the subject matter of these proceedings was not donated to the first respondent by the deceased
[zSTz]Legislation considered
Wills Act [*Chapter 6:06*], s 16(1) H
2002 (2) ZLR p83
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[zCAz]Cases cited A
Avis v Verseput 1943 AD 331
de Jager v Grunder 1964 (1) SA 446 (A)
Delta Pension Fund v Ritchie HH-206-91
During NO v Boesak and Anor 1990 (3) SA 661 (A)
B *Engineering Mgmt Svcs (Pty) Ltd v South Cape Corp (Pty) Ltd 1*979 (3) SA 1341(W)
Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A)
Holland v Holland 1973 (1) SA 897 (T)
Jager's Est v Whittaker & Anor 1944 AD 246
Kay v Kay 1961 (4) SA 257 (A) C
Keeve & Anor v Keeve NO 1952 (1) SA 619 (O)
Mabaso v Felix 1981 (3) SA 865 (A)
Master v Thompson's Exors 1961 R&N 43: 1961 (2) SA 20 (FSC)
Meyer & Ors v Rudolph's Exors 1918 AD 70
Molteno Brothers & Ors v SA Railways & Ors 1936 AD 321
Mvududu v Mvududu NO & Ors 1981 ZLR 397 (G) D
Savanhu v Heirs Est Savanhu 1991 (2) ZLR 19 (S)
Sayle's Est v CiR 1945 AD 388
Stern v Kuper 1941 WLD 223
Steyl Ex p 1951 (1) SA 277 (O)
Thornycroft v Vas 1957 R & N 376; 1957 (3) SA 754 (FSC)

Twigger v Starweave (Pty) Ltd 1969 (4) SA 369 (N)
E *Union Government (Minister of Railways) v Sykes* 1913 AD 156
van Renen's Trustees v Versfeld (1892) 9 SC 161
Varkevisser v Est Varkevisser & Anor 1959 (2) R&N 58; 1959 (4) SA 196(SR)
[zCIz]Case information
E W W Morris, for the applicants
F Mrs *J B Wood,* for the first and second respondents
[zJDz]Judgment
Ndou J: The first applicant sued in his capacity as executor dative of the estate of the late Percy Peter Elwine Willoughby. The late Mr Willoughby married the second applicant, Angela Yvette Farai Mtambu, at Chinhoyi G magistrates court on 9 October 1992 in terms of the Marriage Act [*Chapter 37 of 1974*]. However, before the marriage, the late Mr Willoughby had prepared and signed a last will and testament on 5 April 1991. The marriage between the late Mr Willoughby and the second respondent had not been dissolved. In terms of clause 3 of the will, the late Mr Willoughby H bequeathed to Alexander Logan, the first respondent, 40 percent of his
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shareholding in Rainbow (Pvt) Ltd, all motor vehicles he owned at the time A of his death and all his race horses that he owned in partnership with him (i.e. Alexander Logan).
The late Mr Willoughby passed away on 26 May 1999. At the time of the death, the marital relationship between the late Mr Willoughby and the second applicant was challenged and lacking in happiness. The possibility of B a divorce was under discussion. The will left behind by the late Mr Willoughby is affected by the provisions of s 16 of the Wills Act [*Chapter 6:06*] in light of his subsequent marriage to the second respondent. Section 16 provides:
"16 Effect of testator's subsequent marriage on will
(1) Subject to this section, a will shall become void upon the subsequent marriage of the testator. C
(2)... (3)...
(4) Where it appears from a will that when it was made the testator was expecting to be married and that he intended that —
(a) the will should not become void upon the expected marriage, the D will shall not become void upon that marriage;
(b) a particular disposition or provision in the will should not become void upon the marriage —
(i) that disposition or provision shall take effect notwithstanding the marriage; and
(ii) any other disposition or provision in the will shall take E effect also, unless it appears that the testator intended the disposition or provision to become void upon the marriage.
(5) A will shall not become void upon the subsequent marriage of the testator to the extent that the will disposes of property which would not have gone to the spouse or issue of the subsequent marriage if the testator had died intestate."
Unaware that Mr Willoughby had married the second applicant after the making of the will, the third respondent, the Master of this court, appointed one Peter Moor, a legal practitioner with Wintertons, as executor testamentary of the estate. Upon realisation of the true facts, the third respondent made good his error by appointing the first applicant as executor dative on 3 September 2001. G
The first applicant, as executor dative, requested the first and second respondents to release to him all the assets which belonged to the late Mr Willoughby which first the respondent could have inherited in terms of the will. The first applicant also personally spoke to the second respondent at her workplace. She confirmed that the Mazda 969 and Mazda B1600, both still H registered in the late Mr Willoughby's name, were in her joint possession
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A with the first respondent, being her husband. It is for this reason that the second respondent was joined in these proceedings. The first applicant seeks an order from this court directing the first and second respondents to deliver the assets which belong to the estate to him within seven days of the order being served on them. The first and second respondents oppose the application. The third respondent has no objection to the relief sought by the applicants. B The basis for first and second respondent's objection is. first, that the will is valid. Second, the marriage between Willoughby and the second applicant is invalid because it was procured by entrapment, torture, assaults and ill treatment of Willoughby by the second applicant. The respondents' basis for this conclusion is that "immediately after the marriage, the deceased commenced divorce proceedings."For the record, the parties got married on C 9 October 1992 and, according to papers before me, it was not until June 1996 (some four years later) that there was talk of the marriage having broken down. From what I

can glean from papers before me the divorce proceedings had not commenced. Third, the property in question was donated to the first respondent by Willoughby before his death. In my assessment, there are three D issues for determination, namely, (a) the validity of the will; (b) the validity of the marriage and (c) the existence of the donation.

1 propose to deal with each issue individually.

(a) Validity of the will

I have quoted the provisions of s 16 of the Wills Act *(supra).* It is clear that E s 16(1) provides that a will shall become void upon the subsequent marriage of the testator. This provision is peremptory, therefore the will made by Willoughby became void upon his subsequent marriage to the second applicant. In the circumstances, the first respondent cannot benefit from an invalid legal instrument by operation of the law. The respondents do not challenge this categoric legal position. In regard to the interpretation of F s16(1) in *Savanhu v Heirs Estate Savanhu* 1991 (2) ZLR 19 (S) at 23C -D Gubbay CJ stated as follows:

"It is plain to me that, by enacting the provision in question, the lawmaker was minded to alter the common law in accordance with which a will is not revoked by the subsequent marriage of the testator. See *Ludwig v Ludwig's Executors* (1848) 2 Menz 452; *Shearer v Shearer's Executors* G 1911 CPD 813; *Braude NO v Perlmutter & Ors* 1969 (2) RLR 103 (A) at 109C; 1969 (4) SA 101 (RA) at 106. It was appreciated that the operation of such a principle would cause injustice and untold hardship. So in 1929 a change in the law was effected by the introduction of s 2 of the former Deceased Estates Act, presently superseded by s 16(1) of the Wills Act. Its object is to afford some measure of protection to the new H spouse of the testator who had been previously married, and to any issue

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whether born to the parties or adopted by them." A

Mrs *Woods,* for the respondents, concedes that in light of this categoric statement of the law. the will is invalid. The concession is well founded. The will is clearly invalid and the arguments raised by the respondents are not legally sustainable.

(b) Validity of the marriage B

The marriage between the second applicant and the late Mr Willoughby was properly solemnized by a marriage officer pursuant to the provisions of the Marriage Act [*Chapter 37 of 1974*]. Nothing turns of the formalities required by the Act. It seems to me that the marriage is being assailed on common law grounds. The first respondent states in the opposing affidavit:

"... immediately after the marriage, the deceased commenced divorce C proceedings. Obviously, the marriage was intended to entrap the deceased to part with his property. The deceased was subjected to torture, assaults and was extremely ill-treated and due the ill-treatment and old age. the deceased died before the divorce was finalised."

It seems to me that the first respondent is challenging the validity of the D marriage on the basis of duress *(metus),* misrepresentation, lack of consensus or lack of consummation or a combination them. Marriage is a voluntary union based on consensus but it is generally acknowledged that it is not a contract. The consensus must exist between the spouses mutually on the one hand, and between the spouses and the marriage officer as the official representative of organised society on the other hand - see van der Linden E 1.3.1: *Holland v Holland* 1973 (1) SA 897 (T) and *South African Law of Persons and Family Law* 3 ed by D S P Cronje at p 149.

In her submissions, Mrs *Woods* concedes that there is nothing in the papers that shows that the marriage is a nullity. In the circumstances, I find that there is no merit in the respondents' attempts to impeach the marriage between the F deceased and the second applicant. The papers before me point to the existence of a valid marriage, though a short-lived one. The parties to the marriage had commenced divorce negotiations at the time of the death of the deceased. Mr *Morris,* for the applicants, submits that the respondents have made scurrilous and totally unfounded accusations against the second applicant. He submits that these allegations are not in any way germane to the G issue of whether the executor was entitled to the order sought and can be said to be nothing more than a gratuitous insult, unsubstantiated by any credible evidence. Under such circumstances, he submits, a special award of costs is sought - see *Delta Pension Fund v Ritchie* HH-206-91 at p 6. I understand *Mr Morris* to be saying that the court should mark its displeasure by awarding H

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Ndou J

A costs on an enhanced scale - see *Engineering Management Services (Pty) Ltd v South Cape Corporation (Pty) Ltd* 1979 (3) SA 1341 (W). I agree with his view that the conduct of the respondents in making this allegation was reprehensible. It was not supported by any evidence. Were it not for the premature participation of the second applicant in these proceedings I would

have no problem in awarding costs on an enhanced scale. It is now common B cause that the second applicant was not supposed to participate in these proceedings at this stage and, as such. I decline to take the route suggested by Mr *Morris.* The respondents have unsuccessfully challenged the validity of the marriage.

(c) Existence of donation

C The only issue left is whether the deceased donated the assets which are the subject matter of these proceedings to the first respondent. In para 9 of his opposing affidavit, the first respondent states:

"I would want to make it very clear that my claim is based on the fact that the deceased donated the vehicles and the shares to me before he died. He was of the view that since he had already made a will, there was no D need for him to make a fresh one but the donation had already been made and he indicated that I could check the will with his lawyers. Therefore, the basis of my claim is that both the shares and the vehicles were donated to me and this in the presence of my wife."

The second respondent confirms this donation in paras 3 and 4 of her E supporting affidavit as follows:

"3. I was present when the deceased donated the vehicles and the shares to my husband.

4. The deceased kept on saying that in addition, he had left a will to that effect and this can be confirmed by the will which had been lodged with his lawyers. Therefore his donation did not depart from the

F spirit of the will and is mutual confirmation." From these averments it cannot be said with certainty that the respondents are relying on an agreement in terms of which the deceased undertook to restrict his right to make a testamentary disposition of his estate or on a donation made in contemplation of the donor's death or whether they are relying on both. From submissions made on their behalf, it seems to me that they are G relying on a donation. Donation - *schenking* - is a contract whereby one person, who is not under any legal obligation so to do, but out of liberality, promises to give another person something without receiving or stipulating for anything in return - see Grotius *Inleiding* 3.2.1; Voet *Commentarius ad Pandectas* 39.5.1; van der Linden *Koopmans Handboek* 1.15.1; *Avis* v H *Verseput* 1943 AD 331 at 348; *Estate Jager v Whittaker & Anor* 1944 AD 246

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at 250 and Wille's *Principles of South African Law* 8 ed by D Hutchinson, A B van Heerdon, D P Visser and S G van der Merwe at p 624.

The donee must be enriched and the donor correspondingly improverished - see *The Master v Thompson's Exors* 1961 R & N 43; 1961 (2) SA 20 (FSC) and *Estate Sayle v Commissioner of Inland Revenue* 1945 AD 388 at 394. This motive of liberality, the *animus donandi,* is the distinguishing feature of B a donation. The gift must be inspired by disinterested generosity - *see Avis v Verseput (supra)* and J D Thomas (1965) 6 *Acta Juricata* 165.

In casu, it is difficult to establish from the respondents' evidence when effect was given to the performance of the donation by delivery. I do not agree with Mr *Morris* that it seems that the donation was made *mortis causa.* There is nothing in the papers before me that justifies that conclusion. To constitute C a gift *mortis causa,* the donation must be given or promised in contemplation of death, i.e. the thought of death must be its moving cause - see Voet 39.6.1; Grotius 3.2.22 and Ex p *Steyl* 1951 (1) SA 277 (O). In any event, even a gift made by a dying man is not necessarily a donation *mortis causa,* unless it is made in contemplation of death - see van Leeuwen *Censura Forensis* D 1.4.12.25 and Lee *Introduction to Roman-Dutch Law 5* ed p 290. In my view, the respondents' averments point in the direction of a donation *inter vivos.* There is no mention of the donor's liability to die. Where, therefore, there is no mention of the donor's liability to die, the donation is clearly *inter vivos,* though the mere mention of it. as where the donor gives "after his death", does not change the character of the donation but simply postpones its effect – see E Voet 39.5.4; *Varkevisser v Estate Varkevisser & Anor* 1959 (2) R&N 58, 1959 (4) SA 196 (SR) and *Keeve & Anor v Keeve NO* 1952 (1) SA 619 (O) at 624. This is the message that the two respondents are conveying in their evidence.

The intention to make a donation must be clearly and distinctly proved – see E *Meyer v Rudolph's Executors* 1918 AD 70 at 76 and *van Renen's Trustees v Versfeld (1892)* 9 SC 161 at 166. It is a general principle that he who alleges a donation must prove it - see Voet 39.5.5; *Avis v Verseput (supra)* at 345; *Stern v Kuper* 1941 WLD 223 at 228; *Thornycroft v Vas* 1957 R&N 376; 1957 (3) SA 754 (FSC) and *de Jager v Grunder* 1964 (1) SA 446 (A) at 463.

No person is presumed freely to divest himself of his own property without G receiving some consideration in return - see *Kay v Kay* 1961 (4) SA 257 (A); *Twigger v Starweave (Pty) Ltd* 1969 (4) SA 369 (N) and *Mvududu v Mvududu NO & Ors* 1981 ZLR 397 (G). It is an inference

which may be drawn rather than a rebuttable presumption - see *Stern v Kuper supra* and *Thornycroft v Vas supra.* The respondents are alleging the existence of a donation. It, therefore, follows that they must prove it. All contracts of H
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Ndou J
A donation are interpreted strictly to lay the least possible burden on the donor - see Grotius 3.2.21. Further, it has to borne in mind that as an executor of a decreased estate, the first applicant has a very strong duty. His duty is not only statutory as set out in the Administration of Estates Act [*Chapter 6:01*]*,* but also a moral duty. That duty is to step into the shoes of the deceased and collect all the assets of the estate in whatever form they may take and in the B possession of whomsoever they may be. Unfortunately, the executor's position is disadvantaged by the fact that he has none of the knowledge of the deceased. Accordingly, in such circumstances the normal incidence of evidentiary proof is altered and considerations of fairness and public policy enter the arena. Determining the incidence of the onus of proof is merely a C question of policy and fairness based on experience in the different situations - see *Mabaso v Felix* 1981 (3) SA 865 (A) at 973C; *During NO v Boesak & Anor* 1990 (3) SA 661 (A) at 673A and *Eskom v First National Bank of Southern Africa Ltd* 1995 (2) SA 386 (A), at 392C - E.
In this case, the evidence given by the respondents is characterised by its total lack of particularity as to time and the circumstances of the alleged donation. D The applicant, as the executor of the estate, met with a failure to co-operate by the respondents who must have peculiar knowledge of facts about the assets in their possession. The only inference that I can draw is that the property forming subject mater of these proceedings was not donated to the first respondent by the deceased. I believe I am entitled to make such an inference - *Molteno Brothers and Ors v South African Railways and Ors* E 1936 AD 321 at 333 and *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173. The executor is not in the position of an ordinary litigant and has no actual knowledge himself of events of the alleged donation. On the contrary, it is the respondents who can supply the information. The information is peculiarly within their knowledge. Be that as it may, I hold that E the first respondent failed to prove the assets in question were donated to him. The property should, therefore, form part of the estate of the late Percy Elwine Willoughby.
Before making my order, I would like to point out that Mr *Morris,* for the applicants, conceded that the participation of the second applicant in these proceedings is premature and *per incuriam,* at least until such time as the G executor dative has lain the final accounts of the estate open for inspection and they have been accepted.
It is also conceded that the second respondent should not have been cited. These concessions are well founded. In all the circumstances I make an order in following terms:
H It is ordered that:
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Ndou J
1. The will signed by the late Percy Elwine Willoughby on 5 April 1991, A at Harare, be and is hereby declared null and void.
2. Any bequests made or purported to be made in terms of the said will to first respondent be and are hereby set aside.
3. The first respondent be and is hereby ordered to deliver, within seven days of this order being served on him, the following assets to Mr Canaan B F Dube at Dube, Manikai and Hwacha, 6th Floor, Gold Bridge South Wing, Eastgate Complex, Second Street, Harare:
3.1 Share certificates for the late Percy Elwine Willoughby 's 40 percent shareholding in Rainbow (Pvt) Ltd;
3.2 Registration books or any other proof of ownership by the late Percy Elwine Willoughby for any motor vehicles and other assets he may C have owned at the time of his death, including the following vehicles:
3.2.1 a Mazda 969;
3.2.2 a Mazda B1600;
3.2.3 a Mazda 323;
3.2.4 a Kombi. D
4. The costs of this application be borne by the first respondent.
5. There is no order of costs against the third respondent.
Dube, Manikai & Hwacha, applicants' legal practitioners.
Byron Venturas and Partners, 1st and 2nd respondents' legal practitioners. E

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[zRPz]IN RE CHINAMASA 2002 (2) ZLR 91 (H)
2002 (2) ZLR p91

Citation	2002 (2) ZLR 91 (H)
Case No	Judgment No. HH-118-02
Court	High Court, Harare
Judge	Blackie J
Heard	17 July 2002
Judgment	17 July 2002
Counsel	Details not supplied
Case Type	Criminal trial
Annotations	No case annotations to date

[zFNz]Flynote
Criminal law (common law offences) —contempt of court — "scandalising D the court" and failure to appear for proceedings —what constitutes former —remarks critical of sentence passed by judge —when such remarks may be regarded as contemptuous —contempt aggravated by respondent's subsequent action
Criminal procedure (sentence) —common law offences —contempt of court E — appropriate sentence when contempt committed by Government Minister and legal practitioner
[zHNz]Headnote
The respondent, whilst holding the position of Attorney-General, had made various intemperate statements, strongly criticizing a sentence passed F by a High Court judge as being too lenient. The judge ordered that proceedings be taken against him for contempt of court. This gave rise to the first count of contempt. A hearing on the merits was delayed until the Supreme Court had determined various points *in limine.* After his appointment to the position of Minister of Justice, the respondent was notified of the hearing to determine the merits by way of a notice of set G down, which he ignored. A warrant of arrest was issued and, although not delivered by the police as required, it was clear that the respondent was aware of its issuance. Rather than attending to the warrant, he made further statements in contempt of court. This gave rise to the second count of contempt.
Held, on the first count, that the statements, although intemperate, did not, H by themselves, constitute the offence of scandalizing the court. The
2002 (2) ZLR p92
Blackie J
respondent genuinely believed the sentence to be unreasonable or A inordinately lenient. However, the terms used were not within the bounds of reasonable courtesy. What brought the statement within the ambit of contempt was his intention and lack of good faith. The remarks were intended to

bring the judge into disrepute as a judge and the administration of justice by the High Court into disrepute.
Held, on the second count, that the failure to appear and subsequent B statements constituted a grave contempt of court that was aggravated by the respondent's qualification as a legal practitioner and that at the time of the offences he held the position of Attorney-General and then Minister of Justice. His contempt was compounded by his deliberate and contemptuous response to the authority and process of the court to C the hearing of the contempt indictment against him and to the warrant of arrest issued against him when he failed to appear at the hearing. He made no attempt to explain why he did not respond to the notice setting the original contempt indictment down for hearing. He made no effort to deal with the warrant of arrest that he knew had been issued. He deliberately scorned and avoided the processes and directives of the D court. His only response to the authority of the court was abuse and threats.
Held, that, on the first count, the appropriate sentence was a fine of $50 000 (or in default of payment, three months' imprisonment) together with three months' imprisonment suspended for five years on condition that no further act of contempt of court is committed for which a sentence E of a period of imprisonment without the option of a fine or a fine exceeding $10 000 is imposed.
Held, further, that on the second count, a sentence of three months' imprisonment was appropriate. F
[zCAz]Cases cited
In re *Chinamasa* 1999 (2) ZLR 291 (H)
In re *Chinamasa* 2000 (2) ZLR 322 (S)
S *v Blanchard & Ors* 2001 (2) ZLR 373 (S)
Biti & Anor v Min of Justice & Anor 2002 (1) ZLR 177 (S)
[zJDz]Judgment
Blackie J: The respondent in this matter is a registered legal practitioner. He is also the Minister of Justice, Legal and Parliamentary Affairs in the Government of Zimbabwe. Before he became Minister he was the Attorney- General. He was Attorney-General at the time when the incident, with which this case is concerned, took place. It is convenient to refer to him in this H
2002 (2) ZLR p93
Blackie J
A judgment by his surname (Chinamasa) rather than by any title or the office that he holds or held.
In 1999, three American citizens were arraigned before Adam J charged with a number of offences concerning the possession of arms of war and attempting unlawfully to convey those arms on an aircraft. Adam J convicted each of the accused and subsequently sentenced them. Chinamasa was not happy with B the sentences imposed on the accused. He considered them to be too lenient. He said so in a statement that was published in the Herald newspaper on the front page of its edition for Wednesday 15 September 1999, under the headings,
"US gunmen's sentence causes outrage."
C "Attorney General's office expresses shock at court's 'trivialisation of offence.'"
The article under that heading, reported that:
"In a statement issued yesterday, the Attorney-General, Mr Patrick Chinamasa, said the sentence handed down by High Court judge Justice D Adam 'induces a sense of shock and outrage in the minds of right- thinking people. By imposing sentences, which do not match the seriousness of the offences, Adam J has in effect trivialised crimes of unlawful possession of arms and has seriously erred in doing so. The Attorney General's office is bemused by the meaninglessness of it all. The nation should know and be told that the leniency of the sentences constitutes a betrayal of B all civilised and acceptable notions of justice and of Zimbabwe's sovereign interests. Mere unlawful transiting of firearms through the territory of Zimbabwe is in itself a serious and gross violation of the sovereign and security interests of Zimbabwe.'
'Mr Chinamasa said the attitude taken by the court in meting out sentences, which did not match the severity of the crimes committed, came against the backdrop of repeated complaints made to him by his F law officers of hostility and abuse directed at them and their submissions by the bench during the proceedings. "All these developments erode the office's confidence in the administration of criminal justice'".
Adam J considered the statement to be contemptuous of the court. He indicted Chinamasa to appear before this court to answer a charge of G contempt on account of the statement.
The species of contempt with which this case is primarily concerned is clumsily and archaically called "scandalizing the court".
"It is committed by the publication, either in writing or verbally, of words calculated to bring a court, a judge of a court or the administration of justice through courts generally into contempt. It need not be an attack H directed at any specific case, either past or pending, or at any specific

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Blackie J
judge. It is sufficient if it is a scurrilous attack on the judiciary as a whole, A calculated to undermine the authority of the courts and endanger public confidence, thereby obstructing and interfering with the administration of justice. See *Chokolingo v Attorney-General of Trinidad & Tobago* [1981] 1 All ER 244 (PC) at 248f per Lord Diplock. See also Borrie & Low's *Law of Contempt 2* ed at 226-227; Snyman *Criminal Law* 3 ed at 316; Milton *South African Criminal Law & Procedure* 3 ed vol 2 at 184'. B
In re *Chinamasa* 2000 (2) ZLR 322 (S) 322 at p 331 B-E
When the matter came to court, Chinamasa did not deny making the statement attributed, to him. However, he raised, *in limine,* a number of constitutional objections to the indictment against him. He requested that his objections be referred to the Supreme Court in terms of s 24 of the C Constitution. Some of the objections (necessarily redrafted, to clarify or to express properly and accurately, the points which Chinamasa seemed to want to make) were referred to the Supreme Court for determination. Three of the objections were dismissed as being frivolous and vexatious or as not being relevant for reference to the Supreme Court in terms of s 24 of the Constitution.
The judgment of this court setting out the objections *in limine* and the reasons D for referring or for refusing to refer those objections to the Supreme Court is contained in *in re Chinamasa,* 1999 (2) ZLR 291 (H).
Chinamasa appealed to the Supreme Court against the refusal of this court to refer the three of his objections *in limine* to the Supreme Court. The Supreme Court declined to hear the appeal. Chinamasa, it ruled, had: E
"Obviously overlooked the limitation expressed in s 24(3) of the Constitution. It is there provided: '(3) Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no F application for the determination of that question shall lie to the Supreme Court under subsection (1)'.
It follows that any determination of the three questions which were not referred may only be made by this court in the event of an appeal brought before it against a finding by the High Court that the applicant was guilty of contempt". In re *Chinamasa, supra,* at 329G-330E G
The Supreme Court then dismissed Chinamasa's objections *in limine.* In particular, it held that contempt of court continued to exist as an offence according to the common law of Zimbabwe. It rejected Chinamasa's claims that the existence of the offence and procedures relating to its enforcement were contrary to the provisions of the Constitution of Zimbabwe. In re *Chinamasa (supra)* at 347C-D H
2002 (2) ZLR p95
Blackie J
A It referred the matter back to this court for determination on the merits. It has taken a long time for the determination on the merits of this case to be heard. There are several reasons for this. Firstly, shortly after the judgment of the Supreme Court had been delivered, the then Chief Justice retired. The new Chief Justice directed that this matter should not proceed on the merits until the Attorney-General's appeal against the sentences imposed on the three B Americans had been heard and determined by the Supreme Court. That appeal, see *S v Blanchard & Ors* 2001 (2) ZLR 373 (S), was determined in November 2001. Secondly, Chinamasa was appointed Minister of Justice, Legal and Parliamentary Affairs, relinquishing the post of Attorney-General. The new Attorney-General, belatedly, sought to intervene in the proceedings. He wrote to the then Judge President of this court (now the Chief Justice). C In his letter he said he was "appealing (to the Judge President) to intervene to prevent", what he called, "the intended prosecution by the court where the court clearly has no authority to do so". A prosecution of contempt of court is a criminal matter, he said. Plainly, the court had no authority to proceed with the intended prosecution of Chinamasa. "Prosecutions in this country, D including prosecutions for contempt of court, except where the contempt is committed in the face of the court, can only be instituted by the Attorney- General in terms of s 76(4) of the Constitution or by private persons in the circumstances prescribed by s 16 of the Criminal Procedure Act [*Chapter 9.07*]" "The intended prosecution", he said, "was not only most irregular but also unlawful and amounts to an attempt to usurp the Attorney- E General's constitutional powers. It is unfortunate that this serious breach of law is being committed by the court to which the nation looks for legal guidance and justice". He appealed again to the Judge President "to prevent an occurrence which may seriously damage the image of the court. Any instance in perpetuating the illegality might also lead to a situation where ulterior motives may be read into the matter. It would also be undesirable for F a situation to develop where I will be

compelled to consider exercising my powers in terms of s 76(4)(b) as a way of rectifying the irregularity"

The Attorney-General's claim was fundamentally flawed. Chinamasa, as Attorney-General, had already raised that claim in his objections *in limine.* The Supreme Court had considered it and rejected it in its judgment on that G objection. In re *Chinamasa, supra,* at 343A-344B 2000 (2) ZLR 322 (S)

The Attorney-General was, however, invited to take make whatever application he considered appropriate if, in his view, the Supreme Court judgment was wrong or was being wrongly interpreted or any powers granted to him in terms of the Constitution had been usurped. So far, the Attorney- H General has not taken advantage of that invitation.

2002 (2) ZLR p96

Blackie J

It is of interest to note that, when this matter was finally set down for hearing A on the merits, approximately one year after the Attorney-General's statement that contempt proceedings were of a criminal nature, the Attorney-General made a further statement on these proceedings. As reported by the *Herald* newspaper, in an article in that paper dated 26 June 2002. he criticised this court's issue of a warrant of arrest against Chinamasa for his failure to appear B before the court when summoned to answer the contempt indictment on the merits. '"The matter," he said, "is of a civil nature and not criminal".

These two statements concerning the nature of contempt proceedings by the Attorney-General contradict each other. Both are in conflict with the law that had already been stated by the Supreme Court.

In re *Chinamasa, supra,* at 343A-344B 2000 (2) ZLR 322 (S) C

Thirdly, and thereafter, Chinamasa, now an appointed, but not elected, Member of Parliament and the Minister of Justice, Legal and Parliamentary Affairs, introduced into Parliament a lengthy General Laws Amendment Bill. Tucked into the middle of that Bill was a proposed amendment to the Criminal Procedure and Evidence Act [*Chapter 9:07*]. That amendment ('the D amendment') was to insert a new section in the following terms,

"9A. Prosecutions for contempt of court proceedings

(1) A court or tribunal may, on its own motion, institute proceedings for contempt of court against any person who is alleged to have impaired its dignity, reputation or authority in the following circumstances — E

(a) where the alleged impairment occurred in the presence of the court or tribunal;

(b) Where the alleged impairment occurred in relation to a matter that was actually being heard or tried by the court or tribunal concerned at the time when the alleged impairment occurred, whether such alleged impairment is alleged to have occurred in F the presence of the court or tribunal or otherwise.

(2) No court or tribunal or person other than the Attorney-General or someone acting on the express authority of the Attorney-General shall institute or continue any proceedings for contempt of court against anyone who is alleged to have impaired the dignity, reputation or authority of a court or tribunal in circumstances other than those G referred to in subsection (1)."

The subsection (2) of the amendment clearly covers the proceedings in this case.

The prerogative attaching to a court to institute this type of contempt proceedings is an old and well-established prerogative. H

2002 (2) ZLR p97

Blackie J

A "(S)ome legal writers, and a few judges, have been vehement in their criticism of the recognition of scandalizing the court as an offence". In re *Chinamasa* at 334E-335A

However, many democratic jurisdictions continue to recognise it as an offence and the courts of those jurisdictions are entitled to enforce their B prerogative.

This prerogative of the court has rarely been used in Zimbabwe. It is only in the last two years that it has had to be used in any significant way. This case was the first of its kind in the High Court in twenty years. There has been no instance in Zimbabwe of abuse by the court of this prerogative or its procedures. There has been no public outcry and no academic writing in C Zimbabwe against its use or its continuation. Prior to the drafting of the amendment that would affect this prerogative and the independence of the judiciary to regulate its own affairs in this respect, Chinamasa did not consult on the matter or discuss the amendment with the Law Development Commission, the Law Society or any other interested party outside the Executive. The judiciary, as a whole, was not consulted or advised of the D proposal to introduce this amendment.

The explanatory note attached to the front of the Bill incorporating the amendment gives no reason for the introduction of the amendment. It merely states that the purpose of the amendment is "(to

limit) the circumstances under which a court or tribunal may. on its own motion initiate*(my* E *underlining)* the prosecution of a person for contempt of court".

Chinamasa himself introduced the General Laws Amendment Bill in Parliament. He steered that Bill through the House. When the Bill was read for a second time he said, in respect of the amendment, "The Criminal Procedure and Evidence Act is amended by the insertion F of a provision which limits the instances when a court may, on its own motion, institute*(again my underlining)* proceedings for contempt of court. As you are aware, there is no fora *(sic)* for the public to express their opinions on judgments handed down by the courts. As the law stands the public's voice is muffled by fear of being charged with contempt of court, yet judges should not be immune to constructive criticism" G This bald statement by Chinamasa of the reasons for the amendment is couched in terms of concern for the right of the general public to feel free to criticise judges without fear of being held liable for contempt. It is ironic that the amendment was introduced into Parliament in the same session as two other Bills, the Public Order and Security Bill and the Access to Information H and Protection of Privacy Bill. Both of these Bills are now Acts. Both of them

2002 (2) ZLR p98

Blackie J

limit, on pain of severe penalties, the public's right to criticise the Executive. A It is also ironic that:

(a) Chinamasa repeated the fiction, contained in the explanation at the front of the Bill, that the effect of the amendment was to limit the instances when a court may institute, *(again my underlining)* on its own motion, proceedings for contempt of court. The Act does not only affect the institution of such proceedings in the future. It B prohibits the continuation of proceedings already instituted. It is retrospective in effect. Chinamasa has given no explanation or justification for the need to make this amendment retrospective. In the circumstances of this case the reason is obvious, though at no stage in the debate did Chinamasa reveal that reason.

(b) The amendment does not provide any forum for the public freely to C exercise a right of constructive criticism of the judiciary nor does it "unmuffle" the fear of the public to criticise constructively judges and judgments of the courts. The amendment merely takes away from a court the independence and discretion to determine for itself whether to institute proceedings for this type of contempt. It places that authority in the hands of the Attorney-General, a member of the D Executive.

(c) Neither in his introduction to the second reading of the Bill nor in the entire debate that followed in respect of this Bill in Parliament, did Chinamasa make any mention to Parliament of his personal interest in the Bill, that he was himself the subject of proceedings that would be affected by the amendment and that the effect of the Bill would E be to bring to a stop the proceedings against him. The absence of any declaration to Parliament by Chinamasa of his personal interest in the Bill is surprising and significant.

The Bill containing the amendment was gazetted as the General Laws Amendment Act, 2002 (No. 2 of 2002). Shortly thereafter, however, the Supreme Court, for reasons not connected with the amendment, set aside the F Act as being invalid and of no force and effect. *Biti & Anor v Minister for Justice & Anor* 2002 (1) ZLR 177 (S). It has, therefore, become possible, at long last, to set the matter down for hearing on the merits.

The notice of set down for the hearing on this matter was effected through the Registrar of this Court. It was served on Chinamasa's private secretary at Chinamasa's official office. There was no response from Chinamasa himself, G his private secretary or any lawyer acting on his behalf. Chinamasa was in default on the day set down for the hearing of the matter. A warrant for his arrest was issued.

For reasons set out later in this judgment, the warrant of arrest has not been served on Chinamasa. Judgment on the merits of the indictment is given in H default of his appearance before this court.

2002 (2) ZLR p99

Blackie J

A The line to determine whether a statement falls within or without the definition of the offence of scandalising the court may be difficult to draw. Guidance (but not necessarily an exhaustive list) as to the factors that may be taken into account in that determination is set out in In re *Chinamasa, supra,* at 335B-C.

Do the words fall within or without the limits of reasonable courtesy? or B represent the expression of a genuinely held belief? Can it be said of the words that, emanating as they did from the country's chief law officer, being a person of high standing in the community, they were intended or likely to bring Adam J into disrepute, as reflecting upon his capacity as judge, and to shake public confidence in the manner in which justice had been administered C by the High Court in this case? In this case it is not necessary to look beyond the factors set out for guidance above and I have respectfully adopted them in the determination of this case.

I accept that Chinamasa genuinely believed the sentences imposed on the Americans were unreasonably or inordinately lenient. He has been shown to be correct. He is correct because the majority in the Supreme Court has told D him so. It said that Adam J was wrong in his approach to the sentences imposed and wrong in the quantum of the sentences imposed. The sentences, the majority of the court said, were 'manifestly lenient' S *v Blanchard & Ors (supra)* at p. 384.

The language used by Chinamasa to express his views is not what can be E described as within ...the realms of reasonable courtesy. It is intemperate, pompous and ill-advised. It is surprising to hear such utterances from a person of Chinamasa's background, training and position. They do him no credit personally. Their extravagance brings discredit to the important office of State that he held. Nevertheless such language, on its own, does not take the statements over the line and into the ambit of contempt.

F Where the statements do fall within the ambit of contempt is in their intention and in their lack of good faith. The statements were not a spontaneous outburst of anger or disappointment by an unsuccessful lay litigant. Chinamasa is an experienced practitioner. He was then the holder of the highest legal office in the service of the Executive and a member of the G Cabinet. Chinamasa made his statements two days after the sentences had been imposed on the Americans. He had considered his position and made the statements deliberately. He made the statements in his capacity as Attorney-General. The statements made no reference to the legal remedies open to him. They were not directed to the court where his effective remedy lay. The statements were made to a reporter of a State sponsored newspaper H and to the readers of that paper. There can be no doubt that the statements

made by Chinamasa were intended to bring Adam J into disrepute as a judge A and the administration of justice by the High Court in this case into disrepute. I have little doubt that they had that effect on many people. The words used and the circumstances in which they were uttered and the official by whom they were uttered make that clear- "the sentence handed down by High Court judge Justice Adam 'induces a sense of shock and outrage in the minds of right-thinking people' "the leniency of the sentences constitutes a betrayal of all civilised and acceptable notions of justice"; "All these developments erode the office's confidence in the administration of criminal justice".'

In the result, Chinamasa is found guilty of contempt of this court in respect of the indictment set out at the beginning of this judgment.

However, the matter does not end there. The matter was set down for hearing C on due notice to Chinamasa. He did not appear at the hearing. A warrant for his arrest was issued. The Registrar of this court duly handed the warrant to the police to effect service of it. The warrant has remained in the hands of the police for more than three weeks. There has been no apparent effort by the police to serve it. The Registrar has made enquiries of the police as to why D it has not been served. The police have provided no explanation. The warrant of arrest has not been served.

It is clear that the police will not serve the warrant. The failure of the police to comply with their duty to the court is separate to this enquiry and must be dealt with separately.

It is, however, clear that Chinamasa was fully aware that the matter was set E down for hearing and is aware that there is a warrant out for his arrest for failure to appear at that hearing. It is clear because he has responded publicly to these events with an unfortunate combination of threat, abuse and derision.

In the *Herald* newspaper of 4 July 2002, Chinamasa is reported as saying that:

"It seems to me that in issuing a dubious arrest warrant Justice Blackie is following a bad precedent set by Justice Gillespie in delivering a hostile parting shot against the Executive.' Justice Blackie's conduct he said 'was a gross abuse of the judicial office and should not be tolerated. In fact the abuse is so grave that in my view it is tantamount to misconduct. Notwithstanding Justice Blackie's pending retirement on G July 18, I am going to consult with the Chief Justice and recommend to him the setting up of a tribunal to investigate the conduct of Justice Blackie in this matter.'"

In an interview with the *Daily News,* in its issue of 5 July 2002, under the heading of "Chinamasa remains free despite warrant of arrest."Chinamasa, reportedly in a jovial mood, said, "I have not been arrested. I am not in jail. H

A Do you think I would be talking on my cell phone if I was in jail? Do they allow cell phones in jail?"

There are, of course, factual inaccuracies in the first statement made by Chinamasa. The arrest warrant is not dubious even if the police refuse to act on it. His arrest is not "a hostile parting shot

against the Executive". The Supreme Court directed that "the hearing be resumed before Blackie J." In B re *Chinamasa, supra,* at 347D

This judgment sets out the difficulties in resuming the hearing and the obstacles that have been placed in the way of its resumption, in particular by Chinamasa himself. The warrant follows directly from Chinamasa's failure to appear in court when summoned to do so.

C On Friday 5 July, a letter was received by the Registrar of this court from a counsel on the Attorney-General's staff, purportedly acting on behalf of Chinamasa. asking the Registrar to "assist by arranging that a court be convened before Blackie J, in order that a warrant of arrest issued (in Chinamasa's) matter is dealt with soonest." The counsel involved was advised to file his application by 10.00 am on Monday 8 July and the matter D was set down for hearing at 2.15 pm that day. Approximately one hour after the time by which the application should have been filed, the Registrar received a telephone call from the counsel in the Attorney-General's office to say that Chinamasa had now engaged some other counsel to represent him. Since that time there has been no word from Chinamasa himself or any E counsel or any lawyer on his behalf. It is clear that Chinamasa has no intention of appearing before this court.

It is difficult to imagine a more deliberate and contemptuous response to the authority and process of this court than that of Chinamasa to the hearing of the contempt indictment against him and to the warrant of arrest issued against him when he failed to appear at the hearing. He has made no attempt F to explain why he did not respond to the notice setting the original contempt indictment down for hearing. He has made no effort to deal with the warrant of arrest that he knows has been issued against him. He has deliberately scorned and avoided the processes and directives of the court. His only response to the authority of the court has been abuse and threats. In doing so G he is clearly guilty of a further and grave contempt against this court.

That contempt is aggravated by Chinamasa's qualification as a legal practitioner and the positions that he has held and now holds — Attorney- General and Minister of Justice, Legal and Parliamentary Affairs. In the result Chinamasa is found guilty of two counts of contempt of court.

H In respect of the first count (the indictment of Adam J) Chinamasa is

2002 (2) ZLR p102

Blackie J

sentenced to pay a fine of S50,000, or in default of payment, to serve three A months' imprisonment, together with a further three months' imprisonment, the whole of which is suspended for five years on condition that, during that period he does not commit any further act of contempt of court and for which he is sentenced to imprisonment without the option of a fine or to a fine in excess of $10 000. B

In respect of the second count. Chinamasa is sentenced to serve three months' imprisonment. C

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[zRPz]S v MANYIKA 2002 (2) ZLR 103 (H)
2002 (2) ZLR p103

Citation	2002 (2) ZLR 103 (H)
Case No	Judgment No. HH-215-02
Court	High Court, Harare
Judge	Makarau J & Mavangira J
Heard	29 October 2002; 18 December 2002

Judgment	18 December 2002
Counsel	Appellant in person *M Nemadire,* for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

[zFNz]Flynote
Criminal procedure —trial —onus —on State —evidence relating to an D essential element of alleged crime missing — no requirement for accused to raise matter in cross-examination
[zHNz]Headnote
The onus on the State in a criminal trial remains the same even where the defence proffered by the accused is not worthy of belief. Unless the E accused person admits any one of the elements of the offence charged, the State bears the onus of proving each essential element of the offence beyond reasonable doubt. Thus, on a charge of rape, the State must not only prove sexual relations but lack of consent. Where evidence proving an essential element is missing, the issue that the appellant did not challenge it in cross-examination does not arise. He cannot challenge F what is not there.
[zCAz]Cases cited
Millar v Min of Pensions [1947] 2 All ER 372 (CA)
R v Difford 1937 AD 370
S *v Isolano* 1985 (1) ZLR 62 (S)
G *R v M* 1946 AD 1023
[zCIz]Case information
Appellant in person
H *M Nemadire,* for the respondent
2002 (2) ZLR p104
Makarau J
[zJDz]Judgment
Makarau J: The appellant, aged 62, was charged with and convicted of A four counts of rape. He was sentenced to six years' imprisonment on each count. The sentence on the third count was ordered to run concurrently with the sentence on the second count, leaving the effective sentence at 18 years, three of which were suspended on condition of good behaviour. He appealed against both conviction and sentence. B
The allegations against the appellant were that between 30 July 1997 and 1 August 1997 he had sexual intercourse with his stepdaughter, aged 15, on four different occasions, without her consent. Despite his denial, he was convicted on all four counts. In his defence, the appellant had sought to argue that he had been falsely implicated in the matter as he was having differences C with his wife, the complainant's mother, over title to some immovable property which he owns.
In his notice of appeal, the appellant attacked his conviction on the basis that he ought to have been charged with incest rather than rape as the sexual intercourse between him and the complainant had been consensual. During the hearing of the appeal, the appellant denied that he had drafted the notice D of appeal. He indicated that a fellow inmate in prison had drafted the notice for him and had raised the grounds therein without instruction. Consequently, he did not argue in support of the ground raised in the notice but maintained the defence he had raised in the court *a quo* that the complainant's mother falsely raised the charges against him. I find it highly improbable that the E prisoner who drafted the notice of appeal would have done so without first receiving instructions from the appellant. The prisoner would not have known the circumstances of the appellant and the facts surrounding the commission of the offence. On this basis, I would find that the appeal was properly noted before us, although the appellant was allowed to abandon the ground raised therein. F
The defence of the appellant in the court *a quo* was a complete denial of the alleged sexual intercourse. In the circumstances, the onus was on the State to prove the commission of the offence.

It is trite that in criminal proceedings, the onus is on the State to prove the offence beyond reasonable doubt. While the concept has been easy to G understand, it has not been equally easy to explain. Different courts have tried to explain the nature of the onus on the State in different ways, depending on the stage of the proceedings the trial would be at when the onus is tested. Thus, where a defence has been proffered on behalf of the accused, the onus on the State has however often been explained in relation to that defence. In H
2002 (2) ZLR p105
Makarau J
A *R v Difford* 1937 AD 370, (a case cited by the authors Hoffman and Zeffertt in their textbook *The South African Law of Evidence* 4 ed p 525.), the learned Judge of Appeal had this to say:
"No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that B explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."
A few years later, the same court expressed similar sentiments in *R v M* 1946 AD 1023. Again it viewed the question of the onus resting on the State in C relation to the defence proffered by the accused as follows:
"...the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."
While the above authorities seek to explain the onus on the State in relation D to a plausible defence proffered by the accused, it is trite that the onus on the State remains the same even where the defence proffered by the accused, as in this case, is not worthy of belief. This has been the cornerstone of the law of criminal procedure in this and other kindred jurisdictions. In this regard, I make reference to the remarks of Denning J (as he then was) in *Millar* v E *Minister of Pensions* [1947] 2 All ER 372 (KBD) at 373, again cited by the authors Hoffman and Zeffertt. The learned Judge had this to say:
"...and for that purpose the evidence must reach the same degree of cogency as is required before an accused person is found guilty. That degree is well settled. It need not reach certainty but it must carry a high F degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved G beyond reasonable doubt, but nothing short of that will suffice."
Dumbutshena CJ quoted the above remarks by Denning J with approval in S v *Isolano* 1985 (1) ZLR 62 (S).
It further follows, in my view, that unless the accused person admits any one H of the elements of the offence charged, the State bears the onus of proving
2002 (2) ZLR p106
Makarau J
each essential element of the offence beyond reasonable doubt. This is in A keeping with the principle that the onus is always on the State to prove its case beyond any reasonable doubt. There is a discernible difference between the approach in a criminal and civil case in such instances. In civil cases, unless an averment is specifically denied, it is generally taken as admitted and no evidence need be led on it. In criminal trials, the State has to lead evidence B tending to prove beyond reasonable doubt each essential element of the offence charged.
The application of the above principle has been an issue that presented itself to me in this appeal. The appellant was charged with four counts of rape. It is trite that the offence C is committed when one has sexual intercourse with a woman without her consent. It is further trite and goes without saying that the onus on the State was to prove that the appellant had sexual intercourse with the complainant and the complainant did not consent to such relationship.
In my view, while there is evidence on record proving beyond any reasonable D doubt that the appellant had sexual intercourse with the complainant, resulting in her falling pregnant and subsequently delivering a baby, generally, there is scarcely any evidence on whether or not the sexual intercourse was without her consent.
In my view, and at the risk of being overly presumptuous, the trial magistrate overlooked the need to have evidence proving each essential element beyond E reasonable doubt due to the nature of the defence proffered by the appellant, which did not seek to challenge any of the essential elements of the offence.

I have considered the evidence led from the complainant on each of the four counts and am of the view that, in some instances, it was so scanty as not to prove beyond reasonable doubt that the complainant was not consenting. In F others, it is simply not there. In making this finding I am mindful of the fact that the appellant did not cross-examine the complainant on any of the essential elements of the offence. His quiescence in this regard does not amount to acquiescence, as he has no duty to speak. In any event, where evidence proving an essential element is missing, the issue that the appellant G did not challenge it in cross-examination does not arise. He cannot challenge what is not there.

In relation to count one, this is the evidence that was led from the complainant regarding whether or not she consented to the sexual intercourse:

"So the accused person then got out and by then I thought maybe I had an H

2002 (2) ZLR p107

Makarau J

A opportunity to get into the accused's bedroom and get a broom. Firstly he locked the outside door, I mean the first door before you get into the bedroom. He then got into the bedroom and then locked the door. So I asked the accused as to why he was locking the door and that I wanted to get out but the accused did not respond. The accused grabbed me and B pushed me onto the bed. So I started crying but the accused person silenced me and got hold of my mouth and he started removing my pants and he also produced his thing."

Later on in the record the following exchange is recorded between the prosecutor and the complainant:

"Did you make any sound? — I screamed and the accused person got hold C of my mouth. He also threatened me that if I tell any one about that incident, he would kill me and later chase my mother away from the premises."

The question whether or not the complainant consented to the sexual intercourse was not directly put to the witness.

D The issue I have to determine is whether, from the above evidence, which does not directly answer the issue, I can find that there was evidence before the trial court from which a finding could be made that, beyond reasonable doubt, the sexual intercourse was without consent.

In my view, the fact that the complainant cried when the appellant pushed her E onto the bed after locking the two doors to the bedroom and after failing to respond to her questions as to what he was doing, while possibly indicative of lack of consent to what was about to happen, is not proof beyond reasonable doubt that the complainant did not consent. At the risk of sounding cynical and insensitive, the making of any sound, as suggested by F the prosecutor, may not be relevant in the absence of further details as to when the sound was made and what it signified.

The finding I make above is not that the complainant consented to the sexual intercourse but that the evidence tendered during the trial is insufficient for the purposes of the law, and this despite the finding by the trial magistrate that G the complainant was a credible witness.

I now turn to the second count. In respect of this count, there is direct and uncontroverted evidence by the complainant that she did not consent to sexual intercourse. The same cannot be said of the third count. The following exchange constitutes the evidence upon which the appellant was convicted H on this count:

2002 (2) ZLR p108

Makarau J

"Any other incident of sexual intercourse? —In the evening, he also raped A me.

The evening of what date?—The evening of the 31st.

Where was your mother?—My mother had not returned from work.

Where did he rape you?—In the bedroom.

What did he do then?—He removed my pants and raped me thereafter. B He threatened me again that if I tell anyone he would actually stab me with a knife or cut me with a knife and thereafter chase my mother away from the premises. Where did this occur? C Where at the house?

Where exactly, in the garden, in the house, where?—in the house. You have a bedroom?—I do not have a bedroom

Then where did this sexual intercourse at around 6 occur, in his bedroom, in the dining room, in the kitchen, or what?—In accused's bedroom. D

How did you get to be there?—He grabbed my hand and pulled me into the room."

In my view, the prosecutor did not lead any evidence to show that the sexual intercourse complained of in this count was not by consent. The evidence led shows, at most, that the complainant was dragged by the hand into the E accused's bedroom where the two had sexual intercourse after which the accused threatened the complainant with harm if she reported the matter to anyone. The use of the word "rape" by the prosecutor and the witness in relation to this

count further serves to obscure the detail in the evidence led. It is not apparent whether both used the term in its legal sense or in some other sense. It appears from other parts of the record that the prosecutor, the trial F magistrate and the appellant used the term loosely to mean sexual intercourse.

Regarding the fourth count, the following is the evidence upon which the appellant was convicted:

"Any other incident?"—on the 1st of August, he accompanied my mother and thereafter he raped me. G

How did he rape you on 1st August?—it was in the afternoon. I was actually seated in the house and the accused person approached and lifted me and I started crying and the accused person silenced me and he took me into their bedroom where he placed me on the bed. H

2002 (2) ZLR p109

Makarau J
A Go on— again he removed my pants and then used his right hand to open his zip and produced his penis whereupon he inserted it into my vagina."
In my view, there is not sufficient evidence of lack of consent in relation to this count. The complainant cried when the appellant lifted her up and took her to the bedroom. She was silenced and there is no evidence as to how and B when she was silenced. The deficiency in the evidence on this count and on the other counts could have been easily cured by direct questions as to whether or not the complainant consented to the sexual intercourse by either the prosecutor or the trial magistrate before he pronounced the verdict.
In his judgment, the trial magistrate does not make it easy to establish on what factual basis he made the finding that the complainant did not consent to the C sexual intercourse on the three counts I have highlighted. It further appears from the judgment that the trial court also fell into the error of assuming lack of consent on the part of the complainant. The trial magistrate also used the term "rape" in the judgment without breaking it into its two components of sexual intercourse and lack of consent. As such, it is not clear what he meant D by the term and whether he addressed his mind to the need to find evidence proving beyond reasonable doubt that the complainant did not consent to the sexual assault.
On the basis of the foregoing, and being guided by the principle that it is better to let a few guilty persons go free that to convict even a single innocent E person, I would allow the appeal in respect of counts 1, 3 and 4. I will dismiss the appeal in respect of count 2 in its entirety as I am of the view that the sentence imposed for that conviction is proper.
Regarding counts 1, 3 and 4, in my view there is proof beyond doubt that the appellant had sexual intercourse with the complainant, a girl below the age F of 16. Thus, the appellant is guilty of contravening s 3 of the Criminal Law Amendment Act [*Chapter 9:05*]. The offences were committed in 1997 before the Sexual Offences Act [*Chapter 9:21*] was enacted. I therefore can only impose a penalty that was competent in terms of the repealed law. 1
Accordingly, the following order is made:
1. The G appeal is allowed in respects of counts 1, 3 and 4.
2. The conviction of the appellant in these three counts of rape is set aside and substituted with conviction of contravening s 3 of the General Law Amendment Act, [*Chapter 9.05*].
2002 (2) ZLR p110
Makarau J
3. The appellant is sentenced to a fine of $1 000 or in default of payment, A 20 days imprisonment in respect of each count.
4. The appeal in respect of count 2 is dismissed. Of the six years' imprisonment imposed in respect of that count, two years are suspended for five years on condition the accused does not, within that period, commit any offence of a sexual nature against a female for which he is B sentenced to imprisonment without the option of a fine.
MAVANGIRA J agrees. C
Appellant in person
Office of the Attorney-General, for the respondent D

1 Section 3 of the Criminal Law Amendment Act [*Chapter 9.05*].

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Source:
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[zRPz]MPOFU & ANOR v MADIDA & ORS 2002 (2) ZLR 111 (H)
2002 (2) ZLR p111

Citation 2002 (2) ZLR 111 (H)

Case No	Judgment No. HB-76-02
Court	High Court, Bulawayo
Judge	Chiweshe J
Heard	27 June 2002; 2 June 2002; 18 July 2002
Judgment	18 July 2002
Counsel	*N Mathonsi,* for the first applicant *J Tshuma,* for the second applicant *Ms M Moya-Matshanga,* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

[zFNz]Flynote
Court — contempt of — failure to obey court order — defence of superior D orders — orders manifestly and patently illegal — whether constitute defence
Court — contempt of — failure to obey court order — contempt purged — remedy available to person seeking order of contempt
Practice and procedure — joinder of parties — application for order that E State employee be held in contempt of court — need to cite responsible head of department together with employee
[zHNz]Headnote
The applicants obtained a provisional order that the respondents, who were prison officers, should be held in contempt of court for refusing to obey F three earlier court orders, one issued by the Supreme Court, directing that the applicants should be released from prison where they were being held on charges of murder. The respondents brought the applicants to court in response to the provisional order and, in explanation of their failure to obey the earlier orders, alleged that they had been instructed not to release "State security prisoners"such as the applicants without G clearance from their superior officers.
Held that under s 26(1) of the Prisons Act [*Chapter 7:11*] prison officers are obliged to obey lawful directions, not unlawful ones. The instructions given to the respondents were manifestly and patently illegal and the respondents would have been justified in refusing to obey them. Not having done so, they were liable for contempt of court.
H *Held,* further, that the respondents had purged their contempt by releasing
2002 (2) ZLR p112
Chiweshe J
the applicants, so the applicants were confined to a claim for their costs A in the application. These costs should be met by the State, since the respondents had acted in the course of their employment with the State, and should be paid on a legal practitioner and client scale.
Held, further, that the respondent who was primarily to blame for the contempt should be ordered to pay a fine of $ 10 000, wholly suspended B for five years; the other respondents should be cautioned and discharged.
Held, further, that the applicants knew from the outset the nature of the respondents' defence to their application, and should have joined the relevant State authorities as respondents. In cases such as this it is prudent and desirable for the responsible heads of Government departments to be cited together with the officers whose conduct forms C the subject of the complaint.
[zCAz]Cases cited
S v Muchamba 1992 (1) ZLR 102 (S)
Wilson v Minister of Defence & Ors 1999 (1) ZLR 144 (H) D

[zSTz]Legislation considered
Prisons Act [*Chapter 7:11*], s 26(1)
[zCIz]Case information
N Mathonsi, for the first applicant
J Tshuma, for the second applicant E
Ms M Moya-Matshanga, for the respondents
[zJDz]Judgment
Chiweshe J: In this matter the applicants sought and obtained a provisional order calling upon the respondents to show cause why a final order should not be made as follows:
1. That respondents produce the applicants before this court and explain F why the said applicants have not been released from detention in terms of the orders of this court and the Supreme Court.
2. That respondents be held in contempt of court and an appropriate sentence be assessed.
3. That the applicants be released forthwith; and G
4. That the costs of this application be borne by the respondents "*de bonis propriis"*

Pending determination of the matter the following interim relief was granted:
"That first, second and third respondents are directed to appear before this honourable court at 9.00 a.m. on 27 June 2002 and produce applicants
2002 (2) ZLR p113
Chiweshe J
A before the court and explain why the applicants have not been released in terms of the orders of court."
On 27 June 2002 the respondents duly appeared before the court and produced the applicants as directed. The matter was heard then.
The facts of this matter are common cause. The applicants face charges of B murder on two counts. They were being held at Khami Prison pending trial. The respondents are prison officers serving at Khami Prison where the second and third respondents are officer in charge and second officer in charge respectively. On 29 May 2002 this court granted an order admitting the applicants to bail. The State indicated then that it intended to appeal against that order. The effect of that indication was to suspend the order C admitting applicants to bail. Subsection (3) of s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides:
"(3) A decision by a judge or magistrate to admit a person to bail shall be suspended if, immediately after the decision, the judge or magistrate is notified that the Attorney-General or his representative wishes to appeal against the decision, and the decision shall thereupon be suspended and D the person shall remain in custody until —
(a) if the Attorney-General or his representative does not appeal in terms of subsection (1) —
(i) he notifies the judge or magistrate that he has decided not to pursue the appeal; or
(ii) the expiry of seven days;
E whichever is the sooner; or
(b) if the Attorney-General or his representative appeals in terms of subsection (1), the appeal is determined."
Consequent upon the failure by the Attorney-General or his representative to appeal within the stipulated seven days, the suspension of the order of this court lapsed by operation of law. Accordingly on 14 June 2002 this court F ordered the release of the applicants. The warrants of liberation were issued and served on the respondents on the same date. Respondents did not release the applicants as ordered. Applicants then filed an urgent application with this court. On 18 June 2002 this court granted a provisional order directing that applicants be released immediately. The second respondent, who is the officer in charge at Khami Prison, refused to accept service of that provisional G order. The order was eventually served on the first respondent on 19 June 2002. Again the respondents failed to release applicants.
In the meantime the State had appealed against the orders granted by this court on 29 May 2002 and on 14 June 2002. The appeal was dismissed on 20 June 2002 in terms of judgment number SC 50/2002 given under the hand of H the Chief Justice. The Chief Justice then signed warrants of liberation
2002 (2) ZLR p114
Chiweshe J
directing the release of the applicants. These warrants were served at Khami A Prison on 24 June 2002 and again the respondents failed to comply with that order.
First applicant was eventually released on 25 June 2002. He was immediately after that release arrested by the police. According to the respondents the second applicant was not similarly released

as it was erroneously believed B that he should be detained in respect of other charges not connected to this application.

The respondents gave *viva voce* evidence in open court. They admitted having been served with the court orders in question but pleaded the defence of superior orders. They said that according to standing orders given to them by their superiors none of them were allowed to release prisoners classified C as "state security prisoners" without clearance from their superiors. According to their evidence the applicants fell within that category of prisoners. They said that upon receiving the court orders they sought clearance from their superiors. They were instructed not to comply with the court orders. They argue that in terms of s 26 of the Prisons Act [*Chapter 7:11*] they were obliged D to obey orders from their superiors. Having been ordered not to release the applicants, they had no choice in the matter. They said that with regards common law prisoners no similar standing orders were in force. Any court orders relating to such prisoners would therefore be complied with forthwith.

Subsection (1) of s 26 of the Prisons Act [*Chapter 7:11*], upon which the respondents' defence is premised, provides: E

"(1) Every prison officer shall exercise such powers and perform such duties as may be assigned to him in accordance with this Act and shall obey all *lawful* directions in respect of the execution of his office which he may receive from any officer senior to him in the Service."(my own emphasis)

Clearly the Prisons Act obligates every officer to obey lawful directions. Any F instruction to disobey an order of this court or that of the Supreme Court is obviously not a lawful instruction. However, the mere fact that an order is illegal does not on its own render the respondents liable for contempt of court. It must be shown that the order was not only illegal but patently so. In the case of S v *Muchamba* 1992 (1) ZLR 102 (S) at 105 E it was stated as follows: G

"It is well settled that a subordinate officer, where the orders of his superior are manifestly illegal, as in this case, is not only justified in questioning them, but even in refusing to execute such commands."

In my view the orders given to the respondents were manifestly and patently illegal. The respondents are senior prison officers of considerable experience in the service. They oversee the day to day administration of the prison H

2002 (2) ZLR p115

Chiweshe J

A population at Khami Prison. They are no strangers to court orders both in terms of their import and in terms of their execution. They must have known that any instructions from any quarters to the contrary were illegal and patently so. Indeed they have not pleaded ignorance in this regard. They knew what the law expected them to do. Having been given instructions to the contrary they did not apprise the court of the difficulties that they were B facing. Neither have they been forthcoming in disclosing who in the chain of command had issued the illegal instructions. In the process no less than three court orders, including one from the Chief Justice himself, were disobeyed. That is unacceptable. I have no hesitation whatsoever in holding them liable for contempt of court.

C I accept, however, that the respondents have since purged their contempt by releasing the first applicant. I will assume in the absence of evidence to the contrary that they did so in order to comply with the orders of this court and the Supreme Court. Their motive in this regard has been questioned by the applicants in two respects — namely that a copy of the relevant warrant of liberation has not been returned to the Assistant Registrar of this court as D proof of action taken in pursuance thereof and, secondly, that the first applicant was released to the police on the authority of persons other than this court. Detective Matira and the respondents explained the circumstances under which the first applicant was arrested upon release. Detective Matira acted in terms of a valid warrant of arrest. Whether the simultaneous release and re-arrest of the first applicant was by design or by coincidence is neither E here nor there. Applicants are unable in my view to establish any wrongdoing on the part of the respondents or the police in that transaction. The question of the return of the copy of the warrant of liberation to the Assistant Registrar was canvassed. The respondents gave conflicting statements as to the procedure to be adopted. The correct procedure is that copies of such F warrants must be returned to the Assistant Registrar of this court in order that the court be kept informed of the fate of any such orders it may have issued. I am satisfied that, other than being an administrative flaw, not much turns on that point. I will accept therefore that as at 25 June 2002 when respondents released first applicant, they had purged their contempt. I will also accept the respondents' explanation as to why they had not released the second G applicant at the time.

In *Wilson v Minister of Defence* & *Ors* 1999 (1) ZLR 144 (H) it was held that where after civil contempt proceedings have been commenced the contempt has been purged, then it is no longer

necessary for the applicant to proceed with the contempt proceedings. He is confined to his remedy for a claim of H costs because any possible contempt will have been purged by the release of the applicant. In this case the applicants argue that the present case in that
2002 (2) ZLR p116
Chiweshe J
regard is distinguishable from the *Wilson* case and that therefore the same A principle should not be made applicable. In my view there is no basis upon which any distinction can be made. The point is that the applicants have since been released and therefore the application has been overtaken by events. I will therefore dismiss the application save for that portion of it relating to applicants' costs. B
It appears to me that the respondents were acting in terms of instructions given them by the State. Further, their illegal actions were committed within the course and scope of their employ with the State. It appears to me unfair to visit the respondents personally with an order for costs. Instead I would order that the State meets applicants' costs on an attorney and client scale. H
In my view the applicants should have joined the relevant State authorities C in their application. They knew from the outset the nature of the respondents' defense to the application. In such instances it is prudent and desirable that the responsible heads of Government departments be cited together with the officers whose conduct forms the subject of the complaint.
Finally, what sanctions if any should be imposed upon the respondents? In D *Wilson v Minister of Defense supra* Gillespie J held that where the contempt has been purged in a civil contempt case the court has discretion, taking into account all relevant factors, as to whether or not any sanctions should be imposed on the respondents. I agree with that view. The respondents disobeyed two High Court orders and one Supreme Court order. Their conduct undermines the authority of the courts and impacts negatively on the due administration of justice. It also tarnishes the good image of the Prison Service. They are all senior officers with a wealth of experience. They hold positions of trust and responsibility. It is through their medium that court orders find effect. The court views their conduct in an extremely bad light. Whilst it is accepted that their actions were a result of mis-directions from their superiors, their actions cannot be condoned. F
In my view the ultimate blame and responsibility rests on the second respondent in his capacity as officer in charge at Khami Prison. Whilst the first and third respondents associated themselves with the contempt in one way or the other, it is the second respondent whose responsibility it was to ensure that the court orders were complied with. I intend to impose appropriate G sanctions upon all of them.
It is ordered as follows:
1. That the application be and is hereby dismissed save for costs.
2. That the State be and is hereby ordered to pay applicants' costs on an attorney and client scale. H
2002 (2) ZLR p117
Chiweshe J
3. That A the second respondent be and is hereby ordered to pay a fine of $10 000 or in default of payment to undergo imprisonment for a period of 60 days. This sentence is wholly suspended for a period of five years on condition that he is not convicted of any offence committed within that period involving contempt of court and for which he is sentenced to imprisonment without the option of a fine. B
4. That the first and third respondents be and are hereby cautioned and discharged.
Webb Low & Barry, applicants' legal C practitioners
Criminal 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 2/NDLOVU & ANOR v MINISTER OF DEFENCE & ORS 2002 (2) ZLR 118 (H)

[zRPz]NDLOVU & ANOR v MINISTER OF DEFENCE & ORS 2002 (2) ZLR 118 (H)
2002 (2) ZLR p118

Citation	2002 (2) ZLR 118 (H)
Case No	Judgment No. HB-82-02
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	18 July 2002; 25 July 2002
Judgment	25 July 2002
Counsel	*N. Sigola,* for the applicants *P. Ncube & Ms P Dube,* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

[zFNz]Flynote
Military law — Defence Act [*Chapter 11:02*] — s 46(4) — three-year period within which trial by military court must be commenced — convening D order for trial issued before end of period, but hearing commencing after expiry of period — whether trial commenced within three-year period
Military law — Defence Act [*Chapter 11:02*] — s 62 — review of proceedings of court martial by confirming authority — whether ousts review jurisdiction of High Court E
Words and phrases — "trial" — whether includes arraignment — when trial commences
[zHNz]Headnote
The applicants were members of the Defence Forces who had been convicted and sentenced by a general court martial. They applied to the High F Court for an order setting aside the proceedings of the court martial on the ground that their trial had commenced more than three years after their alleged offence was committed, by which time the court martial had ceased to have jurisdiction to try the offence in terms of s 46(4) of the Defence Act [*Chapter 11:02*]. In fact a convening order had been issued just before the end of the three-year prescriptive period, ordering G the applicants' trial to commence after the period had expired.
Held that the applicants should have should have exhausted their domestic remedies before approaching the High Court, by seeking a review of the proceedings by a confirming authority in terms of s 62 of the Defence **Act.**
Held, further, that in any event the applicants' trial began with their H
2002 (2) ZLR p119
Kamocha J
A arraignment by the issue of the convening order. Since this had been issued within the three-year period their trial had commenced within that period.
[zCAz]Case cited
B *R v Sibanda* 1968 (3) SA 559 (R)
[zSTz]Legislation considered
Defence Act [*Chapter 11:02*], ss 46(4) & 62
[zCIz]Case information
N. Sigola, for the applicants
C *P. Ncube & Ms P Dube,* for the respondents
[zJDz]Judgment
Kamocha J: The applicants appeared before a general court martial on 27 and 28 May 2002 and were convicted at the end of the trial and sentenced to custodial sentences. They brought the matter for review on the following D grounds:

1. That the third respondent * acted in a manner that was grossly irregular in issuing or causing to be issued convening order number 01/2002 on 7 May 2002, ordering the trial of the applicants to commence on 27 May 2002, when in terms of s 46(4) of the Defence Act [*Chapter 11:02*], a military court had ceased to have jurisdiction over the matter as the E alleged offence was allegedly committed on 11 May 1999, which is more than three years after the commencement of the intended trial.
2. The general court martial presided over by the fourth respondent committed a gross irregularity in commencing the trial of the applicants more than three years after the alleged commission of the alleged F offence, as such court had ceased to have jurisdiction to try the matter by operation of the peremptory provisions of s 46(4) of the Defence Act. That court proceeded to try, convict and sentence the applicants to an effective one and half years and one years' imprisonment with labour respectively.
G Accordingly the applicants sought an order:
(a) declaring the trial of the applicants null and void for want of jurisdiction;
(b) setting aside the entire proceedings of the trial of the applicants, including the verdict and sentence following therefrom;
2002 (2) ZLR p120
Kamocha J
(c) reinstating the applicants in the service of the Zimbabwe National Army A in the ranks they held at the commencement of their trial, without loss of benefits including pay and seniority;
(d) that the first respondent should pay the costs of this application from the Consolidated Revenue Fund.
At the hearing the respondents made two pertinent submissions. The first was B that the applicants should have exhausted all their domestic remedies before approaching this court. The Defence Act [*Chapter 11:02*] ("the Act") provides for review of court martial proceedings by a confirming authority. Section 62 of the Act reads:

"62. Review of proceedings of courts martial

(1) If a court martial finds an accused guilty of any offence, the record C of the proceedings of the court shall be transmitted to a confirming authority for review in terms of section *sixty-three.*

(2) Subsection (1) shall not affect the operation of any sentence of a court martial, other than a sentence of death."

The confirming authority is enjoined by section 63 to quash the finding and D sentence of a court martial if it appears that the proceedings were not in accordance with real and substantial justice. Quite clearly, what the applicants sought from this court is something that is already provided for by the Act and reposed on the confirming authority. The applicants' reason for bringing the matter to this court was that it takes a long time for the record to be submitted to the confirming authority. But that problem would not arise in this case E since the applicants have prayed in their interim relief that the third respondent be ordered to produce the record of proceedings within 12 days of the service of this order.
The second submission of the respondents relates to the interpretation of s 46(4) of the Act *. It was argued that the phrase "unless the trial is F commenced within three years" must be interpreted to mean that the judicial process for the determination of the guilt or otherwise of the accused, must be started within the three-year period. *In casu* the applicants stated in their grounds for review that convening order number 01/2002 was issued on 7 May 2002. G
2002 (2) ZLR p121
Kamocha J
A The word "trial" has been interpreted in these courts. Young J in the case of *R v Sibanda* 1968 (2) RLR 167 (G); 1968 (3) SA 559 (R) when dealing with s 30 of the Mental Disorders Act [*Chapter 164 of 1963*], which is now s 28 (2) of the Mental Health Act [*Chapter 15:12*] had this to say at 168D-E (p 559 H of the SA report).
"In my view, the expression 'trial' in s 30(1) ought, because of the history B of the provision, to be interpreted as including arraignment."
The word "arraignment" is defined by Gardiner & Lansdown *SA Criminal Law and Procedure* vol 16 ed p 350 as the calling upon the accused to appear, the informing him of the crime charged against him, the demanding of him whether he be guilty or not guilty, and the entering of his plea. The applicants C were arraigned by issuing convening order number 01/2002 on 7 May 2002. That was within the three-year period, which was only going to expire on 11 May 2002.
The applicants in their interim relief sought to be released forthwith and warrants for their liberation to be issued. Even if their application had been successful it would not have been competent to release them pending review D in the light of s 62(2) *supra* since they were not sentenced to death.

My finding is that the applicants should have exhausted their domestic remedies by taking this matter for review by the confirming authority in terms of the Act. Their complaint about the matter being brought before the court martial is without foundation.
E In the result the application fails and is hereby dismissed.
The applicants shall pay the costs of this application.
Nkiwane Khuphe & Partners, applicants' legal practitioners
F *Coghlan & Welsh,* respondents' legal practitioners

* The Commander of the Zimbabwe National Army - *Editor*
* Section 46(4) of the Defence Act [*Chapter 11:02*] reads:

"(4) Subject to subsection (2), no member shall be tried by a military court for an offence in terms of this Act, other than an offence —
(a) -(c)...
unless the trial is commenced within three years after the date of the commission of the offence."

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/UNITED MERCHANT BANK (ZIMBABWE) LTD'S LIQUIDATORS v KATIYO 2002 (2) ZLR 122 (H)

[zRPz]UNITED MERCHANT BANK (ZIMBABWE) LTD'S LIQUIDATORS v KATIYO 2002 (2) ZLR 122 (H) 2002 (2) ZLR p122

Citation	2002 (2) ZLR 122 (H)
Case No	Judgment No. HH-127-02
Court	High Court, Harare
Judge	Ndou J
Heard	11 January 2002; 31 July 2002
Judgment	31 July 2002
Counsel	*W Ncube,* for the applicant *H Zhou,* for the respondent
Case Type	Civil trial
Annotations	No case annotations to date

[zFNz]Flynote
Insolvency — Insolvency Act [*Chapter 6:04*] — s 40 —dispositions without D value—allowances and discretionary "extra" bonuses made solely at the discretion of the executive Chairman—whether

amount to dispositions without value —distinguishing feature of dispositions without value — no obligation on the part of the insolvent to make the disposition F
[zHNz]Headnote
The defendant had received several payments from her employer, which had subsequently been declared insolvent. The allowances were not paid in terms of any contract of employment. The liquidator of the employer sought an order declaring the payments made to be dispositions without value and ordering the defendant to repay the amounts which she had F received. The court had to decide whether the payments were dispositions without value or valid employment benefits of the defendant.
Held, that the circumstances of the various payments differed and the court thus had to consider each payment separately.
Held, further, that a disposition not made for value is one for which no benefit or value is or has been received or promised as a *quid pro quo.* G The most obvious example of such a disposition is a donation. The "extra" bonuses, made solely at the discretion of the Executive Director at irregular intervals, were not performance related and not made in terms of any legal obligation. There was no *quid pro quo* for such payments which were made when the bank was insolvent and within two years of the sequestration of its estate. Such bonuses, paid out of H
2002 (2) ZLR p123
Ndou J
A liberality inspired by some undisclosed generosity, were not dispositions for value and thus the defendant was obliged to repay these amounts.
Held, further, that the defendant was entitled to receive education allowances and entertainment and clothing allowances in her position as a senior manager as part of her conditions of employment and thus these B amounts did not have to be repaid.
[zCAz]Cases considered
Hill NO v Maria Christ 1927 SWA 50
Huizenga NO v Zwinoira 1987 (2) ZLR 276 (H)
[zSTz]Legislation considered C
Insolvency Act [*Chapter 6:04*], s 40
[zCIz]Case information
W Ncube, for the applicant
H Zhou, for the respondent
[zJDz]Judgment
Ndou J: The plaintiff seeks an order that the payment of $565 000, paid out by United Merchant Bank (Zimbabwe) Limited (UMB) to the defendant between December 1996 and January 1998, be declared a disposition without value, an order setting aside such disposition and an order that the defendant E pay to the plaintiff the sum of $565 000 together with interest thereon at the prescribed rate from the date of the disposition to the date of payment in full, and costs of suit.
The salient facts of the case are that the plaintiff is the liquidator of united UMB, having been duly appointed by the Master of the High Court on 7 F March 1999.
The defendant was, at the material time, employed as company secretary and accountant by UMB.
The matter was referred to trial to settle the following issue:
"Whether or not payments made by Plaintiff (UMB) were part of employment benefits of the defendant or dispositions without value."
G The first and sole witness for the plaintiff was Suzan W. Greener. According to her, between December 1996 and January 1998, Gollop and Blank legal practitioners made various payments to defendant totalling $565 000 on behalf of UMB. The payments were as follows:
13 December 1996 a cheque of $125 000
H 17 January 1997 a cheque of $70 000
2002 (2) ZLR p124
Ndou J
18 March 1997 a cheque of $60 000 A
13 November 1997 a cheque of $50 000
2 December 1997 a cheque of $250 000
13 January 1998 a cheque of $30 000.
The plaintiff discovered these cheques and. in consequence thereof, dispatched B a letter to the defendant asking her for a refund of the total amount of these payments. The defendant's response was that, save for $200 000, the payments were for her earned bonuses. In other words, she admitted liability for $200 000 only. According to records at the plaintiff's disposal, this admitted amount has not been repaid except for $20 000 repaid through Gollop and Blank. She could not trace any records or written agreements on C the allowances and bonuses alleged by the defendant.

The defendant did not produce any document in support of her allegations that this sum was for services rendered. The witness testified that they approached Gollop and Blank legal practitioners who had made the payments for an explanation, all in vain. In the circumstances, the plaintiff considered these payments as loans by UMB to the defendant. I am satisfied this witness is credible. She was not D shaken under cross-examination. In any event most of her testimony is beyond dispute.

The defendant gave evidence. She testified that she was employed as company secretary by UMB from 1995. Prior to that she was employed by Boka Cosmetics doing their books on a part-time basis. Initially she received E her salary by cheque but later through a payroll at the bank. She said that in addition to the salary she also received allowances for school fees, entertainment, clothing and a bonus (as 13th cheque). As senior managers they also received extra payments through Gollop and Blank legal practitioners through a Mr Slater. Mr Slater was one of the directors of UMB and a partner at Gollop and Blank legal practitioners who also did company secretarial F work for UMB. The senior management comprised herself as company secretary/accountant, a Mr Meda as managing director and a Mr Malaba as general manager.

The defendant stated that payment of extra bonuses was not fixed or dependent on any discernible factor. Bonuses were paid at Mr Boka's discretion. Mr Boka was the executive chairman of UMB. The senior G managers did not know in advance the amount of the bonuses. In fact it does not seem that they would be expecting it in any event. These were surprise bonuses, so to speak.

Coming to the cheque payments which form the subject of these proceedings, the defendant testified that the one for $125 000 was "extra" bonus paid in H

A addition to the 13th cheque. The one for S70 000 (January 1997) was for school fees for her three children. The one for $60 000 had to do with allowances and entertainment. The $50 000 (November 1997) was for a bonus. The cheque for $30 000 was for her salary, because during that month the salaries were not run on the payroll. As far as the cheque of $250 000 is concerned, $200 000 was loan advanced to her and $50 000 said to be for an B unspecified allowance. She signed an acknowledgement of debt before Mr Slater for the $200 000. She was supposed to repay the loan through Gollop and Blank at rate of $5 000 per month. Before the issue of the summons in this matter she had repaid $100 000 ($20 000 through Gollop and Blank and $80 000 through Coghlan, Welsh and Guest). As regards to the housing and C personal loans, she stated that she was still making payments to the plaintiffs. The latter loans are not subject to these proceedings. The defendant agreed that she still owed the plaintiff $ 100 000. She said that she only became aware of UMB's financial woes when the people from the Reserve Bank came to their office. Although her job title was accountant/company secretary she did not. however, carry out secretarial or accounting duties, so she was unaware D that as at September 1997 Mr Maleko had reported, in his audit, that the bank was unable to pay its debts. She stated that she did not have a written contract of employment with UMB. She was appointed by word of mouth by the executive chairman, Mr Boka, at a gross salary of $50 000. Mr Boka told her she was going to be company secretary and also in charge of staff matters. When she was initially employed she was not paid any allowances, but when E other senior managers were employed they received allowances and when she queried this anomaly she was also paid allowances. Allowances for school fees did not bear any relationship to the actual fees that she was paying for her children and the number of children involved. The amount was entirely dependent on Mr Boka's discretion. She was not aware whether the bonus was linked to performance. She got a bonus which was $45 000 more than that of her managing director. Her explanation for all the allowances and their rate was that they were solely dependent on Mr Boka's discretion.

The key question for determination, *in casu,* is whether such allowances, which were paid at irregular intervals and entirely at the sole discretion of the executive chairman, Mr Boka, can be categorised as dispositions for value. G These allowances were not paid in terms of any contract of employment. There was no lawful obligation to pay. This, to me, seems to be the crux of the matter. Mr Malaba also testified at the behest of the defendant. He confirms the main thrust of the defendant's testimony. He confirms that at no stage did he and other senior managers know in advance what to expect by way of allowances H until they received the money.

The question is whether these discretionary allowances paid by Mr Boka are A dispositions for value. Section 40 of the Insolvency Act [*Chapter 6:04*] prescribes the requirements that the plaintiff has to prove in order to obtain a judgment in its favour. Section 40 provides as follows:

"40(1) Subject to this Act. every disposition of property not made for value may be set aside by a court if such disposition was made by an insolvent — B

(a) more than two years before the sequestration of his estate and it is proved that, immediately after the disposition was made, the liability of the insolvent exceeded the value of his assets; or

(b) within two years of the sequestration of his estate and the person claiming under or benefited by the disposition is unable to prove C that, immediately after the disposition was made, the value of the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."

Generally, any dispositions of his property made by an insolvent not for value D may be set aside on his insolvency. The underlying principle of the above statutory provision in this connection clearly appears to be that, if at any time a person becomes unable to pay his creditors, any property, which is shown to have been disposed of by him without receiving value in return therefor at a time when his liabilities exceeded his assets, should be restored - see *Mars:* E *The Law of Insolvency in South Africa* 7 ed p 205 (para 12.6).

In addition to proving that the disposition was made and the date thereof, the plaintiff must discharge the onus of proving that it was made not for value - see *Hill NO v Maria Christ* 1927 SWA 50. In regard to the construction of this provision of the Insolvency Act (s 42(1) of the previous Act F [*Chapter 303*] Adam J, in *Huizenga NO v Zwinoira* 1987 (2) ZLR 276 (H) at pages 282H to 284A, stated as follows:

"It is clear that the statute requires the plaintiff to prove first of all that the insolvent had given a disposition of property which disposition was not made for value. The onus is on the plaintiff to 'make out some case to answer' in the sense that he has to lead such evidence which *would prima* G *facie* support his claim.

The provisions of s 26 of the Insolvency Act No. 24 of 1936 of South Africa is worded similarly to our own s 42. In dealing with s 26 of that Act, Watermeyer CJ in *Estate Jager v Whittaker* 1994 AD 246 (where payments of interest at a usurious rate were disposition not for value as the contract providing for such payment was illegal) stated at 25: H

2002 (2) ZLR p127

Ndou J

A 'The words "disposition not made for value" mean, in their ordinary signification a disposition for which no benefit or value is or has been received or promised as a *quid pro quo.* The most obvious example of such a disposition is a donation ... If a lawful obligation to pay the money in fact exists, then the obvious benefit which the payer receives in return for such payment is a discharge from his liability to pay. Such a payment B decreases his assets, but at the same time diminishes his liabilities, and in transactions which are entered into in the ordinary course of business, such discharge from liability would be value for the payment made.'

Further, as most succinctly observed in Catherine Smith's *The Law of Insolvency* (1982) at pp 120, 121 and 122:

'In considering section 26 of the Act which deals with dispositions C without value it is important to bear in mind that the distinguishing feature of such dispositions is that there was no obligation on the part of the insolvent to make a disposition. Either the insolvent made the disposition deliberately and in full awareness of impeding insolvency, in order to favour the recipient or inadvertently, nor appreciating that he was in insolvent circumstances. In either event, provided the debtors' D estate is thereafter sequestrated the person who benefited can be compelled to restore what he received. The object of section 26 is not to prevent a person in insolvent circumstances from engaging in the ordinary transactions of life, but to prevent a person from impoverishing his estate by giving his assets away without receiving any present or future advantage in return... All the surrounding circumstances, under which E the transaction was concluded must be considered in deciding whether or not the insolvent received value for the disposition... Dispositions not made for value are clearly not confined to donations or payments under illegal contracts, but extend to any disposition as defined in the Act provided that there is no *quid pro quo.* A sale of assets for an entirely inadequate consideration is a disposition not for value. Payments under an invalid guarantee have been held to be dispositions not for value.'"

F The circumstances of the various cheque payments seem to differ, warranting that I consider the circumstances in which each payment was made separately.

The cheque payment for $125 000 made on 13 December 1996 was, according to the defendant, for a bonus. This was an "extra" bonus in addition to the 13th cheque. This bonus was not performance related and was based G on the sole discretion of the executive chairman, Mr Boka. From the

evidence, Mr Boka had no legal obligation to pay this bonus. It seems to me that Mr Boka paid this bonus out of liberality inspired by some undisclosed generosity. There was no legal obligation on the part of UMB. Such bonuses were dispositions paid at irregular intervals and not performance based H according to defendant's own testimony. This disposition resulted in the

2002 (2) ZLR p128

Ndou J

defendant being enriched and the assets of UMB correspondingly being A impoverished while the latter was under insolvent circumstances. From the evidence before me I cannot, therefore, find a *quid pro quo* for this payment of $125 000. The payment was made by the insolvent UMB within two years of the sequestration of its estate The petition for the winding-up of UMB was made by the Minister of Justice. Legal and Parliamentary Affairs and filed B with this court on 6 November 1998 and UMB was placed under final liquidation by order of this court on 11 November 1998 and confirmed on 3 March 1999. In such circumstances the defendant is compelled to restore the $125 000 that she received from the assets of UMB.

The cheque for $70 000 was for an education allowance for the defendant's three children. The defendant stated that she was not paid this allowance until C her discovery that other senior managers were receiving it. She enquired why she was being discriminated against in this regard. It was then agreed that, as a senior manager, she also entitled to receive the education allowance. This cheque was paid at the beginning of the school term, and I am satisfied that she was entitled to the payment as part of her conditions of employment. The defendant has established an obligation by UMB to pay her this amount. D

The cheque payment for $60 000 paid in March 1997 was for entertainment and clothing which defendant started receiving under circumstances similar to the education allowance described above. I am. therefore, prepared to find in her favour in this regard too. UMB was in the circumstances under an obligation to pay her this amount as part of her conditions of service. E

The cheque payment for $50 000 made in November 1997 was an extra bonus paid under similar circumstances to the $125 000 *(supra).* I find that in the circumstances UMB was under no obligation to pay the defendant this amount and she is, therefore, compelled to restore it to the assets of UMB.

The cheque payment of $30 000 made on 23 January 1998 was for a salary. F The defendant explained that the salaries for staff at UMB were not run on the payroll for that month and they received cheque payments instead. I am satisfied that she established legal entitlement to this payment.

As far as the cheque payment of $250 000 is concerned, it is common cause that the defendant applied for a loan of $200 000 from UMB. It is beyond dispute that she received a cheque of $250 000 and she signed an G acknowledgement of debt for $200 000 only. According to defendant's testimony, the additional $50 000 was an allowance or bonus, once more arising from Mr Boka's generosity. Mr Boka did not even tell her what the $50 000 was for. It seems to me that this is a classical case of a disposition not made for value. This payment of $50 000 seems to be inspired by H

2002 (2) ZLR p129

Ndou J

A disinterested generosity on Mr Boka's part. This is, with respect, a donation motivated by liberality, ie the *animus donandi.* During the trial it became clear that the defendant has since repaid $100 000 of this loan. In the circumstances the outstanding amount of this $250 000 is $150 000. It is accordingly ordered as a follows:

(a) It B is hereby declared that the cheque payments of $125 000 made out on 13 December 1996; $50 000 made out on 13 November 1997 and $250 000 made out on 2 December 1997 are dispositions without value;

(b) It is hereby ordered that the above dispositions are set aside and the defendant ordered to pay the plaintiff the sums of $125 000, $50 000 and $150 000 together with interest thereon at the prescribed rate *per annum* C from the date of each payment to the date of payment in full: and

(c) Costs of suit.

Coghlan, Welsh & Guest, plaintiff's legal practitioners.

D *Dube, Manikai & Hwacha,* defendant's legal practitioners.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/NCUBE & ORS v ATTORNEY-GENERAL 2002 (2) ZLR 130 (H)

[zRPz]NCUBE & ORS v ATTORNEY-GENERAL 2002 (2) ZLR 130 (H)
2002 (2) ZLR p130

Citation	2002 (2) ZLR 130 (H)
Case No	Judgment No. HB-95-02
Court	High Court, Bulawayo
Judge	Chiweshe J
Heard	31 July 2002; 1 August 2002
Judgment	1 August 2002
Counsel	J C Andersen, SC, for the applicants Mrs M Moya-Matshanga, for the respondent
Case Type	Criminal application
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure — Attorney-General — power to institute criminal proceedings — need for reasonable suspicion that accused person D committed offence
Criminal procedure — indictment — grounds for — reasonable suspicion that accused person committed offence
Words and phrases — suspicion — what amounts to E
[zHNz]Headnote
The applicants sought confirmation of a provisional order barring the Attorney-General from indicting them in the High Court on a charge of murder. They contended that the only evidence linking them to the crime consisted of inadmissible confessions made by their co-accused.
Held, that while the Attorney-General has the prerogative of deciding F whether or not to prosecute any criminal matter, his discretion in that regard had to be exercised judiciously and in accordance with the law.
Held, further, that the ground on which a person may challenge the State's power to place him on remand — that there is no reasonable suspicion that he committed the offence with which he is charged — should also apply in relation to an indictment. G
Held, further, however, that where as in this case an accused person implicates a co-accused there are sufficient grounds for holding that a reasonable suspicion exists that the co-accused has committed an offence. On that basis the co-accused may be arrested, placed on remand and indicted if needs be. The provisional order was accordingly discharged. H
2002 (2) ZLR p131
Chiweshe J
[zCAz]Cases cited A
Attorney-General v Blumears & Anor 1991 (1) ZLR 118 (S)
Attorney-General v Moyo S-33-02
Bull v Attorney-General & Anor 1986 (1) ZLR 117 (S)

Martin v Attorney-General & Anor 1993 (1) ZLR 153 (S)
S v Moyo & Anor HB-26-02
B *S v Spooner* HB-51-01
[zSTz]Legislation considered
Constitution of Zimbabwe, s 13(1) & (2)(e)
[zCIz]Case information
C *J C Andersen, SC,* for the applicants
Mrs M Moya-Matshanga, for the respondent
[zJDz]Judgment

CHIWESHE J: On 16 July 2002 applicants sought and obtained a provisional order calling upon the respondent to show cause why a final order should not be made as follows:

"1. The D indictment in the above matter be struck off;
2 The applicants be removed from remand."

By way of interim relief the following order was granted:

"Pending determination of this matter the applicant is granted the following relief:

(a) the E indictment of the applicants be postponed until this court has made a determination with regard the present matter.

(b) respondent be and is hereby ordered to show cause why applicants should not be removed from remand.

(c) respondent be and is hereby ordered to file its answering papers on or before 12 noon of 17 July 2002 and applicants are granted leave F to set the matter down within 48 hours thereafter."

The background facts to this application are as follows. The applicants and co-accused persons face charges of murder. They were arrested in November 2001. They are all on bail pending trial in the High Court. They have been on remand since the time of their arrest.

G According to the respondents (and this has not been challenged) their Bulawayo office received instructions from the Attorney-General's office in Harare that the applicants be indicted to the High Court in Harare. A letter was then written to the Clerk of Court (Criminal) requesting him to issue summonses against the applicants in terms of s 110 (3)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The letter was copied to the H applicants' legal practitioners. In terms of the summons issued, the applicants

were required to be in court 2, Tredgold Magistrates Court at 8.30a.m on 12 A July 2002. The summonses were not served as the police were unable to locate the applicants. Warrants were then issued in terms of s 110 (3)(b) of the Criminal Procedure and Evidence Act. When the police sought to uplift the warrants they were informed that the magistrate had cancelled the warrants in chambers. It was then agreed between the respondent and B applicants' legal practitioners that the applicants be brought (by their legal practitioners) on 15 July 2002 for indictment. Applicants' legal practitioners duly brought the applicants late in the afternoon of that date. They served the respondent with a chamber application seeking to bar respondent from indicting the applicants. A provisional order was granted on the basis of those papers on 16 July 2002. It was granted *ex parte.* The reasons for that decision C were given under the hand of my brother Kamocha J in judgment number HB-80-2002 and are stated as follows:

"The legal practitioners indicated that they had discussed the issue of making an application in court to have the applicants removed from the remand with the Attorney-General's Office but it (the Attorney-General's Office) did not seem to want to have an application brought to court. D They then ended up deciding to make this application for a provisional order to compel the State to come and argue the matter in court. They went on to say they had already served the papers on the Attorney-General's Office. It was on that basis that the provisional order was granted."

With respect, the correctness of that decision is doubtful, the more so because E it is not based on the merits of the case before the court but on the assumption that the Attorney-General's Office would not attend court unless the provisional order was granted. In my view the issues canvassed in the application are neither new nor urgent. I do not consider, therefore, this matter to be an appropriate case in which an *ex parte* judgment (even on a provisional basis) should have been granted. In terms of the merits of the F matter no assistance is derived from that judgment regarding confirmation or otherwise of the provisional order.

In their heads of argument, the applicants contend that the State has not disclosed any admissible evidence to link them with the offence:

"The sole basis on which it is alleged that they were implicated consists G of alleged confessions by other persons sought to be indicted with them as co-accused in which they are alleged to have been implicated."

It is further argued that whilst the Attorney-General has the power to prosecute he is only entitled to exercise that power in accordance with s 18 and 13 of the Constitution (that is, where admissible evidence is disclosed on which the court may objectively find the existence of a reasonable suspicion H
2002 (2) ZLR p133
Chiweshe J
A that the offence charged has been committed and that the accused should stand trial).
According to the applicants the indictment papers which are before this court do not allege any evidence against the applicants save for the alleged confessions by their co-accused after their arrest — these are not admissible B against applicants.
On their part, the respondent argues that the application should be dismissed because it has no basis in law. He avers that the application is frivolous and vexatious and goes against the provisions of s 76 (4)(a) of the Constitution as well as s 110 of the Criminal Procedure and Evidence Act. He argues that the application seeks to usurp the powers of the Attorney-General. Subsection (4)(a) of s 76 of C the Constitution of Zimbabwe reads:
"(4) The Attorney-General shall have power in any case, in which he considers it desirable so to do —

(a) to institute and undertake criminal proceedings before any court ... and to prosecute or defend an appeal from any determination in such proceedings."

D And subs (7) of that section provides:
"(7) In the exercise of his powers under subsection (4) or (4)(a), the Attorney-General shall not be subject to the direction or control of any person or authority."
The applicants rely on s 13 of the Constitution of Zimbabwe for the E proposition that the Attorney-General can only exercise the powers bestowed upon him subject to the limitations imposed by that section, and in this case, in particular subs (2)(e) of that section. Section 13(1) and (2) read:
"13 Protection of right to personal liberty
(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2). F
(2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorised by law —

(a) ... (b)... (c)... (d)... G

(e) upon reasonable suspicion of his having committed or being about to commit a criminal offence.

(f) ...
(g) ...
(h) ... H
(i) ..."

2002 (2) ZLR p134
Chiweshe J
Section 18(1) of the constitution of Zimbabwe upon which the applicants rely A states:
"18 Provisions to secure protection of the law

(1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law." Whilst I agree with the respondent that the prerogative in deciding to B prosecute any criminal matter rests with the Attorney-General (subject to the provisions relating to private prosecution) I would also agree with the applicants that in exercising his discretion in that regard the Attorney- General must do so judiciously and in accordance with the law. That power cannot be exercised outside the parameters of the law nor in an arbitrary C manner.
The main thrust of this application is the contention by applicants that there are no grounds giving rise to a reasonable suspicion that they committed the offence in regard to which they have been in remand and in respect of which they stand to be indicted.
In the case of *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 159 D it was held thus:
"It is the entitlement of every individual to challenge the power and right of the State to place him on remand. This he does upon a submission that insufficient facts have been alleged to enable the court to objectively find the existence of a reasonable suspicion of his having committed, or being E about to commit, a criminal offence, thereby justifying the deprivation of his personal liberty under s 13(2)(e) of the Constitution. He may adduce evidence, as the applicant did, designed to demolish, clarify or weaken the facts alleged by the State. The test to be applied is the same as that for arrest without warrant. It does not require the firm resolution of conflicting evidence that guilt beyond a reasonable doubt demands, B nor even a preponderance of probability. Certainty as to the truth is not involved, for otherwise it ceases to become suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking."

In so holding Gubbay CJ reiterated the point made in the case of *Attorney- General v Blumears & Anor* 1991 (1) ZLR 118 (S) at 123 A-B. (See also *Bull* G *v Attorney-General & Anor* 1986 (1) ZLR 117 (S)).

That the requirements and test for the existence of a reasonable suspicion that an accused person has committed or is about to commit an offence are as enunciated in the above cases admits of no doubt. Whilst there is ample authority in this regard concerning arrests without warrant, detention, H

2002 (2) ZLR p135

Chiweshe J

A remand and bail applications, I am unable to find, nor are the parties able to refer me to, any authority in which an indictment was stopped on the grounds that no reasonable suspicion exists that an offence has been committed.

Applicants argue that the same considerations would nonetheless apply in relation to an indictment — in fact the same considerations apply throughout the pre-trial stage, including indictment. I tend to agree with Mr *Andersen's* B submissions in that regard. It appears to me that the reason why there is a dearth of authorities at the indictment stage is probably due to ignorance on the part of unrepresented accused persons or, where the accused person is legally represented, such issues would have been canvassed at an earlier stage, particularly at the remand stage. Assuming that an indictment can be C challenged on the same basis and that the test for the existence of a reasonable suspicion would be the same as laid down in the above cited cases, then this application cannot succeed. The State is not required to prove its case at this stage, not even on a balance of probabilities. All it needs do at this stage is demonstrate that on the facts alleged a reasonable suspicion arises that an offence has been committed. The test is the same as that for arrest without D warrant. Suspicion has been described in the *Martin* case *supra* as "a state of conjecture or surmise whereof proof is lacking." The admissibility or otherwise of any facts or evidence that the State may seek to establish or adduce is not a factor for consideration at this stage. Applicants seek a ruling on the basis that whatever evidence the State may have in the form of confessions by co-accused in which applicants are implicated would ordinarily E be inadmissible as against applicants and therefore no reasonable suspicion could be held to exist that the applicants committed an offence. With respect, that would amount to an unjustifiable extension of the test to be applied.

In my view such issues stand for determination by the trial court. Suffice it to say that where an accused person implicates another in circumstances such F as the present, that would be sufficient grounds for holding that a reasonable suspicion exists that an offence has been committed by such other. On that basis an arrest is justifiable. The accused person may be placed on remand on the same basis and indicted if needs be.

Reliance has been placed by applicants on the following cases: *Attorney- General v Moyo* S 33-02, *S v Spooner* HB-51-01 and *S v Moyo & Anor* HB G 26-02.

In these cases what was under consideration was the question of admission to bail. The admissibility or otherwise of co-accused's extra curial statements was considered for purposes of bail. I do not consider those cases relevant to H the present applicant. My attention has also been drawn to the provisions of

2002 (2) ZLR p136

Chiweshe J

ss 178 and 179 of the Criminal Procedure and Evidence Act. Again those A provisions in my view have no direct bearing on the present applicant.

Applicants have been on remand for close to nine months now. At no stage during that period did they apply to be removed from remand, even though they knew or ought to have known the facts upon which the State relied for placing them on remand. Those facts do not appear to have changed. It was B only after the State indicated its intention to indict them that the present application was made (on an urgent basis). I can only conclude that the application is made solely for purposes of defeating the process of indictment. In any event. I have already concluded that on the merits the application cannot succeed.

It is ordered that the provisional order be and is hereby discharged with costs. C

Webb, Low & Barry applicants' legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/B TENGWE ESTATES (PVT) LTD v MINISTER OF LANDS & ANOR 2002 (2) ZLR 137 (H)

[zRPz]B TENGWE ESTATES (PVT) LTD v MINISTER OF LANDS & ANOR 2002 (2) ZLR 137 (H)
2002 (2) ZLR p137

Citation	2002 (2) ZLR 137 (H)
Case No	Judgment No. HH-109-02
Court	High Court, Harare
Judge	Hungwe J
Heard	22 June 2002; 2 August 2002
Judgment	2 August 2002
Counsel	*P Nherere,* for the applicant *N Mutsonziwa,* for the respondents
Case Type	Chamber application
Annotations	Link to case annotations

[zFNz]Flynote
D **Administrative law** — administrative decision — statutory requirements — failure to comply with — effect — decision voidable at instance of affected person — other consequences of that decision also falling away
Interpretation of statutes — particular words — "and" — may never be treated as though it means "or"
E **Land** — acquisition — notice of — requirement to serve on landowner and any other person with registered real right in land — failure to serve such notice on such other person — notice voidable at instance of landowner or such other person
[zHNz]Headnote
F The applicant was the owner of a farm. A bank had a mortgage bond registered over the property. A notice of acquisition was served on the applicant in terms of s 5 of the Land Acquisition Act [*Chapter 20:10*], but no such notice was served on the bank. The section required that notice be served "on the owner of the land to be acquired and the holder of any other registered real right in that land" . The applicant sought to G have the notice of acquisition set aside as being a nullity.
Held, that the rationale behind the requirement to serve notice was clear. The owner and those holding a registered real right in land would suffer a diminution of their rights in the land, if not a loss of all rights in the land, by the process which was set in motion by the notice. They were invited to lodge objections, if any, or to indicate consent if they did not oppose H the intended acquisition. The holder of registered real rights had been
2002 (2) ZLR p138
Hungwe J
put on a par with the owner of the land by the use of the conjunctive A "and" and not the disjunctive "or" in the section. Because "and" can never mean "or" , both parties had to be notified.
Held, further, that both because of the clear wording of the section and because criminal sanctions would follow if the landowner did not vacate the land, strict compliance with the section was

necessary. B Accordingly, the notice was voidable at the instance of either party.
Held, further, that if the notice were held to be void, any consequences of failure to comply with it would also fall away.
[zSTz]Legislation considered
Land Acquisition Act [*Chapter 20:10*], s 5(1)(b) C
[zCAz]Cases cited
Central African Examiner (Pvt) Ltd v Howman & Ors NNO 1966 RLR 75 (G)
Howard v Bodington (1877) 2 PD 203
Naidoo v Director of Indian Education 1982 (4) SA 267 (N) D
Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd [1938] Ch 174; [1937] 4 All ER 405 (ChD)
[zCIz]Case information
P Nherere, for the applicant
N Mutsonziwa, for the respondents E
[zJDz]Judgment
Hungwe J: The applicant seeks the following order: "It is declared that:
1. Failure by the acquiring authority to comply with the provisions of s 5 of the Land Acquisition Act [*Chapter 20:10*] regarding the service of the notice of preliminary acquisition on the owner of the F land to be acquired and the holder of any other registered real right or interest in that land has the effect of rendering the preliminary notice of acquisition and all subsequent actions in the acquisition process null and void and of no legal effect.
2. Accordingly it is ordered that the notice of preliminary acquisition and the acquisition order (Annexures 1 and 2) be and are hereby G declared to be null and void and of no legal effect.
3. That a copy of this order be served on the second respondent, who is directed to instruct the Officer-in-Charge Tengwe Police Station, and all Police Officers at that police station of the existence of this order and to take all lawful measures to ensure that the terms of this order are implemented. H
4. The costs of this application are to be borne by the applicant" .
2002 (2) ZLR p139
Hungwe J
A The applicant's director, Andrew John Cecil Kockett, deposed to an affidavit which formed the basis of this application.
In his affidavit, he states that the applicant owns Fumeira Estate in the district of Hurungwe. On 22 June 2001 that property was gazetted for compulsory acquisition in General Notice 313B of 2001.
B On 3 July 2001, the applicant was served with a preliminary notice of acquisition as required by s 5(1)(b) of the Land Acquisition Act [*Chapter 20:10*].
On 7 May 2002 an acquisition order made in terms of s 8(1) of the Act was served on the applicant.
National Merchant Bank has a mortgage bond registered over the property.
C It is not in dispute that the bank was not served with the preliminary notice of acquisition as required by s 5(1)(b) of the Act.
Section 5(1)(b) states:
"5. Preliminary notice of compulsory acquisition.
(1) Where an acquiring authority intends to acquire any land D otherwise than by agreement, he shall —
(a) …;
(b) serve on the owner of the land to be acquired and the holder of any other registered real right in that land whose whereabouts are ascertainable after diligent inquiry at the Deeds Registry and, if necessary, in the appropriate company register, notice in writing E providing for the matters referred to in subparas (i), (ii) and (iii) of paragraphy (a)."
In terms of s 9 of the Act, the applicant was required to cease all farming operations on the property on or before 24 June 2002. Failure to comply with s 9 invited criminal sanctions on applicant.
F It was argued, for the applicant, that it is entitled to the order sought on the basis that the failure by the acquiring authority to effect service of the initial acquisition order in terms of s 5(1)(b) rendered the process null and void. The subsequent orders issued consequent to an invalid process were therefore of no force or effect.
The respondents opposed the grant of the order on the basis that the acquiring G authority will seek waiver of the requirement of service from the mortgagee which would perfect the matter.
Mr *Mutsonziwa,* for the respondent, admitted that a bond was registered in favour of the bank on 12 June 2001. In his heads of argument Mr *Mutsonziwa* H states:
2002 (2) ZLR p140
Hungwe J

"It is admitted that the word 'shall' in s 5 mean *(sic)* that that compliance A with the provisions of that section is mandatory. If the compliance is mandatory then it will mean that non-compliance with the section rendered the s 5 and 8 (orders) served on the applicant *voidable* as it is [a] must that holders of real rights be served with the requisite papers also."

Since it is intended to seek a waiver of this requirement from the bondholder, B the effect of which would be to rectify the process, this was not a matter in which this court could exercise its discretion in favour of the applicant, so the argument went.

The issue, therefore, is whether failure to serve a preliminary notice of acquisition in terms of s 5(1)(b) on a holder of registered title rendered invalid C the s 5 and 8 orders lawfully served on an owner of land to be compulsorily acquired.

Public authorities are at liberty to devise the procedures most appropriate for exercising their powers, as long as these procedures do not conflict with the provisions, express or implied, of the empowering legislation. In many cases, the legislation expressly stipulates that certain formalities must be complied D with and certain procedures followed when the power is exercised.

As a general principle if these are not observed, the action taken will be invalid: Baxter *Administrative Law* 1 ed p 444-5.

As is observed by Baxter, the general principle is not unqualified, as a substantial number of exceptions have been recognised, hence the distinction E has been drawn between "mandatory," "imperative" or "peremptory" rules, on the one hand, and "directory" rules, on the other.

Lord Penzance in *Howard v Bodington* (1877) 2 PD 203 described the distinction thus:

"Now the distinction between matters that are directory and matters that F are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language to have been adopted to express the idea; but still that is a recognised language and I propose to adhere to it. The real question in all these cases is this, a thing has been ordered by the legislation to be done. What is the consequence if it is not done? In the case of statutes that are said to be G imperative, the courts have decided that if it is not done, the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the courts hold a provision to be ... directory, they say that, although the provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one." H

2002 (2) ZLR p141

Hungwe J

A In the present case, the validity of the preliminary notice of opposition is challenged on the basis that the acquiring authority failed to comply with the provisions of s 5(1)(b) of the Act. Counsel for the applicant relied on the old provision of the Act that counsel cited in full in his heads of argument. That section was amended by s 3 of Act 15 of 2000.

B The amended s 5(1)(b) has been cited above.

It will be seen that the amended section omits reference to "any other person who it appears to the acquiring authority may suffer loss or deprivation of rights by such acquisition." It is still imperative for the acquiring authority, in this case the first respondent, to serve preliminary notice of acquisition on the owner of the land and the holder of any other registered real right in the C land.

The effect of the amendment is to restrict the persons entitled to be served with the notice. The rationale behind the requirement to serve notice is clear. The owner and those holding a registered real right in land will suffer a diminution of their rights in the land, if not a loss of all rights in the land, by D the process which is set in motion by the notice. They are invited to lodge objections, if any, or to indicate consent, as the case may be, if they do not oppose the intended acquisition. But with the further amendment of the Act in s 9, even more dire consequences followed after an order is granted in terms of s 8 of the Act.

It seems to me that the holder of registered real rights has been put on a par E with the owner of the land by the use of the conjunctive "and" and not the disjunctive "or" in the section. The legislature must have been aware of the possibility that, in the procedure for acquiring land, omissions may occur which may lead to a refusal by the Administrative Court to confirm the acquisition process. In this regard there is provision for initiating the process F afresh on the same grounds. I take this recognition to imply that such omissions do invalidate the whole process.

Counsel for the respondents argued that it is not a proper exercise of the court's discretion to grant the order in the circumstances of this case. Unless I substitute the word "or" for "and" , I am unable to put any other meaning to the words used in this section. I would be committing violence on the G enactment whose plain meaning has not been challenged. That is a cowardly evasion for "or" can never mean "and" : *per* Mackinnon LJ in *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174 at 201; [1937] 4 All ER 405 (CA) at 421E

Where a statutory provision has the effect of depriving an individual of his H rights and liberties, the courts render a strict interpretation of those statutory
2002 (2) ZLR p142
Hungwe J
provisions in favour of safeguarding the individual rights and freedoms as A enshrined in our Constitution.
The applicant has, to my mind, demonstrated that the process embarked upon by the first respondents will result in loss or diminution of its right or title and that, should its directors remain on the land, criminal prosecution is imminent. This is the situation which, in my view, led Lewis J in *Central African* B *Examiner (Pvt) Ltd v Howman & Ors NNO* 1966 RLR 75 to state:
"The situation may well be different where the applicant can show, apart from the fear of penal sanction, he is also being prevented, either physically or in some other way, for exercising what he claims to be his legal rights, for in those circumstances he has no means of establishing his rights except through a declaration by this court in civil proceedings." C
Any process of ascertaining legislative intent in this matter will lead to the inevitable conclusion that Parliament intended that, before a person loses his rights in land, any acquiring authority takes the steps set out in Part III of the Land Acquisition Act. If it failed or omitted to take any of the laid down steps, and since there are no criminal sections attaching to that failure, only invalidity can follow. I therefore find that Parliament intended strict compliance D with Part III of the Act, both from the use of the word "shall" in s 5 and the very severe consequences which visit the owner of the land on the successful conclusion of the process of acquisition.
In conclusion, I am satisfied that failure to serve the initial or preliminary notice of acquisition on the bondholder rendered the process voidable at the E instance of the owner or bondholder. As was stated by Friedman J in *Naidoo v Director of Indian Education* 1982 (4) SA 267 (N) at 277F:
"It seems to me, however, that, where something which is voidable is set aside, it is set aside with all its consequences; both the decision itself falls away; and the consequences of that decision."
The applicant seeks an order by this court whose effect would be to direct the F police how to give effect to the order. As the order sought amounts to a declaratur, I am unable to say how the police are to ensure compliance with the order granted to the applicant. I assume that the police will take notice of any declaration of rights that may be issued in favour of the applicant. I also assume that the police will enforce any order of court without having to be G cited first. In the result, therefore, I will exercise my discretion against issuing this order against the police.
The applicant seeks an order for costs against the respondents. For their part, counsel for the respondents conceded that the process was voidable but persisted with their opposition. Costs therefore must follow the event. H
2002 (2) ZLR p143
Hungwe J
A In the result it is ordered as follows:
It is declared that failure by the acquiring authority to serve the preliminary notice of acquisition on the holder of a registered real right in respect of Fumeira Estate renders the preliminary notice of acquisition dated 20 June 2001, and the order of acquisition, dated 4 April 2002, null and void and of no legal effect.
B The first respondent is to pay the applicant's costs.
Gill, Godlonton & Gerrans, applicant's legal practitioners *Civil Division of the Attorney-General's Office,* respondents' legal C practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/GEZA v KHUMALO & ANOR 2002 (2) ZLR 144 (H)

[zRPz]GEZA v KHUMALO & ANOR 2002 (2) ZLR 144 (H)
2002 (2) ZLR p144

Citation 2002 (2) ZLR 144 (H)

Case No	Judgment No. HH-140-02
Court	High Court, Harare
Judge	Ndou J
Heard	30 July 2002; 2 August 2002
Judgment	2 August 2002
Counsel	*P Masamba,* for the applicant *N Mutsonziwa,* for the first respondent Miss *E Ndewere,* for the second respondent
Case Type	Urgent application
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure — seizure of articles — seizure by police of article to be D used as an exhibit — not spoliation entitling person to recover article
Practice and procedure — spoliation order — requirements — shared possession of property — such possession adequate as against co-possessor — seizure of property by police during course of investigations — not spoliation
Property and real rights — spoliation order — requirements — shared E possession of property — such possession adequate as against co-possessor — seizure of property by police during course of investigations — not spoliation
[zHNz]Headnote
The applicant sold a car to the second respondent. Several months later, the F second respondent returned the purchase price and made a complaint to the police that the applicant had stolen the car. The parties agreed that the car should, pending resolution of the dispute, be kept at the applicant's lawyers' office, while the second respondent's lawyers would keep the keys. In spite of this arrangement, the first respondent, a police officer who had been assigned to carry out the investigations G into the alleged criminal offence, took the vehicle and handed it back to the second respondent, on condition that she brought it to court on the date of any criminal trial. The applicant sought a spoliation order, requiring the car to be returned to the lawyers' custody.
Held, that it had to be alleged and proved that the applicant was in peaceful and undisturbed possession of the property and that the respondent H

A deprived him of his possession forcibly or wrongfully, without his consent.
Held, further, that the applicant had co-possession with the second respondent, and this was sufficient to entitle her to a possessory remedy, even against her co-possessor.
Held, further, that the police officer was entitled, in the course of investigation, B to seize the car to be used as an exhibit. Such seizure did not amount to spoliation; he was entitled to take possession by virtue of the Criminal Procedure and Evidence Act, and was not taking the law into his own hands. The Act also entitled him to make such arrangements with regard to the custody of the vehicle as the circumstances might require. He may C have been unwise in entrusting the vehicle to the second respondent, but this was a matter within his discretion.
[zCAz]Cases cited
Adamson v Boshoff 1975 (3) SA 221 (C)
Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (E)
D *Beukes v Crous and Another* 1975 (4) SA 215 (NC)

Boompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd 1990 (1) SA 347 (A)
Brighton v Clift 1970 (2) RLR 14 (G); 1970 (4) SA 247 (R)
Chisveto v Min of Local Govt 1984 (1) ZLR 248 (H)
E *Davis v Davis* 1990 (2) ZLR 136 (H)
Goldsmith v Irwin (1907) 17 CTR 44
Hall v Pitsoane 1911 TPD 853
Magadi v West Rand Administration Bd 1981 (2) SA 352 (T)
Malan v Dippenaar 1969 (2) SA 59 (O)
Manga v Manga 1991 (2) ZLR 251 (S)
F *Mankowitz v Loewenthal* 1982 (3) SA 758 (A)
Mans v Marais 1932 CPD 352
Mbuku v Mdinwa 1982 (1) SA 219 (Tk)
Moloisane v West Rand Administration Bd 1980 (1) SA 372 (W)
Muller v Muller 1915 TPD 28
Nino Bonino v de Lange 1906 TS 120
G *Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D)
Rosenbuch v Rosenbuch & Anor 1975 (1) SA 181 (W)
Shaw v Hendry 1927 CPD 357
van t'Hoff v van t'Hoff & Ors 1988 (1) ZLR 294 (H)
H *Yeho v Qana* 1973 (4) SA 735 (A)

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Ndou J
[zSTz]Legislation considered A
Constitution of Zimbabwe 1980, s 76(4)(a)
Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 49 & 58
[zCIz]Case information
P Masamba, for the applicant
N Mutsonziwa, for the first respondent
Miss *E Ndewere,* for the second respondent B
[zJDz]Judgment

Ndou J: The applicant seeks a spoliation order in the following terms: E

"Pending the final determination of the application, it is ordered that:

1. The first respondent, or second respondent, or both be and are C hereby directed to deliver the motor, a Mitsubishi Pajero registration No. 754 979D, to Canaan Farirai Dube's possession at parking bay 294B Eastgate, Sam Nujoma Street, Harare, within forty-eighty (48) hours of this order being served on one or both of them.
2. Failing which leave be and is hereby granted to applicant to approach this Honourable Court on the same papers, for an order declaring the first and second respondents to be in contempt for D which a custodial sentence of three (3) months will be issued, suspended for forty-eight (48) hours to allow both the respondents to surrender the vehicle in terms of this order."

The terms of the final order sought are:

"That you show cause why a final order should not be made in the following terms:

1. Canaan Farirai Dube and/or the applicant shall keep possession of a Mitsubishi Pajero registration No. 754 979D, at parking bay 294B, Sam Nujoma Street, Harare, in accordance with terms of the agreement between the applicant and the second respondent concluded on or around 3 March 2002.
2. Both the respondents be ordered to pay applicant's costs in this F matter on attorney/client scale, jointly and severally, the one paying the other to be absolved."

On 2 August 2002, I dismissed the application with costs and I now give reasons for my decision. There seems to be no dispute on the question of urgency. Having regard to G the circumstances of the case, I am satisfied that the matter is urgent. The salient facts of the case are that on or about April 2001, the applicant, Miss Geza, represented by an agent known as Mr Mbano, entered into an agreement to purchase the Mitsubishi Pajero registration No. 754-979D, from the second respondent, Miss Nhongo. Consequently, Miss Geza paid Miss Nhongo the purchase price as follows: H

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Ndou J

(a) $500 000 A by cheque drawn by her bankers. Zimbank. in favour of Miss Nhongo dated 2 April 2001;
(b) $1 million by cheque dated 4 July 2001 similarly drawn on Zimbank in favour of Miss Nhongo;

(c) $1 700 000 by cheque drawn on Zimbank in Miss Nhongo's favour.
B The registration book and insurance cover note, although still in Miss Nhongo's name, are in Miss Geza's possession.
On 6 March 2002, Miss Nhongo's legal practitioners returned the above amounts in one lump sum payment of $3.2 million to Miss Geza's legal practitioners.
C Miss Nhongo reported to Southerton Police that Miss Geza had stolen the above-mentioned motor vehicle. The criminal matter was subsequently moved to Marlborough Police, where the first respondent, Assistant Inspector Khumalo, is stationed. The criminal matter was initially investigated by a Constable Makombe. Miss Geza and Miss Nhongo, acting through their respective legal practitioners, entered into an arrangement whereby, pending D the resolution of both the criminal and civil matters, the motor vehicle would be kept at bay 294B Eastgate Complex (where the offices of Miss Geza's legal practitioners are situated) while the ignition key would be kept by Miss Nhongo's legal practitioners. It is clear that the objective of this unusual arrangement of co-possession was to ensure that the vehicle is not disposed of by either party before the determination of the pending criminal and civil E matters. The terms of this arrangement were communicated to Inspector Mkungunugwa of Marlborough Police. The latter police were investigating Miss Geza on an allegation of theft of the said vehicle levelled against her by Miss Nhongo. Their reference number is CR 13/2/02. As alluded to earlier on, Constable Makombe was the initial investigating officer, but Assistant F Inspector Khumalo has since been assigned to take over the investigations. It is the first respondent's case that he was acting in his capacity as the investigating officer when he took the vehicle from the parking bay in Eastgate and later handed it over to Miss Nhongo for safe custody. The objective, as was the case with the earlier arrangement between Miss Geza and Miss Nhongo, was to ensure that the vehicle is not disposed of by either G party prior the determination of the pending criminal matter. The first respondent's case is that he has merely changed the method and place of safe custody, guided by the provisions of ss 49 and 58 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].
In determining this application, I propose to first deal with the protection of possession and then deal with the impact of the provisions of ss 49 and 58 on H such possession.
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Ndou J
A mandament van spolie or a spoliation order is the only true possessory A remedy in our law — see *Muller v Muller* 1915 TPD 28 at 30 - 31; *Malan v Dippenaar* 1969 (2) SA 59 (O) at 64G-H; *Boompret Investments v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) at 353 and Silberberg and Schoeman's *The Law of Property* 3 ed by D G Kleyn and A Borraine at p 129. B
The purpose of the *mandament van spolie* is to restore unlawfully deprived possession *ante omnia* to the possessor, in order to prevent people from taking the law into their own hands — see *Mans v Marais* 1932 CPD 352 at *356; Mbuku v Mdinwa* 1982 (1) SA 219 (Tk) at 220G; *Beukes v Crous & Anor* 1975 (4) SA 215 (NC); *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) at 250B-D; and *Nino Bonino v de Lange* C 1906 TS 120 at 122.
In *van t'Hoff v van t'Hoff & Ors (1)* 1988 (1) ZLR 294 (H) at 296 B-C, Gibson J stated as follows:
"It is well established that in spoliation proceedings, all that the applicant needs to prove is that —
(i) he was in peaceful and undisturbed possession of the property; and D
(ii) that he had unlawfully deprived of such possession.
Once the applicant has proved those two elements, the applicant is entitled to have the *status quo ante* restored. See *Burnham v Neumeyer* 1917 TPD 630; *Neinaber v Stuckey* 1946 AD 1049. It is well settled that in spoliation proceedings the fact that a person has rights as owner of the E property is an irrelevant consideration: *Badenhorst v Badenhorst* 1964 (2) SA 676 (T); *Buck v Buck* 1974 (1) SA 609:1973 (2) RLR 315 (G)."
It was further stated by Adam J in *Davis v Davis* 1990 (2) ZLR 136 (H) at 141B-C as follows:
"Further, in order for the applicant to obtain a spoliatary remedy it was F said by Herbstein J in *Kramer v Trustees, Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753 that:
'... two allegations must be made and proved, namely: (a) that applicant was in peaceful and undisturbed possession of the property; and (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.'" G

1. Was the applicant, Miss Geza, in peaceful and undisturbed possession of the vehicle?

Miss Geza, as the applicant, must prove that she was in possession of the disputed motor vehicle on a balance of probabilities—see *Yeho v Qana* 1973 (4) SA 735 (A) at 739G; *Hall v Pitsoane* 1911 TPD 853 at 857; *Shaw* ***v*** *Hendry* 1927 CPD 357 at 359; *Oglodzinski* ***v*** *Oglodzinski* 1976 (4) SA 273 H
2002 (2) ZLR p149
Ndou J

A (D) and *Magadi v West Rand Administration Board* 1981 (2) SA 352 (T) at 354D. I have outlined that in this case Miss Geza's legal practitioner had the disputed vehicle in his parking bay and Miss Nhongo's legal practitioners had the ignition key. This type of arrangement seems to create co-possession of the disputed vehicle by Miss Geza and Miss Nhongo. Miss Geza need not prove exclusive possession since such co-possession will suffice — see B *Brighton v Clift* 1970 (2) RLR 14 (G), 1970 (4) SA 247 (R); C G van der Merwe *The Law of Things* (Butterworths) 1987 p 57 *para 61; Manga v Manga* 1991 (2) ZLR 251 (S) at 253C-H; *Rosenbuch v Rosenbuch &*
Anor 1975 (1) SA 181 (W) at 183D-G and *Oglodzinski v Oglodzinski supra* at 276B. I am satisfied the applicant has established the *corpus* and *animus* elements which C are necessary to constitute the kind of possession which qualifies for protection against spoliation. Miss Geza was in peaceful and undisturbed co- possession of the vehicle with Miss Nhongo. As illustrated above, such co-possession is possible and Miss Geza would, in the circumstances, be entitled to a possessory remedy even against her co-possessor, Miss Nhongo.

2. Was there spoliation by either respondent?

D The onus is also on the applicant to prove that an act of spoliation was committed by the respondents. This must be proved on a balance of probabilities as *prima facie* proof will not suffice — see *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at 232F-G and *Moloisane v West Rand Administration Board* 1980 (1) SA 372 (W) at 375H.

E In this case, Miss Geza was, strictly speaking, deprived of the possession by Assistant Inspector Khumalo in the course of his investigations of the criminal matter. From the police docket submitted during the hearing, it is clear that Marlborough Police completed their investigations and referred the docket to the public prosecutor's office at Harare magistrates court. An officer in that office perused the docket and gave instructions that the police F arrest the applicant and charge her with theft by false pretences. It was also instructed that the disputed vehicle be recovered. Apparently acting on these instructions, and in complete disregard of the earlier arrangement between Miss Geza and Miss Nhongo, Assistant Inspector Khumalo deprived the applicant of her possession of the vehicle. The question is whether this action by Assistant Inspector Khumalo amounts to spoliation. In this regard the G definition of Innes CJ in *NinoBonino v de Lange supra* at p 122 is pertinent:

"The best definition I have been able to find is one given by Leyser, who states that spoliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right."

H See also *Goldsmith v Irwin* (1907) 17 CTR 444 at 445; *Yeho v Qana supra*

at 739G; *Adamson v Boshoff 1975* (3) SA 221 (C) at 230B and *Mankowitz* v A
Loewenthal 1982 (3) SA 758 (A) at 767A. Is what Assistant Inspector Khumalo did illicit? His attitude is that he is not bound by the arrangement between Miss Geza and Miss Nhongo. As alluded to earlier, he places reliance on ss 49 and 58 of the Criminal Procedure and Evidence Act. I agree that whatever arrangement that Miss Geza and Miss Nhongo made, they cannot override the express provisions of the Criminal Procedure and B Evidence Act. Do these two sections empower Assistant Inspector Khumalo to act in the manner that he did?

Section 49 provides:

"The State may, in accordance with this Part, seize any article —

(a) which is concerned in or is on reasonable grounds believed to C be concerned in, the commission of an offence, whether within Zimbabwe or elsewhere; or

(b) which it is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence, whether within Zimbabwe or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

Section 58 provides:

"A police officer who seizes any vehicle referred to in *section forty-nine* or to whom any such article is delivered in terms of this Part or to whom an article seized in terms of any other enactment is delivered to be dealt with in terms of this Part — E

(a) may, if the article is perishable, with due regard to the interests of the persons concerned, dispose of the article in such manner as the circumstances may require; or

(b) may, if the article is stolen property or property suspected to be stolen, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of such F police officer, such article was stolen, and shall warn such person to hold such article available for production at any resultant criminal proceedings, if required to do so; or

(c) shall, if the article is not disposed of or delivered in terms of paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangements with

G regard to the custody thereof as the circumstances may require."
In dealing with whether the deprivation of possession by the first respondent amounts to spoliation, the purpose of the *mandament van spolie* must be contextually appreciated. Reynolds J, in *Chisveto v Minister of Local Government and Town Planning supra* at p 250C-F stated as follows: H
2002 (2) ZLR p151
Ndou J
A "The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party ... The oft cited and approved passage of Innes CJ in *Nino Bonino v de Lange* 1906 TS 120 at 122 is B pertinent:
` It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable.'"
In this case, the first respondent was not "taking the law into his hands" .
He C purported to act as a police officer empowered by provisions of ss 49 and 58 of the enabling legislation i.e. the Criminal Procedure and Evidence Act. The question of the preservation or protection of public order does not arise.
It seems to me that s 49 empowers the first respondent to seize the motor vehicle in question during the course of his investigations. To show his *bona fides,* he produced a police docket in this matter indicating the stage of his D investigations and directions given by prosecutor's office. The Attorney- General, through his delegate, has decided to prosecute the applicant for theft by false pretences i.e. according to information in the police docket. This discretion is not subject to interference from any person — see s 76(4)(a) of the Constitution of Zimbabwe. The Attorney-General's delegate has given E written instructions to Assistant Inspector Khumalo to charge Miss Geza with theft by false pretences and recover the disputed vehicle. I do not think that Assistant Inspector Khumalo did anything legally wrong. I think, out of courtesy, ideally he should have informed Miss Geza and Miss Nhongo's legal practitioners that he was taking the vehicle in terms of the provisions of s 49. He had no legal obligation to do so. Coming to the disposal of the F vehicle, *Mr Mutsonziwa,* for the first respondent, seems to be relying on the provisions of s 58(b).
Firstly, s 58(a) is not applicable in this matter as the exhibit is not perishable.
Secondly, s 58(b) is not applicable because this route can only be used "with the consent of the person from whom it was seized" . The vehicle was seized G from Miss Geza and she did not consent to the vehicle being given to Miss Nhongo. Section 58(c) appears to be the only one relevant in this case. Section 58(c) empowers a police officer to "make such other arrangement with regard to the custody thereof as the circumstances may require" . The first respondent's case is that after taking the vehicle the question of custody thereof at Marlborough Police Station became a problem. Assistant Inspector H Khumalo, in exercise of the discretion bestowed on him by s 58, authorised
2002 (2) ZLR p152
Ndou J
the release of the disputed vehicle into the custody of Miss Nhongo on A condition that the latter brings it to the court on date of the criminal trial. It does not seem to me to be the wisest thing to do in the circumstances, but that is not the issue before me. I am not required to judge whether he exercised his discretion wisely. His exercise of the discretion is, in my view, not legally assailable. As indicated earlier on, his objective was to ensure that the vehicle was available for purposes of criminal proceedings. There is nothing on the B papers which shows that Miss Nhongo was part of the removal of the vehicle from Eastgate by Assistant Inspector Khumalo. Once it is established that Assistant Inspector Khumalo's conduct does not constitute spoliation, it then follows that the claim against Miss Nhongo is not sustainable.
In light of my above findings, I accordingly dismissed the application with C costs.
Dube, Manikai & Hwacha, applicant's legal practitioners D
Civil Division of the Attorney-General's Office, first respondent's legal practitioners *Mucharehwa & Partners,* second respondent's legal practitioners

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Source:
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[zRPz]S v NCUBE & ANOR (1) 2002 (2) ZLR 153 (H)
2002 (2) ZLR p153

Citation	2002 (2) ZLR 153 (H)
Case No	Judgment No. HB-100-02
Court	High Court, Bulawayo
Judge	Kamocha J and assessors
Heard	22 January 2002; 23 January 2002; 24 January 2002; 25 January 2002; 18 February 2002; 22 April 2002; 23 April 2002; 24 April 2002; 6 August 2002
Judgment	6 August 2002
Counsel	*Mrs M Cheda,* for the State *M J Mellin,* for the first accused *Ms P Dube,* for the second accused
Case Type	Criminal trial
Annotations	No case annotations to date

[zFNz]Flynote
D **Criminal law** — defences — non-pathological criminal capacity — when established — abused wife killing husband
[zHNz]Headnote
The first accused killed her husband by cutting his throat with an axe as he lay drunkenly asleep one night. For more than four years she had suffered abuse from her husband. He was a heavy drinker and used to E assault her once or twice a week with an electric cord; on at least one occasion she had to be hospitalised after such an assault. He also assaulted their two young children, and occasionally threatened to kill her. On the night in question he had come home drunk and, it seems, had abused her and told her to leave his house. After he had fallen asleep, F the first accused removed one of their children from his bed, then took the axe and killed him. Having done so, she and the second accused (her brother-in-law) hid the murder weapon and the blood-stained bedding and carried the deceased's body out of the house. They told neighbours and the police that the deceased had been murdered by thugs. At her trial she raised the defence of non-pathological criminal incapacity, alleging G that as a result of constant abuse by the deceased she was incapable of appreciating the wrongfulness of her actions.
Held, that the first accused had not established the defence of non-pathological criminal incapacity, which ought not to succeed easily. Her actions were not consistent with those of a person who acted subconsciously: H instead they revealed that she had criminal capacity.
2002 (2) ZLR p154
Kamocha J
[zCAz]Cases cited A
S v Arnold 1985 (3) SA 256 (C)

S v Campher 1987 (1) SA 940 (A)
S v Chretien 1981 (1) SA 1097 (A)
S v Laubscher 1988 (1) SA 163 (A) B
[zCIz]Case information
Mrs M Cheda, for the State
M J Mellin, for the first accused
Ms P Dube, for the second accused
[zJDz]Judgment
KAMOCHA J: The two accused were charged with murder, it being alleged that on 13 November 1999 and at house number 2242 Emganwini, Bulawayo, C both accused or one or other of them did wrongfully, unlawfully and intentionally kill and murder Cephas Ncube, a male adult in his lifetime therebeing.
In her plea the first accused raised the defence of non-pathological "criminal incapacity" . She admitted that she had hacked the deceased with an axe but D with no intention of killing him. She said she had struck him twice with the axe on the neck, thinking that she was fixing him. She concluded that she was incapable of appreciating the wrongfulness of her actions as she acted under non-pathological "emotional storm" . Accordingly a plea of not guilty was entered. The second accused denied the charge and a plea of not guilty was entered. E
The State outline was read and produced as exhibit one. In her defence outline the first accused was brief as she sought to rely on the defence of non- pathological "criminal incapacity" which she had pleaded. She stated that she was married to the deceased. While admitting that she killed him by striking him with an axe, she said she was incapable of appreciating the F wrongfulness of her act or acting in accordance with an appreciation of such wrongfulness as a result of a non-pathological "emotional storm" brought about by a sustained period of mental and physical abuse of her by her late husband. She went on to say the deceased drank alcohol to excess and that, from the inception of their marriage, he verbally and physically abused her whilst under the influence of alcohol and that sustained abuse led to the said G non-pathological "emotional storm" .
The second accused's defence outline was as follows. He said the deceased was his half-brother. He was invited by the deceased to go and stay with him at number 2242 Emganwini suburb Bulawayo. He did not have any differences or quarrels with the deceased. On the evening of 12 November 1999 he had supper with the first accused and other children. After 9 p.m. he bade the first H
2002 (2) ZLR p155
Kamocha J
A accused a good night and went to bed. Some time during the night he woke up to find the first accused shaking him. She told him that she had had another quarrel with the deceased and that she had injured him with an axe. She then asked him to go and see him.
He got dressed and found the first accused standing in the living room. She then told him to go and see the deceased in their bedroom. He went there and B found the deceased lying on the floor. There were two plastic bags and a pail with bloody water and swabs in the room. She told him that the plastic bags contained "the tools," a blanket and a bed sheet.
After repeating that she had had a quarrel with the deceased and that she had injured him, she asked the second accused to help her carry the deceased C outside, saying since he appeared lifeless, it was possible that he could be revived by the fresh breeze outside. He assisted in carrying the deceased outside, hoping that he would be revived. It did not occur to him that the deceased was already dead.
A few minutes later, the first accused said the deceased would never wake up. She then ordered the second accused to go into the house. She told him not D to tell the neighbours or the police that she had injured the deceased. She said if he did he would be killed by a person he did not know, but the person knew the second accused very well and that person had in fact assisted her in committing the crime.
Thereafter she ordered him to go and hide the two plastic bags in the bush and E warned him again that if he deviated and went to the police, he would be killed. He claimed that due to confusion and fear he obeyed and went to hide the items and returned to the house where he found her sitting on a sofa in the living room.
She allegedly ordered him to go to bed and warned him again that if he F reported her, all that would happen to her was that she would be arrested and jailed, but he would be killed by the unknown person. He went back to his room but was unable to sleep for the rest of the night.
In the morning she ordered him to go to the police and report that they had found the deceased outside, next to his car. She again warned him that he would be killed if he reported something different. He accordingly went and G reported as ordered.

He stated that he never struck any blow at all on the deceased and did not take part in the killing of the deceased. The assistance he rendered to the first accused after she had killed the deceased was not rendered willingly, he was threatened with death and was in a state of shock and fear. He claimed to H believe that there was another person involved who would kill him.

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Kamocha J

[*The learned judge then described the murder weapon which, together with* A *the post mortem report on the deceased, was produced by consent, and continued:*]

The first prosecution witness was the deceased's sister Edinah Nyoni who is aged 19 years. In 1996 she went to live with the deceased and his wife, the first accused. She said the second accused was deceased's half brother. B

Her evidence on the background information was that the marriage of the deceased and the first accused was not a happy one. She said the deceased used to assault the first accused very regularly. He assaulted her every week at least once a week. At times she would be assaulted twice or more times per week. Not only did he assault his wife, he also assaulted the two little children. The witness herself was not spared. She was assaulted on three C occasions during her stay with the couple. On one occasion she had to be hospitalised. She told the court that the first accused was also hospitalised as a result of a bad assault perpetrated on her in September 1999. The first accused used to be assaulted with an electrical cord. On one occasion she heard the deceased threatening to kill the first accused. She said the deceased D used to go drinking quite often and most of the assaults used to occur after he had been drinking. The assaults mainly took place in their bedroom during the night.

Her evidence as regards the crime was that on the evening of 12 November 1999 she went to bed and left both accused in the sitting room. The next morning at 7 a.m. the first accused went to tell her to go and do some laundry. E She then told the witness that the deceased had not returned home the previous night but, that did not make sense to the witness since the deceased's car was parked outside. He was, however, found lying next to the car. The first accused created a story that deceased had been beaten up by thugs. But, some blood was seen on the stoep and she ordered the witness to quickly clean up the blood. The witness complied. Thereafter she was sent to go and call F a certain neighbour. On her return the first accused sent the second accused to go and report the matter to the police.

When the police arrived the first accused told them that her husband had been beaten up by thugs but her story was quickly found to be untrue as the murder was found to have taken place inside the house. Thereafter the police went G with both accused to collect the exhibits that had been hidden in the bush.

[*The learned judge then dealt with further evidence led at the trial, including extra-curial statements made by the two accused in their evidence in court. He found both the accused to be bad witnesses who were unworthy of belief. The facts he did find proved are set out later in the judgment. He continued:*] H

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Kamocha J

A The first accused called Dr Poskotchinova. a psychiatrist with 29 years' experience. She examined the first accused and concluded that when she killed her husband she did not have any abnormal behaviour and had no mental problem. The first accused told the doctor that her husband used to ill-treat her. She told the doctor that on the fateful night her husband had beaten her up and she got angry. She decided to kill him when he was asleep. It B should be noted that the accused first mentioned that she had been assaulted by the deceased to the doctor when she was examined on 22 January 2001. This was after a period of over one and half years. The assault should have been mentioned to the police and the second accused when matters were still fresh in her mind. It seems to me that that was an afterthought which C accordingly must be rejected.

Defence of Non-Pathological Criminal Incapacity

The first accused raised the defence of non-pathological "criminal incapacity" . This has been accepted as a complete defence by the South African Appellate Division and High Court in cases such as *S v Chretien* 1981 (1) SA 1097 (A); *S v Campher* 1987 (1) SA 940 (A); S v *Arnold* 1985 (3) SA 256 (C); S v D *Laubscher* 1988 (1) SA 163 (A).

When dealing with the defence of non-pathological criminal incapacity C R Snyman in *Criminal Law* 3 ed p 153 says,

"For successful reliance on the defence of non-pathological incapacity it is in fact not necessary to prove that X's mental disability was the result E of certain specific causes or pathological states; if X does not rely on the specific defences of mental illness in terms of s 78(1) of the Criminal Procedure Act, or of immature age, but the court is nevertheless satisfied on the evidence as a

whole that at the time of the act X was incapable of appreciating the wrongfulness of his act or of conducting himself in accordance with such an appreciation, he must be found not guilty, F irrespective of the cause of his mental inability.

The cause may perhaps be what can be called 'emotional collapse', 'emotional stress', 'total disintegration of the personality,' or it may be attributable to factors such as shock, fear, anger or tension. Such a condition may be the result of provocation by Y or somebody else, and G the provocation may in turn be linked to physical or mental exhaustion resulting from insulting behaviour towards X over a long period, which increasingly strained his powers of self control, until these powers eventually snapped — a condition which is sometimes present in an unhappy marriage which is on the point of disintegrating. Intoxication H may also be a cause of the inability. The inability may furthermore be the

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result of a combination of factors, such as provocation and intoxication A ... but the exact description of the cause of the condition is not important. What is important is not the cause of the inability or the description of this cause, but the inability itself."

The South African courts have laid down that the defence ought not to succeed easily. Where an accused person raises this defence he must lay a B foundation for it in the evidence. In *S v Chretien supra* Rumpff CJ emphasised that a court should not easily conclude that an accused person lacked capacity due to intoxication, otherwise the criminal justice system would easily become discredited. What the learned Chief Justice said in that case applies equally to other instances of non-pathological incapacity. C R Snyman in his book quoted *supra* at p 154 says this on the point that the defence should not C succeed easily;

"The chances of X's succeeding with this defence if he became emotionally- disturbed for only a brief period before and during the act, are slender. It is significant that in those cases in which the defence was raised or in which the court was at least prepared to consider it seriously, X 's act was D preceded by a very long period — months or years — in which his level of emotional stress increased progressively. The ultimate event which led to X's firing the fatal shot can be compared to the last drop in the bucket which caused it to overflow."

The defence succeeded in *S v Arnold* and *S v Campher supra.* In *Arnold's* case the court found the accused had been under extreme emotional stress and E found him not guilty. He had been charged with the murder of his wife by shooting her but at the time of the shooting he was in a state of severe emotional stress. The prosecution had failed to prove that when he shot her he was acting consciously and not subconsciously.

The court further held, on the assumption that the accused had acted F consciously when he killed the deceased, that on the evidence it could not be said to have been proved that he either could have appreciated the wrongfulness of his act or, if he did so appreciate it, that he was able to act in accordance with such appreciation of the wrongfulness of his act. The accused was in a state of extreme emotional stress because of the couple's turbulent marriage. The cause of the unhappy marriage was the deceased. She was very volatile G and subject to extreme feelings. She had an interest in men and a desire to be admired. She further had a desire to be a striptease artist, so that she could display her charms and enjoy the attention of an audience.

A further problem with her was that her mother had too much control over her. At one stage the mother went to stay with the couple. Her stay there was H

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A leading to the disintegration of the couple's marriage. When the accused finally asked the mother to leave them alone, that did not go down well with the deceased. She left the matrimonial home. The accused had a son out of his first marriage who had a serious disability — he was hard of hearing. The deceased's attitude towards the boy had become so hostile that the accused was forced to make arrangements for the boy to be placed in a home for B committed children. All this came from the mother, who exercised strong but unfavourable influence over the deceased.

On the day she was shot he found her at home with her friend. He asked the friend to leave as he wanted to speak to her alone and not subject to any outside influence. The friend left and went to wait outside. The two remained C in the house. When the accused asked the deceased what they could do about the situation she appeared uninterested. He told her that he was prepared to have the mother of the deceased back if that was going to resolve their problem. The deceased, however, did not seem to be prepared to discuss the matter. Instead she became provocative by telling him that she wanted to return to stripping and had already got that job. She did not tell him where she D had got the job as a striptease artist. While she repeatedly told him about her new job as a striptease artist she bent forward displaying her bare breasts. She refused to return home. A

combination of the above factors seems to have caused the accused's self-control powers to snap, resulting in him shooting his wife.

E Immediately after shooting her the accused was very upset and took her in his arms, held her hands and touched her lips and she gasped. He then rushed out of the house in an attempt to get the police and an ambulance, he also called a neighbour to come. He sat with her in his arms speaking to her and sat like that till the police arrived.

The trial judge Burger J made these remarks at page 262B-H:

F "It is clear that the accused was emotionally extremely upset by all the prior events and that, at the time of his final conversation with the deceased, he could have been at a breaking point. He says that he is unable to give a full account of what happened — so for instance he is unable to explain how the holster of the gun landed in front of the couch.

G The question arises to what extent the accused was truthful when he says that he cannot remember certain events. The case is remarkable in that *not a single statement made by the accused was found to be untrue. A large number of the statements made by him were corroborated from other sources* and, except for the statement that he, can't remember, all H the rest of his evidence fits logically and has all the appearances of being

highly probable. The State correctly conceded that throughout the A *accused was an honest witness* except that it would not concede that he was truthful when he said he could not remember nor when he said he did not intend to kill her. The State could, however, not point to any fact or reason why these statements should not be accepted except to say that they were improbable.

The *fact that the accused did not adapt his evidence to take advantage* B *of the possibility that the firearm was accidentally discharged with the first shot, as suggested by the ballistic expert, reflected favourably on the accused.*

The events after the shooting, in particular when the accused *made his report to the police and a statement to the magistrate,* all very shortly C after the fatal event, *indicate that the accused was extremely shocked and sincerely regretted the event.* The accused was then still in a highly emotional state and it is unlikely that he was in such a state as to be able to feign any feelings or able to fabricate any lies. He was perfectly open with the police, fully co-operated with the investigating officer and the D next day assisted *inter alia* in the search for the bullets. In our view the events prior to the alleged loss of memory by the accused, as well as all subsequent events, all unequivocally demonstrate a sincere love and affection for the deceased, completely negating any desire or reason on his part to kill the deceased." (Emphasis added)

In casu when the first accused killed her husband, was she acting consciously E and not subconsciously? If she acted consciously, did she have the criminal capacity to appreciate the wrongfulness of her act and act accordingly?

The evidence before the court shows clearly that the accused was subjected to ill-treatment by her husband who used to assault her every week, sometimes twice a week. Their marriage was a very unhappy one. This went on for a F period of more than four years. She reported the ill-treatment to the deceased's friends and parents, to no avail. The deceased even used to assault the two little children and his own half sister Edinah.

The question to be answered is whether or not the defence she raised should avail her. In order to do that the court must examine closely the events immediately preceding the killing and after. It seems to us that the accused G pre-planned the killing. She waited for the deceased to fall asleep and then chopped him twice in the neck as he slept. Before chopping him she had to remove the little girl Lisa from the bed on which the couple used to sleep with her. She took the child to the room where Edinah and the other girls were sleeping. H

A After she had chopped him to death while he was asleep in bed, she removed him from the bed and placed the body on the floor. She then cut off the piece of mattress on which he had bled and then turned over the mattress and made up the bed. She took the bed sheet and blanket on which he had bled and pillow case and put them in a plastic bag. She looked for two plastic bags in which she put all the exhibits. Thereafter she awakened the second accused B and told him not to tell anybody that she had killed the deceased. She instead told him that the story they should tell people was that the deceased was killed by thugs who left him by his car. The same story was to be told to the police. Indeed, upon the arrival of the police she told them that the deceased had been killed by thugs.

C She was untruthful to her neighbours, the police and even to the court. She told the court that before she killed him he had assaulted her severely for a long period and accused her of being a

witch like her mother. This she never mentioned to the police at the time of her arrest when she made her extra-curial statement. Her actions are not consistent with those of a person who acted subconsciously. What her actions reveal is that she had criminal D capacity. Consequently, in the circumstances the defence raised is of no benefit to her.
The participation of the second accused in the actual killing has not been established with any satisfactory clarity. The evidence is confused on his alleged participation before the killing. What admits of no doubt, however, E is his participation after the killing. He assisted the first accused in her attempt to conceal the crime. He carried the body out of the house and placed it next to the car so as to mislead people into believing that the murder had been committed by thugs outside the house. He went to dispose of the exhibits into the bush. He went to report the matter to the police and attempted to mislead them by saying the deceased had been killed by thugs.
F His puerile story that he was afraid of an unknown person is rejected. If he had not been a willing accessory he would have told the police the truth when he went to report. He voluntarily associated himself with the first accused and the crime.
The verdict of the court is as follows:
G The first accused is found guilty of murder with actual intent while the second accused is guilty as an accessory after the fact of murder.
The State counsel has, in my view, properly conceded that there are extenuating circumstances in this matter. I am therefore at liberty to impose a sentence which I consider appropriate. I take into account that the first H accused was subjected to ill-treatment by the deceased for a period of over
2002 (2) ZLR p162
Kamocha J
three years. She used to be beaten up on a weekly basis and sometimes twice A per week. She is a first offender. The second accused is a youthful first offender; because of his youthfulness I shall treat him differently from the first accused. Both accused have been in custody for two years nine months. This should be taken into account. In all the circumstances it seems to me that the justice of the case would be met by sentencing each accused as follows; B
Accused 1: nine years' imprisonment Accused 2: six years' imprisonment.
Ben Baron & Partners, first accused's legal practitioners
Coghlan & Welsh, second accused's legal practitioners C

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v HOLLINGTON & ANOR 2002 (2) ZLR 163 (H)

[zRPz]S v HOLLINGTON & ANOR 2002 (2) ZLR 163 (H)
2002 (2) ZLR p163

Citation	2002 (2) ZLR 163 (H)
Case No	Judgment No. HH-125-02
Court	High Court, Harare
Judge	Adam J & Makoni J
Heard	27 June 2002; 7 August 2002
Judgment	7 August 2002
Counsel	Details not supplied

Case Type Criminal appeal

Annotations No case annotations to date

[zFNz]Flynote
D **Evidence** — witness — examination — leading questions — when permissible — prosecutor putting to State witnesses statements in accused's defence outline — permissibility of
Criminal procedure (sentence) — common-law crimes — extortion — accused enticing person into sexually compromising position, then threatening him with exposure — appropriate sentence
[zHNz]Headnote
E What an accused person says in a defence outline which he has made in terms of s 188 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]*,* or in a warned and cautioned statement that has been admitted in evidence, can be regarded as previous statements made by F him. Hence there is nothing wrong in the prosecutor putting to State witnesses relevant parts of statements in a defence outline and asking the witnesses about them. To do so is not an impermissible leading examination of the witnesses.
The appellants were convicted of extortion in that having enticed the complainant into a hotel room for the purpose of having sexual intercourse G with the first appellant, they induced him by means of assaults and threats of exposure to give them cheques to the value of $1 million. They were each sentenced to four years' imprisonment of which one year was conditionally suspended. On appeal:
Held, that the sentence complied with the relevant principles and was not H vitiated by irregularity or misdirection, nor was it so severe that no
2002 (2) ZLR p164
Adam J
reasonable court could have imposed it. In the circumstances, the appeal A court could not interfere with it.
[zCAz]Cases cited
Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)
Benmax v Austin Motor Co Ltd [1955] 1 All ER 326 (HL) B
Hughes v Graniteside Holdings S-13-84
S v De Jager & Anor 1965 (2) SA 616 (A)
S v Five 1988 (2) ZLR 168 (S)
S v Musindo 1997 (1) ZLR 395 (H)
S v Nhumwa S-40-88
Swain v Society of Advocates, Natal 1973 (4) SA 784 (A) C
Watt (or Thomas) v Thomas [1947] 1 All ER 582 (HL)
[zSTz]Legislation considered
Criminal Procedure and Evidence Act [*Chapter 9:07*]*,* s 188
[zJDz]Judgment
Adam J: The appellants were convicted by the regional magistrate of D extortion. She sentenced them to four years' imprisonment of which one year was conditionally suspended for five years. They appealed against both convictions and sentence. We dismissed their appeal. These are the reasons.
[The learned judge then set out the facts of the case, which were as E follows. The first appellant and the complainant had had a sexual relationship some years previously and they remained on good terms. They met in Harare at the first appellant's instigation and then went to a hotel, where they booked a room. Once they were in their hotel room, undressed and about to have sexual intercourse, the second appellant by pre-arrangement burst into the room with a video camera and filmed the F scene. He claimed to be the first appellant's husband and threatened the complainant with a knife. Under extreme coercion from the appellants, the complainant wrote out four cheques for $250 000 each and made them payable to the first appellant. The first one was deposited in the first appellant's bank account, but the complainant reported the matter to the police before the others could be cashed, and the appellants were G arrested. The evidence showed clearly that the appellants had planned the whole incident in order to extort money from the complainant.
The learned judge then dealt with arguments raised by counsel and continued:] During the proceedings reliance was placed by the appellants' counsel on *S* H

2002 (2) ZLR p165
Adam J
A *v Musindo* 1997 (1) ZLR 395 (H) at 407 Blackie J *et* Gillespie J said:
"Another type of leading examination occurs when the prosecutor puts a series of questions along the lines:
'Now the accused will say in his defence that... Is this the case?' unmistakably inviting the answer, 'No'. This species of examination is particularly to be criticised where it is put to a witness who has not yet B given evidence on the issues in his or her own words. In such a case it is a leading examination and must detract from the weight attached to evidence which it elicits... This sort of examination ought to be avoided. The putting of the defence is the function of the defence."
It is clear, with respect, that Blackie J and Gillespie J should have considered the provisions of s 188 of the Criminal Procedure and Evidence Act C [*Chapter 9:07*]. The accused must make a statement outlining the nature of his defence and the material facts on which he relies. In such a defence outline the accused invariably makes statements about what the complainant or other prosecution witnesses may have said or done. The prosecutor cannot rely on the accused or his counsel putting the accused's statements to the prosecution D witnesses under cross-examination. It must be remembered that the statement made in the defence outline is the accused's statement which he must have been aware of before any evidence is led at the trial, because he has himself made the statement at that time or must have read it if it was written down before the trial. In most cases the accused when giving his evidence adopts his defence outline. In the light of this, not forgetting s 189 of that Act, in my E view there is nothing wrong in the prosecutor reading accurately the relevant parts of the accused's statements in his defence outline, putting it to prosecution witnesses and asking them about it. What the accused states in his defence outline (or for that matter in his warn and caution statement that has been admitted) can be regarded as a previous statement. It is not a leading examination to put such a statement made in the accused's defence outline.
F In *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 (HL) Lord Thankerton observed at 587 A-B:
"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:
I. Where G a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the H trial judge's conclusion.
2002 (2) ZLR p166
Adam J
II. The appellate court may take the view that, without having seen or A heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter B will then become at large for the appellate court.
It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."
Lord MacMillan said at 590 B-D:
"The appellate court had before it only the printed record of the evidence. C Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case, but it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in D reaching his conclusion but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seen equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the E powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone completely wrong."
In *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 (HL) Lord Reid said F at 328 I - 329 A-B:
"But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it the written transcript of their evidence. No one would seek to

minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare G cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly H

2002 (2) ZLR p167

Adam J

A discounted by the trial judges or. on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations."

B In *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) Van Blerk JA said at 787 - B:

"The only dispute is whether the Court *a quo* erred in its findings of fact. It is trite that in resolving a dispute of this kind, where the issue depends upon oral evidence, the opinion of the trial Court will not lightly be disturbed on appeal. To succeed the appellant in the instant case will be C required to show that there were no grounds which could reasonably justify the exercise of a discretion against the appellant."

In *Hughes v Graniteside Holdings* S-13-84 Dumbutshena CJ said at pages 10-11 of the cyclostyled judgment:

"A court of appeal is confined to the record of evidence and the reasons D which the trial court has given for its decision. In such circumstances the appeal court's powers are restricted. In appeals based solely on fact the appellate court must recognise that the trial court was in a better position to observe the demeanour of the witnesses. When, for instance, the trial court, as in the instant case, has made an adverse finding on the credibility of the appellant and some of her witnesses, an appellate court E should take cognizance of the fact that the trial court observed the witnesses and formed its impression of individual witnesses on their performances. It is, therefore, not desirable for an appeal court to disturb findings which depend on the credibility of witnesses" .

More recently in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G to 63 D Gubbay CJ said:

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

In the light of the foregoing this court has no grounds to interfere with the H findings of fact and the reasons for the regional magistrate's decision.

2002 (2) ZLR p168

Adam J

The appellants' counsel submitted in their heads of argument that as far A sentence was concerned the present case had no precedent. The regional magistrate erred in assessing sentence on the basis that the appellants were partners in crime when in fact a conspiracy was not proved, since her reasoning that there was planning and premeditation was not supported on the evidence. It is most difficult to understand the arguments of their counsel. B The regional magistrate having made her findings and convicted the appellants, are we to understand from their counsel she should have once more at the sentencing stage determined whether there was planning and premeditation on their part? Their counsel continued that the regional magistrate, accordingly, failed to differentiate between cases she cited and the present case because in those cases there was no background of moral perversion. Surely their C counsel could not be making reference to the sexual intercourse in 1996 when the complainant was, even according to the first appellant, not aware that she was "married." Normally infidelity by a complainant (as a husband) against his own wife is not known or categorised as moral perversion. What happened on 25 October 1999 according to the regional magistrate's findings of fact can hardly be called moral perversion on the part of the complainant. D Their counsel submitted that the regional magistrate erred in law in not making a finding that the complainant was a greater sinner than the first appellant, but he does not cite any authorities for his submission. He also submitted that the regional magistrate erred in not having regard to and accepting that the complainant's actions caused the break-up of a "marriage" . Their counsel once again ignored the evidence of the maid that the two slept E on 25 October 1999 in the same bedroom; that she returned a week later, and that he only left the matrimonial home in November

1999. The regional magistrate on her findings of fact could not do so (particularly as she found them to be untruthful witnesses) since she held they had planned the whole episode. Their counsel submitted that a custodial sentence, let alone three F years, is in the circumstances so severe as to induce a sense of shock and relies once more on the most dubious grounds that society cannot condone a situation whereby an adulterer is caught red-handed. On their own evidence (the adulterer was hardly caught red-handed) the "wife" telephoned her "estranged husband" at 12.01 p.m. and told him that the complainant wanted to have sexual intercourse with her (she helps the complainant, by going to G buy the condoms, in his objective), the "estranged husband" tells her he is coming (finds the door conveniently unlocked while he is with a video camera and a knife). From their own mouths as to what had happened does their counsel contend that society will be appalled? The regional magistrate made no error about the morality aspect of the matter. H

A Their counsel submitted that the appellants were in custody from 12 May 2000 until their release on bail (pending appeal) on 16 June 2000 so it is inequitable in the circumstances, even if this court were to consider otherwise, to recommit them to custody. Their counsel submitted a fine would meet the justice of the case as a suspended sentence is unnecessary as there is no likelihood of repetition and some time has already been served.

B The respondent's legal counsel in its heads of argument submitted that although extortion is viewed very seriously by the courts — *S v Guyo* S-196-93 — the circumstances of this case are such that a custodial sentence was not warranted. He pointed out the appellants were happily married and that the complainant caused a break-up of the marriage. He then makes C unsubstantiated allegations of sexual abuse by the complainant. He submitted that a custodial penalty, given those circumstances, would be so excessive as to induce a sense of shock. He pointed out that they were first offenders; the first appellant lost her job and the second appellant lost a business deal. He submitted that the trial proceedings received wide media coverage which obviously had a traumatic effect on the appellants (as their counsel had D submitted to the regional magistrate). This factor, he said, should have been given due consideration by the trial court and the appellants gained nothing out of the commission of the offence. He said a knife was used in instilling fear in the mind of the complainant but not used to injure the complainant (as their counsel had submitted to the regional magistrate). However it must not be forgotten that the second appellant tried to stab the complainant. The E respondent's counsel submitted that this nature of crime is not prevalent. He also submitted that the appellants spent a period close to three weeks in prison. He further submitted that it would be undesirable, other things being equal, to send them back to prison when they had already served a portion: S v *Five* 1988 (2) ZLR 168 (S). He submitted that bearing in mind the F compelling circumstances of mitigation advanced on behalf of the appellants, the mitigatory factors far outweighed the aggravating factors. The regional magistrate in her reasons stated that she took into account what had been said on their behalf by their counsel, including that they were first offenders. She stressed that extortion was a serious offence, referring to S v *Guyo supra, S v Moyo* S-51-91 and S v *Masibera* G-S 270-80. She indicated that their G counsel had said that they suffered trauma through publicity but she was of the view that the complainant suffered a lot of trauma through publicity She said it was the first appellant who enticed the complainant to the hotel.

In *S v De Jager & Anor* 1965 (2) SA 616 (A) at 628 H to 629 A-B Holmes JA said:

H "It would not appear to be sufficiently recognised that a Court of appeal

does not have a general discretion to ameliorate the sentences of trial A Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking B disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.

In *S v Nhumwa* S-40-88 Korsah JA at page 5 of the cyclostyled judgment said: C

"It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence imposed complies with the relevant principles, even if it is severer than one that the court would have imposed, sitting as a court of first instance, this court will not interfere with the discretion of the sentencing court." D

It is clear that the sentence imposed by the regional magistrate complies with the relevant principles. This court is unable to hold that her sentence is vitiated by irregularity or misdirection. It is not so severe that no reasonable court could have imposed it. E
MAKONI J concurred.

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Source:
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[zRPz]MARANGE v CHIROODZA 2002 (2) ZLR 171 (H)
2002 (2) ZLR p171

Citation	2002 (2) ZLR 171 (H)
Case No	Judgment No. HH-130-02
Court	High Court, Harare
Judge	Makarau J
Heard	8 March 2002; 7 August 2002
Judgment	7 August 2002
Counsel	*O Chinganga,* for the plaintiff *C Mukwesha,* for the defendant
Case Type	Civil Trial
Annotations	Link to case annotations

[zFNz]Flynote
D **Customary law** —application —unregistered customary law marriage — termination — distribution of estate —should be decided by general law principles
Family law —husband and wife —divorce —distribution of matrimonial property —tacit universal partnership —when can be held to exist
[zHNz]Headnote
E Customary law is inapplicable in all instances when the estate of parties to a terminated unregistered customary marriage has to be distributed. It should rarely appear just and proper to any court that customary law should apply to the distribution of the estate of those in an unregistered marriage. In all cases where the distribution of the estate of parties in an F unregistered union is raised and the estate includes land or rights to land, the application of general law is justified. To apply customary law to the distribution of such an estate will be to perpetuate an injustice and to discriminate against African women who chose to marry according to custom. Marriage is a union for life in common of a man and a woman. The legal G rights and obligations created by marriage include community of life and the maintenance of one common household. This is an invariable consequence of marriage. As such, the parties contribute in their different ways to

the successful running of their common household. The common estate may be built by the industry of the husband and the thrift of the wife, but it belongs to them jointly, as the one could not have H succeeded without the other. Where the spouses pool their resources for
2002 (2) ZLR p172
Makarau J
their common enjoyment, even if they are not involved in a commercial A venture for profit, they are in a universal partnership for the purposes of their livelihood and the maintenance of their common household.
[zCAz]Cases cited
Chapeyama v Matende & Anor 1999 (1) ZLR 534 (H) B
Chapeyama v Matende & Anor 2000 (2) ZLR 356 (S)
Chiromo v Katsidzira 1981 ZLR 418 (A)
Dokotera v The Master & Ors 1957 R&N 697 (SR); 1957 (4) SA 468 (SR)
Edelstein v Edelstein NO & Ors 1952 (3) SA 1 (A)
Jenah v Nyemba 1986 (1) ZLR 138 (S)
C *Jirira v Jirira & Anor* 1976 (1) RLR 7 (G)
Jengwa v Jengwa 1999 (2) ZLR 121 (H)
Mashingaidze v Mashingaidze 1995 (1) ZLR 219 (H)
Masimbe v Mungofa HH-96-94
Mtuda *v Ndudzo* 2000 (1) ZLR 710 (H) D
V v De Wet NO 1953 (1) SA 612 (O)
Zimnat Insurance Company Limited v Chawanda 1990 (2) ZLR 143 (S); 1991 (2) SA 825 (ZS)
[zSTz]Legislation considered
Customary Law and Local Courts Act [*Chapter 7:09*], s 3
Matrimonial Causes Act [*Chapter 5:13*], s 7 E
[zCIz]Case information
O Chinganga, for the the plaintiff
C Mukwesha, for the defendant
[zJDz]Judgment
Makarau J: The above matter was presented to me by way of a stated case F thus:
"1. THE CLAIM.
The plaintiff's claim is that between 1990 and 2000, there was in existence a tacit universal partnership between her and the defendant and the two were equal partners therein. During this period, the partnership acquired both movable and immovable property that the the plaintiff G wants to be declared her sole and exclusive property, that she be awarded the immovable property in Budiriro and that the defendant be awarded the immovable property in Norton and an equitable distribution of the movable assets be made. H
2002 (2) ZLR p173
Makarau J
2. COMMON A CAUSE (IN GENERAL AND BROAD TERMS).
The following are common cause:
(a) That the parties were "married" in terms of a customary law union which has since been dissolved and the parties no longer stay as husband and wife. B
(b) That during the subsistence of the union, the plaintiff was not formally employed. On the other hand, the defendant was gainfully employed throughout and directly contributed to the financial well being of the union.
3. MATTERS IN DISPUTE
(a) While the plaintiff maintains she financially contributed to the C union through the sale of vegetables and through dressmaking, the defendant maintains the plaintiff was never involved in any such activity at all and that if she contributed to the material well being of the union at all, her contributions was indirect.
(b) While the plaintiff maintains that part of the rentals received from 5465 Budiriro Township Harare, were used as part of the purchase D price for the Mazda 323 motor vehicle, the B1800 motor vehicle and roofing material, the defendant's position is that all the (little) money received as rentals was used solely for buying food for the family and that the said purchase prices were raised solely by him either through personal savings from his salary or through bank financing."
E The parties herein did not, in the stated case, specifically define the issue that falls for determination. It is however clear from the pleadings filed in the matter and from the nature and content of the arguments advanced by both legal practitioners, that the crisp issue that falls for determination in this suit is whether or not the plaintiff is entitled to a share in the estate that was acquired during the subsistence of their union on the basis that a universal F partnership existed

between the parties. In my view, the determination of the above issue necessarily involves answering the question whether or not the unregistered customary union between the parties established a tacit universal partnership between them.

The issue surrounding the matrimonial property regime attaching to G unregistered customary unions arises from the fact that our general law has been most ambivalent in the way that it treats unregistered customary unions. For some purposes, the parties to the union are regarded as married persons and are accorded the rights and obligations that the law grants to or imposes on married persons. For others, the parties to such unions are regarded as H unmarried. By design or through an oversight, the law has not made any

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express provision for the distribution of the property of persons in such A unions when their unions terminate other than through the death of one of the parties.

The problem of how to treat the distribution of the property of persons in unregistered customary unions when such unions dissolve has dogged these courts for a long time. Calls to have the Legislature step in and remedy what B is clearly an iniquitous position have fallen on deaf ears. Parliament has dragged its feet to redress this peculiar problem that afflicts and affects the greater majority of the African population of this country. 1 The burden of creating a just and equitable environment in property distribution for the African woman married according to tradition and custom has been left to the courts. The courts have in my view responded with commendable innovation C amid self-introspection to fashion a choice of remedies where one has been denied by statute. However, in an effort to fashion out remedies that do not have the effect of distorting existing legal concepts, the responses of the courts have tended to be inconsistent and confusing. As Garwe J (as he then was) puts it in *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H) at 714 (F).

"There has been legislative — even judicial — hesitancy to clarify the D legal status of claims arising out of such unions. Decisions emanating from this court and the Supreme Court have not made the situation any clearer. As Chatikobo J noted in *Matibiri v Kumire* 2000 (1) ZLR 492 (H), different judges have, sadly, approached the matter in different ways. My approach in this case will no doubt add to the confusion. What is clear, however, is that most judges in this jurisdiction are agreed that E justice needs to be achieved in these cases and that, in the absence of clear legislative provisions, this might be achieved by judicial innovation."

In my view, the unregistered customary union is an institution that will be with us for a long time. It is an institution sustained by tradition and custom, graced by social acceptance, and favored by the majority of the people in the F country *see Jengwa v Jengwa* 1999 (2) ZLR 121 (H). Since it is an institution that the law has not, and in my view cannot, openly outlaw or condemn, parties to it will expect the law to have the scope and capacity to determine the distribution of the estate acquired during the subsistence of the union. This is so because in the eyes of the community where such unions are prevalent, there is no difference between the sanctity and the respect G accorded to a registered and an unregistered union. Thus, the law becomes

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A incomprehensible in the eyes of society by failing to provide the same remedy to the same people, married under the same traditions but differentiated simply by the registration of their unions. Further, having given limited recognition to the union during its subsistence, it makes a complete ass of the law for it to suddenly turn blind and fail to recognise the parties when the union terminates on the pretext that the law has no express provision on how B to distribute the estate of such persons. In my view, in such an instance when it fails to provide a remedy to correct an obvious injustice, the law then removes itself from the people and fails to be a reflection of the mores and values of the society it seeks to serve. It risks being ignored as alien.

On the basis of the foregoing, it is my view that this court cannot deny C litigants in the position of the plaintiff relief, on the basis that the law does not provide any relief in express terms.

In the matter before me, the defendant argued that customary law and not general law is applicable.

In arguing as he does, the defendant rejects the application of what is D essentially a general law principle to a marriage contracted according to African custom. This is not a new issue before these courts. It is inevitable that these courts are more often than not faced with this conflict of laws situation because our jurisdiction has a dual legal system that applies to the same people.

In the case of *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 (H) E Robinson J raised the issue in a case whose facts are not dissimilar to the ones before me. In remarks that have been extensively quoted in these courts, the late Judge had this to say:

"On the merits, the application is ill founded in that it seeks to apply a general law concept, namely the concept of a tacit universal partnership, to an unregistered customary law union which has come to an end, F without attempting to lay any foundation for applying general law to the facts of this case in lieu of the application of customary law, in accordance with the choice of law rules prescribed by s 3 of Part I... of the Customary Law and Primary Courts Act 6 of 1981."

These remarks have been cited in support of holding that customary law may G be applicable to the distribution of the property of persons in an unregistered customary union that has terminated *see Jengwav Jengwa (supra).* In other words, it is an option open to the court when distributing the assets of parties to an unregistered customary union that has terminated. In my view, it is difficult to envisage a situation where the courts will routinely apply customary law to distribute the property of persons in an unregistered union H that has terminated. I say so on two main reasons.

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Firstly and due to the nature of the current socio-economic state in this A country, where a piece of land is invariably one's most valuable asset, the disputes that are brought to court claiming an equitable distribution of the assets of divorced parties invariably include the distribution of rights in land or immovable property. This may take the form of a claim to be awarded a piece of land as one's sole and absolute property, the right to be awarded a share in that land, or the right to remain in occupation of the land until a B certain condition (usually connected with the attainment of majority status of minor children of the marriage) is met.

It is trite that customary law has no concept of private ownership of immovable property. This has been accepted as a settled position in customary law by this court. Therefore in my view, where the distribution of the estate C of persons in an unregistered customary marriage includes the distribution of rights, title and interests in immovable property, customary law is clearly not applicable to the distribution of that property. This has been a settled position in our law: see *Dokotera v The Master & Ors* 1957 R&N 697 (SR); 1957 (4) SA 468 (SR).

Secondly, this court has accepted in a number of decisions that the existing D content of customary law practices on the distribution of property upon the dissolution of an unregistered union is unjust. As Garwe J puts it in *Mtuda v Ndudzo (supra),* most judges in this jurisdiction are agreed that justice needs to be achieved in such cases, hence innovation on the part of the judges is required. The reasons for so holding are obvious and have been described E by the different courts in different words.

The injustice has become apparent due to the changes in the legal-socio- economic structure of the African society with the advent of independence and changes in the legal framework. The Constitution of Zimbabwe grants equality to all citizens regardless of sex or gender. By this development, women now have enhanced opportunities to get employment and to equal F pay with their male counterparts. In my view, this is part of the change that Fieldsend CJ had in mind in 1981 *Chiromo v Katsidzira* 1981 ZLR 418 (A). Then, he cautioned about the need for urgent thought to be given to the increasing number and complexities of the cases that were likely to arise with the increasing number of both wives and husbands working and contributing G to their joint households. To his caution I may add that the further enhancing of the rights of housewives even where they are not formally employed compounds the complexities. This has arisen from the recognition by Parliament that the hours spent in looking after children and in keeping house are hours spent working at home. The law now sees little distinction between the housebound spouse and the one who brings in a salary or wage. Thus, non- H

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Makarau J

A monetary contribution by the wife towards the attainment of a certain lifestyle by the parties is a contribution meriting compensation when the parties divorce 2.

In my view, age-old practice under customary law as it relates to the property rights of women in an unregistered customary marriage, has lost step with the thrust of gender policy in this country. It provides that a married woman at B divorce is only entitled to property that she has personally acquired through her labours and property accruing to her through the marriage of her girl-children: see *Jenah v Nyemba* 1986 (1) ZLR 138 (S); and Ncube in *Family Law in Zimbabwe* at pp 171-172. Thus, where a working wife buys food and groceries and pays for all the other consumables throughout her marriage while releasing her husband to acquire durable assets, at divorce she C cannot under customary law share in the durable assets as they were not acquired through her direct labour. This practice in my view arguably contravenes the Declaration of Rights in a number of instances notwithstanding the provisions of s 23 (3) of the Constitution. In my view, it is an embarrassing relic of an oppressive legal system. It is palpably unjust. Thus, in accordance D with the choice of law rule provided in s 3 of the Customary Law and Local Courts Act [*Chapter 7.09*], the

customary law practice on this point becomes inapplicable, as it will lead to an unjust result. The section provides that customary law shall apply in all civil cases where, regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that customary law should apply. In all other cases, the general law of E Zimbabwe shall apply.

On the basis of the foregoing, I would then venture to suggest that customary law is inapplicable in all instances when the estate of parties to a terminated unregistered customary marriage has to be distributed. Having regard to the legal-socio- economic structure of the African society today and the absence of any social as opposed to legal difference between a registered customary F marriage and an unregistered one, it should rarely appear just and proper to any court that customary law should apply to the distribution of the estate of those in an unregistered marriage. (Customary law no longer applies to the distribution of the estate of those in a registered customary marriage that has terminated) 3. In my view, in all cases where the distribution of the estate of parties in an unregistered union is raised and the estate includes land or rights G to land, the application of general law is justified. To apply customary law to the distribution of such an estate will be to perpetuate an injustice and to discriminate against African women who chose to marry according to custom.

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The foregoing in my view compels in all cases of this nature, a choice of law A that declines to apply customary law to avoid palpable injustice and discrimination on the basis of colour and ethnic practice. On the basis of the foregoing, I would further hazard to find that there is no conflict of laws situation in all such claims. General law is the only law applicable as it is the only law that will lead to a just result.

Indeed the practice of our courts in such cases has always been to apply B general law under one guise or another.

The plaintiff in the matter before me has chosen to base her claim on the principles of a universal partnership. This is not a principle that has always been readily received by these courts. In *Mtuda v Ndudzo supra* at 716 D, the learned judge had this to say: C

"I must say that, whilst the law on universal partnerships is clear, its application by the courts in this country in cases such as this one has been far from being uniform or satisfactory."

The learned judge then proceeded to consider four requisites of a partnership as follows: each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether money or D skill; the business to be carried out should be for the joint benefit of the parties; the object of the business should be to make a profit; and the agreement should be a legitimate one. He then concluded that the facts of the case before him revealed no more than an ordinary marriage relationship that did not constitute a universal partnership, as the parties were not involved in any commercial activity for the purposes of gain. This is what he had to say E at 716 H:

"What is clear from the facts of this case is that this was an ordinary marriage relationship. The parties were not involved in a commercial activity for the purposes of profit. Even if the plaintiff's claims were accepted in full, the services rendered by her did not go beyond those F ordinarily expected of a wife in her situation. In this situation, there can be no question of a tacit universal partnership."

It is mainly on the basis of the above decision that the defendant has argued that there was no tacit universal partnership between himself and the plaintiff.

This court has applied the principle of tacit universal partnership in a number G of cases. One such case is *Masimbe v Mungofa* HH-96-94. In this case, the parties were not married to each other even under customary law. The parties were a medical doctor and a nurse who had lived together for a long time. The point being made here is that the two were not engaged in any commercial venture for the purposes of profit but had simply lived together, pooling their resources and building a common estate. Although the court in this case did H

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A not specifically address the issue, the fact of their living together and pooling together their resources for their common good was tacitly held to constitute a universal partnership.

The principle of a universal partnership was also held applicable by the Supreme Court in the case of *Chapeyama v Matende & Anor* 2000 (2) ZLR 356 (S) where the parties were in an unregistered customary union for six B years and sought to have their common estate distributed upon their divorce. In this case, the husband was employed as a security guard while the wife used to knit jerseys and sell them. The parties later established a hardware business and part of the proceeds from the jerseys was used to purchase stock for the hardware side of business. In this matter, the

trial judge, whose remarks were quoted with approval by the Judge of Appeal, had this to C say:
See *Chapeyama v Matende & Anor* 1999 (1) ZLR 534 (H)
"In a case such as the present, where the evidence given during the trial indicates beyond any shadow of doubt that the parties to an unregistered union contributed equally for their mutual benefit to the accumulation of property acquired during such a union, a departure may be made from the D general rule. None of the parties will be prejudiced by an approach whereby the matter is decided on the basis of the whole evidence led during the trial, which evidence discloses the existence of a relationship on which a fair apportionment of property can be based. In this case, the evidence led discloses the existence of a common law concept and a basis must be laid for its application depending on the choice of law."
E Although the parties in this matter had a hardware business, it appears to me that the trial judge placed emphasis not on the business venture but on the fact that the parties had jointly contributed towards their mutual benefit and had acquired property as a result. In my view, the knitting of jerseys for sale cannot be said to be beyond what is expected of a wife in an unregistered customary marriage where the wife has such a skill. Every spouse is expected F to contribute his/her level best to the common household. It however does not follow that only those spouses who are involved in an income generating endeavour should be recognised at law.
In a South African case *V v De Wet NO* 1953 (1) SA 612 (O), De Beer JP held that a universal partnership existed between a man and his mistress who had bore him two children. The plaintiff lived with the deceased, a married man G who was living apart from his wife and borne him two children. The parties established a printing and decorating business where the plaintiff did the larger share of the work in addition to attending to the household duties. In concluding that a partnership existed between the parties, the judge also considered the fact that the mistress attended to the household duties attendant upon bringing up two children as part of the the plaintiff's H contribution to the partnership. He further regarded the aim of the partnership
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Makarau J
as a legitimate one in that the parties wanted to provide for their own A livelihood and that of their children.
The issue that then arises is whether or not before a court can hold that there existed a universal partnership between any two persons in a marital relationship, the parties to the union must in addition to living together and bringing up their common issue, also run a business venture. The absence of B a commercial venture seems to have been the basis upon which the learned judge in *Mtuda v Ndudzo* held that there was no partnership between the parties.
As I have demonstrated above, in this jurisdiction universal partnerships have been declared to exist in circumstances where the parties did not run a commercial venture but pooled their resources for their common good. In my C view, the implication of so declaring is to hold that where the spouses pool their resources for their common enjoyment, even if they are not involved in a commercial venture for profit, they are in a universal partnership for the purposes of their livelihood and the maintenance of their common household.
Given the two different approaches that emerge from this court. I am much persuaded to adopt the one that grants rather than the one that denies relief. D In my view, a court should not shrink from redressing an injustice when one can be redressed without offending public policy. In this regard I am guided by the remarks made by the Acting Chief Justice (as he then was), in the case of *Zimnat Ins Co v Chawanda* 1990 (2) ZLR 143 (S). He had this to say:
"Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital E role to play in moulding and developing the process of social change. The Judiciary can and must operate the law so as to fulfil the necessary role of effecting such development.
It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than F by the Legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that Judges do not merely discover the law, but they also make law. They take part in the process of creation. Law- making is an inherent and inevitable part of the judicial process. The opportunity to play a meaningful and constructive role in developing G and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law. even though there is a spate of judicial precedents which obstructs the taking of such a course. If judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand. In a famous passage Lord Atkin, H
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Makarau J
A referring to judicial precedents, said:
'when these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass through them undeterred.'"
I am much persuaded to pass through the ghosts of precedent undeterred for in my view, the need for the law to reflect the light of the society that it serves B cannot be over-emphasised. This in turn calls for dynamism in the law as society is ever developing.
In adopting the stance that I have, I am not charting any new territory. Judges in this jurisdiction have held that a tacit universal partnership existed where the parties were not running commercial ventures. Again in the case of *V v* C *De Wet (supra),* the learned judge did not limit the application of the partnership to the business assets only but extended it to the entire estate that the parties had accumulated. He awarded the plaintiff 50 percent of the entire assets of the estate.
The arguments in support of the view that an unregistered customary union establishes a tacit universal partnership are similar to the arguments advanced D by jurists who favour holding that there is universal community of property between married persons. Marriage itself is a union for life in common of a man and a woman. The legal rights and obligations created by marriage include community of life and the maintenance of one common household. This is an invariable consequence of marriage. As such, the parties contribute in their different roles to the successful running of their common household. E The common estate may be built by the industry of the husband and the thrift of the wife, but it belongs to them jointly as the one could not have succeeded without the other. As van der Heever J put it in *Edelstein v Edelstein NO & Ors,* the husband could not have successfully conducted his trade if his wife had not cooked the dinner and minded the children. It is on this basis that I hold that there existed a tacit universal partnership between the plaintiff F and the defendant in the above matter.
In the plea filed on behalf of the defendant, the existence of a tacit universal partnership was denied. This implies that there was no express agreement between the parties. In Roman Dutch Law, there is no presumption of equality of shares in a partnership, but the share of each partner is in G proportion to what they have contributed. On the basis of the above, the parties are to lead evidence as to their respective contributions. It is so ordered.
Mudambanuki & Associates, the plaintiff's legal practitioners H *Mtombeni, Mukwesha & Associates,* defendant's legal practitioner

1 Fieldsend CJ made the first call for legislative intervention in 1981 in *Chiromo* v *Katsidzira* 1981 ZLR 418 (A) during the first parliament of independent Zimbabwe. Calls for legislative intervention are still being made by both the High and Supreme courts in their judgments.
2 Section 7 of the Matrimonial Causes Act [*Chapter 5:13*]
3 Since 1985 with the promulgation of Matrimonial Causes Act

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[zRPz]DELTA CORPORATION & ORS v HARARE CITY COUNCIL & ORS 2002 (2) ZLR 182 (H)
2002 (2) ZLR p182

Citation 2002 (2) ZLR 182 (H)

Case No Judgment No. HH-132-02

Court High Court, Harare

Judge	Adam J
Heard	20 February 2002; 7 August 2002
Judgment	7 August 2002
Counsel	*J B Colegrave,* for the applicants Mrs *Y Dondo,* for the Minister
Case Type	Application for review
Annotations	No case annotations to date

[zFNz]Flynote
Town planning —master plan —change of use —factors which may be taken D into account —only sound town planning principles may be considered —not proper to consider "wider social and political implications" such as desirability of having indigenous businesses in the area
[zHNz]Headnote
The City of Harare town planning scheme, which covered portions of the E suburbs of Gunhill and Borrowdale, reserved three stands as a green belt area for public open space and recreation. In October 1979, adjacent land, previously zoned as residential land, consisting of eight stands, was re-zoned for office park use under a supplementary order, which in this zone only freely permitted special prestigious office buildings. F
The first applicant was one of the pioneers in the planning and construction of the prestigious special office complex. On the basis of the open space's special designation as a green-belt area, and confirmed as such by the council, the applicant specially selected its site adjacent to that green-belt area to establish and develop its office building designed in a landscaped setting to ensure that it was done in the best interests of the G neighbourhood, the environment and, particularly, the residents of the area. It was a selection based on the clear representations and undertakings given by the council that this was a green-belt area and was and would remain designated as such. In pursuance of its objective to enhance the green-belt area and to ensure the protection and preservation of national flora and fauna the applicant had spent considerable sums of money to H
2002 (2) ZLR p183
Adam J
A maintain and improve the green-belt area. In 1988 a subdivision was made for a wild life sanctuary and the three reserved stands were leased by the City of Harare to the applicants.
On 12 November 1998 the Minister sent a notice in terms of s 49(3) of the Regional, Town and Country Planning Act [*Chapter 29:12*], indicating that an application had been received from the council for the change of B reservation over the three stands from open space and recreational use to office use. The applicant objected, and filed affidavits in support from the owners of other offices in the office park area. The Minister referred the matter to the council. In November 1999, the Minister set up an advisory board in terms of s 67A of the Act. In April 2000, the Minister advised the applicant that, acting on the recommendations of C the board, he approved a change of use over one of the three stands to allow the second respondent to build office accommodation. The reason given by the board for the change of use were the "wider social and political implications" and the desirability of "having successful indigenous business enterprises move into the neighbourhood to be D next to their established business counterparts" . The applicant, in seeking judicial review of the Minister's decision, asserted that the reasons given by the advisory board had nothing to do with town planning and that the Minister had accordingly acted *ultra vires.* It was argued that it is implicit in Part IV of the Act, which deals with master plans and local plans, that sound town planning principles must, at all E times be adhered to. The Minister argued that he did not have to confine himself to town planning considerations and that his decision was reasonable.
The advisory board noted that the name of the party applying for change of reservation was not given in the papers. It also noted other irregularities, including the fact that a director of the second

respondent, the party F actually making the application, was a city councillor and had not recused himself from the meeting of the council at which the matter was discussed. It also pointed out that a similar application by another company several years earlier had been withdrawn, following objections from affected parties.

G *Held,* that a municipality that has acquired land must use it for the purposes for which it was acquired or for use which is permissible in terms of the operative master plan or local plans. However, the municipality may, in terms of s 49(2) of the Regional, Town and Country Planning Act [*Chapter 29:12*], with the consent of the Minister, dispose of land to anyone in such manner and subject to such conditions as may appear to H it to be expedient for the purpose of ensuring the best use of the land

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concerned or the erection on the land concerned of such buildings as A appear to be needed for the proper use of the land for the purposes for which it was acquired. The evidence indicated that the council's application to the Minister in this case was not made *bona fide.* The real applicant for change of use was the second respondent, but in terms of the Act it was the council, as owner of the land, that had to make the B application. The Minister, in treating the application as though it had come from the second respondent, had acted *ultra vires* the section.

Held, further, that once a master plan had been approved in terms of ss 13 and 14 and was in operation, the Minister's powers were prescribed by the Act. The Minister was obliged, when he considering an application in terms of s 49, to be satisfied that the council imposed conditions to C ensure the best use of the land concerned or the erection on the land concerned of such buildings as appear to the council to be needed for the proper use of the land for purposes for which it was acquired. This implied that the conditions had to be in accordance with operative master plan. Change of use thus had to be in accordance with sound town planning principles. The advisory board's (and thus, by implication, D the Minister's) rationale was that a need could be demonstrated for a change of zoning which would be seen to be taking account of new social and political realities in Zimbabwe. Such considerations were matters which were reserved for the legislature if they were not adequately covered by the Act. The Minister's decision was thus open to review on the grounds of unreasonableness. The advisory board, and E the Minister, took into account factors which should not have been considered and did not give due consideration to town planning principles.

Held, therefore, that the Minister's decision should be set aside

[zSTz]Legislation considered F

Regional, Town and Country Planning Act [*Chapter 29:12*], ss 13, 14 and 49

[zCAz]Cases cited

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680 (CA) G

Council of Civil Service Unions v Min for the Civil Svc [1984] 3 All ER 935 (HL)

Jackson v Adams 1958 R & N 747 (SR)

Jones v City of Salisbury 1972 (2) RLR 396 (A)

Metsola v Chrmn, PSC 1989 (3) ZLR 147 (S) H

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A *Muzonda v Min of Home Affairs & Anor* 1993 (1) ZLR 92 (S)

Nyoni v Secretary for Public Svc & Anor 1997 (2) ZLR 516 (H)

PF-ZAPU v Min of Justice (2) 1985 (1) ZLR 305 (S)

PSC v Tsomondo 1988 (1) ZLR 427 (S)

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

Salisbury, City of v Sagit Trust Ltd 1981 ZLR 479 (S) B

Trust Ins Brokers (Pvt) Ltd v Min of Finance 2000 (2) ZLR 462 (S)

Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor 1993 (1) ZLR 162 (S)

Watchtower Bible and Tract Society of Pennsylvania & Anor v Drum Investments (Pvt) Ltd & Anor 1993 (2) ZLR 67 (S)

[zCIz]Case information

C *J B Colegrave,* for the applicants

Mrs *Y Dondo,* for the Minister

[zJDz]Judgment

ADAM J: In this matter the applicant on the grounds of gross irregularity seeks an order to set aside the third respondent's authorisation of Stand 16921 of the Salisbury Township Lands from public open space to office use.

D At the hearing the applicant sought condonation for late filing of its application, which was granted. The third respondent ("the Minister ") sought condonation for late filing of his heads of argument, which was also granted. There was an affidavit filed by the shareholder of Kama Construction (Pvt) Ltd, but since leave had not been obtained from this court it was not E considered as shareholders do not have *locus standi.* The second respondent, in his capacity as the provisional liquidator of Kama Construction (Pvt) Ltd, has intimated that he will abide by the decision of this court and so has the first respondent ("the council"). Also, attention must be drawn to the fact that for these review proceedings not all papers, correspondence and documents that were before the third respondent have been filed - for example, the F appointment of the advisory board of 5 November 1999 and others.

It would be appropriate to give a brief background to this application. The City of Harare Phase 4, Section 2 Town Planning Scheme which covered portions of Gunhill and Borrowdale reserved for public open space and recreation - green-belt area - Stands 15727, 16686 and 16921. In October G 1979 adjacent land zoned as residential land consisting of eight stands was rezoned for office park under the approved Supplementary Order No. 7, which in this zone only freely permitted special prestigious office buildings. So this led to the development of Northridge Office Park. The Supplementary Order No.7 did not cover public open space reservation. In terms of the City of Harare Phase 4, Section 2 Town Planning Scheme the purpose of the H reservation was to provide an open space amenity to be used for passive

recreation for the general public. In 1988 a subdivision was made for a wild A life sanctuary and the open space (Stands 15727, 16686 and 16921) was leased by the City of Harare to the applicant and Trustees of the Astra Pension Fund. The applicant was one of the pioneers in the planning and construction of the prestigious special office complex. On the basis of the open space's special designation as green-belt area and confirmed as such by the council, B the applicant specially selected its site adjacent to that green-belt area to establish and develop its prestigious special office building, designed in a landscaped setting to ensure that it was done in the best interests of the neighbourhood, the environment and particularly the residents of the area. It was a selection based on the clear representations and undertakings given by the council that this was C a green-belt area and was and would remain designated as such. In pursuance of its objective to enhance the green-belt area and to ensure the protection and preservation of national flora and fauna, the applicant had spent considerable sums of money to maintain and improve the green-belt area.

In its founding affidavit, the applicant averred that on 12 November 1998 the Minister caused a notice to be sent in terms of s 49(3) of the Regional, Town D and Country Planning Act [*Chapter 29:12*] indicating that an application had been received from the council for the change of reservation over Stands 15727,16686 and 16921 from open space and recreational use to office use. The applicant is the owner of property adjacent to the proposed development, so it decided to object on 3 December 1998, since the open space in question E constituted an area of indigenous woodland containing a small selection of antelope and other flora and fauna which greatly enhanced the natural beauty of the area. It wrote a letter to the Minister which stated that the proposal to consider for conversion of the open space reservation to office use:

(a) is not in the public interest and no public need has been established;
(b) does not accord with town planning principles; F
(c) does not accord with the co-ordinated and harmonious development of the area;
(d) is not in the interest of the environment and the need to retain an already existing green-belt area and to preserve the natural flora and fauna;
(e) is against the best interests of the neighbourhood and the residents of the G area; and
(f) cannot be supported on any ground whatsoever and no justifiable ground has been submitted.

It averred that other objections were also made by Central Africa Building Society, Trustees of the Astra Pension Fund and Astra Holdings Ltd and Aon H

A Minet (Pvt) Ltd. Supporting affidavits were filed by them. As a consequence of these objections, the Minister on 7 January 1999 advised the applicant that the objections had been referred to the council for their comments and that he would advise of the council's response as soon as he received it. On 29 March 1999 the Minister wrote to the applicant and attached a copy of a letter addressing the objections raised by the applicant. The Minister requested a B response from the applicant. The copy of the letter dated 1 February 1999 is from Kama Construction, addressed to the council. The applicant was unaware of the existence of Kama Construction. From a perusal of their letter, it was clear that Kama Construction was the one that had made the application to the Minister

for the change of use. The applicant made its response on 22 April 1999. questioning the Minister sending a response from C Kama Construction. It must be remembered that Minister had stated that he would provide the council's response to the applicant's objections as soon as he received it. The Minister, in terms of s 67A(1) of the Act, set up an advisory- board on 5 November 1999. On 13 July 2000 the Minister advised the applicant that the advisory board had produced and submitted their report. D After taking into consideration various economic, social and town planning concerns, the board recommended that only one stand - Stand 16921 - could be developed, leaving stands 15127 and 16686 as open spaces. The Minister subsequently gave authority to change the reservation over Stand 16921 from public open space to office use, subject to conditions. There were no reasons given by the Minister. The applicant requested a copy of the advisory board's E report, which it received on 22 August 2000. Only after this did the applicant become aware of the reasons for the change of use recommended and accepted by the Minister. The advisory board's conclusion, set out in its report stated:

"...although the need for change of use has not been established by the F applicant, the application has wider social and political implications, which in this case could demonstrate the need for a change of use on the stands in question."

The "wider social and political implications" would be the desirability of:

"...having successful indigenous business enterprises move into the neighbourhood to be next to their established business counterparts" .

G This, in all probability, is not a proper town planning consideration and should not, therefore, have provided the reason for the board's recommendation. The Minister accepted the recommendation of change of use, and one can only reasonably infer that he did so for the reason given by the advisory board. The applicant asserted that it is not a reason that has anything to do with sound town planning considerations and, because of it, F the Minister acted *ultra vires* his powers in granting his authority.

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In the opposing affidavit, the Minister averred that the applicant did indeed A make objections, but in dispute is the extent to which the indigenous woodland and small selection of antelope "greatly enhance the natural beauty of the area and its surrounds for the benefit of residents of Harare as alleged" . The Minister was of the view that there were sufficient grounds for development of one of the three stands. The claim that no public need B whatsoever has been shown is disputed. Public need is of limited value to the application. The authorised offices are to be used directly by the applicant. The authorised offices will neither be leased nor sold. The Minister did not support the application in its original form, but confined it to Kama Construction's space and "blue chip" location requirements and needs. There is no gross irregularity in the Minister's decision. All legal procedures were C complied with and all material facts relevant to the application were considered diligently. It was never the intention of legislature in enacting ss 67 and 68 of the Act that the Minister should confine himself to only town planning considerations on such applications. There is no legal obligation for the Minister to confine himself to town planning considerations. The Minister did not act *ultra vires* his power in granting his authority. He acted legitimately D and reasonably, given the merits of the case, and the sound and pragmatic advice he received from the advisory board. The Minister considered all relevant planning and socio-economic factors relevant to the application. The conditional approval granted by the Minister constituted sound town planning. A genuine effort was made by the Minister to weigh all issues pertaining to this development proposal and pass judgment thereon. E

In its answering affidavit, the applicant averred that, on the one hand, the Minister disputes the fact that no public need whatsoever has been shown for the change of use, but, on the other hand, he states that public need is of limited value to the application. This the applicant found confusing. The applicant also found the observation that the authorised offices will neither F be leased nor sold similarly confusing. How could such be prevented at least over an extended period of time? The applicant noted from the Minister's affidavit that it is not denied that he accepted the recommendation by the advisory board for the reasons set out by the applicant.

In the applicant's heads of argument it submits that the advisory boards' report stated that no need for a change of use had been established by Kama G Construction, which had been treated in the hearings before the advisory board as the applicant. *Prima facie,* therefore, in terms of accepted town planning principles, no case has been made out for allowing an office building in a pleasant woodland which abutted onto both Whitwell Road and Ridgeway North and which woodland the applicant was most anxious to H

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A preserve: *City of Salisbury v Sagit* 1981 ZLR 479 (S). The basis for change of use given by the advisory board was that of wider social and political implications, coupled with the desirability of having successful indigenous enterprises move there. But in the absence of any need for a change of use. this is not a valid reason. The Minister stated that he considered all relevant planning and socio-economic factors relevant to the application. B In the absence of any need for a change of use being established, the applicant submits that there were no sound town planning reasons for approving any change of use. The socio-economic factors are also not a valid town planning reason: *Jones v City of Salisbury* 1972 (2) RLR 396 (A). The advice of the advisory board is inconclusive. The Minister is obliged to adhere to sound planning principles. He has no right to ignore those principles. His powers do C not extend that far. The applicant submits that it is implicit in Part IV of the Act, which deals with master plans and local plans, that sound town planning principles must, at all times, be adhered to.

In his heads of argument, the Minister submits that the applicant has not shown there were procedural flaws in the process of granting the application. D In fact, from the record it is clear that the Minister took all necessary steps to ensure that the application was properly considered. He submits that the applicant does not allege the decision to allow the change of use was unreasonable but contends that an irrelevant consideration was used in arriving at the decision. He submits that this court can only interfere with his decision if it is grossly unreasonable. It is not sufficient to show that it was E simply unreasonable: *Nyoni v Secretary for the Public Service & Anor* HH- 193-97.

The council's application of 22 July 1998, made by its Director of Works on its behalf to the Minister, was in terms of s 49(3) and (4) of the Act. It stated that the owner was the council, with the size of the property being 31240 F square metres (3.1 hectares). It indicated that the council had resolved that the change of use be granted. It concluded that the:

"open space in question is adjacent to an existing office park housing the headquarters of a number of organizations. To grant change of use to this open space would simply imply an extension to the existing office park.

Furthermore, there is a provision for open space and recreation further G south of this area which should cater for the residents' open space and recreational needs."

It therefore recommended accordingly. It gave the names and addresses of ten owners of abutting properties.

In its report of 18 May 2000, the advisory board stated that the application H did not state the name of the prospective developer. It pointed out that the

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council's application did not contain any evidence that this would be the best A use of the land concerned. It indicated that the copies of the parts of the council minutes dealing with its support for change, sent with the application to the Minister, lacked detail as to what the council approved. The minutes did not reflect which councillors were present at the meeting that resolved to recommend the change of use. The advisory board found that a director of B Kama Construction was a city councillor at the time of the application and was present at the council meeting that considered the matter. The advisory board's criticisms of the application were that (a) it did not inform the council or the Minister who the developer was (this was only revealed 15 months later when the council had been requested to respond to the objections); (b) the size of land on the application was less than the whole area of the three C stands (8.5 hectares); (c) the information in the council minutes and other materials was very scanty; (d) the need for change of use was not established: (e) there is no evidence that the director of Kama Construction as city councillor recused himself during that council meeting: (f) the list of owners with abutting properties was not as comprehensive as the list used when a similar application by Hunyani Holdings was made. Indeed. Borrowdale D Junior School, the only property owner to the north of this open space, was not on the list to be notified; (g) the Minister requested the council to reply to objections received but it did not do so as the applicant and the Minister did not query it; and (h) there was a long lapse of time between the notification to the abutting property owners in November 1998 and the publication of the notice in the newspaper in February 1999. It indicated that the current E application appeared to be similar to the application made in 1991 by Hunyani Holdings to the council, which was submitted to the Minister, covering the same three stands and seeking a change of use of 3.2 hectares. (This may provide the explanation for the counci's application for 3.1 hectares). There were 47 objectors to Hunyani Holdings' application. Their F main objections were (a) the public would lose use of the open space and the "green lung"; (b) it would lead to loss of environmental amenity of the existing woodland with the indigenous trees and small fauna; (c) there is an existing traffic problem on Ridgeway North at the junction of Whitwell Road; the

proposed change would exacerbate the traffic problem and the traffic would be more hazardous for the children of the Borrowdale Primary G School; and (d) there is no need for this particular site, in view of the fact that other areas for offices were available elsewhere in Harare for development. That application of Hunyani Holdings was withdrawn. The advisory board stated that unlike to the Hunyani Holdings application, the present application gives no information on the development proposed for the stands and no conditions attached. The information relating to the application has come out H

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A in bits and pieces during the investigations by the advisory board right up to the time of its sittings. The advisory board commented that the consequence of lack of clear information on the application itself and the confusion caused by lack of attention to the statutory procedural requirements of the Act meant that the various parties involved were not fully informed of what was proposed. The advisory board recorded its displeasure at the apparent lack of B transparency in the procedures followed by the council in the handling of this application. The advisory board showed concern at the council's lack of an inventory of open spaces. Its survey of the area in question revealed the existence of a number of open spaces, although most (if not all) of the open spaces were in poor condition. The applicant stated that the area of open space C leased by it was a fenced off area currently inaccessible to the public at large. This was so in order as to prevent unlawful dumping of waste. Access could be gained through a gate near the applicant's offices. The advisory board stated that there is no doubt that this open space provides a "greenbelt" and that the fencing does not prevent a passive consumption of the amenity. The advisory board recommended that, before any possible rezoning of open D space, the council carry out a study to determine the possible impact that might occur as a result of the possible loss of open space to development and that planning for open spaces becomes an integral part of the overall city- wide or local plans. The advisory board drew attention to the traffic volumes which are quite large and increasing and that the situation is worse during peak hours and during the time of picking up school children. The public open E space is bounded to the north, across Whitwell Road, by Borrowdale Primary School; St Michael's Primary School on Ridgeway North, opposite Borrowdale Junior School, is within half a kilometre of the public open space; to the south by Northridge Office Park; and to the west by the remainder of Borrowdale Common and Borrowdale West residential area. The advisory board also referred to the Harare Combination Master Plan F approved in February 1994 in which issues relevant were:

Goal A: Ensure conservation and protection of woodlands, natural and made environments.

Objective 1: All major physical development projects should be subjected to environmental impact assessments before implementation.

G **Policy 24:** Provide accessible passive and active recreational facilities to satisfy the demand for such by both motorist and non-motorist recreation pursuers.

What is very clear is that on 7 January 1999 the objections from the applicant were sent by the Minister to the council. On 15 January 1999 the council's H Director of Works wrote to Kama Construction (neither letter was in the

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record of proceedings filed in this court). On 1 February 1999 Kama A Construction made its comments to the Director of Works. There is nothing to indicate that the council had passed a resolution for Kama Construction to provide responses to objections made to its application to the Minister, nor that such responses should be communicated to anyone else on its behalf. On 10 March 1999 the Minister forwarded more objections to the council (no B letters pertaining to this were in the record of proceedings filed in this court). On 4 and 24 March 1999 Kama Construction replied to the Director of Works (none of these replies are in the record of proceedings filed in this court). On 29 March 1999 the Minister forwarded a copy of Kama Construction's letter of 1 February 1999 to the applicant (no correspondence pertaining to how the Minister obtained a copy of the letter of 1 February 1999 was in the record of C proceedings filed in this court). On 22 April 1999 the applicant replied to the Minister pointing out that no comment had been made to the points raised by it. It considered that the procedures that were followed were defective and not in accordance with the law and that any authorisation in terms of that application would be invalid for the following reasons:

A. the letter referred to an application from the City of Harare; D

B. there was no indication as to what special conditions, if any. the Minister was likely to impose concerning the office used.

The legislation governing the matter is the Regional, Town and Country- Planning Act [*Chapter 29:12*] which makes provision, among other things, for master and local plans to be prepared by the local planning authority (the E city council) which are approved by the Minister, and become the operative master plan. It also provides for the acquisition of land which is to be vested in the municipality. The municipality that has acquired land shall use it for the purposes for which it was acquired or for use which is permissible in terms of the operative master plan or local plans. A municipality that has acquired land may, in terms of s 49(2), with the consent of the Minister, dispose of land F to anyone in such manner and subject to such conditions as may appear to it to be expedient for the purpose of ensuring the best use of the land concerned or the erection on the land concerned of such buildings as appear to be needed for the proper use of the land for the purposes for which it was acquired. Section 49(3) provides that, notwithstanding an operative master plan or G local plan, the Minister may authorise the use of any reserved land for a purpose other than that for which it was so reserved. But the Minister may not authorise any use until he has served notice on every owner adjacent to the reserved land and afforded them an opportunity of lodging objections and representations. Section 49(4) provides that, notwithstanding an operative master plan or local plan, land which has been acquired by the municipality H

A for public purposes in terms of this Act may, with the consent of the Minister, be transferred free from any restriction limiting the use of the land to public purposes. But the Minister may not give such consent until he has given public notice inviting objections and representations and has given the municipality concerned an opportunity to respond to the objections and representations. Section 49 (4a) states that the Minister may refer any B objections and representations to an advisory board before making his decision.

The council, according to the application of 22 July 1998, submitted it in terms of s 49(3) and (4) of that Act. It is clear that since the council would have been contemplating the disposal of Stands 15127, 16686 and 1692, the C ownership of which vested in it, the council would have been required to abide by the provisions of s 49(2).

The record of proceedings filed before this court do not reveal that the council was *bona fide* in making its application in terms of s 49(3) and (4) of the Act. The advisory board stated that there was apparent lack of transparency in the submission of the application by the council since there is no evidence that D the director of Kama Construction who was a city councillor recused himself during the deliberations of the meeting of the council, when the resolutions were adopted accepting the recommendation of its environmental management committee. That committee recommended that an application be made by the council for change of use. The advisory board stated that the information on E which that recommendation was made, as revealed in the minutes and relevant documents, was scanty and there was lack of clear information on the application itself to the Minister. The advisory board quite candidly pointed out that the information (not from the council) relating to the application to the Minister had come from Kama Construction in bits and pieces in the course of the advisory board's work up to the time of the sittings F of the advisory board.

The applicant had, in its letter of 22 April 1999 to the Minister, stated that it now noted that the applicant for the change of use was Kama Construction. The advisory board report, in paragraph "1.0" under "introduction," states that in terms of s 49 the Minister received an application for change of use from the council but in para "3.0" it gives the caption "application by Kama G Construction for change of use."

It would appear that both the council and the Minister were well aware, before the appointment of the advisory board in November 1999, that the council was not really applying for the change of use. The party doing so was Kama Construction. The Minister, in his letter of 12 November 1998 sent to the H applicant, said the applicant for change of use was the City of Harare. Despite

this the Minister treated Kama Construction as the applicant. It is abundantly A clear from the record of proceedings, particularly the copies of the minutes of the hearings of advisory board, that the applicant for change of use was Kama Construction. In his opposing affidavit, the Minister averred that the authorised offices were to be used directly by Kama Construction. He continued that he did not support the original application (from the council) B in its original form, but confined it to Kama Construction's location needs and space. The Minister has admitted that he did not support the original application and the record of proceedings filed before this court do not disclose that another application was made to him. It is more than likely that he wrongly treated the letter of 1 February 1999 as the application. Just because it was made available to the Minister did not mean that he was C entitled to regard this as an application in terms of s 49. Kama Construction did

not own the land in terms of s 49, because the ownership vested in the council. Only the owner of the land, which is the council, in terms of s 49(3) and (4) of the Act, could apply to the Minister for him to authorise the change of use of reserved land or for him to give his consent for transfer of land acquired for public purposes. The council, in allowing Kama Construction to D be the applicant without a resolution from the council acted *ultra vires* the provisions of s 49(3) and (4) of the Act. The council's resolution was tainted by the participation of the director of Kama Construction in the meeting of council. The Minister, in treating Kama Construction as the owner of the land without the necessary resolution from the council, acted *ultra vires* those same provisions of the Act. The Minister did not in terms of s 49(3) serve E notices to all the adjacent property owners. He thereby denied a large number (according to the advisory board report) an opportunity to object or to make representations.

Turning to the applicant's heads of argument, where submissions were made concerning accepted town planning principles, s 13 of the Act requires a F study to be done before a master plan can be prepared. Section 14(2) provides that a master plan shall —

(a) formulate policies of the municipality and its general proposals for the planning area in respect of the co-ordinated and harmonious development or redevelopment and other uses of land, including measures for G

(i) the regulation of the use of land and the construction and use of buildings; and

(ii) the conservation and improvement of the physical environment, including the preservation of buildings of special or architectural merit and historic interest; and the economic development of the planning area; and

(iii) the movement of traffic therein, including the closure and diversion H

A of roads; and

(b) set out the relationship of the above proposals to the major proposals for land use and traffic in any neighbouring area which affect the planning area; and

(c) indicate the manner in which the policies and proposals referred to above are justified by the study (done before the preparation of the master plan) B and by any other information obtained by the city council; and

(d) indicate parts of the planning area which are of high scenic value and should be protected.

Section 16 provides that the city council shall submit to the Minister the draft master plan as well as the study done and a report of objections and C representations together with the council's views on the objections and representations. The Minister may return the draft master plan with directions as to what should be done. The Minister, in considering the draft master plan, must take into account reports submitted, consider the objections or representations and cause a local inquiry to be made into any master plan which, in his opinion, should be the subject of such an inquiry. He may D approve the draft master plan submitted or resubmitted subject to such modifications or reservations, if any, as he deems fit and shall thereafter give notice in the *Gazette* of his decision and indicate when it will become operative.

It is clear from the foregoing that once there is an operative master plan, the E powers of the Minister to intervene thereafter are prescribed by the Act. The provisions of s 49 and s 67A confine the Minister to what is provided in the Act. The use of the expression "town planning considerations" by the applicant was meant to refer to what is provided in s 14. There is a legal obligation on the Minister, when he considers applications in terms of s 49, to be satisfied that before the city council disposes of land acquired by it that F it imposes conditions for purposes of ensuring the best use of the land concerned or the erection on the land concerned of such buildings as appear to the city council to be needed for the proper use of the land for purposes for which it was acquired. This implies in accordance with the operative master plan.

G In *Jones v City of Salisbury* 1972 (2) RLR 396 (A) Macdonald JP (as he then was) said at 398-300: "On the contrary, the court, guided by the fundamental principles of town planning set out in s 27 of the Act, had to be satisfied that the grant of special consent was justified as being in accord with the sound town H planning requirements of the area."

In the Minister's heads of argument it was submitted that the applicant did A not allege the decision to authorise change of use was unreasonable, only that irrelevant considerations were used in arriving at the decision. It was also submitted that the court can only interfere with the Minister's decision if it is grossly unreasonable. It is not sufficient to show that the decision was simply unreasonable. Reliance was placed on *Nyoni v Secretary for Public Service supra.* But that case does not even use the words "grossly B unreasonable" . In fact it held that a decision may be set

aside on the grounds of unreasonableness where there is no evidential basis for the conclusion arrived at.

In *Jackson v Adams* 1958 R & N 747 (SR) at 953 Quenet J (as he then was) said: C

"I agree with the respondent's counsel that this court should only interfere with the town planning court's judgment if it finds that the decision was not based on reasonable grounds, that some wrong principle was applied, that matters were taken into account which should not have been considered, or that matters were not considered which should have been taken into account." D

In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 (CA) at 682-683 Lord Greene MR said:

"The courts can only interfere with an act of an executive authority if it is shown that the authority have contravened the law.. .The law recognises certain principles on which the discretion must be exercised... E

What, then are those principles? They are perfectly well understood. The exercise of such discretion must be a real exercise of discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general F interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty — those, of course, stand by themselves — unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all G been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as H

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A a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. B Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. C In fact, all these things largely fall under one head" .

And later at 683E:

"Theoretically it is true to say — and in practice it may operate in some cases — that a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."

D In *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 950-951 Lord Diplock said:

"Judicial review has. I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on E which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...

By 'illegality' as a ground for judicial review I mean that the decision- maker must understand correctly the law that regulates his decision- making powers and must give effect to it...

F By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 860, [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 G mind to the question to be decided could have arrived at it...

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural H rules that are expressly laid down in the legislative instrument by which

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its jurisdiction is conferred, even where such failure does not involve any A denial of natural justice." `
This decision has been followed in *PF-ZAPU v Minister of Justice* (2) 1985 (1) ZLR 305 (S) at 325-6. *Rushwaya v Minister of Local Government* 1987 (1) ZLR 15 (S) at 18-19: *Public Service Commission v Tsomondo* 1988 (1) ZLR 427 (S) at 442: *Metsola v Chairman. Public Service Commission* 1989 (3) ZLR 147 (S) at 158, B *Muzonda v Minister of Home Affairs* 1993 (1) ZLR 92 (S) at 99; *Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor* 1993 (1) ZLR 162 (S) at 168; *Watchtower Bible and Tract Society of Pennsylvania & Anor v Drum Investments (Pvt) Ltd & Anor* 1993 (2) ZLR 67 (S) at 69; and *Trust Insurance Brokers (Pvt) Ltd v Minister of Finance* 2000 (2) ZLR 462 (S) at 468. C
It is clear that the Minister's decision is open to review proceedings on grounds of "Wednesbury unreasonableness." The Minister acted on the recommendation of the advisory board (according to his letter of 13 July 2000 to the applicant) which took into consideration various economic, social and town planning concerns. The applicant submitted that the advisory board's conclusion was that although the need for change had not been D established by Kama Construction, the application has wider social and political implications in terms of the definition of "need." so the wider social and political implications, according to the applicant, would appear to be the desirability of having successful indigenous enterprises move into the neighbourhood. The advisory board's rationale was that a need could be E demonstrated for a change of zoning in which case planning would be seen to be taking account of new social and political realities in Zimbabwe. Such considerations surely are matters which are reserved for the legislature if they were not adequately covered by the Act. It would seem that the advisory board's view was that when the Minister in February 1994 approved the Harare Combination Master Plan he did not take into consideration (some 14 F years after independence) the new social and political realities in Zimbabwe. The advisory board's "compromise" selection of Stand 16821 directly opposite Borrowdale Primary School was based on the advisory board trying to steer a middle course that would bring about a compromise between the objectors and Kama Construction. In so doing, pragmatic extraneous G circumstances of the location of a successful indigenous enterprise (based on the personal preference of a director of Kama Construction) was given prominence which should not have been considered by the advisory board (and by implication the Minister) while sound planning principles in terms of the Act were not duly considered which should have been taken into account. Therefore the Minister's decision cannot stand. H
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Adam J
A In conclusion, the advisory board report has recorded the failure by the council and the Minister to adhere to the requirements of the Act. This must be of great concern to the public. Transparency should be of paramount importance in all applications under the Act.
Accordingly, it is ordered that the authority to change the reservation over B Stand 16921 Salisbury Township Lands from public open space to open land given by the Minister is set aside and that the Minister shall pay the costs of this application.
Scanlen & Holderness, applicant's legal practitioners *Mtombeni Mukwesha & Associates,* first respondent's legal practitioners C *Civil Division of the Attorney General's Office,* third respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/LOWVELD LEATHER PRODUCTS (PVT) LTD v INTERNATIONAL FINANCE CORPORATION LTD & ANOR 2002 (2) ZLR 200 (H)

[zRPz]LOWVELD LEATHER PRODUCTS (PVT) LTD v INTERNATIONAL FINANCE CORPORATION LTD & ANOR 2002 (2) ZLR 200 (H)
2002 (2) ZLR p200

Citation	2002 (2) ZLR 200 (H)
Case No	Judgment No. HH-176-02
Court	High Court, Harare
Judge	Karwi J
Heard	24 July 2002; 7 August 2002
Judgment	7 August 2002
Counsel	*F Girach,* for the applicant *O Mutero,* for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

[zFNz]Flynote
Practice and procedure — execution — sale — judgment expressed in foreign currency but payable in Zimbabwe —contract providing that payment only to be made in foreign currency — effect
[zHNz]Headnote
The first respondent, an international finance institution, had loaned the E applicant a sum of money for a project to set up a business which would export leather products. The loan agreement stated that the repayments were to be made in United States dollars. When the loan was not repaid, the first respondent obtained judgment for the sum loaned plus interest. A writ of execution was issued. The applicant then tendered the F equivalent in Zimbabwe currency at the official rate of exchange (which was substantially less than the *de facto* rate). The applicant sought an interdict to prevent execution, arguing that the first respondent could not insist on payment of the debt in foreign currency and that execution could not be levied in foreign currency.
Held, that the loan agreement specifically stated that payment could not be G satisfied by the tender of anything other than United States dollars. Even though the sale in execution was to be in Zimbabwe dollars, the proceeds had to be converted to United States dollars by arrangement with the Government of Zimbabwe, in order to comply with exchange control requirements. There were no grounds to grant an interdict, as the probabilities of success on the part of the applicant were dim. H
2002 (2) ZLR p201
Karwi J
[zCAz]Cases cited A
Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd 2002 (1) ZLR 632 (H)
Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe 1988 (2) ZLR 482 (S)
Ndauti v Kgami & Ors 1948 (3) SA 27 (W)
B *Philips Electrical (Pvt) Ltd v Gwanzura* 1988 (2) ZLR 117 (H)
[zCIz]Case information
F Girach, for the applicant
O Mutero, for the respondent
[zJDz]Judgment
KARWI J: The applicant seeks the following interim order:
C "That pending the final determination of this matter on the return date —
1. The second respondent be and is hereby indicted and restrained from proceeding with execution of the judgment obtained by the first respondent against the applicant in HC 1130/02."

The applicant's director, Rose Mazula, deposed to an affidavit which formed D the basis of this application. In her affidavit she states that the first respondent, which is an international finance institution established under articles of agreement between its member states, which include the Republic of Zimbabwe, obtained judgment against the applicant in case No. HC 1130/02 for payment of —

(a) US$300 000; E

(b) US$ 155 122.05. being interest on the above figure calculated at 12.385 per cent to 1 January 2002;

(c) US$62 111.26, being interest on overdue capital and interest;

(d) Further interest on the sum of US$300 000 calculated from 2 January 2002 to date of full payment; F

(e) Commitment fees of US$444.41;

(f) Collection commission and costs on the legal practitioner scale, all arising out of a contract of loan entered into between the parties on 10 March 1997.

Pursuant to the judgment, the first respondent issued a writ of execution G against the applicant for the recovery of the judgment debt, which writ was served on the applicant on 26 June 2002. A notice of attachment was served on the applicant on 27 June 2002. From the time that the applicant received the notice of attachment, it attempted to engage the first respondent in negotiations with a view to reaching a compromise settlement. All settlement H proposals made by the applicant were spurned by first respondent, which

2002 (2) ZLR p202

Karwi J

insisted on full payment. The applicant then tendered payment of the full A judgment debt in the local currency equivalent converted at the official rate. The second respondent, under instructions from the first respondent, refused to accept payment. The first respondent insisted on payment in United States dollars.

Mr *Mutero,* for the first respondent, referred to s 3.06 of the loan agreement, B which provides that "Payments due to the IFC under this Agreement shall be made in Dollars, in immediately available funds, in such place as IFC shall from time to time designate." "Dollars" is defined in the agreement as "the lawful currency of the United States of America." More pertinently, s3.109 of the loan agreement provides that:

"Currency Indemnity C

The obligation of the Company (Applicant) to pay in Dollars the aggregate amount of the principal of, and interest, front-end fee and commitment fee on. the Loan and any other amounts payable in Dollars under this Agreement shall not be deemed to have been novated, discharged or satisfied by any tender of (or recovery under judgment expressed in) any currency other than Dollars, except to the extent to D which such tender (or recovery) shall result in the effective payment of such aggregate amount in Dollars at the place specified pursuant to this Agreement and accordingly, the amount (if any) by which such tender (or recovery) shall fall short of such aggregate amount shall be and remain due to IFC as a separate obligation, unaffected by judgment having been obtained (if such is the case) for any other amounts due E under or in respect of this Agreement."

Mr *Girach,* for the applicant, submitted that the first respondent cannot insist on payment of the judgment debt in foreign currency, even if in terms of the agreement signed by and between the parties payment was to be in United States dollars and that as payment of the full judgment debt had been tendered F in the Zimbabwe dollars equivalent, execution should not take place. He also made it clear that it was unreasonable for first respondent to insist on proceeding with execution if no payment in United States dollars is made, even though at the end of the day the proceeds of the sale in execution will be in local currency, as execution cannot be levied in foreign currency. He added that the applicant will clearly suffer irreparable harm as it will lose all G its machinery and premises from which it operates in a situation where it is able and willing to pay off the debt. He said the applicant was unable to obtain the foreign currency of the magnitude of the judgment debt to be able to satisfy it. The foreign currency situation in the country prevented it from doing so.

Mr *Mutero* strongly argued that the applicant was in the business of providing H

2002 (2) ZLR p203

Karwi J

A both wet blue and finished leathers for export and was therefore able to pay in foreign currency. In fact, the loan acquired by the applicant from the second respondent was to fund that project for export. Mr *Mutero* also added that his client was aware that execution was to be carried out in local currency. The issue of foreign currency would be between it and the Government of Zimbabwe, in terms of the articles of agreement between it B and the Zimbabwe Government. Mr *Mutero* added that *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (S)

was distinguishable from this case. So too was *Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H). He said that the point of distinction was that the above cases dealt in the main with the question of whether or not judgment can be granted in foreign currency, whereas this C case dealt with the question of whether or not, pending the final determination of the issue, the first respondent should be interdicted and restrained from proceeding with execution of its judgment, having refused to accept payment which had been tendered in full in local currency.
The issue to be decided is whether or not the applicant should be granted an D interim interdict in the circumstances of this case. The elements necessary for the granting of an interim interdict were clearly laid down in *Philips Electrical (Pvt) Ltd v Gwanzura* 1988 (2) ZLR 117 (H) at p 122 as follows:

"(a) a *prima facie* right;

(b) a well-grounded apprehension of irreparable harm if the interim E relief is not granted and the ultimate relief is eventually granted;

(c) that the balance of convenience favours the granting of an interim interdict; and

(d) that the applicant has no other satisfactory remedy."

It is obvious that the above prerequisites are inter-related and that, as *per* F Ettlinger AJ in *Ndauti v Kgami & Ors* 1948 (3) SA 27 (W) at 37:
"Upon consideration of all the circumstances and particularly upon a consideration of the probabilities of success of the applicant in the action, and the nature of the injury which the respondent, on the other hand, will suffer if the application is granted and he should ultimately turn out to be right, and that which the applicant, on the other hand, might sustain if the application is refused and he should ultimately turn out to be right..."
G In the instant case, the applicant is willing and able to pay off the debt in full in the Zimbabwe dollar equivalent. The first respondent insists that applicant is an exporter of leather and is able to pay in United States dollars. The first respondent also insists that the terms of the loan agreement should be enforced and therefore execution should be allowed to proceed. The first H respondent accepts that the sale in execution will be in Zimbabwe dollars,
2002 (2) ZLR p204
Karwi J
which proceeds will be converted to United States dollars and that this issue A will be determined by the Zimbabwe Government.
The applicant did not seek to challenge s 3.09 of the loan agreement entered into by and between the parties, which provides that it had "to pay in dollars the aggregate amount of the principal of and interest, front-end fee and commitment fee, on the loan and any other amounts payable in dollars under B this Agreement shall not be deemed to have been novated, discharged or satisfied by any tender of (or recovery) under judgment expressed in/any currency other than dollars" .
There was no challenge against the strict enforcement of the loan agreement. The applicant also could not challenge the fact that despite the fact that the sale in execution was to be in local currency, the first respondent was to negotiate with the Zimbabwe Government C in order to effectively have the judgment debt satisfied in full as ordered in HC 1130/92 without contravening any provisions of the Exchange Control Act and Regulations.
It is in view of the above position that, after applying the elements necessary for the granting of an interim interdict to this matter and in particular upon D consideration of the probabilities of success of the applicant in this action, that the probabilities of success on the part of the applicant are considered dim.
It is in view of this position that the application be and is hereby dismissed with costs. E *Kantor & Immerman,* applicant's legal practitioners *Sawyer & Mkushi,* legal practitioners for the first respondent F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/ZESA STAFF PENSION FUND v MUSHAMBADZI 2002 (2) ZLR 205 (S)

[zRPz]ZESA STAFF PENSION FUND v MUSHAMBADZI 2002 (2) ZLR 205 (S)
2002 (2) ZLR p205

Citation	2002 (2) ZLR 205 (S)
Case No	Judgment No. S-57-02
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza AJA
Heard	16 May 2002; 8 August 2002
Judgment	8 August 2002
Counsel	*P Nherere,* for the appellant *C Selemani,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Practice and procedure — judgment — default judgment — execution D following — prevention of — remedies available — interdict not appropriate remedy —rescission should be sought
[zHNz]Headnote
The appellant obtained judgment against a bank with which it had deposited monies, which had not been repaid. The respondent, the bank's chief executive officer, had bound himself as surety and co-principal debtor. E The appellant obtained default judgment against the bank and the respondent, and sought to execute against the respondent's movable property, the bank itself having been placed in curatorship. The respondent did not apply for rescission. Instead, he sought and obtained an order returning the property and an interdict restraining the sheriff F from proceeding with the auction.
Held, that no cause of action was shown. The appellant, having obtained judgment, was entitled to execute its judgment. While execution may be stayed by the High Court, this is usually done pending an application for rescission. No such application was pending and the grant of the final order would effectively amount to a permanent denial of the appellant's G right to execute judgment.
Held, further that the grant of a stay of execution is discretionary. It is only made where real and substantial justice requires a stay or where injustice would otherwise result. The requirements of justice did not dictate that there should be a stay of execution in this case. If anything, injustice would result if the appellant were not allowed to execute its H judgment.
2002 (2) ZLR p206
Ziyambi JA
Held, further, that neither a clear right nor *a prima facie* right having been A established, there was no basis for the grant of an interdict.
[zCAz]Cases cited
Durma (Pvt) Ltd v Siziba 1996 (2) ZLR 636 (S)
Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, & Anor 1973 (3) SA 685 (A) B
Flame Lily Investment Company (Private) Limited v Zimbabwe Salvage (Private) Limited and Another 1980 ZLR 378 (G)
Sanachem (Ply) Ltd v Farmers Agri-Care (Pty) Ltd & Ors 1995 (2) SA 781 (A)
Setlogelo v Setlogelo 1914 AD 221 C
[zCIz]Case information
P Nherere, for the appellant
C Selemani, for the respondent

[zJDz]Judgment

ZIYAMBI JA: The background to this matter is conveniently set out in the appellant's heads of argument. The respondent was, at all material times, the D chief executive officer of Universal Merchant Bank of Zimbabwe Limited, trading as Unibank. The appellant deposited monies with Unibank, which monies were payable in June 2000. The respondent bound himself as surety for and co-principal debtor with Unibank in respect of the latter's indebtedness to the appellant.

In June 2000, Unibank failed to repay to the appellant the sum of E $13 078 406.49 and the appellant sued both the respondent and Unibank in the High Court. On 13 September 2000, the appellant obtained default judgment against Unibank and the respondent. No application was made to rescind the judgment.

Unibank having failed to satisfy the judgment debt and having been placed F under curatorship, the appellant took out a writ of execution and, on 17 September 2001, movable goods belonging to the respondent were attached and removed. The respondent filed an urgent chamber application seeking the following relief:

"That you show cause to this Honourable Court why a final order should G not be made in the following terms:

(a) That the goods attached and removed under case No. 8838/00 be and are hereby immediately forthwith returned to the applicant.

INTERIM RELIEF SOUGHT

Pending determination of this matter the applicant is granted the following relief: H

(a) That A this order act as an interim interdict preventing the Deputy Sheriff of Harare from proceeding with the auction.

(b) That costs of this application be borne by the first respondent."

It will be seen that the respondent sought, as final relief, a permanent stay of execution and, as interim relief, an interdict restraining the Deputy Sheriff from selling the respondent's goods in execution. The respondent alleged B that the goods attached, being valued at $500 000, were insufficient to satisfy the debt which had now risen to $23 000 000. He alleged also that Unibank was in the process of being recapitalised and the appellant stood to benefit more from the recapitalisation of Unibank than from Unibank's liquidation.

The learned judge granted the provisional order. It is against this judgment that the appellant now appeals with leave of this court granted on 9 October C 2001, on grounds, *inter alia,* that the learned judge erred in granting the relief which he did.

Two errors on the part of the learned judge are immediately evident.

In the first place, no cause of action was established in the court *a quo.* The appellant, having obtained judgment against the respondent, was entitled to D execute its judgment. While the High Court does have the power to regulate its own process and stay execution in certain cases, this is usually done pending determination of an application for rescission of the judgment concerned or the happening of some event such as the hearing of an appeal, the bringing of an interpleader suit and so on. See *Civil Practice of the Supreme Court of South Africa* 4 ed by Van Winsen, Cilliers and Loots at pp E 804 and 807. In the present case, no application for rescission was pending and the grant of the final order would effectively amount to a permanent denial of the appellant's right to execute its judgment.

Further, the stay of execution is discretionary and is granted only where real and substantial justice requires such a stay or where injustice would otherwise F result. In the present case, the requirements of justice do not dictate that there should be a stay of execution. If anything, an injustice is likely to result if the appellant is not allowed to execute his judgment.

As it was put by Mr *Nherere,* "the exercise of the court's discretion (in such cases) is subject to the judgment creditor's right (to execute his judgment). It cannot override it." See *Graham v Graham* 1950 (1) SA 655 (T); *Santam* G *Ltd v Norman & Anor* 1996 (3) SA 502 (C).

Secondly, the remedy sought by the respondent in the court *a quo* was an interdict. It is trite that the requirements for a final interdict are:

a) a clear right which must be established on a balance of probabilities.

b) irreparable injury actually committed or reasonably apprehended; and H

c) the absence of a similar protection by any other remedy.

See *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Flame Lily Investment Company (Private) Limited v Zimbabwe Salvage (Private) Limited and Another* 1980 ZLR 378 (G); A *Sanachem (Pty) Ltd v*

Farmers Agri-Care (Pty) Ltd & Ors 1995 (2) SA 781 (A) at 789B. With regard to a temporary interdict, the following must be established:

a) a right which, though *prima facie* established, is open to some doubt: B
b) a well-grounded apprehension of irreparable injury:
c) the absence of any other remedy
d) the balance of convenience favours the applicant

See *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, & Anor* 1973 (3) SA 685 (A) at 691; *Flame Lily Investment Company (Private) Limited v Zimbabwe Salvage (Private) Limited and Another supra;* C *Durma (Pvt)Ltd v Siziba* 1996 (2) ZLR 636 (S) at 641.

Neither a clear right nor *a prima facie* right was established on the respondent's papers, which amounted to no more than a plea *ad misericordiam* (by a debtor who has, for over a year, avoided paying his debt) entreating the appellant to abandon its judgment and to participate in the recapitalisation scheme put D forward by the curator of Unibank. There was accordingly no basis shown for the grant of the interdicts sought by the respondent.

Finally, I make the observation that many of the so-called urgent applications brought before the High Court are not urgent. In many of these cases the applicant will have created his own state of urgency by failing to take any action until the removal and sale of his property is imminent. This is precisely E what happened in this case. The "urgent" application was brought more than one year after default judgment was entered. No attempt was made to rescind the judgment and no payment was made in liquidation of the debt. In such circumstances, an applicant should have great difficulty in persuading any judge that his application is urgent.

It is for the above reasons that after hearing counsel we upheld the appeal and F issued the following order:

"1. That the appeal be and is hereby allowed with costs.
2. That the order of the court *a quo* be and is hereby set aside and the following is substituted:-

'The application is dismissed with costs.'" G

Sandura JA and Gwaunza AJA concurred.

Madanhi & Associates, appellant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v JONGWE 2002 (2) ZLR 209 (S)

[zRPz]S v JONGWE 2002 (2) ZLR 209 (S)
2002 (2) ZLR p209

Citation	2002 (2) ZLR 209 (S)
Case No	Judgment No. S-62-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ
Heard	5 August 2002; 8 August 2002
Judgment	8 August 2002
Counsel	*J Samkange,* for the appellant

M Nemadire, for the respondent

Case Type Application in chambers

Annotations Link to case annotations

[zFNz]Flynote
D **Appeal** — bail pending trial — appeal against refusal — principles guiding court
Criminal procedure — bail —appeal — principles that should guide court — risk of absconding — assessment of — nature of charges and severity of likely punishment — critical importance of
[zHNz]Headnote
E The appellant, facing a charge of murder, had been refused bail by the High Court and appealed.
Held, that when assessing the risk of an applicant for bail absconding before trial, the court will be guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the F strength of the State case; the accused's ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial. The most critical factors are the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the State case.
G *Held,* further, that the temptation to abscond, given the situation in which the appellant found himself, would be irresistible.
Appeal dismissed.
[zCAz]Cases cited
H *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S)
2002 (2) ZLR p210
Chidyausiku CJ
[zSTz]Legislation considered A
Criminal Procedure & Evidence Act [*Chapter 9:07*], s 121(2)(a)
[zCIz]Case information
J Samkange, for the appellant
M Nemadire, for the respondent
[zJDz]Judgment
Chidyausiku CJ, [in Chambers, in terms of section 121(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]]
The appellant in this case is facing a charge of murder. He applied to the High Court for admission to bail pending his trial. Matika J dismissed the bail application. The reasons for judgment are attached to the notice of appeal in this matter. The appellant was aggrieved by the dismissal of the bail C application and now appeals to a judge of this Court in terms of s 121(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:02*]. It is apparent from the reasons for judgment that bail was refused for the following reasons:
(a) that the appellant was facing a very serious offence for which, upon conviction, he is likely to be sentenced to a long term of imprisonment D and that the evidence against the appellant was overwhelming. The above factors were an inducement for the appellant to abscond to avoid the trial;
(b) that the appellant was likely to commit suicide to avoid trial;
(c) that the appellant could be harmed by members of his deceased wife's E family;
(d) that the appellant might interfere with investigations.
The grounds of appeal are set out in the notice of appeal which provides as follows:
"1. On the 24th of July 2002, the Appellant made an application for bail F pending trial. The case was initially set down for hearing on the 25th of July 2002. It was then postponed at the request of the state which wanted to submit opposing papers. The matter was then postponed to the 26th of July 2002 for hearing before Mr Justice Matika. After hearing arguments by counsel, the Court refused bail on the following grounds:
a) That the Appellant is facing a serious charge; G
b) That the Appellant is likely to commit suicide;
c) That the Appellant is likely to abscond;

d) That the Appellant is likely to be harmed by members of his deceased wife's family and, finally

e) That the investigations are still pending.

After refusing bail, an application for leave to appeal was made and the application was granted. H

2002 (2) ZLR p211

Chidyausiku CJ

2. The A Court found that the State had made general submissions. It however felt that there was a resemblance of the truth in that the Applicant was not denying that he had stabbed his wife which resulted in her passing away.

3. It is respectfully submitted that the Court did not consider any of the submissions made by the Appellant namely:

a) That B the Appellant in his favour surrendered himself to the Police;

b) That it was a domestic dispute resulting in the unfortunate death of his wife;

c) Although he had travelled to Zhombe to his communal lands, upon hearing that his wife had passed away, he immediately C made arrangements to return and surrender himself to the Police;

d) That he has co-operated with the Police in their investigations.

4. The Honourable Judge erred in not placing sufficient weight on the fact that the Appellant, well aware of the charges he was likely to face, surrendered himself to the Police and had stated under oath his desire to stand trial and clear his name.

5. The D Honourable Judge erred in refusing the Appellant bail when there was no evidence that he will abscond and not stand trial.

6. Appellant is a young man with a 7 month old child. He has a fixed abode and he is a registered legal practitioner and member of parliament.

7. That he had shown that he had no desire to abscond but to stand trial E and that he wishes to be given an opportunity to be heard.

8. WHEREFORE, Appellant prays -that the judgment of the High Court to the extent that it denied him bail be set aside and that he be admitted on bail on the terms set out in the draft order annexed hereto."

It is a matter of regret that the notice of appeal does not set out the grounds F of appeal succinctly and clearly as is required by the Rules. Although bail was refused for a number of reasons the notice of appeal challenges only one ground, namely, the learned judge's conclusion that the appellant is likely to abscond if granted bail and his reasons for so concluding. The confusion is compounded by counsel for the appellant's written and oral submissions attacking the other grounds for refusing bail which have not been appealed against in terms of the above notice of appeal. Be that as it may, in my view this matter can be disposed of on the basis of the main ground for the refusal of admission to bail and in respect of which an appeal has been noted, namely, that the appellant is H likely to abscond if granted bail.

Thus, the critical issue that falls for determination in this appeal is whether the learned judge in the court *a quo* erred in concluding that the appellant was likely to abscond if granted bail.

2002 (2) ZLR p212

Chidyausiku CJ

The facts of this case are briefly as follows: A

The appellant is aged about 28 years old. He is a legal practitioner and a Member of Parliament for the constituency of Kuwadzana. Although the appellant and the deceased have only been married for a year it seems their marriage was not a happy one. The marriage appears to have been rocked by domestic violence and allegations and counter-allegations of infidelity B culminating in the tragic death of the deceased, the appellant's wife. She too, was a lawyer, having recently graduated from the Law School.

Most of the facts of this case are common cause. In particular, there is no dispute that the deceased died as a result of the stab wounds inflicted upon her by the appellant. The only dispute of facts relates to what transpired when the appellant visited or returned to the offices of Muskwe and Associates on C the day that the appellant stabbed the deceased. The appellant's version of what happened on that occasion is set out in his warned and cautioned statement to the police which reads, in part, as follows:

"Question: Do you understand the nature of the allegations? Yes. ACCUSED PERSON REPLY IN ENGLISH VERSION D

I deny the charge of Murder. What happened is that on Friday the 19th of July we were walking in town with my wife. Immediately after 2 p.m. she said that she wanted to see her friend, one Jacqualine who works for a law firm called Muskwe and Associates. I left her at the firm and went to my office. Later on after about 30 to 40 minutes, I went to Muskwe and Associates and asked Jacqualine where my wife was. Jacqualine told me E that she was in consultation with Donald

MASHINGAIDZE a lawyer in the next office. I opened MASHINGAIDZE's door and saw the two making love on top of a table. I could just not believe it. At about 3.30 pm I then asked my wife who was sitting in the lounge eating oranges what it is that she was doing with MASHINGAIDZE. She answered as follows: 'What you saw is correct. In fact he is a better man. I long told F you that our marriage is not working'. At this stage, I got extremely provoked and took a knife which was on a coffee table and stabbed her.
Signed LEARNMORE JONGWE" .
This version of events by the appellant is disputed by the State. The State contends that when the appellant called at the offices of Muskwe and Associates the deceased was not in Mr Mashingaidze's office as alleged by the appellant but in Ms Makoni's office. According to the summary of the State case the following are the events leading to the stabbing of the deceased by the appellant. H
2002 (2) ZLR p213
Chidyausiku CJ
A On 19 July 2002 the appellant left home in the company of his wife Rutendo Jongwe nee Muusha going to town for shopping. While in town the wife asked to be dropped at Globe House, corner Jason Moyo Avenue and First Street, where she wanted to see a friend Jacqualine Makoni of Muskwe and Associates Legal Practitioners. This was at about 1400 hours.
The appellant later returned and walked into the office of Donald Mashingaidze B a lawyer at that company, looking for his wife who by then was with Jacqualine Makoni in her office.
When the appellant entered Donald Mashingaizde's office he saw him drafting a letter of demand and at that time he realised for the first time that his wife was not on a casual visit, but was instead instituting divorce D proceedings.
There was a heated exchange of words between the appellant and the lawyer, in which the appellant threatened that the case was going to "soil a lot of people."
The appellant went out of the office and joined his wife who was in the office of Jacqualine Makoni and both husband and wife left for their home at about 1520 hours.
When the couple arrived home, the appellant took his mother to Wilkins Hospital to see a sick brother, leaving his wife at home with their seven- month old baby and a maid.
E The appellant returned home alone and upon arrival at about 1600 hours he quarrelled with his wife over the pending divorce proceedings. During the argument the appellant grabbed a kitchen knife and brutally stabbed his defenceless wife eight times in the chest, neck, face and forearms. He left her bleeding profusely and drove away. The wife struggled to the main gate, calling for help, where she collapsed. Mrs Dembo, a neighbour who F heard the cry for help, immediately rushed her to Avenues Clinic where she died on 20 July 2002 as a result of the wounds inflicted upon her by the appellant.
Thus, the issue is whether the appellant found his wife, the deceased, being intimate with Mr Mashingaidze or whether that allegation is false as she was G with her friend Ms Makoni upon the appellant's return to Muskwe and Associates.
This dispute of fact is critical to the defence of provocation raised by the appellant. If indeed the appellant found the deceased being intimate with Mashingaidze, that would enhance the appellant's defence of provocation. It H is pertinent to observe at this point that the State's version of events leading
2002 (2) ZLR p214
Chidyausiku CJ
to the killing of the deceased as set out above is plausible and has a ring of A truth while the appellant's version as set out in his warned and cautioned statement is riddled with improbabilities. According to the affidavit of the investigating officer the deceased had met the alleged paramour only once previously. The two hardly knew each other. The deceased was a professional woman. She was married with a seven-month old baby. The question is, is it B likely that a professional woman would desire to be laid on a desk by a man she hardly knew? The door to the office was unlocked and that is why, on the appellant's version, he was able to enter and see his wife being intimate with the paramour. This incident is alleged to have occurred during working hours when the risk of the parties being caught in the act was extremely high. The appellant's own reaction seriously undermines his own story. Given the C brutal manner in which the appellant killed the deceased, for whatever reason, it is difficult to believe that he would simply walk away from a man he finds ravishing his wife. It is common cause that he reacted very violently and killed his wife in response to provocation that must be less than the provocation of seeing his wife being intimate with another man.
The trial court will have to consider the above strengths and weaknesses of D both the State case and the defence case and resolve the dispute of fact. If the appellant's version of events is found to be false and the State version is found to be correct then the inescapable conclusion is that the

appellant killed his wife because she had commenced divorce proceedings against him. If he could not have her then no one else was going to have her would be the most E logical motive. Such a finding would leave the appellant with very little prospects of success in establishing a defence to a charge of murder and the existence of extenuating circumstances in order to avoid the imposition of the death sentence. The appellant is a legal practitioner who. I have no doubt, would be familiar with the strengths and weaknesses of his case and would stand guided or influenced by those considerations in deciding what chances F he should take.

This Court has had occasion to set out principles that should guide a court in determining an application for bail.

In the case of *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S) this Court reviewed a long line of cases and laid down the following guiding G principles for determination of bail applications:

(a) That the Supreme Court can only interfere with a High Court decision if there has been a misdirection or irregularity in the High Court or if the judge had exercised his discretion in a manner which was so unreasonable as to vitiate the decision reached. H

(b) That A when dealing with the matter of bail the court has to strike a balance between the liberty of the accused and the State's need to ensure that the person stands trial and does not interfere with the course of justice.

(c) That the *onus* is on the accused to show on a balance of probabilities why it is in the interests of justice that he should be freed on bail, but that the amount of evidence necessary for him to discharge this *onus* would vary B according to the circumstances of each case.

(d) That in judging the risk that an accused person would abscond the court should be guided by the following factors:

(i) the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction; C

(ii) the apparent strength or weaknesses of the State case;

(iii) the accused's ability to reach another country and the absence of extradition facilities from the other countries;

(iv) the accused's previous behaviour:

(v) the credibility of the accused's own assurance of his intention and motivation to remain and stand trial; D

(e) That the risk of interference with investigation if alleged must be well founded and not based on unsubstantiated allegation and suspicion.

The majority of the above principles have no relevance to the present case. However, the principle set out in paragraph (d) is apposite. The court *a quo* found that the appellant was facing a very serious charge and that upon E conviction he faces a lengthy term of imprisonment. On this basis the court *a quo* concluded that the appellant was likely to abscond. In my view this was a proper exercise of the learned judge's discretion and the decision cannot be said to be irrational.

Although the learned judge did not comment in any detail on the strength or F otherwise of the State case the facts of this case are as set out above. As I said earlier this case turns on the risk of abscondment by the appellant. In *Aitken's* case, *supra,* Gubbay CJ at p 254D-G sets out how the court should assess the risk of abscondment. He had this to say:

"THE RISK OF ABSCONDMENT

In judging this risk the court ascribes to the accused the ordinary motives G and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the State case; the ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is H intended to stand trial."

It is quite clear from the above remarks that the critical factors in the above A approach are *the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the State case.*

In the present case there is no doubt that the offence with which the appellant is charged is very serious. Murder is a very serious offence for which an B accused is required by law to be sentenced to death unless extenuating circumstances are found to exist. Thus, if the court concludes that no extenuating circumstances exist in this case the appellant faces the prospects of the death sentence. In this case the evidence against the appellant is very cogent, if not overwhelming. The appellant admits inflicting the wounds found on the C deceased. The post mortem report clearly establishes the nature and the multiplicity of the stab wounds that he inflicted. The post mortem report clearly

establishes that this was a savage and brutal attack on the deceased. According to the post mortem report the following injuries were found on the deceased: D

"Front:

- Sharp incised stab wound 8.5cm (original = 4cm according to surgeon) on right breast (upper outer quadrant) sutured 7 sutures.
- Round sharp stab wound 0,5cm diameter lateral right chest wall
- Sharp therapeutic drain wound 10th intercostal space 2 x 1cm (drain site) unsutured E
- Clean therapeutic wound in 6th ICS 20cm with 14 sutures (site of thoracotomy)
- Sharp incised stab wound left breast (upper outer quadrant) 2,5cm sutured (2 sutures)
- 0,5 cm diameter round stab wound on left breast (upper inner F quadrant) approximately 1 cm deep
- Clean sutured wound 2,5 cm (1 suture) (left submammary adjacent to lower outer quadrant)
- 2,5cm sharp incised wound left shoulder 2 sutures approximately 2cm deep
- 2,5 cm incised stab wound left wrist unsutured approximately 0,2 G cm deep
- L-shaped wound 3 x 1,5cm on right side of face. (5 sutures approximately 0,5cm deep
- 1,5cm incised stab wound right neck (1 suture) approximately 1cm deep H

- Pointed A 0,3cm diameter wound left side of neck approximately 0,5cm deep
- 16 cm healed surgical scar on lower abdomen (pfannensteil Caesarean scar)"

The weapon used is described in the post mortem report as:

"Prestige stainless Rostfrei Inox' kitchen knife with a 13x3x2cm black H handle and a 16x3x0,1cm serrated singled-edges cutting flat blade."

The doctor's conclusion was:

"The deceased was a 23 year old female who sustained bilateral haemothoraces following fatal stab chest wounds during a domestic dispute with the husband. At autopsy there were two main fatal wounds C through the breasts each in the 3rd intercostal space associated with incised lung left upper lobe, lung right upper lobe, right heart atrial appendage, a fractured left 3rd rib and a combined total of 1,1 litres of blood in the pleural cavities. Both wounds were approximately 14cm deep from the skin surface of breasts to the endocardium of right atrium and the incised lung on the left.

D Bilateral haemothoraces due to the stab wounds with a single-edged 16cm flat-bladed kitchen knife was the cause of death."

Thus, the post mortem report reveals that the appellant inflicted on the deceased multiple stab wounds. According to the diagram not less than eight stab wounds were inflicted on the deceased. Of these, two stab wounds were particularly serious and fatal. These two fatal wounds were to the chest just E below each of the breasts. These stab wounds were directed at a very vulnerable part of the body. These two stab wounds were each 14cm deep from the skin surface to the endocardium and pierced the lung.

The kitchen knife used to inflict the wounds, from its description in the post mortem report, is a formidable weapon.

F Given the nature and the seriousness of the wounds; the vulnerability of the part of the body to which the stabbing was directed; the degree of force that must have been required to inflict such wounds — the inevitable inference is that whoever inflicted those wounds must have intended to bring about the death of the deceased by his action or, at least, foresaw the death of the victim a virtual certainty.

G The appellant raised the defence of provocation. I have already commented on the respective merits of the defence case and the State case in this regard. The *onus* to establish the defence of provocation and extenuating circumstances is on the appellant. Should the trial court reject his version of events the H appellant will have problems establishing extenuating circumstances.

For the above reasons I am satisfied that the evidence against the appellant A is overwhelming and the prospects of conviction for an offence involving the death of the deceased is a virtual certainty. I am also satisfied that the prospects of the appellant receiving a long prison term or even the death sentence, if convicted of murder, are real.

I am equally satisfied that because the prospects of conviction and upon B conviction the imposition of a long prison term, indeed, even the death sentence are real, the temptation for the appellant to abscond if granted bail is irresistible. On this basis alone I would dismiss the appeal. The need to consider the other grounds for the refusal to grant bail fall away.

Byron Venturas & Partners, appellant's legal practitioners C

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[zRPz]S v SYLOW 2002 (2) ZLR 219 (H)
2002 (2) ZLR p219

Citation	2002 (2) ZLR 219 (H)
Case No	Judgment HH-136-02
Court	High Court, Harare
Judge	Adam J & Mavangira J
Heard	25 July 2002; 14 August 2002
Judgment	14 August 2002
Counsel	*E W W Morris,* for the appellant *M Nemadire,* for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

[zFNz]Flynote
Appeal — criminal appeal — appellant on bail absenting himself from D country beyond time stipulated by court —appellant thereby becoming a fugitive from justice —correct procedure to adopt —court declining to hear case in his absence
Court —jurisdiction —fugitive from justice —who is —when a fugitive from justice may ask court to protect his rights
[zHNz]Headnote
E While on bail pending appeal against conviction and sentence for theft by conversion, the appellant was allowed by the court to leave the country for a limited period. He did not return in the time stipulated, and an unauthenticated medical certificate was produced as the reason for his failure to return. His bail was estreated and a warrant was issued for his F arrest.
After several months the court was asked whether the matter could be heard in the absence of the appellant from the country. Other reasons were advanced for his absence from the country, including hate mail, threats, and a background of increased lawlessness and lack of police protection.
G *Held,* that a fugitive from justice may be regarded as a person who is wilfully avoiding the execution of the processes of the court of the land, or as one who is avoiding the processes of the law through flight out of the country (voluntary exile) or hiding within the jurisdiction of the court. Such a person is not amenable to the processes of the court and cannot invoke the authority of the

court for the purpose of establishing his legal H rights. Before a person seeks to establish rights in a court of law he must

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approach the court with clean hands; where he himself, through his own A conduct makes it impossible for the processes of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests. An appellant seeking to have a conviction set aside is initiating proceedings for relief. However, this consideration does not operate in the same way B or to the same extent where the fugitive does not take the initiative, but is before the court involuntarily at the instance of another.

Held, further, that if the appellant's reason for leaving was fear of a medical break-down, and if he advised his legal practitioner of this from outside Zimbabwe, his legal practitioner was obliged to inform the court. If the appellant feared a mental breakdown, his legal practitioner-should have C sought a further extension of the period on the grounds that he would be out of Zimbabwe beyond the end of the period agreed, supplying the necessary supporting medical certificates from medical practitioners in Zimbabwe.

Held, further, that as long as the appellant had not purged his contempt, that is, having breached the terms of his bail conditions by being out of the D jurisdiction of the court, he must be regarded as a fugitive from justice. The court would accordingly decline to hear the matter.

[zCAz]Cases cited

Botes v Goslin 1987 (2) SA 716 (C)

Chetty v Law Society, Transvaal 1983 (1) SA 777 (T) E

Eskom v Rademeyer 1985 (2) SA 654 (T)

Fraind v Nothmann 1991 (3) SA 837 (W)

Maluleke v Du Pont NO 1966 RLR 620 (G)

Meyerson v Health Beverages (Pty) Ltd 1989 (4) SA 667 (C)

Mulligan v Mulligan 1925 WLD 164 F

S v Isaacs 1968 (2) SA 184 (A)

S v Moshesh 1973 (3) SA 962 (A)

S v Neill 1982 (1) ZLR 142 (H)

S v Nkosi 1963 (4) SA 87 (T)

[zCIz]Case information

E W W Morris, for the appellant G

M Nemadire, for the respondent

[zJDz]Judgment

Adam J: The appellant was convicted on fourteen counts of theft by conversion. He was sentenced to five years' imprisonment, of which one year's imprisonment was suspended for five years on condition that he did H

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A not during that period commit an offence involving dishonesty for which he was sentenced to imprisonment without the option of a fine, and a further two years were suspended on condition he paid $448 000 to the complainant. He appealed against the conviction and sentence. He was granted bail pending appeal. This bail was varied by this court to allow him to travel out of the country. This court ordered the temporary release of his passport, allowing B him to travel between 15 December 2000 and 10 January 2001.

On 27 February 2001 the respondent asked the Registrar for the matter to be placed before a judge for the estreatment of the appellant's cash bail and the calling in of the appellant's surety. On 2 March 2001 the appellant's legal practitioners wrote that the appellant had fallen ill in Switzerland, but did not C provide any medical certificate. On 16 March 2001 this court issued a warrant of arrest for the appellant. On 10 April 2001 the appellant's legal practitioners wrote that the appellant was still ill but that the appellant intended to return to Zimbabwe. On 12 April 2001 the respondent replied that the appellant had to come back to prosecute his appeal.

A court application was filed on 11 July 2001 on the appellant's behalf, with D his affidavit having been sworn in Switzerland on 22 June 2001. It should be mentioned that his founding affidavit did not attach an original medical certificate, and the one attached was also not dated. The respondent filed notice of opposition (without an opposing affidavit) but with respondent's submissions. Later an affidavit was filed. The appellant filed his heads of E argument, which were served on the respondent. The respondent did not file its heads of argument, and was barred. The matter was set down on 15 November 2001, with appearance on behalf of both parties. The matter was postponed, with costs to be paid by the respondent, to allow the respondent to make an application for the

upliftment of the bar within three weeks of that order, failing which the court application would proceed as an unopposed matter. It appears that no application was made by the respondent, so on 17 January 2002 Ndou J ordered, (1) that the appeal record be prepared no later than one month after the date of the order to enable the appellant to prosecute his appeal; (2) that on completion, the appeal proceed as normal, save that should the appellant be absent from Zimbabwe, he should produce evidence of his current medical condition to the court hearing the appeal so G as to enable it to determine whether or not the appeal should proceed; and (3) that the warrant of arrest of 16 March 2001 should not be enforced pending the determination of this appeal and should be deemed to have been cancelled at the conclusion of the appeal if his conviction and sentence were set aside. The appeal was set down before Garwe JP and Guvava J on 14 May 2002. The H only issue that had to be determined was whether or not the matter should be

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postponed (since the appellant's legal practitioners had produced an A unauthenticated medical certificate) to enable the appellant to produce an authenticated medical certificate. The matter was postponed for a determination to be made whether or not the appeal could be heard in the absence of the appellant from the country. Only if this court found for the appellant would the court proceed to deal with the merits of the appeal. B

At the hearing of this appeal we determined that the appeal could not be heard in the absence of the appellant from the country. These are the reasons.

In the appellant's heads of argument it was submitted by his counsel that the appellant left the country legally and this factor puts the matter in a different light from those cases like *Mulligan v Mulligan* 1925 WLD 164, *Maluleke v Du Pont NO* 1966 RLR 620 and S v *Neill* 1982 (1) ZLR 142 (H). He referred C to *Escom v Rademeyer* 1985 (2) SA 654 (T) and relied on what was said by Stegmann J at 658H. But Stegmann J referred to 166-167 *of Mulligan v Mulligan supra* and said at 658H-I:

"In that passage it appears that a 'fugitive from justice' may be accepted as being one who is 'wilfully avoiding the execution of the processes of D -the court of the land', or as one who is 'avoiding the processes of the law through flight out of the country (voluntary exile) or hiding within the jurisdiction of the court'.

' I turn now to consider whether the respondent is a fugitive from justice within those definitions. To arrive at a conclusion it is necessary to set out the facts depicting the sequence of events placed before me." E

Stegmann J concluded that Rademeyer was a fugitive from justice, but since he had involuntarily been called before the court, the rule *nisi* specifically called upon him to give an answer. Rademeyer wished to do so if given the additional time he needed. It was for that reason that Stegmann J granted a fugitive from justice *locus standi in judicio* and the rule *nisi* was extended. He also observed at 662D-F: F

"I do not wish to be understood to hold that the principle in question can never be invoked against a defendant or respondent who happens to be a fugitive from justice. It may very well be that a fugitive who is a defendant does not enjoy the right ordinarily enjoyed by a defendant to institute a claim in reconvention. He may suffer other disadvantages in respect of procedural, and even substantive, rights ordinarily enjoyed by G a litigant."

In *Mulligan v Mulligan* 1925 WLD 164 the applicant (husband) obtained a rule *nisi* operating as a temporary against the respondent (wife) to show cause why she should not be interdicted from disposing of certain property pending action. The applicant had been convicted and was on bail which was H

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A estreated. He went into hiding. On the return day, the respondent took a preliminary point that the applicant was a fugitive from justice and therefore had no *locus standi in judicio.* The respondent's contention was upheld and the rule discharged. De Waal J said at 166-168:

"In England an outlaw 'can neither sue on his contracts nor has he any legal rights which can be enforced; while at the same time he is liable to B all causes of action'... See Wharton's *Law Lexicon, sub voce*' Outlawry'; Outlawry is defined as 'being put out of the law for contempt in wilfully avoiding the execution of the processors of the King's Court'. Wharton says that the legal maxim applicable to the outlaw is 'Let them be answerable to all and none to them'. See also *Davis v Trevanion* 14 LJ QB 138; *in re Mander* 6 QB 867; and *Aldridge v Buller 6* LJ Exch 151.

C Now, it should be noted that formerly, both in England as well as Holland, a person had to be proclaimed or declared to be an outlaw or *verbanneling* by judicial process; but it is submitted that there is very little difference, if any, between a person declared to be such and a fugitive from justice, as both are outside the law for contempt in wilfully avoiding the execution of the processes

of the courts of the land. D Similarly, the difference, if any, is small between banishment *(ballingschap* or *verbanning)* or involuntary exile on the one hand and avoiding the processes of the law through flight out of the country (voluntary exile) or hiding within the jurisdiction of the court. In either case, the person, whether he be in exile or a fugitive from justice, is not amenable to the processes of the court, and as such, in my opinion, cannot E invoke the authority of the court for the purpose of establishing his legal rights. Before a person seeks to establish rights in a court of law he must approach the court with clean hands; where he himself, through his own conduct, makes it impossible for the processes of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests... Moreover F it is totally inconsistent with the whole spirit of our judicial system to take cognisance of matters conducted in secrecy ... As a fugitive from justice, he is not only not amenable to the ordinary criminal and civil processes of the court, but, as far as this court is concerned, it cannot call upon him to appear in person to give evidence on oath; it cannot order his arrest in case the facts he testified to in his affidavit are proved to be G false, whereas on the other hand he would be able to incept criminal proceedings for perjury proved to have been committed by his opponent.
Were the court to entertain a suit at the instance of such a litigant it would be stultifying its own process and it would, moreover, be conniving at and condoning the conduct of a person who, through his flight from H justice, sets law and order in defiance."
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Adam J
In S v *Nkosi* 1963 (4) SA 87 (T) the appellant was convicted of a statutory A offence and sentenced when he escaped from gaol. Hill J, after referring to *Mulligan v Mulligan supra* said at 87-88:
"Mr *Beale* also referred us to a number of American decisions to the said effect. In one of these cases, *Togan v Casaus,* reported in the second series of the American Law Reports (49 ALR 2d) p 1419, the presiding judge at p 1423 says in regard to an appeal by a defendant who wilfully B avoided the process of the Court and punishment:
'Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal. A party to the action cannot with right or reason, ask the aid or assistance of a court in hearing of the demands, while he stands in an attitude of contempt to legal orders and processes of the courts of the State.' C
A similar view was expressed in the case of *Woodson v The State* 19 Fla. 549, reported in the American Criminal Reports (Gibbons) p 477 where the head-note reads:
'An appellate court will dismiss appeal — escaped convict — An appellate court will refuse to hear a criminal case on a writ of error D where the plaintiff in error has escaped and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail'."
In *Maluleke v Du Point NO supra,* a rule *nisi* was issued against the respondent by the General Division of the High Court, which transferred the matter to the Appellate Division. The Appellate Division, having heard E arguments on the issues concerning the applicant being a fugitive from justice and of him having *locus standi,* struck the matter off the roll. The Appellate Division held that the applicant had deliberately put himself beyond the reach of the law and there was no difference in principle between defiance based on fear of being brought to justice and defiance, simply, from a refusal to be bound by the law. In both cases, the act of defiance was directed F to placing oneself beyond the law; the law will refuse its protection to those who place themselves beyond its reach. The applicant was under an order of restriction in terms of the Law and Order (Maintenance) Act, which required him to report once a week. He failed to report, so a warrant of apprehension was issued against him. His counsel submitted that until it was established G that the restriction order was valid the allegation that he was a fugitive from justice could not be sustained.
Quènet JP said at 623:
"I do not think it necessary to examine the validity of the restriction order or of the warrant itself. The admitted facts established that the applicant fled the country or was in hiding, and that it is not possible to effect service of process upon him. It is clear, then, the applicant has deliberately H
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A put himself beyond the reach of the law. 1 cannot accept the suggestion that that his flight might have nothing to do with the disobedience to the restriction order. We were informed from the bar that his attorney had no information in regard to his whereabouts and had not heard from him."
Fieldsend AJA, after referring to the passage at 166-168 in *Mulligan v Mulligan supra* said at 624:
B "This passage, in my view, makes it clear that a court will not entertain an action by a person who puts himself beyond its reach by going into hiding or fleeing the country without any

explanation, regardless of whether or not he is in contempt of any particular order or warrant of the court."

In *S v Isaacs* 1968 (2) SA 184 (A) the appellant, who has been convicted of C fraud, was granted leave to appeal with his existing bail extended pending the determination of appeal. The appellant's attorneys stated that the appellant had estreated his bail and was a fugitive from justice. On the date set for the hearing of the appeal, there was no appearance on his behalf, so the court held that it had the discretion of either striking it off the roll or dismissing the appeal for non-prosecution. The appeal was dismissed for non-prosecution.

D In *S v Moshesh* 1973 (3) SA 962 (H) the appellant, an attorney, was convicted of theft. He was granted leave to appeal with existing bail extended pending the outcome of his appeal. His bail was withdrawn and a warrant for his arrest issued, since he and his family left South Africa and it would appear the appellant was in Lesotho. On the date set for the hearing of the appeal the court said that the appellant was clearly a fugitive from justice and dismissed E his appeal for non-prosecution.

In *S v Neill* 1982 (1) ZLR 142 (H) the appellant was convicted of an offence under the Exchange Control Act and released on bail pending appeal against sentence. He left the country and his bail was estreated. It was submitted on his behalf that the appellant could be regarded as a fugitive from justice, but F that this court could exercise its discretion and hear the appeal, not only because on the merits the appeal was arguable, but also because his actions could not be stigmatised as a bad example of contempt of court. This court held that the only category of person who has absolutely no right to institute proceedings at law is the fugitive from justice or outlaw; even where the proceedings were reviewable this did not alter the situation. It also held that G even if the court had a discretion to hear the appeal, this was not a proper case to exercise it, since by breaching the bail conditions the appellant had shown contempt for the laws and processes of the country. For this court to entertain his appeal it would be stultifying its own processes and conniving at and condoning the appellant's actions. H In *Chetty v Law Society, Transvaal* 1983 (1) SA 777 (T) the applicant sought

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rescission of judgment. The respondent had set a date for its council meeting A with the applicant without prior notification. The applicant failed to appear before the respondent's council. It became generally known that the applicant had left the country and was in Botswana. The respondent applied for a rule nisi to be issued. The rule was confirmed after the applicant had been given more than adequate time to file his opposing affidavit. In seeking to set aside B the confirmed rule, the applicant in his affidavit denied having left the country to avoid the consequences of any misconduct on his part as an attorney and gave a detailed account of the harassment he suffered at the hands of the security police which he claimed led to his decision to leave the country. O'Donovan J said at 780C:

"It must however have been clear to the applicant that, through the flight C out of the Republic, on the eve of a meeting that he had undertaken to attend, he avoided the processes of investigation in which the Law Society was then engaged, and any proceedings arising thereout, and the inference is in my view inescapable that this result was intended by him whatever other factors may have motivated him."

He then referred to *Mulligan v Mulligan supra* and said that De Waal J D defined a fugitive as a person who is "avoiding the processes of the law through flight out of the country" . He continued at 780G:

"Counsel for the applicant contended that the principle enunciated in these cases is limited on its application to a person seeking to establish his rights in a court of law. The position of the present applicant is, so it is argued, to be contrasted because he is merely attempting to defend E himself against processes of the law which has been set in motion against him... I do not consider, however, that this distinction can be validly made in the instant case.

'The relief which he sought is rescission, and the person initiating proceedings for the relief is the applicant. An applicant seeking to have a conviction set aside, as in *S v Nkosi (supra)* or *Woodson v The State* 19 F Fla 549, which is referred to in *S v Nkosi* at 88A-B, is in a comparable position."

If I understand O'Donovan J correctly, he maintained that had the applicant in those proceedings filed an application for the cancellation of the warrant of arrest and the setting aside of the estreatment of his bail, the position would G have been no different. The appellant would have no *locus standi injudicio* as a fugitive from justice.

In *Botes v Goslin* 1987 (2) SA 716 (C) litigation had been settled and was made an order of the court under which the appellant consented to judgment for an amount and undertook to pay the

respondent's taxed costs. The appellant did not comply with the order and through his attorneys asked the H

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A respondent's attorneys to stay or withdraw the writ on the grounds that the respondent had become a fugitive from justice. The magistrate ruled that the appellant had not proved that the respondent was a fugitive from justice and that, even if he were, that was irrelevant since there was no prospect at all that his presence would be required at court. The appeal was against this ruling. The respondent opposed the appeal on the basis that the magistrate was B correct. He was not actively seeking any legal relief. Van Den Heever J held the magistrate's ruling as incorrect and said at 721D-J and 722A:

"The basic morality in denying a fugitive from justice the assistance of the very system he refuses to submit to is elementary: a man cannot say that he is prepared to abide by the rules of society, and seek society's assistance in enforcing them, only when they favour him and when he C chooses, but not when he decides that it does not suit him to do so. There was no question of the relevant fugitive perhaps having to testify in S v *Isaacs* 1968 (2) 1 SA 184 (A) or *S v Nkosi* 1963 (4) SA 87 (T) nor indeed in the majority of cases referred to below. Nor is it necessary that the fugitive should have already been convicted: *Rademeyer's* case at 661H- I. The law will deny its protection to those who place themselves beyond D its reach. *Mulligan v Mulligan* 1925 WLD 164 has been followed and quoted with approval for more than half a century. Goslin, by jumping bail, was avoiding the processes of the law. By assisting him with its process the court would be 'stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who, through his flight from justice, sets law and order in defiance'. E That Goslin is not asking for a court *order* is irrelevant. The court does not enforce its judgment unless the judgment creditor sets the court's machinery in motion for that purpose. That is exactly what Goslin is doing. He has asked the clerk of the *court* to authorise and require the messenger of the *court* to attach and sell the judgment debtor's property ... That he has done so through his attorney is irrelevant without the F additional factor such as a cession ...

In short, Goslin is not a passive party brought before the court by another, as was the position in eg *Rademeyer's* case and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A), but was himself the mover setting the court machinery in motion.

I am unimpressed by the argument that Botes' hands somehow become G dirty by his reliance on Goslin's conduct to escape Botes' obligations in terms of a court order. The judgment debt stands as an asset in Goslin's hands and perhaps some other creditor of Goslin may be able to take advantage of it; but Goslin himself cannot, and there is nothing improper in Botes objecting to being compelled by law to pay money to someone who has placed himself beyond the reach of the law and probably the H borders of the country as well."

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Adam J

In *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) the A respondent (as plaintiff) sued the applicant (as defendant). The applicant left South Africa in 1985 and was being sought by the South African police. The applicant sought certain amendments to his pleadings. Thring AJ said at 672B-E and 673A-G:

"There seems to be considerable merit in Mr *Seligson's* contention that the applicant is, in fact, a fugitive from justice. However, in view of the B conclusion to which I have come, it is not necessary for me to decide this question because I am satisfied that, even if applicant is a fugitive from justice, this does not destroy his *locus stand in judicio* to approach this court for an amendment of his plea.

The fundamental objection against a fugitive from justice from being allowed to participate in the legal process is that thereby he asks the court C 'to set its machinery in motion to protect his civil rights and interests' *(Mulligan's case supra* at 167). Thus, a fugitive from justice cannot institute proceedings by, for example, issuing summons, nor can he issue a writ of execution *(Botes v Goslin, (supra)).*

It seems to me, however, that this consideration does not operate in the same way or to the same extent where the fugitive does not take the D initiative, but is before the court involuntarily at the instance of another."

In *Fraind v Nothmann* 1991 (3) SA 837 (W) the respondent issued a summons against the applicant by having it served on a domestic servant at the applicant's residence. He obtained a default judgment. Before to the issue of summons, the applicant was arrested in terms of a writ of arrest *tamquam suspectus defuga.* He was released because he denied that he was about to E depart from South Africa. Five days later he left South Africa for Israel.

Streicher J said at 840J-841D:
"The applicant is therefore a fugitive from justice and should not be allowed to 'invoke the authority of the court for the purpose of establishing his legal rights'.
It does not follow, however, that he should not be allowed to defend F actions instituted against him. In the *Chetty* case, O'Donovan referred to the In re *Mander* case referred to by De Waal J, where Lord Denman CJ said that an outlaw could not bring proceedings but' if an action were brought against him the position G would be different'. That difference was apparently accepted by O'Donovan J in the *Chetty* case, also in our law, but he distinguished the *Mander* case on the basis that Chetty sought a rescission and was the person initiating the proceedings. The right of a fugitive from justice to defend legal proceedings instituted against him was also recognised in *Escom v Rademeyer* 1985 (2) SA 654 (T) at 662A-F." H
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A Streicher J distinguished in *Chetty's* case by pointing out that in that case papers had been served on Chetty and he had decided not to oppose the confirmation of the rule *nisi.* There was no irregularity in the proceedings and the order was a valid order. But before him the summons was not served on the applicant, since he had the right to be served with the summons and to defend the action. If that was the case, he must also have the right to apply B for the rescission of a default judgment erroneously granted against him.
It is clear from the above cases that a fugitive from justice, in a very restricted sense, is allowed *locus standi injudicio.* The appellant has estreated his bail and this court has merely indicated that the warrant of arrest issued on 16 March 2001 should not be enforced. He cannot be said not to be a fugitive C from justice. The undated medical certificate filed with his founding affidavit of 22 June 2001 (over three months after the estreatment of his bail and the issue of the warrant of arrest) did not specifically indicate that the appellant could not travel before 10 January 2001. In his founding affidavit the appellant stated that for different reasons, on which he would elaborate, he was not able to return to Zimbabwe. He averred that he was under medical D surveillance and treated with anti-depressants and different medicines throughout the year 2000. He spoke of stress, the time spent in custody and the uncertainty of the hearing of his appeal and said that his condition of health was deteriorating. He averred that, with the increasing fear for his personal security in the political situation and for the survival of the Dental Clinic, his condition worsened to such a point that on 10 January 2001, when E he was supposed to return, he could not do so. He maintained that he communicated the state of his health and his incapacity to return to Zimbabwe, to his legal practitioners in January 2001. The appellant did not attach a supporting affidavit from his legal practitioners. As an officer of this court, his legal practitioner would have known that his client was not in a position F to return and he should have sought an extension of appellant's absence from Zimbabwe if that was the case. The appellant, in an attachment called "Overview," candidly states that in January 2001, fearing that a mental breakdown was imminent, he travelled to Geneva to be with his family. The appellant does indicate that he advised his legal practitioners of this from Geneva. But if that was so, his legal practitioner was obliged to inform this G court. In light of this, the only inference that can be drawn is that the appellant was well aware that he would be breaking the terms of his bail conditions, as it was very clear that he was not going to return to Zimbabwe by 10 January 2001. Surely if he feared a mental breakdown, the logical thing for him to have done was to have his legal practitioners in January 2001 seek a further H extension of the period, on the grounds that he would be out of Zimbabwe
2002 (2) ZLR p230
Adam J
beyond 10 January 2001, supplying the necessary supporting medical A certificates from medical practitioners in Zimbabwe. The appellant is a professional dentist with adequate knowledge as to what should have been done by him. The appellant, in his statement of 30 April 2001, also attached to his founding affidavit, gives a clue for his absence from Zimbabwe. He stated that he now finds himself in a situation where a warrant of arrest is B issued against him. He receives hate mail threatening him and his family. His company has been robbed of all its funds and closed down. Friends and colleagues have been physically threatened and attacked and told not to assist him. His main accusers, Mr and Mrs Harvey, appear to openly ally themselves with lawless elements, so far condoned by the political establishment and police, to extort money from him and further damage him and the Dental C Clinic. In this climate and against the background of increased lawlessness and the lack of police protection, he fears that his return to Zimbabwe would place him in direct danger and be most prejudicial both to his safety and health.
It would appear from the foregoing that the appellant is not in a different situation to *Chetty's* case, where the court in that case considered him a D fugitive from justice. As long as the appellant has

not purged his contempt, that is, having breached the terms of his bail conditions by being out of the jurisdiction of this court, he must be regarded as a fugitive from justice. For this court to hear his appeal in his absence "would be stultifying its own processes and conniving at and condoning the appellant's actions." E
Accordingly, this court declines to determine the appeal in his absence.
MAVANGIRA J: Concurred F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/CHIPUNZA & ORS v BEVERLEY BUILDING SOCIETY 2002 (2) ZLR 231 (H)

[zRPz]CHIPUNZA & ORS v BEVERLEY BUILDING SOCIETY 2002 (2) ZLR 231 (H)
2002 (2) ZLR p231

Citation	2002 (2) ZLR 231 (H)
Case No	Judgment No. HH-133-02
Court	High Court, Harare
Judge	Smith J
Heard	31 May 2002; 15 August 2002
Judgment	15 August 2002
Counsel	*P Nherere,* for the applicants Mrs *B Mtetwa,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

[zFNz]Flynote
Employment — contract — termination — retrenchment — application for D Minister's approval — status of employees pending Minister's decision — entitlement to salaries and benefits
Practice and procedure — application — applicant not having exhausted domestic remedies — court's discretion to hear matter
Practice and procedure — application — respondent wishing to raise point E that applicant should have exhausted domestic remedies — should do so in opposing papers and not raise matter for first time in argument
[zHNz]Headnote
The respondent company engaged on a restructuring exercise, and decided to retrench 17 of its managers. A retrenchment package was offered. Some of the managers accepted the package, but the applicants, twelve F in number, did not. The respondent then realised that the provisions of the Labour Relations (Retrenchment) Regulations 1990 had not been complied with, and withdrew the letters of termination. Meetings with the applicants to resolve the retrenchments were unsuccessful and the matter was referred to a retrenchment committee established under the Regulations. The

committee's recommendations were referred to the G Ministry of Labour, whose Permanent Secretary advised the respondent that the application to retrench the applicants had not been approved.
Two months later, the respondent sought a court order referring the dispute to the Minister so that he could act in terms of the Regulations. The applicants were barred for failure to file opposing papers in time, then H indicated that they would not oppose the application. The court ordered

that the matter be referred to the Minister and that the Minister should A decide it on the basis that the applicants did not object to retrenchment. In the meantime, the respondent stopped paying benefits that had been previously paid to the applicants, failed to pay their bonuses, and failed to pay salary increases granted to other employees. The applicants sought an order compelling the respondent to pay their salaries and B other benefits until such time as the dispute was settled. They also sought rescission of the order granted.
The respondent opposed the application, arguing that the applicants should have exhausted their domestic remedies under the code of conduct. It was also argued that there was no evidence that the applicants were entitled to the annual increments demanded, and that, even if increments C were due, the respondent was entitled to withhold them because of the applicants' conduct since the applications were filed.
Held, that where an application has been made to the Minister for the approval of proposed retrenchment of staff, the persons concerned remain employees until the Minister has made his decision. They are entitled to the salaries and other benefits due under their contracts. D However, where a benefit is in the discretion of the employer, it can be withheld at any time. In this case, the applicants were entitled to all the benefits they had previously received, as well as the salary increases which had been granted across the board to all employees.
Held, further, that if the respondent in an application wishes to raise the E procedural point that the applicant should have first exhausted his domestic remedies, it should do so in its opposing affidavit and not raise the matter for the first time in argument.
Held, further, that the fact that the applicant has not exhausted his domestic remedies does not oust the jurisdiction of the court. The court has a discretion to hear the matter. One factor is whether in the circumstances F it is appropriate for the domestic tribunal to consider the matter. In this case, because of the status of the applicants, the domestic procedures would not be seen to be completely impartial.
Held, further, that there were no good grounds for rescinding the order previously granted. The applicants had accepted their retrenchment and only disputed the package offered. This stand was reiterated on their G behalf by a labour consultant they had retained.
[zCAz]Cases cited
Chikamwe & Ors v Standard Chartered Bank of Zimbabwe Ltd & Anor S-152-98 H

A *Chiremba & Ors v Reserve Bank of Zimbabwe* 2000 (2) ZLR 370 (S)
Deweras Farm (Pvt) Ltd v Zimbank 1997 (2) ZLR 47 (H)
Deweras Farm (Pvt) Ltd v Zimbank 1998 (1) ZLR 368 (S)
Foreman & Anor v KLM Royal Dutch Airlines 2001 (1) ZLR 108 (H)
Kadir & Sons (Pvt) Ltd v Panganai & Anor 1996 (1) ZLR 598 (S)
Nicholas v Fraser Alexander Zimbabwe (Pvt) Ltd 2001 (2) ZLR 272 (H)
B *Sibanda & Ors v Nkayi RDC* 1999 (1) ZLR 32 (S)
Tutani v Min of Labour & Anor 1987 (2) ZLR 88 (H)
V Saitis & Co (Pvt) Ltd v Fenlake (Pvt) Ltd 2002 (1) ZLR 378 (H)
[zCIz]Case information
P Nherere, for the applicants
C Mrs *B Mtetwa,* for the respondent
[zJDz]Judgment
Smith J: The applicants are employees of the respondent. Last year the respondent embarked on a restructuring exercise which resulted in its decision to retrench 17 of its managers. Letters dated 31 May 2001 were sent by the respondent to the managers in question, advising them that their D services were terminated and offering them a retrenchment package. Some of the managers accepted the package they were offered but the applicants did not. It was realised that the respondent had not complied with the provisions of the Labour Relations (Retrenchment) Regulations 1990 (SI 404 of 1990) (hereinafter referred to as "the Retrenchment Regulations") and so the respondent withdrew the letters of termination. Meetings between the E applicants and the

respondent were held on 19 June, 5 July, 17 July and 1 August 2001. When the parties failed to reach an agreement, the respondent, by letter dated 7 August 2001, referred the dispute to the retrenchment committee established in terms of the Retrenchment Regulations. That committee considered the matter at its meeting on 22 August 2001 and made F its recommendations. The Ministry of Public Service, Labour and Social Welfare (hereinafter referred to as "the Ministry"), in a letter dated 20 September 2001, purporting to be from the Permanent Secretary of the Ministry and not the Minister, advised the respondent that its application to retrench the applicants had not been approved.

On 12 October 2001, the respondent instituted review proceedings (case No G HC 9926/01) wherein it sought an order referring the dispute between the parties to the Minister of Public Service, Labour and Social Welfare (hereinafter referred to as "the Minister") so that he could act in terms of s5(2) of the Retrenchment Regulations. The applicants failed to file any opposing papers timeously and were barred. They filed an application for the H upliftment of the bar and then decided not to oppose the respondent's

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Smith J

application. The Minister filed a notice of opposition but then withdrew his A opposition and said that he would abide by the decision of the court. Although the draft order filed with the application required that the Minister act in terms of s 5(2) of the Retrenchment Regulations, an amended draft order was filed by the respondent before the matter was heard by Omerjee J. He issued an order on 25 January 2002 in terms of the amended draft. It read as follows: B

"It is ordered that -

1. The Applicant (i.e. the respondent in this case) must submit an application to the Minister for approval accompanied with full reasons for the retrenchment together with the recommendations of the Retrenchment Committee. C
2. The Minister is to consider the application on the basis that the 1st to 12th respondents (i.e. the applicants in this case) do not object to the retrenchment."

Meanwhile the respondent had awarded salary increases to all its employees other than the applicants, stopped paying the applicants the benefits they had D previously been paid (i.e. school fees, motor vehicle allowances and sports club subscriptions), failed to pay the applicants their bonuses for the year 2001 and resorted to paying the applicants their salaries on dates different to those on which the rest of its employees were paid. In response to this action on the part of the respondent, the applicants filed an application seeking reinstatement of the benefits withheld and the award of bonuses and salary E increases given to the other employees of the respondent (HC No 11602/01). By letter dated 22 April 2002 the respondent advised the applicants that it was stopping payment of their salaries pending the resolution of the dispute between them. The response by the applicants was to file a further application (case No HC 3953/02) seeking an order that the respondent continue to pay their salaries and other benefits until such time as the dispute is settled. F

Mr *Nherere* argued that the three applications are all related in that they all turn, to some extent, on the pendency of the retrenchment dispute. He submitted that unless and until Ministerial approval for the retrenchment of the applicants is granted, their contracts of employment continued to subsist. Consequently, they are entitled to their salaries and all other benefits G provided for in their contracts of employment. Under Zimbabwean law, an employer may not unilaterally terminate a contract of employment except in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985), the Retrenchment Regulations or the relevant code of conduct. As the respondent had chosen to act under the Retrenchment Regulations, the applicants H

2002 (2) ZLR p235

Smith J

A remained employees until Ministerial approval of their retrenchment was given: see *Kadir & Sons (Pvt) Ltd v Panganai & Anor* 1996 (1) ZLR 598 (S). Until such time as the applicants' contracts of employment are validly terminated, it is unlawful for the respondent to withhold their salaries and other benefits. The attempt by the respondent to justify the withholding of the applicants' salaries on the grounds that they had been charged with B misconduct cannot be sustained.

Mr *Nherere* submitted that the order sought in case No HC 3953/02 should be granted as the respondent cannot lawfully withhold payment of the applicants' salaries. Furthermore, the order sought in case No HC 11602/01 should also be granted because the increases in salaries, bonuses and other C benefits are contractual entitlements, not merely discretionary benefits. As regards case No HC 1687/02, Mr *Nherere* argued that the real issue is that of rescission. The order granted by Omerjee J in case No HC 9726/01 was granted in default. The appropriate procedure to reverse

that judgment would therefore be by way of rescission, not appeal: see *Sibanda & Ors v Nkayi Rural District Council* 1999 (1) ZLR 32 (S). The court may rescind a default D judgment if there is good and sufficient cause: see *Deweras Farm (Pvt) Ltd v Zimbabwe Banking Corp* 1997 (2) ZLR 47 (H) which was affirmed by the Supreme Court in 1998 (1) ZLR 368 (S). He submitted that mere default on the part of the applicants is not decisive. It is but one of the factors that the court must take into account. The applicants did not oppose the application because they had no objection to the draft order that was attached to the E founding affidavit. The amended order was filed with the answering affidavit which was served on the legal practitioners but not brought to the attention of the applicants. The applicants have shown good cause for rescinding the order granted by Omerjee J.
Mrs *Mtetwa, in limine,* submitted that the issue of salaries and other benefits F is not properly brought before this court. In terms of the code of conduct, an employee who is aggrieved by the conduct of the employer must bring a grievance in terms of clause 7.1 of the code. The issues raised by the applicants are clearly grievances as envisaged in the code. They should have exhausted their domestic remedies before approaching the court: *see Nicholas v Fraser Alexander Zimbabwe (Pvt) Ltd* 2001 (2) ZLR 272 (H) and G *Chikamwe & Ors v Standard Chartered Bank of Zimbabwe Ltd & Anor* S-152-98. In addition, *Mrs Mtetwa* argued that the applicants had not placed any evidence before the court as to the terms of the contract each had with the respondent. The respondent is not obliged, in law, to pay the applicants an annual increment. It is for the applicants to establish that there is a legal H obligation binding on the respondent: see *Chiremba & Ors v Reserve Bank*

of Zimbabwe 2000 (2) ZLR 370 (S). The applicants are awaiting the A determination by the Minister of an application for retrenchment. Until that determination is made, it would be premature for the court to intervene in the question of increases in salaries and other benefits. There is nothing before the court to establish that the respondent is obliged to grant an increment to each and every employee as a matter of right and that it has no discretion in B any particular case.
Mrs *Mtetwa* further submitted that the respondent is entitled to withhold increments otherwise due to the applicants because of their behaviour since the applications were filed. They have circulated defamatory and malicious correspondence concerning the respondent and its senior management. In any event, increments and benefits are not a right and depend entirely on the C circumstances prevailing at any given time: see *Foreman & Anor v KLM Royal Dutch Airlines* 2001 (1) ZLR 108 (H).
It was submitted by Mrs *Mtetwa* that the applicants should have exhausted their domestic remedies before approaching the court. There are three applications under consideration. Voluminous papers were filed in each. In D none of those did the respondent raise the issue that the applicants should first have exhausted their domestic remedies. That issue was raised for the first time in the respondent's heads of argument. I consider that if a party to an application wishes to raise such an issue, that should be done in the opposing affidavit. That will then give the other party an opportunity to reply in the answering affidavit and state why he has approached the court without first E exhausting his domestic remedies. The court would then be in a better position to come to a decision. It must be pointed out that the existence of domestic remedies does not exclude or oust the court's jurisdiction. In determining whether or not to exercise its jurisdiction in preference to referring the applicant to his domestic remedies, the court will have regard to a number of factors, as stated in *Tutani v Minister of Labour & Ors* 1987 (2) ZLR 88 (H). F One of the factors is whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains. In *Nicholas'* case *supra* at 274 Blackie J said:
"Further, the onus is on the applicant to show good reason to by-pass a domestic procedure. In *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S), G it was said that a litigant should exhaust his domestic remedies unless there are good reasons for approaching the court. Also in this court, it has been said that 'domestic tribunals' should not be by- passed without good reason. See *Munyira v Secretary for Education & Public Service Commission* S-214-98 (not reported), which relied for the proposition on Baxter *Administrative Law* pp 720-721. See *Chikonye's* H case *(supra).*

A The applicant has the domestic procedures provided in terms of the Act and termination regulations available to him. These procedures are specifically designed and set up to deal with employer/employee matters. Those procedures have not been shown to be inadequate for the applicant's purposes. The applicant has not put forward any good reason for this court to receive the matter rather than for him to pursue his domestic B remedies. He appears to have approached the court believing that he could do so as a matter of right."

In this case, I consider it appropriate that the court should exercise its discretion for the following reasons. Firstly, the respondent did not raise the objections in its opposing affidavit. Secondly, having regard to the seniority of the applicants in the structure of the building society and the decisions C taken by the board of the respondent in relation to the applicants, together with the disputes between the parties before the applications were made, the domestic procedures would not be seen to be completely impartial. Thirdly, the applicants wish to have the order by Omerjee J set aside and that could only be done by way of an application to court.

To my mind, the starting point in this exercise is to determine the present D status of the applicants. In *Kadir & Sons supra* at p 604B-E Gubbay CJ said:

"It is clear to me that until the critical stage of the Minister's decision has been reached, the employees whom the employer proposes to retrench remain on the pay-roll. They have not been retrenched. The fact that in the interim period the employer may have ceased to operate the business E does not rid him of the legal obligation to pay the employees their wages. That this is so is underscored by the use of the phrase 'proposed retrenchment' in ss 5, 6 and 7 of the Regulations, as well as by the necessity for the Minister, in reaching his decision, to take account of the prospects of the employees finding employment in the future and the terminal benefits to which upon approval of the proposed retrenchment F they will become entitled.

Of course, the Minister may order that his approval of the retrenchment takes effect from a date in the future. The Regulations do not disable him from doing so. But to back-date the retrenchment conflicts with the intendment of the Regulations. A contrary view would cause an injustice to employees who, awaiting the Minister's decision on whether or not G they were to be retrenched, are obliged not to seek and obtain other employment."

Clearly, the applicants remain employees of the respondent until the Minister has announced his decision. All things being equal, they are therefore entitled to continue being paid the salaries and other benefits due to them under their contracts at the time the application for approval of their H retrenchment was made. What about increases and bonuses that are granted

to other employees after the application for retrenchment is made? Mr A *Nherere* conceded that where a benefit is in the discretion of the employer it can be withheld at any time. However, the cost-of-living adjustment of 18.25 *percent* that was given with effect from 1 July 2001 was awarded across the board to all employees. The increase of 13 *percent* with effect from 1 September 2001 was awarded on a similar basis. Likewise, the bonus was B awarded across the board to all employees. As regards the allowances for motor vehicles, school fees and sports club fees, the applicants were being given those allowances before the application for retrenchment. There is no basis for their withdrawal so long as the applicants remain employees of the respondent.

As regards the application for rescission of the order granted by Omerjee J, C the applicants want the order replaced by one which merely requires the retrenchment dispute to be referred to the Minister for him to act in terms of s 5 (3) of the Retrenchment Regulations. In other words, the retrenchment committee will inquire into the merits and decide whether or not approval for the retrenchment should be granted, and not only into the package to be given to the retrenched employees. The applicants' case is that the minutes of D meeting between the parties, which state that the parties agreed on the actual retrenchments but disagreed on the package, have been doctored and manipulated. They did not represent what had happened or been said and should be ignored. The respondent, on the other hand, hotly denies that the minutes are inaccurate. It claims that the applicants have made up the E allegations in order to prolong the dispute. Clearly the dispute as to the accuracy of the minutes cannot be resolved on the papers.

What is not in dispute, however, is the following. The respondent filed its application in case No HC 9726/01. The applicants failed to file notice of opposition within the prescribed period and were barred. They subsequently instructed their legal practitioners to file a notice of opposition and to seek F the upliftment of the bar. The matter was set down for hearing on 25 January 2002. Two days before that, their legal practitioners advised them that the chairman of the retrenchment committee and the Minister, who were also respondents in that case and who had filed notices of opposition, had withdrawn such notices and agreed to abide by the order of the court. By that G stage the respondent had already given notice to the legal practitioners of the applicants and of the Minister that an amended draft order had been filed and would be prayed for. The order was issued by Omerjee J on 25 January 2002.

It is not disputed that the applicants did not appear at the hearing on 25 January and that they were in wilful default. That is a factor that must be taken into account but it is not decisive. In *V Saitis & Co (Pvt) Ltd v Fenlake (Pvt) Ltd* H

Smith J

A 2002 (1) ZLR 378 (H) Chinhengo J dealt very comprehensively and lucidly with the question of rescission of a judgment. At p 386 of the judgment he said:

"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 B 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 always been so, is evident from McNally JA's words in *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corporation* 1998 (1) ZLR 368 (S) where at 369F he said:

'While it may generally be true to say that when there is wilful C default there will usually not be good and sufficient cause, I believe we fetter our disvretion improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause.'"

Is there other good and sufficient cause to set aside the judgment? I do not think so. It seems to me that initially the applicants did accept their D retrenchment and only disputed the package. That was specifically stated by the labour consultant they had retained to argue their case in his letter to the respondent dated 4 June 2001. He said "My clients are not contesting the proposed retrenchment by your company but only wish to place on record the following points for your noting and consideration". It is inconceivable that the labour consultant, who must be an expert in the field of labour relations E in order for him to be retained, would make a mistake on such a vital point. If he had indeed made a mistake, however, then one would have expected the applicants to have filed an affidavit from the labour consultant admitting that he had made a mistake and setting out the circumstances. Another factor which I consider to be of importance is the fact that the applicants forwarded F to the retrenchment committee their submissions relating to the retrenchment package but they did not forward any proposals relating to the actual retrenchment. Why was that if the retrenchment itself was being opposed?

Another factor which I consider to be very relevant is the time factor. That is a factor which the legislature obviously considered to be of importance when enacting the Retrenchment Regulations. Under s 5 of the Retrenchment G Regulations the retrenchment committee is enjoined, within two weeks of the matter being referred to it, to make a recommendation to the Minister. If it fails to make a recommendation, the Minister must call for all the documents in the matter and give his decision. Section 6 requires the Minister to consider, *without delay,* any recommendation submitted to him by the H retrenchment committee and then to either approve or refuse to approve the

2002 (2) ZLR p240

Smith J

proposed retrenchment within two weeks. Clearly the Retrenchment A Regulations appreciate that speed is of the essence.

For the reasons set out above, I consider that the application for rescission of the default judgment should be dismissed with costs.

It is ordered that:

1. The respondent shall continue to pay the applicants their salaries, B adjusted upwards by 18.5 percent with effect from 1 July 2001 and 13 percent with effect from September 2001 together with any further adjustments granted by the respondent to its employees generally across the board, after September 2001, until such time as the Minister has approved their retrenchment.
2. The respondent shall grant the applicants a bonus equal to any bonus C granted across the board to its employees in 2001 who are on the same grade as the applicants.
3. The respondent shall continue to pay the applicants the benefits relating to school fees, motor vehicles and sports clubs subscriptions at the level they were being paid when the application for approval of their D retrenchment was made.
4. The respondent shall pay the applicants' costs in connection with cases No HC 11602/01 and HC 3953/02.
5. The application for rescission in case No HC 1687/02 is dismissed with costs. E

Chingore & Garabga, applicants' legal practitioners

Kantor & Immerman, respondent's legal practitioners F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/BEVERLEY BUILDING SOCIETY v MINISTER OF LABOUR 2002 (2) ZLR 241 (H)

[zRPz]BEVERLEY BUILDING SOCIETY v MINISTER OF LABOUR 2002 (2) ZLR 241 (H)
2002 (2) ZLR p241

Citation	2002 (2) ZLR 241 (H)
Case No	Judgment No. HH-82-02
Court	High Court, Harare
Judge	Smith J
Heard	31 May 2002; 15 August 2002
Judgment	15 August 2002
Counsel	*Mrs B Mtetwa,* for the applicant *Mrs Y Dondo,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

[zFNz]Flynote
D **Court** — contempt — failure to obey court order — party alleging order to be erroneous — duty to obey order until it is set aside — disobedience to order constituting contempt
Practice and procedure — order — party's duty to comply with — party alleging order to be erroneous — duty to obey order until it is set aside E — disobedience to order constituting contempt
[zHNz]Headnote
During the course of retrenchment proceedings, a court order was issued directing the employer to submit an application for retrenchment to the responsible Minister, for the Minister to determine on the basis that the employees did not object to retrenchment. The Minister had withdrawn F his initial opposition to the granting of the order. The Minister did not consider the matter within the 14 day time limit specified in the relevant regulations, and the employer sought to have him committed for contempt of court. The Minister objected, on the grounds that the court order did not specify a time limit and that he could not make a decision G without input from the affected employees.
An affidavit was submitted from an Acting Minister (who had not himself been involved in the earlier proceedings), disputing aspects of the order. In particular, he claimed that he had to hear the views of the employees. He sought to have the order set aside.
Held, that there was no basis under r 449 of the High Court Rules for setting H aside the order. The order was not granted erroneously in the absence
2002 (2) ZLR p242
Smith J
of any party affected. The affected parties were aware, before the order A was granted, of what was being sought and deliberately chose not to oppose the order or attend the hearings
Held, further, that the Acting Minister's affidavit contained untruths, in that he deposed to matters which had actually been done by the substantive Minister. It was obvious that officials in the Ministry had drawn up the affidavit. B
Held, further, that if the Acting Minister considered that the court order was erroneously granted, he should have acted promptly to have it set aside, rather than waiting until an application was made to have him committed for contempt. Where a party considers a court order to be in error, his duty

is to obey it until it is set aside. Failure to do so amounts to C contempt. Costs would be awarded to the applicant on the higher scale and the Minister would be fined.

[zCAz]Cases cited

In re *Chinamasa* 2000 (2) ZLR 322 (S)
Culverwell v Beira 1992 (4) SA 490 (W) D
S v Mushonga 1994 (1) ZLR 296 (S)
Whata v Whata 1994 (2) ZLR 277 (S)

[zCIz]Case information

Mrs *B Mtetwa,* for the applicant
Mrs *Y Dondo,* for the respondent E

[zJDz]Judgment

Smith J: The applicant (hereinafter referred to as "BBS") reviewed its structures in 2001 and decided that some of its managers would have to be retrenched. It gave them notice that their services were being terminated but it failed to comply with the requirements of the Labour Relations F (Retrenchment) Regulations, 1990 (S I 404 of 1990) (hereinafter referred to as "the Retrenchment Regulations"). It subsequently withdrew the notices and tried to negotiate with the managers concerned. When they were unable to reach agreement the matter was referred to the Retrenchment Committee in terms of s 5 of the Retrenchment Regulations. That Committee met on 22 August 2001 and thereafter made its recommendations to the respondent (hereinafter referred to as "the Minister") on 30 August 2001. The Minister decided not to accept the recommendations of the Retrenchment Committee. BBS then instituted review proceedings (case No HC 9726/01). The Minister, by way of an opposing affidavit deposed to by the Chief Labour Relations Officer, opposed the application but subsequently withdrew his opposition and agreed to abide by any order the court might make. The managers who

A were to be retrenched did not file opposing papers within the prescribed period and were barred. They subsequently filed an application for the uplifting of the bar but that application was formally withdrawn on the day of the hearing on 25 January 2002.

On 25 January Omerjee J handed down the order (hereinafter referred to as "the court order") which reads as follows:

"1. The B Applicant must submit an application to the Minister for approval of the retrenchment accompanied with full reasons for the retrenchment together with the recommendations of the retrenchment committee.

2. The Minister is to consider the application on the basis that the 1st to 12th Respondents (i.e. the managers to be retrenched) do not object to the retrenchment".

A copy of the court order was served on the Minister on 4 February 2002. BBS considered that the Minister would make his decision within 14 days, as required by s 6 of the Retrenchment Regulations. When no response had been received by 18 February, a reminder was sent to the Attorney-General's Office BBS then filed this application on 25 March 2002, seeking an order declaring the Minister to be in contempt of court and directing that he be committed to jail until such time as he complied with the court order. BBS also claimed its costs on the legal practitioner and client scale.

The Minister opposed the application, needless to say. He submitted that the court order did not specify any time limit within which he had to make a E decision. He considered that BBS is being unfair and unjust because there was no input from the managers who are being retrenched and so he could not make a decision on the matter. Although BBS served the application and the court order on him, they were not served on the managers concerned. The court order did not debar him from hearing the managers concerned or prevent them from making representations "on a fresh application as they F would have legitimately expected to do or be allowed". It was BBS that made it impossible for him to make a determination by 18 February or any other date as it did not advise the managers of the applications and the terms of the court order. In order to be able to make an informed decision and bring the matter to finality, he had called for the written views of the managers. It would have been a travesty of justice for him to have made a determination G without first hearing the parties that would be affected thereby. As at 5 April he had not been furnished with any input from the managers which would enable him to make a decision pursuant to the court order.

The Minister's opposing affidavit was filed on 8 April. Subsequently, on 15 April, an application was filed on behalf of the Minister in terms of Order 49, H rule 449, of the High Court Rules for the court order to be set aside. The

Smith J

founding affidavit was deposed to by John Nkomo in his capacity as Acting A Minister of the Public Service, Labour and Social Welfare. In his affidavit the Acting Minister stated as follows:

"6 Whilst I had indicated a willingness to abide by the court's decision I observed and indeed my attention was later so drawn by my Ministry's legal advisor that the order of the court dated 25 January 2002 was materially different from what the Respondent originally B sought in that Application. I attach a copy of the Draft Order sought in Application No. HC 9726/01 marked Annexure 'JM I'.

7. It is evident as I have stated that the terms of the original Draft Order and upon which I had based my concession to abide were materially different from the Final Order given on 25 January 2002 by Omerjee J. It was my understanding of the court's order that I was being called C upon to act and make a decision in terms of powers vested in me by S.I. 404/90 and that the format of Applicants application had to comply with S.I. 404/90.

8. (i) Furthermore in terms of compliance there exists a difficulty as regards paragraph 2 of the Court order. My ministerial file on the matter submitted to me reflects that the employees were actually D contesting the retrenchment. It is my view therefore that in coming to a just decision in terms of law, I am thus required to solicit the views of both parties.

8. (ii) Paragraph 2 of the said Order thus has the effect of usurping the powers given to me in terms of the applicable law in so far as the said paragraph seeks to limit my discretion to act. The relevant law as set E out in SI 404/90 gives my office a wide discretion and it is for that reason I believe that the Order seeks, perhaps inadvertently, to limit this discretion. In fact what the content of the Order seeks to do is to take precedence over the statutory provisions of the instrument aforesaid.

9. In the circumstances it is my humble view that the Order given in Case No. HC9726/01 is not the order originally sought by Applicants F therein neither is it the Order that I elected to abide by. I am advised and verily believe that that Order was erroneously made. The fact that the draft order sought is materially different from the order granted by this Honourable Court lends credence to that proposition. It is accordingly on the basis of the aforegoing that application is hereby sought in terms of Order 49, r 449 (1)(a) of the High Court G Rules for variation of the Order of 26 January 2002 on the grounds that same was erroneously given as it was at variance with original draft order. My right to a fair hearing as enshrined in section 18(9) of the Constitution seems to have been overlooked as I was not heard with respect to the order that this Honourable Court subsequently granted. H

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10. Alternatively A there is need for this Honourable Court to clarify its order as on a proper interpretation of SI 404/90 the effect and meaning of the judgment or order is unclear. This will enable me to give effect to its true intention.

11. I further contend that Respondent's legal practitioners acted improperly when at the hearing of review they failed and or B deliberately omitted to ensure that the Order originally sought and consented to by Applicant was the one granted by the Court instead this Honourable Court was misled into granting an erroneous order. For this reason I contend that this is a matter befitting the award of costs on a legal practitioner and client scale."

The order sought by the Acting Minister was for the Court order to be set aside C and substituted with the following order:

"(i) That the dispute be and is hereby referred to the Minister in order for him to act in terms of section 5(3) of the Regulations.

(ii) That all salaries and other benefits paid to the employees after 20 October be deducted from the final package".

BBS opposed the application by the Acting Minister. *In limine,* it contended D that the court order was not made in error or erroneously made in the absence of other interested parties as the Minister and the managers concerned deliberately chose not to appear at the hearing. It also submitted that there is no ambiguity in the court order. Therefore the only conclusion to be drawn is that the Acting Minister brought the application improperly in order to avoid the consequences of the application filed by BBS to hold the Minister E in contempt of court. BBS also submitted that the Acting Minister, John Nkomo, could not properly swear to facts arrived at by a totally different Minister. It is only the substantive Minister, July Moyo, who can say what he did and why. Therefore the supporting affidavit cannot be accepted. BBS also questioned why it had taken the Minister/Acting Minister almost three F months to bring the action if it was genuinely believed that an error had occurred.

In the opposing affidavit BBS made the following submissions. The Minister was advised, before he withdrew his opposition in case No HC 9726/01, that an amended order would be sought as new facts had been unearthed when perusing the retrenchment file. The information was contained in the answering G affidavit that was served on the Minister's legal practitioners on 7 November 2001. The application in that case had been premised on the belief that it was not the Minister who had made the decision. When BBS was invited to peruse the record, it was ascertained that the Minister had in fact made the decision, although he had grossly misdirected himself in that he had acted on the recommendations of the Chief Labour Relations Officer and ignored those H of the Retrenchment Committee. The amended draft order had been served

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on the legal practitioners of the Minister and those of the managers concerned. A The Acting Minister/Minister is therefore deliberately trying to mislead the court when he says that he expected that the order that would be granted would be the one set out in the founding papers and not the amended draft order. The notice of withdrawal was filed in January 2002, more than two months after BBS had advised the Minister that it would seek an amended B order. When the matter was argued in court on 25 January Omerjee J wished to make an order that would ensure that the recommendations of the Retrenchment Committee on the application that had been filed with it would be placed before the Minister in terms of the court order, in an endeavour to avoid the possibility of officials placing selected documents before the Minister. The Minister did not at any stage consent to the original draft order. C Opposition to the order sought was filed on his behalf. He was then advised that an amended order would be sought. Thereafter the opposition was withdrawn and he said that he would abide by the court's decision. The provisions of the Retrenchment Regulations were followed right up to the time when the Retrenchment Committee made its recommendations and forwarded them to the Minister. Thereafter it was the Minister who failed to D act in terms of the Retrenchment Regulations when he made his decision based on recommendations from other sources. The application for retrenchment approval was made to the Retrenchment Committee and each party was given an opportunity to make representations, which were taken into consideration by that Committee. In terms of the Retrenchment E Regulations, the Minister must have regard to the recommendations of the Retrenchment Committee. There is nothing in those regulations which requires or indeed permits him to solicit the views of either of the parties.

The application to set aside the court order cannot possibly be upheld. It purports to be made in terms of Order 49, r 449, of the High Court Rules. Rule 449 (1) provides that the court or a judge may, *mero motu* or on the F application of any party affected, rescind or vary any judgment or order on the grounds specified in para (a), (b) or (c) thereof. Paragraphs (b) and (c) are irrelevant. Paragraph (a) provides that the order may be set aside or corrected if it was erroneously sought or erroneously granted in the absence of any party affected thereby. G There is no possible basis for holding that the order was granted erroneously in the absence of any party affected thereby. The learned judge who granted the order was fully aware of what he was doing. The applicant was seeking the order that was granted. The other parties affected, namely the managers and the Minister, were aware of the draft order initially sought and of the amended draft that would be sought. They were also aware of the date of the hearing and deliberately decided not to oppose H

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A the application or attend the hearing. However, even if the papers did show that there was some error on the part of the learned judge (which they do not), the founding affidavit cannot be accepted because it is indisputably false. As stated earlier, the affidavit was deposed to by the Acting Minister, John Nkomo. He says that it was he who had indicated a willingness to abide by the decision of the court yet the papers clearly show that it was the substantive B Minister who did so. The Acting Minister says that it is his view that he was required to solicit the views of both parties in order to come to a just decision. In fact that was the view of the substantive Minister and he solicited the views of only one of the parties, not both. It is obvious that officials in the Ministry drew up the affidavit, put it before the Acting Minister and showed him where to sign and he did so without even bothering to read the document. I say that C because, if he had read it, he could not possibly have sworn on oath that he was the one who had done the things and reached the conclusions stated therein and then signed it. He would have known that it was not he who had done the things alleged in the affidavit.

The timing and the content of the application to set aside the court order D render the *bona fides* of the Minister very suspect. If he genuinely believed that the court order had been granted in error, why was the application not made a few days after the court order was served on him? Why was it

filed some two and a half months later? Why was it only filed after the application to put him in contempt of court? Why was it then so urgent that the founding affidavit had to be put before the Acting Minister, who then perjured himself? E Why did the founding affidavit contain palpable untruths? I cannot accept statements to the effect that the Minister's decision to abide by any order of the court was based on what was set out in the original draft order, when notice of the amended draft order was served on the Minister on 4 November 2001 and he made his decision to abide by the court's order on 23 January F 2002, nearly three months later.

The allegations made by the Minister in his opposing affidavit differ in many respects from the allegations made by the Acting Minister in his affidavit seeking to set aside the court order. These affect the credibility of the Minister. In the heads of argument filed on behalf of the Minister it was not argued that he had refused to comply with the court order because it was G erroneously granted. Instead it was argued that he is yet to comply with the order but has had to get the input from the managers concerned.

In S v *Mushonga* 1994 (1) ZLR 296 (S) at 304-305 Gubbay J said:

"The opposing view is that generally a person may not refuse to obey an order of court merely because it has been wrongly made, for to do so H would be seriously detrimental, if not completely fatal, to the authority

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Smith J

of the court. This proposition was forcibly advanced by De Villiers CJ A in In re *Honeyborne* (1896) Buch Vol 6 145 at 150, in these terms:

'It would be utterly subversive of the authority of magistrates and of the dignity and decorum which ought to prevail in all courts of law if [an invalid order could be disobeyed with impunity]. If the agent were to be allowed to defy the authority of the court on the ground of an error of judgment on the part of the court, the question would in every case be B whether the magistrate is right in his reading of the law or whether the agent is correct in his, but there would be no tribunal on the spot to decide between them. Undoubtedly it is the duty of the agent to bow to the decision of the court and to seek his remedy elsewhere; and it is equally the duty of the court to uphold its own dignity and see that its authority is respected by the practitioners before the court.' C

On this approach, the person must first obey the supposed invalid order and thereafter seek redress, if any, by way of appeal or review. He is not to determine for himself whether the order ought not to have been made, but should come to the court for relief if advised that it is invalid. Otherwise, as observed by Caney J in *S v Zungo supra* at 271E:

'...the conduct of legal proceedings would become chaotic.' D

See also *R v Vass* 1945 GWLD 34 at 39; *S v Tobias* 1966 (1) SA 656 (N) at 665 E-F; *Culverwell v Beira* 1992 (4) SA 490 (W) at 494 A-C.

It is this view, and not the other, that derives direct support from English law. See Miller *Contempt of Court 2* ed at pp 438-440; Arlidge and Eady *The Law of Contempt* para 5-44 at p 280.

The exception to the general proposition is where blind compliance with E an obviously invalid order would itself tend to weaken respect for the administration of justice. Suppose, for instance, that a judicial officer had ordered a person to do something quite absurd and blatantly in violation of his legal rights; his disobedience could not be regarded as contemptuous. See *Makapan v Khope* 1923 AD 551 at 556 *in fine* – 557; F *R v Vass supra* at 37 Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* at pp 172-173; Snyman *Criminal Law* 2 ed at p 343.

Accepting the limitation, which is essentially a matter of common sense, it is the second view that I find the more persuasive. Its adherence ensures that the authority, dignity and respect of the court — the maintenance of which is so fundamental to the proper administration of justice — is not G demeaned or prejudiced".

The views so expressed were approved in *Whata v Whata* 1994 (2) ZLR 277 (S) at 281-282 where Gubbay CJ, after referring to *Mushonga's* case, said

"It was there held, after a review of the cases, that generally a person may not refuse to obey an order of court merely because it has been wrongly made; for to do so would be seriously detrimental to the standing and H

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A authority of the court. The judgment went on to point out that the proper approach was for the person first to obey the supposed invalid order and thereafter to seek redress, if any, by way of appeal or review. It was not for him to determine for himself whether the order ought not to have been made. He should come to the court for relief if advised that it was invalid. The exception being where the order was blatantly absurd in its command B and would itself tend to weaken respect for

the administration of justice. Only in that remote eventuality would disobedience not be regarded as contemptuous."
In his opposing affidavit the Minister has not alleged that the court order was invalid or obscure or in any way defective. It is only in the application for dismissal of the court order that the Acting Minister, not the substantive C Minister, tried to establish that it had been erroneously granted.
In *Culverwell v Beira* 1992 (4) SA 490 (WLD) at 494 A-C Goldstein J said:
"Counsel was unable, however, to refer me to any authority for the proposition that an order which is wrongly granted by this court can be lawfully defied and I know of none. All orders of this court, whether D correctly or incorrectly granted, have to be obeyed until they are properly set aside. Counsel relied for his argument on cases concerning regulations which are found to be *ultra vires;* in such cases conduct in breach of regulations is not unlawful. However, no authority was quoted to me — and I am aware of none — which equates court orders with regulations in the manner contended for. Acceptance of counsel's argument would in many cases result in respondents being able to defy all but Appellate E Division orders with impunity contending that they believed such orders to be wrong; the resultant chaos is not difficult to imagine. I accordingly reject counsel's argument."
If the Minister, for any reason, disagreed with the court order, it was for him to institute proceedings timeously, whether by way of appeal or review or F otherwise, to have the order set aside or reversed or corrected. He took no such action. Instead, he just ignored the court order. He has tried to excuse his conduct by claiming that the views of the managers concerned had not been sought and that he had a duty to ensure that the views of all parties were obtained. In fact, the managers did have an opportunity to express their views to the Retrenchment Committee, as did BBS. In fact, the requirements of the G Retrenchment Regulations were observed until after the Retrenchment Committee had forwarded its recommendations to the Minister. Thereafter the Minister decided to depart from the provisions of the Retrenchment Regulations. Instead of making a decision, as he was required to do, he decided to contact the managers concerned for their views. In doing so he did not act impartially. He did not advise BBS of what he was doing and he did H not give BBS an opportunity to comment on the input of the managers.
2002 (2) ZLR p250
Smith J
It is clear from the provisions of the Retrenchment Regulations that A retrenchment exercises must be attended to expeditiously. Unfortunately that has not been done in this case. The Retrenchment Committee made its recommendation on 4 September 2001. The Minister was required, in terms of s 6 of the Retrenchment Regulations, to make his decision by 18 September. He did not do so. Instead he made a decision that was irregular. B The review application was filed in October. The Minister allowed opposing papers to be filed. Then in January 2002, when the matter was set down for hearing, he withdrew his opposition and agreed to abide by the decision of the court. That initial opposition and subsequent *volte face* resulted in a delay of three months. The court order was served on the Minister on 4 February and the Minister had still made no decision by 31 May when this matter was C heard. Had the Minister made his decision in September 2001, as required by the Retrenchment Regulations, the managers concerned would have had their retrenchment packages long ago and would have been paid off. However, BBS has had to continue paying them to date. It may well be that BBS has a good case to sue the Minister for the damages suffered due to his D failure to comply with the Retrenchment Regulations.
In *in re Chinamasa* 2000 (2) ZLR 322 (S) at 343 C GubayJ said:
"So far as contempt involving disobedience to the order or process of a court is concerned, the offence is treated as 'civil' contempt. This is because such contempts are, in reality, a form of execution, pursuant to which the person of the defaulting party may be attached in order to E coerce compliance with the order."
There can be no doubt that the Minister has shown disobedience to the court Order. His failure to comply with the order has caused BBS to suffer unnecessary expenses and has left the managers concerned in a state of uncertainty for many months. He has deliberately flouted the provisions of the Retrenchment Regulations which, as the responsible Minister, he is F expected to enforce.
In para 8 (i) of the affidavit by the Acting Minister in support of the application to set aside the court order, he says that his ministerial file on the matter reflects that the managers concerned were actually contesting the matter and therefore it was "his" view that, in coming to a just decision in G terms of law, he was required to solicit the views of both parties. That shows that the Minister was not prepared to abide by the court order. There was something on the ministerial file which showed that the managers had not consented to the retrenchment so, despite being ordered by the court to proceed on the basis that they had consented, he decided not to do so. Neither did he consider it necessary to institute proceedings forthwith to set aside or H
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Smith J
A suspend the court order. He decided that he would ignore the court order. It is accepted that no one, not even a judge, is infallible, although many believe that the Pope is and many lesser mortals believe that they are. The law recognises that judges, or at least those in the High Court, are fallible and that is why there are provisions allowing for an appeal from the judge's decision and for the setting aside or correction of a judge's decision. It is one of the B basic tenets of our law, however, that until an order of court is suspended or set aside, it must be observed. Failure to do so renders the person concerned guilty of contempt of court. If any person is permitted to ignore a court order with impunity, the rule of law is endangered. There can be no rule of law in this country if a Minister or other official can, with impunity, ignore a court C order because he thinks it is wrong.
As regards costs, I consider that they should be awarded on the higher scale. The Minister has shown a blatant disregard for the court order. He has shown complete disrespect for the court.
Insofar as the application for the setting aside of the court order is concerned, the *bona fides* of the application cannot be accepted. Clearly the application was filed in a vain attempt to convince D the court that the Minister was *bona fide* in his disregard for the court order. Had the contents of the affidavit of the Acting Minister been consistent with the opposing affidavit of the Minister, then the court might have accepted that the Minister or his officials were acting honestly but under a mistaken view of the law. The affidavit of the Acting Minister was, however, completely at variance with the prior actions of the Minister. The court does not even know E whether the Minister supports the application for the setting aside of the court order. It appears that his officials were trying to mend broken fences and their attempts were very inept.
It is ordered that
1. The respondent is declared to be in contempt of court. F
2. The respondent is ordered to pay a fine of $50 000 and, in addition, is committed to prison for three months which is suspended on condition that the respondent complies with the order granted by Omerjee J, on 24 January 2002, within 14 days of the date of this order.
3. The respondent shall pay the applicants' costs, including the costs of the G application to set aside the order granted by Omerjee J on the legal practitioner and client scale.
Kantor & Immerman, legal practitioners for applicants
Civil Division of the Attorney-General's Office, legal practitioners for H respondent

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[zRPz]ARTCRAFT FURNITURE MANUFACTURING v TOKOZANI (PVT) LTD & ORS 2002 (2) ZLR 252 (H) 2002 (2) ZLR p252

Citation 2002 (2) ZLR 252 (H)

Case No Judgment No. HB-98-02

Court High Court, Bulawayo

Judge Cheda J

Heard 12 July 2002; 15 August 2002

Judgment 15 August 2002

Counsel Miss *P Dube*, for the applicant

N Ndlovu, for the respondents

Case Type Application for summary judgment

Annotations No case annotations to date

[zFNz]Flynote
Contract — interpretation — commercial sale agreement — need for fair and broad interpretation D
Words and phrases — "implementation of this agreement "— meaning of in context of commercial contract of sale
[zHNz]Headnote
The parties entered into a sale agreement which contained a clause requiring them to refer to arbitration "any dispute concerning the interpretation or implementation of [the] agreement, excluding the purchasers' obligation E to make payment". The purchasers failed to register a covering bond as they were required to do under the agreement and the seller sued for the balance of the purchase price. The purchasers denied breaching the agreement, alleging that the seller's withholding of transfer fees had rendered it impossible for them to register the bond, and raised the point *in limine* that the matter should have been referred to arbitration since F the issue between the parties concerned the implementation of the agreement.
Held that the agreement was a commercial transaction which should be interpreted fairly and broadly. The word "implementation" in the clause should therefore be given its ordinary and everyday meaning of performance. G
Held, further, that while the dispute between the parties certainly concerned the purchasers' obligation to make payment, and so would be excluded from arbitration, it also concerned the seller's conduct in withholding funds and preventing performance by the purchasers. It therefore had to be submitted to arbitration under the clause. H
2002 (2) ZLR p253
Cheda J
[zCAz]Cases cited A
Hillas & Co Ltd v Arcos Ltd (1932) 147 TLR 503; [1932] All ER Rep 494
Union Govt v Smith 1935 AD 232
[zCIz]Case information
Miss *P Dube,* for the applicant
B *N Ndlovu,* for the respondents
[zJDz]Judgment
Cheda J: On 21 May 2001 plaintiff (hereinafter referred to as "the applicant") entered into an agreement of sale with the first, second and third defendants (hereinafter referred to as the first, second and third respondents respectively). The first respondent agreed to purchase certain assets and C stock from applicant. One of the terms of the agreement was that first respondent register a notarial general covering bond over the assets sold within 30 days of the date of sale. The said bond was to be in favour of the applicant. The bond was only registered on 30 January 2002. It was clear that registration was done outside the agreed time. There is therefore *a prima facie* D breach of one of the terms of the agreement of sale. As a result of this perceived breach by the first respondent, the applicant issued summons against the first, second and third respondents out of this court on 5 February 2002 for the sum of $1 824 586,30 which was, however, amended to the sum of $1 562 081,69 as the applicant conceded that it owed the respondents the sum of $854 585,00. Therefore the applicant's claim is for:
(a) $1 562 081,69 E and
(b) interest thereto at the rate of 45 *per centum* from 1 February 2002 to date of full payment.
Paragraph 1.4 of the contract reads:
"The purchasers shall issue instruction to Lazarus and Sarif Legal F Practitioners of Bulawayo to register a Notarial General Covering Bond over the assets (annexure "A") for the value of $4 200 000,00 (four million two hundred thousand dollars) in favour of the sellers to be lodged within 30 days from the effective date of sale."
The effective date of sale is 31 May 2001 as stipulated by paragraph 5.1 of the said agreement. In response to the summons issued out of this court, the G first, second and third respondents caused

an appearance to defend to be entered through their legal practitioner of record on 11 February 2002. The applicant applied for summary judgment on 20 March 2002, which the respondents opposed. Mr Neville Rohan Buffee, a director of the applicant, in his founding affidavit for the summary judgment, avers that the respondents were in breach of the agreement by virtue of their failure to register a notarial H general covering bond within 30 days as agreed.

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Cheda J

Clause 6 is a breach clause and it reads: A

"In the event that the purchasers fail to make any payment provided for herein on due date or otherwise committing a breach of any of the conditions hereof, and failing to make such payment or remedy such a breach within 14 days of written notice, in addition and without prejudice to any other rights available at law, the seller shall have the right:

6.1 To claim immediate payment of the balance of the purchase price B together with any other amounts outstanding in terms of the agreement hereof; or

6.2 ...

6.3 ..."

It is on the basis of clause 6.1 that the applicant now prays that summary C judgment be granted in its favour. The respondents oppose the application on the basis that:

(a) they are not in breach as the applicant only delivered the necessary documents for the registration of the bond in January 2002.

(b) the applicant has withheld a lot of money which is necessary for the transfer fees for the registration of the bond. D

(c) the applicant has waived its right to cancel the agreement as it continued to accept monthly rentals for the premises and the purchase price from the time it alleges that the breach took place.

(d) summons was issued for other reasons because it was issued after the bond had been registered. E

(e) there was a verbal agreement whereby the first respondent agreed to sell its products through the applicant.

It is pertinent to note that clause 6.6 of the said agreement stipulates that:

"In the event that there should be any dispute concerning the interpretation or implementation of this agreement excluding the purchasers' obligation F to make payment such dispute shall be referred to the senior partner for the time being of Lazarus and Sarif, Mr Charles Lazarus, who shall resolve the dispute in accordance with the principles of equity and fair play and whose written determination shall be final and binding incapable of appeal."

At the hearing, the respondents raised a point *in limine,* namely, that the G applicant was not properly before the court as it was supposed to exhaust all the remedies provided for in the agreement of sale. They also argued that the arbitration clause specifically states that the parties should bring this matter before an arbitrator in the event of a dispute regarding the interpretation or implementation of the agreement. The question to be asked is whether the present dispute falls within the ambit of this court or an arbitrator. Miss *Dube,* H

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Cheda J

A for the applicant, argued that this dispute is not for arbitration as it does not deal with implementation but payment, which is specifically excluded by clause 6.6. The Chambers Concise Dictionary 1988 defines implement as "to give effect to; to fulfil or perform". Arbitration is now an integral part of our legal procedures for dispute resolution. Arbitration is defined by Butler and Finsen, *Arbitration in SA Law & Practice* (1993) at 1 as:

B "Arbitration is a procedure whereby the parties refer that dispute to a third party, known as an arbitrator, for a final decision after the arbitrator has first impartially received and considered evidence and submissions from the parties. The reference to the arbitrator takes place pursuant to an agreement between the parties. The arbitrator, in resolving the dispute, is not an ordinary court of law but a person chosen by the parties."

C Pursuant to this notion, our legislature passed the Arbitration Act [*Chapter 7:15*] giving effect to the resolution of some disputes by arbitration. In my view, therefore, there are two essential elements in determining whether or not a dispute qualifies for arbitration, namely that the parties mutually agreed that in the event of a dispute, such dispute should be referred to arbitration D and that a dispute is in existence.

In the present matter, it is apparent that these two elements are present. What, however, is disputed is whether the dispute in question, that is, the registration of the bond, is excluded from being referred to the arbitrator. The major question which falls for determinations is whether or not the word "implementation" in the agreement refers to the failure or otherwise of the E registration

of the bond. The definition given *supra* refers to giving effect, fulfilment or performance of the said agreement of sale.

Miss *Dube* argues that this matter is not covered by clause 6.6 as it deals with payment only. However, Mr *Ndlovu,* for the respondents, while admitting that indeed there is a balance outstanding by the respondents, goes further to F argue that the whole matter has to take a totally different dimension by virtue of the fact that the applicant has unlawfully withheld an amount of $854 585 and that the said breach of the agreement of sale was occasioned by the applicant's failure to perform its part of the contract which impeded the timeous registration of the bond. An additional factor is an allegation of a subsequent verbal agreement regarding the sale of the first respondent's G products through the applicant. These allegations certainly cannot be resolved through the papers. In my view, there is a dispute of fact between the parties. In as much as the arbitration clause excludes reference to arbitration, the other part of the said clause deals with a dispute arising out of the implementation or interpretation H of the agreement. The question is whether the dispute in question is to do with

2002 (2) ZLR p256

Cheda J

the implementation or interpretation of the agreement of sale or is purely to A deal with payment. In my view, the dispute would certainly have everything to do with payment were it not for the self-help action by the applicant in withholding what was otherwise due to the respondents. What the applicant did was not agreed to by the respondents and, as such, it was a unilateral decision in a mutual bilateral contract. This conduct by the applicant on its B own, unfortunately introduces a major element in the contract, being the delay of the registration of the bond, and this renders the implementation of the agreement incapable of performance. It is this conduct which raises a dispute in this matter. Much has been said about the meaning of "interpretation" and "implementation". In deciding what the word "implementation" means, I am of the view that regard must be had to the intention of the parties. C

A contract of this nature requires performance, therefore ordinarily, should either party fail to perform, the other should be able to institute legal proceedings to assert his legal rights. In the present case, the parties specifically agreed that in the event of a dispute in relation to implementation, such dispute should be referred to arbitration. The word "implementation", D in my opinion, should be given its ordinary and everyday meaning, bearing in mind the intention of the parties in commercial transactions. In *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LTR 503 (HL) at 514; [1932] All ER Rep 494 at 503 I, Lord Wright remarked;

"Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the E course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly without being too astute or subtle in finding defects ..."

I am not in agreement with *Miss Dube* that the word "implementation" means anything other than performance, which performance is now doubtful for F different reasons as held by the parties. This document was drafted by the parties with a clear intention and I am uncomfortable with interpreting the said clause so restrictively as to defeat the parties' intention.

In *Union Government v Smith* 1935 AD 232 at 241, Wessels CJ had this to say: G

"...[W]e must look at the whole document and, if from other parts of the document itself, it appears that the parties did not intend the literal meaning to convey their intention, or if to give a term its literal meaning would result in an absurdity, then we must reject the literal meaning and give to the words the meaning which the parties manifestly intended." H

2002 (2) ZLR p257

Cheda J

A This *dictum* goes to show the extent the courts go to give effect to the intention of the parties. In the present case the parties' intention was to exclude the issue of payment, but I doubt if they intended to so exclude it where the other party would want to use it where the other party itself is *prima facie* culpable.

I find that there is a dispute, which dispute prevents the implementation of the B agreement of sale. This dispute falls within the authority of the duly appointed arbitrator, being Mr Charles Lazarus of Lazarus and Sarif.

I, therefore, find that the applicant's interpretation of the meaning of the arbitration clause is unduly restrictive, being not a true reflection of the intention of the parties.

C I am accordingly satisfied that the point raised *in limine* is valid and there is therefore no need for me to consider the merits of the applicant's application. The application is therefore dismissed with costs.

Messrs *Coghlan & Welsh,* applicant's legal practitioners

D Messrs *Lazarus & Sarif,* respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/CHIZUNGU GROUP OF MBERENGWA v SHONIWA 2002 (2) ZLR 258 (H)

[zRPz]CHIZUNGU GROUP OF MBERENGWA v SHONIWA 2002 (2) ZLR 258 (H)
2002 (2) ZLR p258

Citation	2002 (2) ZLR 258 (H)
Case No	Judgment No. HB-102-02
Court	High Court, Bulawayo
Judge	Chiweshe J
Heard	1 January 2002; 15 August 2002
Judgment	15 August 2002
Counsel	*C P Moyo,* for the plaintiff *S Mazibisa,* for the defendant
Case Type	Special plea in bar
Annotations	No case annotations to date

[zFNz]Flynote
Company law — publication of company's name — liability of director who fails to display company's name on documents — whether director personally liable for debts incurred by company on such documents
[zHNz]Headnote
Section 113 of the Companies Act [*Chapter 24:03*], which requires companies to mention their names legibly in all their invoices, receipts and other E documents, does not impute personal liability on a company director who issues documents which do not display his company's name and the words "(Pvt) Ltd". Whilst creating penal sanctions for a company or director failing to display such words when issuing publications or signing on behalf of the company, the section does not impute personal F liability for directors found guilty of such omissions save in cases involving the issuance of promissory notes, bills of exchange, cheques or orders for money or goods.
[zSTz]Legislation considered
Companies Act [*Chapter 24:03*], s 113 G
[zCIz]Case information
C P Moyo, for the plaintiff
S Mazibisa, for the defendant H
2002 (2) ZLR p259
Chiweshe J

[zJDz]Judgment
A **Chiweshe J:** The plaintiff sued the defendant * for damages in the sum of $1 392 242.00 arising out of the defendant's failure to perform its obligations in terms of a contract entered into in January 1999. In terms of that contract, the defendant was obliged to electrify six homesteads belonging to the plaintiff's members. Apparently the plaintiff is a partnership comprising five partners.
B The defendant, George Shoniwa, raised a plea in bar in which he states that he is a director of a company known as Greenwich Electrical Contractors (Pvt) Ltd. He further states that he does not trade as Greenwich Electrical and that there is at law no entity known as George Shoniwa trading as Greenwich Electrical. He insists that he has never had any personal dealings with the plaintiff as claimed and is therefore wrongly joined in this action as the C plaintiff has no cause of action against him.
In its reply to the special plea in bar, the plaintiff avers that in its dealing with the defendant he did not disclose that he was acting in his capacity as a director of a registered company with limited liability, and that all receipts and invoices made out by the defendant reflect that they are for "Greenwich D Electrical Contractors" and the words "LTD, "PVT", "limited", "Private", "Co" or "company" were not mentioned in legible characters as required by law. For those reasons, so argues the plaintiff, the defendant must be held personally liable to the plaintiff in terms of the law.
On his part, the defendant maintains he signed the contract on behalf of Greenwich Electrical Contractors and that failure to mention the word "Limited" or Ltd" or "Private" or "Pvt" E does not render defendant personally liable.
The fact that Greenwich Electrical Contractors (Pvt) Ltd is a company duly registered in terms of the law is not in dispute. In terms of a certificate of incorporation filed of record, the company was registered on 9 September 1997.
F I agree with defendant that s 113 of the Companies Act [*Chapter 24:03*] does not in any way impute personal liability on a director who deals with clients without displaying the words "(Pvt) Ltd" save in specified circumstances of fraud or dishonesty. Whilst creating penal sanctions for a company or director failing to display such words when issuing publications or signing on behalf of the company, the section does not go further to impute personal G liability for directors found guilty of such omissions save in cases involving the issuance of promissory notes, bills of exchange, cheques or orders for money or goods.
Clearly, the defendant does not fall into any of the above categories. Accordingly, there is no basis upon which he can be held personally liable.
2002 (2) ZLR p260
Chiweshe J
The special plea raised by the defendant must therefore succeed. A
The plaintiff's claim against the defendant personally must be and is hereby dismissed with costs.
Sibusisio Ndlovu Legal Practitioners, plaintiff's legal practitioners B
Cheda & Partners, defendant's legal practitioners

* The defendant was cited as "George t/a Greenwhich Electrical

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/CHIRISERI & ANOR v PLAN INTERNATIONAL 2002 (2) ZLR 261 (S)

[zRPz]CHIRISERI & ANOR v PLAN INTERNATIONAL 2002 (2) ZLR 261 (S)
2002 (2) ZLR p261

Citation 2002 (2) ZLR 261 (S)

Case No	Judgment No. S-56-02
Court	Supreme Court, Zimbabwe
Judge	Sandura JA, Cheda JA & Ziyambi JA
Heard	27 May 2002; 20 August 2002
Judgment	20 August 2002
Counsel	*J Siveregi,* for the appellants *R Harvey,* for the respondent
Case Type	Civil Appeal
Annotations	Link to case annotations

[zFNz]Flynote
Employment — contract — termination — unlawful — order for payment of D damages, back-pay and benefits as alternative to reinstatement — assessment of quantum — how calculated — back-pay must be net pay, not gross
[zHNz]Headnote
A labour relations officer had ordered the reinstatement of the appellants E without any loss of salary and benefits from the date of their suspension. After the respondent had brought the matter before the Labour Relations Tribunal, the appellants appealed to the Supreme Court on the grounds that an award of damages made to them by the Tribunal as an alternative to reinstatement was wholly unreasonable. The Tribunal had calculated F the damages on the basis that they had been dismissed from the date of their suspension in terms of s 3(1) of SI 371 of 1985. It then calculated damages on the basis of the length of time it considered it would have taken the appellants to find alternative employment from the same date.
Held, that when, as *in casu,* an order for reinstatement is made retrospectively, then the damages awarded must include back-pay and benefits from the G day of suspensions to the day reinstatement is ordered. Damages awarded for loss of employment are then to be calculated from the date reinstatement is ordered.
Held, further, that the award was properly net and not gross back-pay and benefits, and that damages were mitigated by the net and not gross H amount earned over the relevant period.
2002 (2) ZLR p262
Sandura JA
[zCAz]Cases cited A
Chegutu Municipality v Manyora 1996 (1) ZLR 262 (S)
Leopard Rock Hotel Co (Pvt) Ltd v van Beek 2000 (1) ZLR 251 (S)
[zSTz]Legislation considered
Labour Relations Act [*Chapter 28.01*], s 96(1)(c) B
[zCIz]Case information
J Siveregi, for the appellants
R Harvey, for the respondent
[zJDz]Judgment
Sandura JA: In this matter each appellant appealed against the quantum C of the damages awarded to him by the Labour Relations Tribunal ("the Tribunal") as an alternative to his reinstatement as an employee of the respondent.
The relevant facts are as follows. The appellants, who were employed by the respondent, were suspended on 20 July 1994 without pay and benefits in D terms of s 3(1) of the Labour Relations (General Conditions of Employment)(Termination of Employment) Regulations, 1985, published in

Statutory Instrument 371 of 1985 ("the Regulations"). On the same day, the respondent applied to the labour relations officer at Kwekwe for the authority to dismiss them.
The labour relations officer subsequently dismissed the application and E ordered the respondent to reinstate the appellants without loss of salary and benefits with effect from the date of their suspension. That decision was later upheld by the senior labour relations officer.
Thereafter, the respondent appealed to the Tribunal. That appeal was dismissed with costs and the following order was issued: F
"That the appellant ... reinstate both respondents with effect from the date of suspension with no loss of salary or benefits.
Alternatively:
That the appellant ... pay to each respondent an amount of damages which the parties may agree upon, (failing) which either party may approach the Tribunal for quantification of damages." G
When the parties subsequently failed to agree on the quantum of damages, they returned to the Tribunal, which later determined the matter on 20 April 2001. However, as the appellants were dissatisfied with the amounts awarded to them, they appealed to this court.
In terms of s 92(2) of the Labour Relations Act [*Chapter 28:01*] ("the Act") H
2002 (2) ZLR p263
Sandura JA
A an appeal from the Tribunal lies to this Court only on a question of law. A ruling by the Tribunal on the quantum of damages is a ruling on fact and, therefore, not appealable, unless it is wholly unreasonable. See *Leopard Rock Hotel Co (Pvt) Ltd v Van Beek* 2000 (1) ZLR 251 (S) at 256B-C.
In the present case, I am satisfied that the Tribunal's decision is wholly B unreasonable. Consequently, the matter is properly before this court.
In assessing the quantum of the damages payable to the appellants the Tribunal misdirected itself. It proceeded on the basis that the appellants had been dismissed by the respondent on 20 July 1994 when, in fact, they had only been suspended without pay and benefits. It then calculated the damages on the basis that it would have taken the appellants eighteen months from 20 July C 1994, to find alternative employment.
In respect of the first appellant ("Chiriseri") the Tribunal reduced the damages by $45 996.50, which sum he had earned whilst on suspension when he was temporarily employed by the Ministry of Health. However, with regard to the second appellant ("Chinyenze"), the damages were reduced by S45 000. that being the amount by which the Tribunal thought he should have D mitigated his damages.
In the circumstances, the Tribunal assessed Chiriseri's damages as follows:
"His damages are therefore equivalent to 18 months E salary and benefits less $45 996.50 plus 13th cheque:

Salary and benefits	$6 812.00 x 18
Total	$122 616.00
13th Cheque x 1	+7 866.00
Total	$130 482.00
Less mitigation F	- 45 996.50
	$ 84 485.50
Cash in lieu of leave	+ 5 244.00
Total damages	$ 89 729.50"

Chinyenze's damages were assessed as follows:

"Salary and benefits	$ 6 470.00
Period G	x 18 months
	$116 460.00
Less mitigation	- 45 000.00
	$ 71 460.00
13th Cheque x 1	+ $ 7 776.00
Total damages H	$ 79 236.00"

2002 (2) ZLR p264
Sandura JA
Counsel for the appellants submitted that the period within which the A appellants could not reasonably have been expected to find alternative employment was eighteen months. I did not understand counsel for the respondent to disagree with that submission. In fact, he submitted that the assessment of damages by the Tribunal was fair and equitable.
However, that was not the appellants' view. Whilst taking no issue with the B deductions made in respect of the mitigation of their damages, they contended that they were entitled to back-pay and benefits from 20 July 1994, when they were suspended, to 9 July 1998, when the Tribunal dismissed the respondent's appeal against their reinstatement. In addition, it was their contention that they were entitled to eighteen months' salary and benefits, being damages for the premature termination of their contracts of employment when the C respondent opted to pay them damages rather than reinstate them.
In the circumstances, the only issue between the parties is whether, in addition to the salary and benefits for eighteen months, each appellant is entitled to back-pay and benefits from 20 July 1994 to 9 July 1998.
Before determining that issue, I would like to set out the order issued by the labour relations officer on 29 March 1995. It reads as follows: D
"I order that they (the appellants) be reinstated without any loss of salary and benefits with effect from the date of suspension."
It was common cause that the appellants were suspended from their positions without salary and benefits on 20 July 1994. However, I hasten to add that when the labour relations officer issued the order set out above, he overlooked E the provisions of s 96(1)(c) of the Act in terms of which the alternative of damages is an essential part of any order of reinstatement. However, that error was subsequently corrected by the Tribunal on 9 July 1998 when, in dismissing the respondent's appeal, it made provision for the payment of damages in lieu of reinstatement.
In the circumstances, the order issued by the labour relations officer, as F corrected by the Tribunal, provided for the alternative of damages as required by s 96(1)(c) of the Act.
Having said that, I proceed to consider whether the appellants are entitled to any back-pay and benefits. In this regard, it is important to bear in mind that the respondent was ordered to reinstate the appellants "with effect from the G date of suspension with no loss of salary or benefits" or, alternatively, pay them damages in lieu of reinstatement.
It is clear from the wording of the order that if the appellants had been reinstated they would have been entitled to back-pay and benefits from 20 July 1994, when they were suspended, to 29 March 1995, when the order was issued by the labour relations officer. I say so because the order makes it clear H
2002 (2) ZLR p265
Sandura JA
A that the reinstatement is to have a retrospective effect.

As this court stated in *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 268A-B:
"... the word 'reinstate' or 'reinstatement' carries no automatic retrospective connotation, either in ordinary language or in our legislation. Normally it means simply that the person concerned will be placed again B in his/her former job. If retrospectivity is intended, one would normally look for additional words such as 'with effect from the date of dismissal' or 'with effect from (a particular date in the past)' or 'with back-pay and all benefits from ... (date)'."
Applying that test to the order of reinstatement issued by the labour relations C officer and confirmed by the Tribunal, it is clear that retrospectivity was intended.
However, as the appellants were not reinstated the question to consider is whether the damages to be paid in lieu of reinstatement should include back- pay and benefits from 20 July 1994 to 29 March 1995. In my view, where the order of reinstatement indicates that retrospectivity was intended, the damages D to be paid in lieu of reinstatement must include back-pay and benefits.
As this Court stated in *Leopard Rock Hotel Co (Pvt) Ltd v Van Beek, supra.* at 254H-255A:
"... 'back-pay' and 'damages' are indeed different concepts, but only in the sense that 'damages' is a wider concept. It will normally include E back-pay, but may include, for example, compensation for loss of promotion prospects, interest, and other elements as appropriate."
However, there is no basis for awarding the appellants back-pay and benefits in respect of the period after 29 March 1995, the date on which the order of reinstatement was issued. In addition, I should point out that what the appellants are entitled to is the net amount and not the gross back-pay and F benefits. The same applies to the eighteen months' salary and benefits which each appellant is entitled to as damages for the premature termination of his contract of employment.
Accordingly, each appellant is entitled to (a) net back-pay and benefits from 20 July 1994 to 29 March 1995, a period of about eight months, and (b) net G salary and benefits for eighteen months. From the total sum should be deducted the amount by which each appellant mitigated his damages whilst he was on suspension. In this regard, it is the net amount as opposed to gross earnings which should be deducted. The Tribunal erroneously deducted gross earnings during the period of suspension.
H The next issue to consider is whether this matter should be remitted to the
2002 (2) ZLR p266
Sandura JA
Tribunal for the calculation of the damages payable to each appellant. As the A record of the proceedings in the Tribunal shows the gross salary and benefits of each appellant, and gives no indication of the net salary and benefits, I was initially tempted to remit the matter to the Tribunal. However. I am concerned that that course would unduly delay the finalisation of this matter.
In the circumstances, I think that it is in the interests of the parties that this B Court should take a robust view of the matter and calculate the net salary and benefits of each appellant, bearing in mind each appellant's gross salary and benefits as calculated by the Tribunal, and applying the provisions of the relevant Finance Act, i.e. the Finance Act, 1993, Act No. 12 of 1993 ("the Finance Act").
In terms of the relevant provisions of the Finance Act, no income tax was C payable in respect of the first S6 000 of each appellant's annual salary and benefits, but the balance attracted income tax at the rate of 20 to 45 *per centum.*
Applying the provisions of the Finance Act. Chiriseri's net salary and benefits were about $58 178.00 *per annum* or $4 848.00 per month. Although D his gross earnings whilst he was on suspension were $45 996.50, the net amount was about $35 048.00. His damages are. therefore, as follows:
(a) Net back-pay and benefits for 8 months

= $4 848 x 8 = $38 784.00

(b) Net salary and benefits for 18 months E

= $4 848 x 18 = $87 264.00

Total = $126 048.00

From that total should be deducted his net earnings during the period of suspension, i.e. $35 048.00. That deduction leaves a balance of $91 000.00, which is the quantum of damages payable to Chiriseri in lieu of reinstatement F . The amount will attract interest at the prescribed rate from 20 April 2001 to the date of payment in full.

Similarly, applying the provisions of the Finance Act, Chinyenze's net salary and benefits were about $55 854.00 per annum or $4 654.50 per month. Although his estimated gross earnings during the period of suspension were G $45 000.00, the net amount was about $34 450.00. His damages are, therefore, as follows:

(a) Net back-pay and benefits for 8 months

= $4 654.50 x 8 = $37 236.00 H

A (b) Net salary and benefits for 18 months E

= $4 654.50 x 18 = $83 781.00

Total Sum = $121 017.00

From that total sum should be deducted his net earnings during the period of suspension, i.e. S34 450.00. That deduction leaves a balance of $86 567.00. B which is the quantum of damages payable to Chinyenze in lieu of reinstatement. The amount will attract interest at the prescribed rate from 20 April 2001 to the date of payment in full.

Finally, I would like to comment on the submission by counsel for the appellants that in *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S) (i.e. the C second appeal by Ambali) this court should have ordered that Ambali be paid his salary and benefits for the period during which he was suspended from employment.

However, before commenting on that submission I wish to say that in Ambali's first appeal to this court, which appeal was heard in June 1998. the record of the proceedings in the Tribunal was in an unsatisfactory state. That D prompted McNally JA to say the following at page 1 of the cyclostyled judgment in *Ambali v Bata Shoe Co Ltd,* S-100-98 (not reported), a judgment with which I concurred:

"This is a labour matter, and the record is unsatisfactory. It has apparently been reconstructed because the record on tape could not be found."

E At page 2 of the cyclostyled judgment the learned Judge of Appeal set out the decisions reached by the Regional Hearing Officer, the Labour Relations Board and the Tribunal as follows:

"There was a hearing before the Regional Hearing Officer on 29 April 1986 ... On 14 August 1986 *the Regional Hearing Officer ordered that Ambali be reinstated.*

F Bata then appealed to the Labour Relations Board (the Board) ... On 15 April 1988 *the Board found that Ambali should be reinstated.*

An appeal was then noted by Bata to the Tribunal. On 28 June 1988 the Tribunal found for Bata." (The emphasis is mine).

When *Ambali* appealed to this Court, (i.e. the first appeal) the appeal was G allowed with costs and the following order, which appears at page 6 of the cyclostyled judgment, was made:

"The order of the Tribunal is set aside, and in its place is substituted 'the appeal is dismissed with costs.' The matter is remitted to the Tribunal so that it may specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment ..."

H It is clear from the judgment that both the Regional Hearing Officer and the

Labour Relations Board simply ordered that Ambali be reinstated. They did A not order "that Ambali be reinstated with effect from the date of suspension with back-pay and benefits." In other words,

the order of reinstatement did not have a retrospective effect.
Accordingly, the damages awarded in lieu of reinstatement would not include back-pay and benefits. That is why, in the second appeal, Ambali was B not awarded back-pay and benefits for the period during which he was on suspension.
In the circumstances, the following order is made:
1. The appeal is allowed with costs.
2. The order issued by the Tribunal is set aside and the following is C substituted:
"(a) That the respondent shall pay to Chiriseri damages in lieu of reinstatement in the sum of $91 000.00. together with interest at the D prescribed rate from 20 April 2001 to the date of payment in full.
(b) That the respondent shall pay to Chinyenze damages in lieu of reinstatement in the sum of $86 567.00. together with interest at the prescribed rate from 20 April 2001 to the date of payment in full.
(c) That the respondent shall bear the applicants' costs."
Cheda JA and Ziyambi JA concurred. E
Dube Manikai & Hwacha, appellants' legal practitioners
Granger & Harvey, respondent's legal practitioners F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/MADYARA v GLOBE & PHOENIX INDUSTRIES (PVT) LTD 2002 (2) ZLR 269 (S)

[zRPz]MADYARA v GLOBE & PHOENIX INDUSTRIES (PVT) LTD 2002 (2) ZLR 269 (S)
2002 (2) ZLR p269

Citation	2002 (2) ZLR 269 (S)
Case No	Judgment No. S-63-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza AJA
Heard	8 July 2002; 20 August 2002
Judgment	20 August 2002
Counsel	*C M Jakachira,* for the appellant *R M Fitches,* for the respondent
Case Type	Details not supplied
Annotations	Link to case annotations

[zFNz]Flynote
Appeal — Labour Relations Tribunal — appeal against decision of — appeal lies only on point of law — decision by Tribunal on quantum of damages D — misdirection by Tribunal — appeal competent

Employment — contract — termination — unlawful — order for reinstatement — where order implies retrospectivity, employee entitled to back-pay and other benefits — benefits to which employee entitled — duty to mitigate loss — onus on employer to show that employee could have E mitigated loss

[zHNz]Headnote

The appellant had been unlawfully dismissed from his employment by the respondent. The Labour Relations Tribunal ordered his reinstatement without loss of pay or benefits from the date on which he was dismissed, alternatively damages in an amount to be assessed by the Tribunal. The F appellant was not reinstated, and the Tribunal was approached to award damages. An award of damages was made, but a claim for back-pay and some allowances was disallowed. The sum which was awarded to the appellant was assessed on the basis that the period within which the appellant could not reasonably have been expected to find alternative G employment was three years from the date of his dismissal. The appellant appealed against the quantum of damages.

Held, that an appeal against a decision of the Labour Relations Tribunal lies only on a question of law. There is no right of appeal against a decision of fact (and a ruling on damages is a ruling of fact) unless the decision could be said to be unreasonable. However, where there was a H misdirection, an appeal may lie. In this case, the Tribunal had misdirected

2002 (2) ZLR p270

Sandura JA

itself with regard to back-pay, and the appeal was properly before the A court.

Held, further, that where the wording of the order for reinstatement clearly implies retrospectivity, then the employee is entitled to back-pay and benefits. In this case, since the order referred to reinstatement from the date of dismissal, it was clear that retrospectivity was intended. As far B as back-pay and benefits were concerned, there was no cogent reason for distinguishing between an employee who was reinstated and one who was not, where the order of reinstatement had a retrospective effect. Both of them were entitled to back-pay and benefits. The only difference between them was that one got his job back whilst the other was paid damages. C

Held, further, that the appellant was also entitled to the underground allowance he would have received had he not been dismissed. The fact that during that period he was not working underground is irrelevant, because he had been unlawfully prevented from working by the respondent. As he was entitled to free accommodation, electricity and water while employed, he was entitled to such expenses incurred on D these items as he could prove.

Held, further, that while an employee should mitigate his loss by taking alternative employment, the onus is on the employer to show that the employee earned or should have earned some money during the period in question. The respondent had been in default at the previous hearings, so had not discharged the onus. In any event, it was not argued on behalf E of the respondent that the appellant should have mitigated his losses: it has been submitted that the assessment of the appellant's damages was fair and reasonable.

[zSTz]Legislation considered F

Labour Relations Act [*Chapter 28:01*], s 92(2) F

[zCAz]Cases cited

Ambali v Bata Shoe Co Ltd S-100-98

Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S) G

Chiriseri & Anor v Plan International 2002 (2) ZLR 261 (S)

Gauntlet Security Svcs (Pvt) Ltd v Leonard 1997 (1) ZLR 583 (S)

Leopard Rock Hotel Co (Pvt) Ltd v van Beek 2000 (1) ZLR 251 (S)

Nyaguse v Mkwasine Ests (Pvt) Ltd 2000 (1) ZLR 571 (S)

Zimbabwe Sun Hotels (Pvt) Ltd v Lawn 1988 (1) ZLR 143 (S) H

2002 (2) ZLR p271

Sandura JA

[zCIz]Case information

A *C M Jakachira,* for the appellant

R M Fitches, for the respondent

[zJDz]Judgment

Sandura JA: The appellant in this matter appealed against the quantum of the damages awarded to him by the Labour Relations Tribunal ("the B Tribunal") as an alternative to his reinstatement as an employee of the respondent.

The background facts are as follows. The appellant was dismissed from his job on 23 October 1996. He appealed to the Tribunal in terms of s 101(7) of the Labour Relations Act [*Chapter 28:01*] ("the Act") and, on 28 June 2000, the Tribunal ordered as follows:

"1. That C the respondent being in default, the appeal be and is hereby granted with costs.

2. That the respondent be and is hereby ordered to reinstate the appellant without any loss of salary or benefits with effect from the 23rd of October 1996, being the date of dismissal. D

ALTERNATIVELY:

3. That the appellant be and is hereby awarded damages in lieu of reinstatement, the quantum of which is to be assessed by the Tribunal.

4. That the amount is to be paid together with interest at the prescribed rate of interest with effect from the date of dismissal."

When the appellant was not reinstated, he approached the Tribunal for the E quantification of his damages and, on 9 February 2001, the Tribunal ordered the respondent to pay to him damages in lieu of reinstatement in the sum of $162 674.63, together with interest and costs of suit. The respondent was again in default on that occasion.

Dissatisfied with the quantum of damages awarded to him, the appellant F appealed to this court.

The first issue to deal with is whether this appeal raises any question of law because, in terms of s 92(2) of the Act, an appeal from the Tribunal lies to this court only on a question of law. A ruling by the Tribunal on the quantum of damages is a ruling on fact unless it is wholly unreasonable.

G As McNally JA said in *Leopard Rock Hotel Co (Pvt) Ltd v van Beek* 2000 (1) ZLR 251 (S) at 256B-C:

"A ruling by the Tribunal on damages is a ruling on fact and thus not appealable unless it can be categorised as wholly unreasonable. This may (but not must) be the situation where the Tribunal has misdirected itself on the law as to the criteria to be taken into account in assessing H damages."

2002 (2) ZLR p272

Sandura JA

In the present case, I have no doubt that in assessing the damages payable to A the appellant the Tribunal misdirected itself because it disallowed the appellant's claim in respect of back-pay. The matter is, therefore, properly before the court.

The sum of $162 674.63, which was awarded to the appellant, was assessed on the basis that the period within which the appellant could not reasonably B have been expected to find alternative employment was three years from the date of his dismissal. The sum was made up as follows:

Net salary for three years:	$134 156.76
Rentals:	$ 23 450.00
Electricity bills:	$ 5 067.87 C
TOTAL:	$162 674.63

The appellant's claims for back-pay from October 1996 to July 2000 and for underground allowances and water bills were disallowed. In addition, the D amounts claimed by the appellant in respect of rentals and electricity bills were reduced to the amounts shown above because those were the amounts proved by documentary evidence.

The appellant's claims in respect of rentals, electricity and water bills were based on the fact that before his dismissal the appellant was entitled to free accommodation, which included free water and electricity. E

The real issue in this appeal is whether, in addition to the sum awarded to him as damages in lieu of reinstatement, the appellant is entitled to back-pay and benefits from 23 October 1996, when he was dismissed, to 28 June 2000, when the Tribunal ordered that he be reinstated or paid damages.

In determining that issue, the starting point is the order issued by the Tribunal F on 28 June 2000, which I have already set out at the beginning of this judgment. The Tribunal ordered the respondent to reinstate the appellant "without any loss of salary or benefits with effect from the 23rd of October 1996" or, alternatively, pay him damages in lieu of reinstatement.

Recently, I commented on a similarly worded order in *Chiriseri & Anor* v G *Plan International* S-56-02 *. At p 6 of the cyclostyled judgment I said **:

"It is clear from the wording of the order that if the appellants had been reinstated they would have been entitled to back-pay and benefits ... I

2002 (2) ZLR p273

Sandura JA

A say so because the order makes it clear that the reinstatement is to have a retrospective effect. As this court stated in *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 268A-B:

'... the word "reinstate" or "reinstatement" carries no automatic retrospective connotation, either in ordinary language or in our B legislation. Normally it means simply that the person concerned will be placed again in his/her former job. If retrospectivity is intended, one would normally look for additional words such as "with effect from the date of dismissal" or "with effect from (a particular date in the past)" or "with back-pay and all benefits from ... (date)".'

Applying that test to the order of reinstatement issued by the labour C relations officer ... it is clear that retrospectivity was intended ...

In my view, where the order of reinstatement indicates that retrospectivity was intended, the damages to be paid in lieu of reinstatement must include back-pay and benefits."

Those comments apply to the present case with equal force. As far as back- pay and benefits are concerned, there is no cogent reason for distinguishing D between an employee who is reinstated and one who is not, where the order of reinstatement has a retrospective effect. In my view, both of them are entitled to back-pay and benefits. The only difference between them is that one gets his job back whilst the other is paid damages for the premature termination of his employment contract.

E Commenting on the relationship between back-pay and damages, McNally JA said the following *in Leopard Rock Hotel Co (Pvt) Ltd v van Beek supra* at 254H-255A:

"... it seems to me that 'back-pay' and 'damages' are indeed different concepts, but only in the sense that 'damages' is a wider concept. It will normally include back-pay, but may include, for example, compensation F for loss of promotion prospects, interest, and other elements as appropriate."

I entirely agree with those comments.

Later on in the judgment the learned Judge of Appeal said the following at 255H-256A:

G "'Back-pay' is thus a concept associated with reinstatement. If an employee is reinstated she will normally be awarded back-pay. If she succeeds in proving wrongful dismissal, but is not reinstated, she will be entitled to 'damages', a major element of which will be back-pay. Perhaps, more correctly, one should say the damages will be assessed by reference to H the back-pay lost. But here the back-pay will be limited to a period from

2002 (2) ZLR p274

Sandura JA

the date of wrongful dismissal to a date by which she could, with A reasonable diligence, have obtained alternative employment."

Again, I agree with those comments. However, the comment that "the back- pay will be limited to a period from the date of wrongful dismissal to a date by which she could, with reasonable diligence, have obtained alternative employment" must be interpreted in the context of the facts of that case, B which are set out at p 252E-F as follows:

"The appellant ('the hotel') employed Mrs van Beek as a bookkeeper from 7 June 1993 to 4 January 1995 on which date she was suspended pending approval of her dismissal by a labour relations officer ('LRO').

Dismissal was approved by the LRO and by a senior labour relations officer ('SLRO'). The Labour Relations Tribunal ('the Tribunal') reversed C their decisions and ordered reinstatement or damages. It transpired that she had found alternative employment in January 1997. The Tribunal awarded her back-pay for twenty-four months which was calculated (by consent) to be $287 138.89."

By taking alternative employment in January 1997, Mrs van Beek, instead of standing by her contract of employment and enforcing her rights against the hotel, elected to accept the repudiation of her contract and terminated it. She could not, therefore, seek reinstatement, but could only claim damages.

Commenting upon an employee who had elected to terminate his contract of service by taking alternative employment whilst on suspension, Gubbay JA (as he then was) said the following in *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* E 1988 (1) ZLR 143 (S) at 153A-B:

"But I am inclined to go further and hold positively that the respondent was shown on the probabilities to have elected to terminate his contract of service in reliance upon the appellant's breach in suspending him without pay. His remedy therefore lay in delict and not in contract, but I express no view as to whether or not he might succeed in a claim for F damages, since altogether different considerations will apply."

In my view, those comments apply with equal force to Mrs van Beek.

In the circumstances, Mrs van Beek's position was very different from that of an employee, like the present appellant, who has not elected to accept the repudiation of his contract of employment, and

in respect of whom the G Tribunal has ordered "reinstatement with effect from the date of dismissal with back-pay and all benefits or, alternatively, damages". In my view, the comment by McNally JA would not apply to the calculation of damages in lieu of reinstatement payable to such an employee.
Before leaving the issue of back-pay and benefits, I would like to clarify this court's decision in *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S) H
2002 (2) ZLR p275
Sandura JA
A (Ambali's second appeal), criticised by counsel for the appellant in his heads of argument. Ambali was not awarded back-pay and benefits for the period during which he was on suspension for the simple reason that the order of reinstatement issued in his favour did not have a retrospective effect. It simply stated that Ambali was to be reinstated. It did not say that he was to be reinstated "with effect from the date of suspension" or "with back-pay and B all benefits". *See Ambali v Bata Shoe Co Ltd* S-100-98 (not reported) at p 2 of the cyclostyled judgment (Ambali's first appeal).
Having said that, I would like to consider the benefits to which the present appellant was entitled, in addition to his salary. They were two.
The first benefit was an underground allowance. In terms of clause 20 of the C Collective Bargaining Agreement: Mining Industry (General Conditions) 1990, published in SI 152 of 1990, the appellant, being an employee working underground, was entitled to an underground allowance equal to three *per centum* of his basic salary. Had he not been unlawfully dismissed, that allowance would have been paid to him every month. He is, therefore, entitled to it from 23 October 1996, the date of his dismissal, to 28 June 2000, D when the Tribunal ordered the respondent to reinstate him without loss of salary or benefits with effect from the date of dismissal. The fact that during that period he was not working underground is irrelevant, because he had been unlawfully prevented from working by the respondent.
The second benefit to which the appellant was entitled was free E accommodation, which included free water and electricity. In this regard, the appellant ought to have produced evidence showing how much it cost him to rent a house of the same standard as the one which had been provided to him free of charge, and the cost of water and electricity incurred whilst occupying such a house during the relevant period. Regrettably, no such evidence was produced, apart from receipts showing that during the relevant period the F appellant paid rentals totalling $23 450, and electricity bills totalling $5 067.87.
However, as the two amounts have not been challenged on appeal, there is no basis for interfering with the Tribunal's awards in respect of the costs of alternative accommodation and electricity. No documentary evidence was produced in respect of the water consumed during the relevant period. The G appellant was not, therefore, entitled to any award in that respect.
I now wish to deal with the mitigation of damages. It is well established that an employee who considers that he has been dismissed unlawfully should mitigate his damages by taking temporary employment. See, for example, *Gauntlet Security Services (Pvt) Ltd v Leonard* 1997 (1) ZLR 583 (S) at H 586C-G and *Ambali v Bata Shoe Co Ld supra* at 419A-B.
2002 (2) ZLR p276
Sandura JA
In the present case, the Tribunal found that the appellant did not do anything A to mitigate his damages. However, the burden of showing that the appellant earned or ought to have earned some money during the relevant period rested on the respondent.
Thus, in *Nyaguse v Mkwasine Estates (Pvt) Ltd* 2000 (1) ZLR 571 (S) at 575C-D McNally JA said: B
"But at the same time, it must be borne in mind that the *onus* is on the employer to show that the employee has, or should have, earned an income from some other source. If the Tribunal is forced to make an estimate, it must use the information to hand, and not simply pluck a figure from nowhere."
As the respondent was in default on 28 June 2000, when the appeal was heard C by the Tribunal, and on 6 February 2001, when the application for the quantification of the appellant's damages was heard, the *onus* of showing that the appellant earned or should have earned some money, and how much he earned or should have earned, during the relevant period was not discharged. In any event, it was not argued on behalf of the respondent that the appellant should have mitigated his losses. On the contrary, it was submitted that the D assessment of the appellant's damages was fair and reasonable, a submission with which I disagree.
Consequently, on the basis of the appellant's net salary figures, produced to and accepted by the Tribunal, the appellant is entitled to the following:

(a) Three years' net salary, being damages in lieu of reinstatement:

E

	$137 676.76
(b) Net back-pay from November 1996 to June 2000:	$197 678.44
(c) Underground allowance (3% of back-pay):	$5 930.35
(d) Rentals:	$23 450.00
(e) Electricity:	$5 067.87 F
TOTAL:	$369 803.42

In the circumstances, the following order is made - G
1. The appeal is allowed with costs.
2. The order issued by the Tribunal on 9 February 2001 is set aside and the following is substituted:
"(a) That the respondent shall pay to the applicant the sum of $369 803.42 H
2002 (2) ZLR p277
Sandura JA
A together with interest at the prescribed rate from 9 February 2001 to the date of payment in full.
(b) That the respondent shall bear the applicant's costs."
B Cheda JA & Gwaunza AJA concurred.
Jakachira & Co, appellant's legal practitioners
C *Gill, Godlonton & Gerrans,* respondent's legal practitioners

* See p 261 of this volume — *Editor*
** See p 265 A-E above — *Editor*

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Source:
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[zRPz]S v CHANDAFIRA 2002 (2) ZLR 278 (H)
2002 (2) ZLR p278

Citation	2002 (2) ZLR 278 (H)
Case No	Judgment No. HH-137-02
Court	High Court, Harare
Judge	Smith J

Heard 21 August 2002

Judgment 21 August 2002

Counsel Details not supplied

Case Type Criminal review

Annotations No case annotations to date

[zFNz]Flynote
Criminal procedure (sentence) — general principles — fine — level of — Criminal Penalties Amendment Act, 2001 — failure of Minister to lay D before Parliament statutory instrument setting out levels of fines — effect
Statutes — Criminal Procedure and Evidence Act [*Chapter 9:07*] — s 346A — provision whereby level of fines prescribed by Minister not effective until approved by Parliament — Act deleting specific fines and substituting E levels coming into effect but level of fines not approved — effect
[zHNz]Headnote
The Criminal Penalties Amendment Act, 2001, was enacted to set fines in over 200 statutes by reference to a "level" rather than to a specific monetary amount. The Act came into effect on 20 May 2002. The Act inserted a new s 346A into the Criminal Procedure and Evidence Act F [*Chapter 9:07*]. This section provided that the Minister of Justice could set the levels of fines by statutory instrument, but that the Minister must, within the next fourteen days on which Parliament sits after he makes such a statutory instrument, lay it before Parliament and the statutory instrument shall not come into force unless approved by resolution of Parliament. The Minister had published such a statutory instrument on the same day as the statutory instrument which fixed the date of commencement of the amending Act. However, the statutory instrument setting the levels of fines had never been laid before or approved by Parliament.
Held, that there was now a *lacuna* in the law. Effectively, a fine could not H

Smith J
A be imposed. An instruction from the Attorney-General that the previous level of fines should continue to apply was incompetent, because all the affected Acts had been amended when the Criminal Penalties Amendment Act came into effect.
[zSTz]Legislation considered B
Criminal Procedure and Evidence Act [*Chapter 9:07*], s 346A
[zJDz]Judgment
Smith J: The accused was charged with contravening s 9(1)(b) of the Control of Goods Act [*Chapter 14:05*], as read with Statutory Instruments 153B of 1989 and 336 of 2001. It was alleged that he was selling 1 kg packets C of brown sugar for $150, when the controlled price is S35. Three people confirmed that they had in fact paid him $150 for the sugar. It seems clear that the policy of prescribing maximum prices to ensure that basic foodstuffs and other commodities are available to all at affordable prices is not working. The accused pleaded guilty and was duly convicted on 12 July 2002. He was sentenced to a fine of $3 000 or, in default of payment, 40 days' imprisonment. D The conviction is in order and the sentence is appropriate. The only question is whether the trial magistrate, who is a provincial magistrate, had the jurisdiction to impose such a sentence. There is no doubt that prior to 20 May 2002 the magistrate had the necessary jurisdiction, but the position on and after that date has changed.
E The Criminal Penalties Amendment Act, 2001 (hereinafter referred to as "the Act") was promulgated on 1 February, 2002 (Statutory Instrument 55 of 2002). The long title of the Act says that it is an Act to make provision for increases in the general level of fines in statutes through statutory instrument and to amend a number of other Acts. The Act inserts a new section 346A in F the Criminal Procedure and Evidence Act [*Chapter 9:07*] which empowers the Minister of Justice, Legal and Parliamentary Affairs (hereinafter referred to as "the Minister") to publish a statutory

instrument setting forth a standard scale of fines which must specify different levels of fines, each level being designated by a number, and, in respect of each level of fine, the monetary amount of the fine. The Act then amends some 266 Acts by deleting G references to specific amounts of money and substituting a reference to a specific level. Thus, for example, s 6(1)(a)(i) and s 6(1)(b) of the Control of Goods Act [*Chapter 14:05*] provided that the maximum amount of the fine that could be prescribed was $10 000. The Act amended those sections by deleting the reference to $10 000 and substituting the words "level eight".

H The reason for introducing the new system is a very sensible one. It is a

2002 (2) ZLR p280

Smith J

system which operates in the United Kingdom and possibly in other countries. A Hitherto, when an Act which creates any offence is drafted and passed by Parliament, it specifies the maximum penalty that may be imposed in the case of a person who is convicted of committing the offence. If it is considered that a fine is appropriate, which is the case in the vast majority of offences, the maximum fine that can be imposed is stated. With the passage of time and the B effects of inflation, penalties that were considered appropriate when the Act was passed by Parliament become more and more unrealistic. For example, in the Miscellaneous Offences Act [*Chapter 9:15*] for some offences the maximum penalty was a fine not exceeding $50 or imprisonment for a period not exceeding six months and for others it was a fine not exceeding $200 or imprisonment for a period not exceeding 12 months. If the maximum fine that C may be imposed is expressed as level one or level two, and the Minister is able to quantify each level by way of a statutory instrument, the maximum monetary penalties can be increased as the value of the dollar decreases without having to amend every reference to the amount of maximum fine in every Act of Parliament by way of another Act of Parliament. Moreover, the increase can be effected by one statutory instrument, instead of having D separate amendments for every one of the sections that need amending.

Section 1(2) of the Act provides that the Act shall come into operation on a date to be fixed by the President by statutory instrument. By Statutory Instrument 111 of 2002 the date of commencement was fixed as 20 May 2002. With effect from that date, all the amendments to the various statutes specified in the Act came into effect. One of the statutes that were amended is the Magistrates Court Act [*Chapter 7:10*]. Section 50 of that Act prescribes the ordinary jurisdiction for magistrates as to punishment. It specifies the maximum fines and the maximum period of imprisonment that a magistrate may impose for offences. Thus, in the case of a magistrate, other than a senior, provincial or regional magistrate, the maximum fine he could impose on F summary trial is $2 000 and on remittal it was $3 000. A senior magistrate could impose a fine not exceeding $3 000 and a provincial or a regional magistrate could impose fines not exceeding $5 000 and $12 000 respectively. The Act amended the relevant provisions of s 50 of the Magistrates Court Act by deleting the references to $2 000, $3 000, $5 000 and $12 000 and substituting references to level six, level seven, level eight and level eleven G respectively.

The statutory instrument fixing the date of commencement of the Act was published in the Gazette of 20 May 2002. In the same Gazette the statutory instrument made by the Minister setting forth the monetary amount of each level of fine was published (Statutory Instrument 112 of 2002). According to H

2002 (2) ZLR p281

Smith J

A the provisions of that statutory instrument, level six is S40 000, level seven is $80 000, level eight is $120 000 and level eleven is $250 000. Those amounts equate to the maximum fines that can be imposed by the various classes of magistrates in the ordinary run of cases. It seems incredible that the ordinary jurisdiction of magistrates is being increased so greatly. Whereas previously a junior magistrate would impose a fine of $2 000 on summary B trial and $3 000 on remittal, it is now proposed that he will be able to impose fines of up to S40 000 on summary trial and $80 000 on remittal. In the case of a regional magistrate, he will be able to impose a fine of up to $250 000, instead of the previous $12 000.

Had the statutory instrument made by the Minister came into operation on 20 C May 2002, which is the date the Act came into effect making all the amendments to 268 Acts of Parliament, all would be well. However that is not the case. The new s 346 A that has been inserted in the Criminal Procedure and Evidence Act provides, in subs (2), that the Minister shall publish a statutory instrument setting forth the standard scale of fines and, in subs (3), that he may at any time thereafter amend or replace the standard scale. D However, subs (4) of that section provides that the Minister shall within the next fourteen days on which Parliament sits after he makes a statutory instrument in terms of sub (2) or (3), lay it before Parliament and *the statutory instrument shall not come into force unless approved by resolution of Parliament.* Therefore, although all the various

statutes have been amended by the deletion of specified amounts for the maximum fines that may be E imposed and a standard scale of fines has been fixed, the standard scale is not in force because it has not been approved by resolution of Parliament.

One wonders at the competence and level of intelligence of those responsible for this state of affairs. Any reasonably intelligent person would have published the standard scale of fines and then fixed the date of commencement F of the Act as being the date the scale is approved by resolution of Parliament. That would have avoided any *lacuna* in the law. However, that was not done. The *lacuna* was created on 20 May 2002 and has yet to be filled. Parliament has met on two occasions since 20 May and on neither occasion did the Minister seek to move the necessary resolution in Parliament. One wonders what he is waiting for.

G The jurisdiction of the various classes of magistrate has been fixed at various levels but there is no statutory instrument in force specifying the monetary amount of the different levels. Likewise, there are some 266 Acts of Parliament which create offences and specify the maximum level of fine that can be imposed on a person convicted of any particular offence so created, H but there is no standard scale of fines in force specifying the monetary amount

2002 (2) ZLR p282

Smith J

of any of the levels. Subsection (4) of the new s 346 A is very specific. The A standard scale of fines prescribed by the Minister shall not come into force unless and until it is approved by resolution of Parliament. In Statutory Instrument 112 of 2002 there is an explanatory note at the foot of the notice. It explains the provisions of the new section 346 A, including subs (4) thereof, and concludes by stating "Accordingly, the notice is not effective B until and unless Parliament resolves to approve it". The courts cannot ignore the specific requirements of an Act of Parliament. Parliament has specifically provided that any scale of fines must be approved by Parliament and that must be respected.

The Attorney-General is aware of the predicament caused by the bringing into operation of the Act without there being a Standard Scale of Fines in C force. His office issued a circular in which it is stated that the Act came into operation on 20 May 2002 and that the Standard Scale of Fines fixed by the Minister in SI 112 of 2002 will not come into effect unless and until approved by resolution of Parliament. The circular then goes on the state:

"3. The net effect of the foregoing is that although the 2001 Act is now in D force the new regime of monetary penalties will not come into operation until it is approved by Parliament. It follows that all existing statutory penalties as prescribed before the entry into force of the 2001 Act remain intact and will continue to apply until SI 112 of 2002 is approved by Parliament. Moreover, the present level of monetary penalties will also apply *after* Parliament has granted its approval to SI 112 of 2002 in E respect of all offences committed *prior* to the date of approval of Parliament.

4. Similarly, the existing sentencing jurisdiction of magistrates courts and the existing ceiling for deposit fines will continue to apply until SI 112 of 2002 is approved by Parliament".

I fail to see how it can be said that all existing statutory penalties will remain F intact and continue to apply and that the existing sentencing jurisdiction of magistrates courts will continue to apply. Those penalties have been amended by an Act of Parliament, as has the sentencing jurisdiction of magistrates. The provisions of an Act of Parliament cannot be ignored when they cause problems. The problem must be dealt with, not just put under a carpet and forgotten. One cannot remedy the situation by issuing a circular which does G not have the force of law and cannot amend, suspend or obliterate the provisions of an Act of Parliament.

The effect of bringing the Criminal Penalties Amendment Act, 2001, into force before there is a Standard Scale of Fines in effect means that magistrates H

2002 (2) ZLR p283

Smith J

A have no jurisdiction to impose a fine. In addition, in the case of any offence, a person convicted of any such offence may be sentenced to imprisonment but cannot be sentenced to a fine.

In this case the conviction is confirmed but the sentence is set aside. The matter is referred back to the trial magistrate so that he can impose a competent sentence. He may impose a short custodial sentence and suspend B the entire sentence or impose a very short period of community service. He may not however impose a fine unless there is some legislation empowering him to do so.

C Makarau J concurred.

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[zRPz]S v UZANDE 2002 (2) ZLR 284 (H)
2002 (2) ZLR p284

Citation	2002 (2) ZLR 284 (H)
Case No	Judgment No. HH-139-02
Court	High Court, Harare
Judge	Adam J
Heard	21 August 2002
Judgment	21 August 2002
Counsel	Details not Supplied
Case Type	Criminal review
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure (sentence) — common law offences — theft — stock theft — increased jurisdiction of magistrates under Stock Theft Act — accused D convicted of theft by false pretences, having taken money from complainant for cattle which were not his — not a theft of the cattle and increased jurisdiction not applicable
[zHNz]Headnote
The accused was convicted of theft by false pretences. He purported to sell E cattle, which actually belonged to his father, and converted the proceeds of the sale to his own use. The magistrate assumed the increased jurisdiction provided under the Stock Theft Act [*Chapter 9:18*] and sentenced the accused on the basis that he had stolen the cattle.
Held, that the magistrate had erred. This was not a case of theft of stock, but of theft of the money and the increased jurisdiction was not applicable. F
[zCAz]Case cited
S v Kamusisi 1993 (2) ZLR 396 (S)
[zSTz]Legislation considered G
Stock Theft Act [*Chapter 9:18*], ss 3 & 11
[zJDz]Judgment
Adam J: The accused was convicted of theft of false pretences. The magistrate sentenced him to 30 months' imprisonment of which five months imprisonment was suspended for five years on condition the accused did not H
2002 (2) ZLR p285
Adam J
A during that period commit any offence involving dishonesty for which upon conviction he is sentenced to imprisonment without the option of a fine. A further fifteen months were suspended on condition the accused paid the sum of $40 000 to the complainant

The outline of the State case, accepted by the accused, indicated that during B December 2001 the complainant visited the accused who had promised to sell him four head of cattle. The complainant paid $20 000 for two head of cattle which the accused accepted. But the complainant could not collect them as the accused said they were grazing in the paddock which was far away. The complainant was advised by the accused to bring $20 000 so that he could collect all four head of cattle. On 24 December 2001 the accused was paid C $10 000 and he was going to get $10 000 when he supplied the cattle. Before the end of December 2001 the complainant gave a friend of his $10 000 to go and pay the accused and collect the four head of cattle. After collecting the $10 000 from the complainant, the accused duped him into believing that the four head of cattle were to be collected from the paddocks but instead the accused absconded from his homestead and disappeared. The D accused was arrested by the police.

When the essential elements of the offence were being explained to the accused the magistrate asked him whether he misrepresented to the complainant and he replied he did not as he was selling his father's cattle. He admitted that he had not told his father about it. He admitted that as a result E he obtained $40 000 from the complainant and converted it to his own use.

The magistrate, in the reasons for sentence, indicated that the offence committed by the accused was selling cattle belonging to some one else. After payment the complainant learnt that the accused did not own cattle. The cattle he purported to sell belonged to his father. The magistrate then asserted F that such an offence attracts a penalty prescribed in the Stock Theft Act. He referred to *S v Kamusisi* 1993 (2) ZLR 396 (S) where he said the Supreme Court held that because theft is an essential element of the crime of robbery, it would be repugnant to the scope and purpose of the Stock Theft Act to hold that the increased penalties applicable to stock thieves were not applicable to persons who stole stock during the course of a robbery. The magistrate G continued that, in the present case, the accused person committed the offence of theft by false pretences because he wanted to steal his father's cattle. The magistrate was satisfied that the special jurisdiction conferred on magistrates to impose increased sentences on persons convicted of offences referred to in s 11 of that Act was applicable in this case.

H In *S v Kamusisi, supra,* the appellant with two others were charged with

robbery of two head of cattle and one goat but he and one co-accused were A convicted of theft in terms of s 209 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The sentence imposed was three years' imprisonment of which six months were conditionally suspended. It was argued on behalf of the appellant that the sentence imposed was in excess of the trial magistrate's jurisdiction of twelve months since he had erroneously B assumed the special increased jurisdiction provided in s 9(b) of the Stock Theft [*Chapter 9:18*]. Gubbay CJ observed at 398:

"In my view, it would be wholly repugnant to the scope and purpose of the Stock Theft Act to hold that penalties are applicable to cattle thieves but not, for instance, to armed cattle rustlers who are charged with robbery. I consider that the presumption against such a glaring absurdity being C intended by the law-maker is to be invoked."

It is clear from the foregoing that the learned Chief Justice was concerned with the charge, which was for robbery of two head of cattle and one goat. Section 3(2)(a) of that Act makes the Act apply in every case where a person is charged with theft of stock. Although the appellant was not charged with D theft of stock the learned Chief Justice quite correctly held that the Act applied to robbery of stock as well.

In the present case the accused was charged with theft by false pretences in that he unlawfully and with intent to defraud misrepresented to the complainant that he would sell four head of cattle to him for $40 000 and by means of this E misrepresentation he obtained $40 000. It is clear from the charge that the theft committed in this case was the theft of money, unlike in S v *Kamusi, supra,* where the charge was robbery of stock and theft of stock was the offence with which the appellant was convicted.

The magistrate was under a misconception that the accused had stolen his father's cattle. The accused obtained money from the complainant by F inducing him to part with it by the accused's deception that he was selling his father's cattle. This case would be no different from, for example, one where the accused had obtained money from the complainant by inducing him to part with it by the accused's deception that he was selling his father's bicycle (which the complainant wanted to buy). It follows that the magistrate did not G have the necessary increased jurisdiction to sentence the accused.

Accordingly, the conviction is confirmed but the sentence is set aside and is

substituted by one of twelve months' imprisonment of which three months are suspended for five years on condition the accused does not within that period commit any offence involving dishonesty

for which upon conviction H
2002 (2) ZLR p287
Adam J
A he is sentenced to imprisonment without the option of a fine, and a further nine months are suspended on condition the accused pay the complainant the sum of $40 000 through the Clerk of Court, Chegutu Magistrates Court, by 30 September 2002, if the accused has not already paid the $40 000.
B Chinhengo J concurred.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/MARIMO v BRANCOS & ANOR 2002 (2) ZLR 288 (H)

[zRPz]MARIMO v BRANCOS & ANOR 2002 (2) ZLR 288 (H)
2002 (2) ZLR p288

Citation	2002 (2) ZLR 288 (H)
Case No	Judgment No. HH-142-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	10 May 2002; 21 August 2002
Judgment	21 August 2002
Counsel	*H Simpson,* for the plaintiff *A Nagar,* for the defendants
Case Type	Stated case
Annotations	No case annotations to date

[zFNz]Flynote
Contract — terms — tacit or implied — sale of goods — implied term that D goods sold free of encumbrances — when purchaser may bring claim against seller Sale — breach of warranty against eviction — claim against seller — whether buyer must put up *virilis defensio* against claim by third party — third party having no valid claim — duty of buyer to resist claim E
[zHNz]Headnote
The plaintiff bought a car from the defendants (who were second-hand car dealers) in 1997. In 2000 he put the car up for sale at an auction. The car was impounded by the Department of Customs, which claimed that it was owed outstanding import tax and surtax. The plaintiff paid the sums claimed to get the car back, then sued the defendants for the sums paid. F
Held, that it was a tacit term of the contract that the car was free from any encumbrances, in particular that there would be no customs duty or surtax to which the plaintiff would be liable after

paying the purchase price.
Held, further, that if a demand is made against the purchaser and such demand appears to him sustainable at law, the purchaser may call upon G the seller to intervene to ensure that he is not evicted.
Held, further, that a *virilis defensio* must be made where the third party's claim is not unassailable. In this case, the Department of Customs' claim was prescribed. The applicant could have resisted it, and should have put up a defence. Consequently, he could not claim against the H seller.
2002 (2) ZLR p289
Chinhengo J
[zCAz]Cases cited A
Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A)
Chinyerere v Frazer NO 1994 (2) ZLR 234 (H)
Kanokanga v Evans & Ors 2000 (2) ZLR 41 (H)
Moyo v Jani 1985 (1) ZLR 112 (H) B
Olivier v Van der Bergh 1956 (1) SA 802 (C)
Pan American World Airways Inc v SA Fire and Accident Ins Co Ltd 1965 (3) SA 150 (A)
Reigate v Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592; [1918] All ER Rep 143 C
Smith v Min of Lands & Natural Resources 1979 RLR 421 (G)
[zSTz]Legislation considered
Customs and Excise Act [*Chapter 23:02*] s 193(3)
[zCIz]Case information
D *H Simpson,* for the plaintiff
A Nagar, for the defendants
[zJDz]Judgment
Chinhengo J: This is a special case in terms of Order 29 of the High Court of Zimbabwe Rules, 1971. The question in dispute is one of law. The parties have agreed on the facts and in terms of Order 29 r 204 I may give judgment E without hearing any evidence.
The facts agreed upon by the parties are the following. The first defendant operates a panel beating business and is also a used car dealer. Prior to April 1997 the plaintiff had purchased a Mazda 626 motor vehicle from the first defendant.
F In April 1997, the plaintiff purchased from the first defendant a Toyota Hilux pick-up with registration numbers 617-536T for the sum of $90 000. The first defendant had himself purchased the same motor vehicle from a Mr N. Keown. The plaintiff paid the purchase price and took delivery of the motor vehicle.
G On 3 November 2000, the plaintiff attempted to sell the motor vehicle at a public auction. At the sale the motor vehicle was impounded by the Department of Customs and Excise who demanded outstanding import tax and surtax in an amount of $254 053,51. The plaintiff informed the first defendant immediately of the impounding of the motor vehicle and of the demand for H the payment of the import tax and surtax. The first defendant, as seller, did
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not take up the matter with the Department of Customs and Excise on behalf A of the plaintiff. On 9 July 2001, the plaintiff paid the import duty and surtax in order to secure the release of the motor vehicle. The plaintiff also paid storage charges in an amount of $24 757,70 to secure the release of the motor vehicle. He also paid $3 968,65 being the cost of a new battery. The defendants have failed and refused to reimburse the plaintiff these amounts. B
On these facts the issues placed before me for determination are these:
1. Whether or not the first defendant, as the seller and a car dealer, was under an implied contractual duty to sell and deliver the motor vehicle free from any encumbrance
2. Whether there was a duty on the seller (the defendants) to intervene on C the plaintiff's behalf after the motor vehicle had been impounded by the Department of Customs and Excise.
3. Whether the defendants are liable to reimburse the plaintiff with those amounts which he has paid to secure the release of the motor vehicle.
4. Whether the defendants have any valid defence for their refusal to reimburse the plaintiff. D
It is not in dispute that the parties entered into a contract of sale of a motor vehicle. The first issue for determination raises the question whether in a contract of sale it is an implied term of the contract that the *res vendita* is free from any encumbrances. It will, in my view, be quite hazardous to lay down a general principle of law arising from this question. Encumbrances on E property sold may be of many and different kinds and their nature equally varied. There will be cases, in my view, where the freedom from encumbrances of a *res vendita* will depend on the facts of the case so that as a general rule is will not be possible to say that there is an implied term that the *res*

vendita is not encumbered in any way. I will therefore restrict myself to the specific facts of this case. F

The first defendant is a motor car dealer. This means he buys and sells motor vehicles as his business. A motor vehicle, at any time, is owned by someone and as such a motor car dealer either sells a motor vehicle which he himself owns or sells a motor vehicle owned by someone else for a commission. Generally speaking, in so far as the purchaser of a motor vehicle from a car G dealer is concerned, that motor vehicle, unless expressly stated, is sold subject to the purchaser paying the purchase price and becoming the owner of the vehicle. It will be in the contemplation of the seller and the purchaser, indeed their intention, that upon payment of the purchase price stipulated and the taking of delivery, the motor vehicle becomes the property of the purchaser without the purchaser having to pay any other costs which should H

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A have been built into the cost of the motor vehicle so sold. That this should be an implied term of the contract of such sale is so universal and notorious that the seller's intention to be bound by it can be safely presumed. It is necessary to clarify that this implied term is not one implied by law but one which is aptly described by Christie in *The Law of Contract,* 3 ed. as a tacit term of a contract. A term implied by law is an unexpressed provision of a contract B which the law imports therein as a matter of course without reference to the actual intention of the parties, and such a term cannot normally be in conflict with the express provisions of the contract. See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531. Christie *(op cit)* says at p 179:

C "The origin of many terms now implied by law was no doubt the idea that any, or at least any honest party entering into a particular type of contract would want to include such a term in it, but once the law has settled on a particular term it is fruitless to inquire into the intention of the parties except to the extent of ascertaining whether they have exercised their privilege of expressly excluding the term that would otherwise be implied, as when a sale is made *voetstoots.* A term that would normally D be implied by law may also be excluded because it would conflict with the express terms of the contract."

A term implied by law is thus clearly distinguishable from a tacit term which is a term implied from the facts described in *Alfred McAlpine (supra)* at 531- 2 as:

E "... an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties."

See also Christie *(op cit)* at p 187 – 194.

F In order for me to decide whether a tacit term is to be implied I must of course examine the express terms of the contract between the parties. *(Pan American World Airways Inc. v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175 (C). The contract was a verbal one. It was preceded before April 1997 by another such contract in terms of which the plaintiff had G purchased another motor vehicle from the defendants and had not been faced with a problem similar to the one which arose in respect of the Toyota Hilux. If the parties had been asked whether the plaintiff would be expected to pay the customs taxes they would have said, to paraphrase the words of Scrutton LJ in *Reigate v Union Manufacturing Co. (Ramsbotton)* [1918] 1KB 592 at 605, [1998] All ER 143 at 149 "We did not have to say it but, of course, the H buyer is not required to pay any more than the purchase price which he has

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paid, i.e. $90 000." It is quite clear to me that it was a tacit term of the contract A that the motor vehicle purchased by the plaintiff was free from any encumbrances, in particular that there would be no customs duty or surtax to which the plaintiff would be liable after paying the purchase price. The motor vehicle was in any case owned by the defendants, which fact adds more weight to the finding that such was a tacit term of the contract. The bystander B test adumbrated in *Smith v Minister of Lands & Natural Resources* 1979 RLR 421 at 426 (G) and in *Chinyerere v Frazer NO* 1994 (2) ZLR 234 (H) is clearly applicable and leads inevitably to the conclusion that the defendants as sellers would have been liable for payment of any outstanding dues in respect of the motor vehicle to the Department of Customs and Excise. The first issue is therefore answered in favour of the plaintiff. I do not agree with C the submission made by counsel for the defendants in her heads of argument that the implied term here is one implied by law.

The second issue is whether, when the Department of Customs and Excise moved to impound the motor vehicle, there was any duty on the defendants to intervene on the plaintiff's behalf so as to

ensure that the motor vehicle was not impounded. It is not in dispute that the plaintiff immediately informed the D defendants about the impounding of the motor vehicle and the demand for import duty and surtax. It was submitted on behalf of the plaintiff that the defendants had a duty to intervene by addressing the concerns of the Department of Customs and Excise so that the plaintiff was not prejudiced. The defendants agree as much but it was submitted on their behalf that that E duty only arises for the seller where legal action has been taken against the purchaser and not just any "indeterminate action". It was further submitted that that duty arises for the seller where the action taken against the purchaser is lawful. The defendant's counsel also submitted that where there is a duty upon the seller to intervene, there is upon the purchaser a corresponding duty to put up a *virilis defensio.* F

The duty of the seller which in principle is admitted by the defendants arises from what is generally known as "the warranty against eviction" and it creates the duty on a seller to intervene in order to protect the purchaser. It seems obvious to me that such a duty arises for the seller where the dispossession is not as a result of some criminal activity such as theft for, G quite obviously, such activity falls outside the scope of the warranty. I do not agree that it can be widely stated, as was stated in the defendants' heads of argument, that the "warranty against eviction can only apply where the eviction is lawful," because, to my mind, it is the lawfulness or otherwise of the eviction that is tested by the seller's intervention or by the purchaser putting up a *virilis defensio.* As to the meaning of *virilis defensio* see H

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A *Kanokanga v Evans & Ors* 2000 (2) ZLR 41 (H) and the cases therein cited.

In dealing with the submissions made for the defendants, I will have to examine two issues in particular. First, whether the duty on the seller arises only where legal action had been taken against the purchaser. Second, and accepting that the purchaser must put up a *virilis defensio,* whether such was B called for in the circumstances of this case.

On the first submission, it was contended for the defendants that:

"the duty to intervene is only cast upon the seller of the goods if a third party commences a court action against the purchaser seeking to dispossess the latter ... *In casu,* of course, no such action was ever commenced. Therefore it cannot be claimed, with respect, that the defendants ought C to have stopped the plaintiff from making payments of duty to the Department of Customs as the plaintiff had the option to explore his legal rights and act on the advisement of his appointed legal practitioners."

I think that the defendants' position has again been overstated on this point. The law does not require that an action should have been commenced against the purchaser for him to be able to claim against the seller. It may be the D position that in most of the decided cases legal action had been commenced against the purchaser before the purchaser could ask for the seller's intervention, but that does not establish a principle such as has been argued for the defendants in this case. My reading of cases such as *Olivier v Van Der Bergh* 1956 (1) SA 802 (C) does not lead to such a conclusion. I am satisfied that if a demand is made against the purchaser and such demand appears to E him sustainable at law, the purchaser may call upon the seller to intervene to ensure that he is not evicted. I would again find for the plaintiff on this point.

The only argument which favours the defendants is that the plaintiff should have put up a *virilis defensio. A virilis defensio* must be made where the third party's claim is not unassailable. Where the claim is unassailable, the F purchaser is not required to put up such a defence. See again *Kanokanga v Evans & Ors (supra)* and *Moyo v Jani* 1985 (1) ZLR 112 (H). The argument made for the defendants is that the claim by the Department of Customs and Excise was not unassailable. It was argued that the seizure of the motor vehicle was in breach of s 193(3) of the Customs and Excise Act [*Chapter 23:02*] because the extinctive period of two years had expired when the motor G vehicle was seized by the Department of Customs and Excise. Section 193(3) provides that:

"No seizure shall be made in terms of subsection (1) where more than two years have elapsed since the articles first became liable to seizure or where such articles have been acquired after importation for their true H value by a person who was unaware at the time of his acquisition that they were liable to seizure:

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Provided that: A

(i) goods imported in contravention of section *forty-seven, forty-eight* or *one hundred and seventy-five* or exported or attempted to be exported in contravention of section *sixty-one* shall be liable to seizure at any time from any person;

(ii) proof that a person was unaware that the goods he acquired were liable to seizure shall lie on him."

The first proviso is not relevant.

It is agreed that the plaintiff bought the motor vehicle in April 1997 ad that the motor vehicle was impounded on or about 3 November 2000 when the plaintiff attempted to sell it at an auction. It is also agreed that the motor vehicle had been owned by a Mr Keown before it became the defendants' C property. Quite clearly a period of more than three years had elapsed from the time that the said Mr Keown owned it to the time that it was impounded in the hands of the plaintiff, who had possessed it for at least three years. It is not clear on the facts as to when the motor vehicle first became liable to seizure. But whatever that time may be, the motor vehicle was liable to seizure for the whole period from when it was purchased first by the D defendants and then by the plaintiff. The plaintiff submitted that he had no knowledge of the date when the motor vehicle became liable to seizure and that it was the defendants' duty to ascertain this fact and to intervene on his behalf. I do not agree. As I stated, the date from which the motor vehicle became liable to seizure is self-evidently before the plaintiff bought it, which was on or before November 1998. E

In an action based on a warranty against eviction, the purchaser is not absolved, unless the third party's claim is unassailable, from putting up a *virilis defensio* merely because the seller has not intervened or assisted the purchaser in any other way. The inactivity of the seller is not a licence for the purchaser to give u*p* possession or ownership without putting up a reasonable F defence. It seems to. me that in this case, when the Department of Customs and Excise demanded the payment of the outstanding import taxes, the plaintiff, in defendants' counsel's words "just rolled over and submitted without question" to pay the taxes demanded and as such he made a "gratuitous and voluntary gift to the State". It may well have been the position, if the facts were different, that it was the defendants only who could G have provided the means of resisting the claims by the Department of Customs and Excise by producing the import papers. But on the facts of this case and having regard to the provisions of s 193(3) of the Customs and Excise Act, in particular, the extinction of the period within which the seizure was competent and the fact that the plaintiff was a purchaser for the true value H

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A of the motor vehicle and was unaware at the time of the purchase that the motor vehicle was liable to seizure, there seems to me to have been no excuse for the plaintiff's failure to put up a *virilis defensio.* The provisions of s 193(3) did not require the defendants to have assisted the plaintiff in order for the plaintiff to defeat the Department's claims.

The plaintiff did not in his pleadings or in the prayer to the summons allege B that the Department of Customs and Excise's claim was unassailable or that he put up a reasonable defence against the department's claims. That failure to allege in the pleadings, and in any manner whatsoever to put up a reasonable defence, is fatal to his claim. I am satisfied that the seizure of the motor vehicle may not have been warranted and that the plaintiff should have C put up a reasonable defence on the basis of s 193(3) of the Customs and Excise Act. He failed to do so and he has himself to blame.

Accordingly the plaintiff's claim is dismissed with costs.

Mushonga & Associates, plaintiff's legal practitioners.

D *Scanlen & Holderness,* defendants' legal practitioners.

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[zRPz]MANDAZA v DAILY NEWS & ANOR 2002 (2) ZLR 296 (H)
2002 (2) ZLR p296

Citation 2002 (2) ZLR 296 (H)

Case No	Judgment No. HH-144-02
Court	High Court, Harare
Judge	Adam J
Heard	20 February 2002; 19 March 2002; 27 May 2002; 30 May 2002; 28 August 2002
Judgment	28 August 2002
Counsel	*H Zhou,* for the applicant *G S Wernberg,* for the respondents
Case Type	Application for interdict
Annotations	No case annotations to date

[zFNz]Flynote
Constitutional law — Constitution of Zimbabwe, 1980 — Declaration of D Rights — right to privacy — to what extent protected by Constitution — need to balance against right to freedom of expression and freedom of the press
Delict — *injuria* — invasion of privacy — when an *injuria* — approach to be taken — plaintiff a public figure — relevance of E
[zHNz]Headnote
The respondent newspaper published photographs, taken from the air or from the outside of the property, of residential properties owned by the applicant. The applicant was a well-known public figure. He sought an interdict preventing the publication of any dossier of his properties or any further intrusions into his private life. He claimed that he had a constitutional right to privacy. F
The respondents argued that an interdict would infringe the freedom of the press and their right to freedom of expression.
Held, that there was a right to privacy granted by ss 11 and 18 of the Constitution, though not a well-expressed one.
Held, further, that there was a qualified common law right to privacy, which G aimed at unlawful intrusions upon the personal privacy of another and the unlawful publication of private facts about a person. The right to privacy had to be balanced against the right to freedom of expression. *Held,* further, that the information about the applicant's ownership of the properties was in the public domain, being obtainable from the Deeds Office. The photographs were not taken by means of unlawful intrusion H
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Adam J
A into or over the properties. It could not be said that the applicant had suffered any *injuria* by the publication of photographs of his property. Had the photographs been of sensitive personal data, the result might have been otherwise.
[zCAz]Cases cited B
A v B & C [2002] EWCA Civ 337 (Court of Appeal, 11 March 2002)
Australian Broadcasting Corp v Lenah Game Meats Pty Ltd [2001] HCA 63
Bantam Books Inc v Sullivan 372 US 58 (1963)
Campbell v Mirror Group of Newspapers [2002] EWHC 499 (QB)
C *Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S)
Chinamora v Angwa Furnishers (Pvt) Ltd 1996 (2) ZLR 664 (S)
Douglas v Hello! Ltd [2001] QB 967
Financial Mail (Pty) Ltd v Sage Hldgs Ltd 1993 (2) SA 451 (A)
Hunter v Southam Inc (1985) 11 DLR (4th) 641 (SCC)

D *Jacobson v Massachusetts* 197 US 11 (1905)
La Grange v Schoeman & Ors 1980 (1) SA 885 (E)
Mahomed v Kassim 1972 (2) RLR 517 (A)
In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)
National Media Ltd & Ors v Bogoshi 1998 (4) SA 1196 (SCA)
Near v Minnesota 283 US 697 (1930)
E *New York Times Co v US* 403 US 713 (1971)
O'Keeffe v Argus P & P Co Ltd & Anor 1954 (3) SA 244 (C)
Organization for a better Austin v O'Keefe 402 US 415 (1971)
Pakendorf en Andere v de Flamingh 1982 (3) SA 146 (A)
Reid-Daly v Hickman & Ors (2) 1980 ZLR 540 (A)
F *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S)
*Rhodesian P & P Co Ltd v X & Anor 1*974 (2) RLR 207 (A)
S v A & Anor 1971 (2) SA 293 (T)
S v Israel & Anor 1975 (2) RLR 191 (A); 1976 (1) SA 781 (RA)
S v Marwane 1982 (3) SA 717 (A)
[zSTz]Legislation considered G
Constitution of Zimbabwe, 1980, ss 11 & 18 Constitution of South Africa 1996, s 14
[zCIz]Case information
H Zhou, for the applicant
H *G S Wernberg,* for the respondents
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Adam J
[zJDz]Judgment
Adam J: The applicant was granted interim relief on his urgent chamber A application on 19 July 2001, whereby the respondents are interdicted from publishing any dossier of the applicant's properties or committing any further unlawful acts of intrusion into the applicant's private life. The respondents filed their opposing affidavit on 24 July 2001 and the applicant filed his answering affidavit on 3 August 2001. The applicant's heads of B argument were filed on 10 October 2001, with the respondents' heads of argument being filed on 24 October 2001. At the hearing of the matter on 20 February 2002, the matter was postponed *sine die,* with costs reserved, together with the interim relief altered by consent whereby the respondents were interdicted from publishing unlawful acts of intrusion into the applicant's private life. On 14 March 2002, the applicant filed a supplementary affidavit C now seeking a final order in accordance with the amended draft order that the respondents be interdicted from intruding into the applicant's private life by taking and/or publishing aerial photographs of the applicant's properties. On 19 March 2002, the matter was further postponed with costs being reserved. On 27 May 2002, the applicant's supplementary heads of argument were filed, on which date the matter was postponed to 30 May 2002. D
In his founding affidavit, the applicant averred that on 6 July 2001, the first respondent published an article which suggested that he could only have acquired the three properties named in the published article through unlawful means. He believed that, besides the extremely defamatory nature of the publication, it is also an extreme form of invasion into his constitutional right E to privacy. On 16 July 2001, the respondents published yet another article in which they stated they were finalising a dossier of his properties. He believed that there is no legal or moral justification why his private life must be opened up and laid out for public consumption. The Constitution of this country specifically protects him and guarantees his right to privacy. If the respondents are not interdicted from publishing the so-called dossier of his properties, he F obviously would not have enjoyed the right to such protection against intrusions into his private life. He also averred that the respondents have, to an extent, caused damage to his person by their previous publications on him and they should not be allowed to aggravate such damage without just cause.
In his opposing affidavit, the second respondent averred that both respondents G admit publication of the article, but denied that the article suggested that the applicant had acquired the three properties through unlawful means. The first respondent's reporter had specifically invited the applicant to comment but the latter contented himself with an abusive response. The respondents denied that the publication of the article is defamatory and, most importantly, they say, the applicant has not sought to particularise the manner in which the H
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Adam J
A article is allegedly defamatory, nor indeed has the applicant contended that the facts published are not true. They pointed out that the applicant is a public figure and the article is of public interest. They averred that they do not accept the contents of the paragraph about the applicant's

constitutional right to privacy, insofar as they relate to a constitutional right to privacy or to an infringement thereof. They averred that the respondents published the article B in the public interest and in the exercise of their right to freedom of expression, and that in any event the ownership of properties is a matter of public record and can be established by a search in the Deeds Registry. They averred, with respect, that there can be no right to privacy where ownership is a matter of public record. Alternatively and, in any event, publication was truthful and in the public interest. They denied the contents of the paragraph C in which the applicant believed that there is no legal or moral justification why his private life must be opened up and laid out there for public consumption. They denied that publication of ownership of certain properties, which publication was truthful, can be an infringement of privacy. Indeed, the applicant admits he owns or controls other properties. They failed to see D how or why the respondents should be interdicted from publishing matters of public record. Moreover, they said, the interdict constitutes an infringement of freedom of the press and the respondents' right to freedom of expression to an extent that is not reasonably required in a democratic society.

In his answering affidavit, the applicant averred that it surely does not take any splitting of hairs to see the import of the publication. Anybody who reads E the report will undoubtedly end up with the conclusion that he unlawfully acquired the three properties. He also reiterated that he had no obligation at all to discuss his private acquisitions with the respondents' reporter. He reminded the respondents that this application is not meant to prove the defamatory nature of the publication; it is meant to interdict the respondent F from violating his constitutional right to privacy. He denied that the publication is in the public interest and that he is a public figure in the sense of him being a suitable candidate to be stripped of the right to privacy. His properties belong to him, his wife and children, who enjoy the protection of the Zimbabwean Constitution. Hiring private planes to photograph his family home hardly was of public interest and surely was a serious intrusion into his G family's privacy. Whether the facts are true or false was not relevant; he simply should not be displayed in the public gaze especially if no justification exists. He averred that the respondents' right of expression does not supersede his right to privacy at all. He also averred that there is no way that the article can be said to have been of public interest. Further, the fact that ownership H of property is a matter of public record does not mean that such ownership

can be published without just cause. He did not share the view that ownership A of immovable property is matter of public record and therefore becomes a non-issue for the sake of the right to privacy. He reiterated that the publication was nowhere near being in the public interest. He asserted that permitting the respondents to publicise the dossier on his properties is tantamount to legalising the violation of his constitutional right to privacy. A democratic B society respects and protects quite jealously the individual's rights, including the right to privacy.

The respondents' heads of argument indicates that the applicant's case is based on s 11(c) of the Zimbabwe Constitution which was repealed by Act 14 of 1996. The respondent's legal practitioner submits that there can be no question in this matter of the applicants' privacy being invaded as the C ownership of immovable properties is a matter of public record. In effect, the final order sought seeks to interfere with the respondents' right to address matters of public concern. The applicant, in his supplementary heads of argument, states that the respondents admit that photographs were taken using telephoto lens well outside the applicant's airspace and that the photographs of his Mount Pleasant house were taken from outside the D property. The applicant's legal practitioner submits that it is not disputed that this was done without the applicant's authority.

It is undoubtedly true that the Fourteenth Amendment in 1996 repealed and replaced s 11 of the Constitution with a Preamble. It provides that persons are entitled, subject to the provisions of the Constitution, to the fundamental E rights and freedoms of the individual in Chapter Three of the Constitution, but with the limitation that the enjoyment of those rights and freedoms do not prejudice the public interest or the rights and freedom of other persons. Before the Fourteenth Amendment, in the case of *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S), Gubbay CJ held that s 11 was a substantive provision (although commencing with the word "Whereas") that conferred a Preamble F to the rights provided for in the Declaration of Rights section. The purpose of this section was to strike a necessary accommodation between the enjoyment of the freedoms and the potential prejudice resulting from their exercise both to others and the public. The learned Chief Justice observed at 55:

"In *Dow v Attorney-General* [1992] LRC (Const) 623, a decision of the Appeal Court of Botswana, Amissah JP, at 636e-637b, considered the identically worded s 3 of the Constitution of Botswana. He viewed it, most aptly, as 'the key or umbrella provision' in the Declaration of Rights under which all

rights and freedoms must be subsumed; and went on to point out that encapsulates the sum total of the individual's rights

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Adam J

and freedoms in general terms, which may be expanded upon in the expository, elaborating and limiting sections ensuing in the Declaration of Rights."

It is true that the eminent Holmes J in *Jacobson v Massachusetts* 197 US 11 (1905), in considering a State law relating to vaccinations with reference to the Preamble of the American Constitution, said at 22:

"Although [the Constitution's] preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such may be implied from those so granted. Although, C therefore, one of the declared objects of the Constitution was to secure blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless apart from the preamble, it be found in some express delegation of power, or in some power be to properly implied therefrom."

Even Holmes J accepted that what is contained in the Preamble can be a D source of substantive powers if it could be properly implied from the text of the body of the Constitution.

In this context, the principles of constitutional interpretation are pertinent. In *Hunter v Southam Inc* (1985) 11 DLR (4th) 641 (SCC) at 649, it was stated:

"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily F be repealed or amended. It must, therefore, be capable of growth and development over time to meet the social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting the provision, bear these considerations in mind."

In light of the foregoing, the effect of the Fourteenth Amendment cannot be G said to have in any way curtailed or dwindled the right to each of the following, namely: life, liberty, security of person and the protection of the law, freedom of conscience, of expression, and of assembly and association and protection for privacy of a person's home and other property which are encapsulated in s 11 (the Preamble) that refers to persons being entitled to H fundamental rights and freedoms of the individual. In my view, s 18 read with

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s 11 still provides a constitutional right to privacy, even though not well- A expressed in the explicit terms of s 14 of the South African Constitution 1996. That section provides that everyone has the right to privacy, which includes the right not to have: (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed. Even s 14 is not an exhaustive list since the B expression "includes" is used. This would suggest to me that paras (a) to (d) are merely some of the examples of the constitutional right to privacy.

In *Chinamora v Angwa Furnishers (Pvt) Ltd* 1996 (2) ZLR 664 (S), Gubbay CJ, in dealing with s 18(1), said at 689:

"The phrase 'subject to' is a simple expedient which subjects the provisions of the subject section to the provisions of the master section. Where there C is a clash, the concept shows which of the two takes effect."

He referred to the judgment of Muller JA in *S v Marwane* 1982 (3) SA 717 (A) who said at 747H:

"The purpose of the phrase 'subject to' ... is to establish what is dominant and what subordinate or subservient; that to which a provision is D 'subject', is dominant — in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation."

In *Rhodesian Printing & Publishing Co Ltd v X & Anor* 1974 (2) RLR 207 (A), it was held that under Roman-Dutch Law there was a qualified right to privacy. Beadle CJ said at 214: E

"The starting point in the law of this subject is that *prima facie:* 'Every person has an inborn right to tranquil enjoyment of his peace of mind'. (See Melius de Villiers on *Injuria,* 24, *O'Keeffe v Argus Printing & Publishing Co Ltd* 1954 (3) SA 244 (C) at 247; *R v Umfaan* 1908 TS 62 at 66; *S v A & Anor* 1971 (2) SA 293 (T) at 297). *Prima facie,* therefore, every incursion of that right is an *injuria.*

This general rule is, however, F subject to a great many limitations ... For the purpose of this case, however, I find the following passage from de Villiers helpful. See *O'Keeffe*'s case *supra,* at p 248:
'Whether an act is to be placed amongst those that involve an insult, indignity, humiliation or vexation depends to a great extent upon the modes of thought prevalent amongst any particular community or at G any period of time, or upon those of different classes or grades of society, and the question must to a great extent therefore be left to the discretion of the court where an action on account of the alleged injury is brought ...'
This passage is clear authority for the proposition that in dealing with what are the 'modes of thought prevailing in a particular community' H
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A distinction may be drawn between 'different classes or grades of society'."
In *O'Keeffe's* case, the unauthorised publication of the plaintiff's photograph in a newspaper advertisement was held to be violation of her *dignitas.* In S v *A & Anor supra,* the planting of a listening device in the plaintiff's apartment was held to be an invasion of his dignity. In *Reid-Daly v Hickman & Ors (2)* 1980 ZLR 540 (A), the secret installation of an electronic listening B device in the appellant's office at Inkomo Camp was held to be an invasion of his dignity. But in *S v Israel & Anor* 1975 (2) RLR 191 (A); 1976 (1) SA 781 (RA), the wife suspected the husband of committing adultery so she hired a private investigator. The wife and the private investigator peeped through a bedroom window where the husband was with a woman in a double bed. C Beadle ACJ said at 203H-204B; 787E:
"In a case where one spouse suspects the other of committing adultery, which the guilty spouse denies, invasion of privacy of the guilty spouse and of his paramour by the injured spouse may be justified where the injured spouse invades that privacy *solely* with the *bona fide* motive of obtaining evidence of the adultery, and the invasion is more than is D reasonably necessary for the purpose of obtaining that evidence. I stress here the word 'solely' because, if the injured spouse knows that she already has, or that she clearly has the means of getting, other adequate evidence of adultery ... The evidential onus of proving her motive must rest on the injured spouse."
And at 207:
E "I now turn to the merits of the instant case. When the appellants peeped through the complainant's window, they did so *solely* with the *bona fide* motive of obtaining evidence of adultery. I do not think that in the circumstances what they did can be considered as doing more than was reasonably necessary for the purpose of obtaining evidence of that fact. I am, therefore, of the opinion that they were justified in peeping through F the window and that their conviction of criminal *injuria* for so doing was not warranted."
In *Financial Mail (Pty) Ltd & Ors v Sage Hldgs Ltd & Anor* 1993 (2) SA 451
(A), Corbett CJ observed at 462E-H and 464C-D:
"I need not essay a definition of the right to privacy. Suffice it to identify two forms which an invasion thereof may take, *viz:* (i) an unlawful G intrusion upon the personal privacy of another; and (ii) the unlawful publication of private facts about a person ... Of course, not all such intrusions or publications are unlawful. And in demarcating the boundary between lawfulness and unlawfulness in this field, the court must have regard to the particular facts of the case and judge them in the light of contemporary *boni mores* and the general sense of justice of the H community as perceived by the court ... Often ... a decision on the issue
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of unlawfulness will involve a consideration and a weighing of competing A interests...
(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known ...
(2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the number of their viewers or listeners; and they are peculiarly vulnerable to the error B of confusing the public interest with their own interest."
However, the intrinsic significance of freedom of expression has been universally accepted. In re *Munhumeso & Ors supra,* Gubbay CJ observed at 57:
"Freedom of expression, one of the most precious of all the guaranteed C freedoms, has four special purposes to serve: (i) it helps the individual to 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 is possible to establish a reasonable balance between stability and social change."
In Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S) at 210-211, Gubbay D CJ, in considering the importance of freedom of expression, said:

"It was stated by this court in In re *Munhumeso,* ... at 56F-H ... that:
'The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be underestimated. They lie at the foundation of a democratic society and are 'one of the E basic conditions for its progress and for the development of every *man'; per* European Court of Human Rights in *Handyside v United Kingdom* (1976) 1 EHRR 737 at para 49.'
In *Wood & Ors v Min of Justice & Ors* 1994 (2) ZLR 195 (S) at 198, the comment was added that the freedom of expression is 'one always to be jealously guarded by the courts.'
This approach, which underscores the pre-eminence of freedom of F expression as an indispensable condition for a free and democratic society, conforms with what is reflected in international human rights instruments, some of which Zimbabwe has ratified or acceded to."
In *National Media Ltd & Ors v Bogoshi* 1998 (4) SA 1196 (SCA), Hefer JA observed at 1207-8, 1210-11 and 1216: G
"It is trite that the law of defamation requires a balance to be struck between the right to reputation, on the one hand, and the freedom of expression on the other ...
It would be wrong to regard either of the rival interests with which we are concerned as more important than the other. The importance of the protection of reputation is self-evident ... In a judgment of the Supreme H
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A Court of Canada *(Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC) at 162, Cory J cited an article by David Lepofsky in which the author said that reputation is the 'fundamental foundation on which people are able to interact with each other in social environments and proceeded to say (at 163) that —
'the good reputation of the individual represents and reflects the B innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.'
The freedom of expression is equally important. Professor van der Westuizen (in van Wyk *et al Rights and Constitutionalism: The New* C *South African Legal Order* at 264) describes it as essential in any attempt to build a democratic social and political order. Elsewhere it has been referred to as 'the matrix, the indispensable condition of nearly every other form of freedom' *(Palkov State of Connecticut* 302 US 319 (1937) at 327), and in the majority judgment in the European Court of Human Rights in *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754, it D was said that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. That this is not an overstatement appears from Mcintyre J's reminder *in Retail, Wholesale and Department Store Union, Local 580 et al v Dolphin Delivery Ltd* (1987) 33 DLR (4th) E 174 (SCC) at 183 that:
'(f)reedom of expression ... is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society.'
In the same vein, Joffe J said in *Government of the Republic of South* F *Africa v Sunday Times Newspaper & Anor* 1995 (2) SA 221 (T) at 227H- 228A:
'The role of the press in a democratic society cannot be understated ... It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest, mal- and inept administration. It must G also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern.'
If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be H defended and should have been rejected in *Pakendorf.*
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… A
In my judgment, the decision in *Pakendorf must* be overruled. I am, with respect, convinced it was clearly wrong.
This provision [s 39(2)], as Kentridge AJ explained in *du Plessis & Ors v de Klerk & Anor* 1996 (3) SA 850 (CC) at 885G-H (1996 (S) BCLR B 658), 'ensures that the values embodied in chap 2 will permeate the common law in all its aspects' ... The resultant position appears to be the same as that in Canada, which is described as follows in the *Church of Scientology* case *supra* at 156 paras 91 and 92:
'It is clear from *Dolphin Delivery supra* that the common law must be interpreted in a manner which is consistent with Charter principles. C The obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing

social conditions and values ... Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make them comply with current societal values. The Charter represents a D restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.'
(See also *du Plessis* at 881-2 (para [55]) 884B-F.) E
..."
In the *National Media* case, it was pointed out that *Pakendorf en Andere v de Flamingh* 1982 (3) SA 146 (A), held that owners of newspapers, publishers, editors and printers were liable without fault and, in particular, were not entitled to rely on their lack of knowledge of defamatory material in their publication, or upon erroneous belief in the lawfulness of the publication of F defamatory material. The Supreme Court of Appeal *overruled Pakendorf and* restated the correct position under Roman-Dutch common law.
What Hefer JA said about striking a balance between the right to reputation and the right to freedom of expression, in my view, also in similar, terms a balance has to be struck between the right to privacy and the right to freedom of expression. The applicant's counsel submitted that what the public interest or benefit would be in the publication of that information if the information is already known to the public. He referred to *Mahomed v Kassim* 1972 (2) RLR 517 (A), where the appellant was found to have defamed the respondent by indicating that the respondent had stolen money belonging to the society. The appellant did not plead any secondary meaning of the words, but based H

A his case on their primary meaning. The appellant applied to amend his plea by inserting a defence that the words used were true and the publication was for the public benefit. Beadle CJ allowed the amendment and then held that the publication was not for the public benefit and so the defence of justification failed. The learned Chief Justice said at 529:
"... the public benefit flows from making the misbehaviour of the plaintiff B 'known' to the public. It seems to follow from this that that which has been said must be something of which the public are ignorant. It does not seem correct to speak of 'informing' people of something of which they are already aware. The public interest lies in telling the public something of which they are ignorant, but something which it is in their interest to know. If they already knew it, it hardly seems that the mere repetition can C be of some value."
However, what was said by Beadle CJ must now be understood along with what was enunciated by the Supreme Court in In re *Munhumeso supra* and *Retrofit (Pvt) Ltd v PTC & Anor.*
It cannot be seriously asserted on behalf of the applicant that information D which is in the Registrar of Deed's office pertaining to ownership of immovable property is already known to the public. There is a wide difference between what information the public has access to and information that is known to the public. The two are not always synonymous.
In *Campbell v Mirror Group of Newspapers* [2002] EWHC 499 (QB), the plaintiff, an internationally renowned fashion model and celebrity, was E shown on 1 February 2001 in the newspaper on the front page between two colour photographs, the one in a baseball cap ordinarily dressed with the headline below — "Therapy: Naomi outside Meeting"; and the other more glamorously dressed with the heading — "Naomi: I am a drug addict". The articles in it were by Polly Graham and marked "exclusive" and read — F "Supermodel Naomi Campbell is attending Narcotic Anonymous meetings in a courageous bid to beat her addiction to drugs". The Editor of the "Mirror" gave the explanation that, being conscious of the terms of the PCC Code of Conduct, he considered carefully whether there was a public interest in publishing that Campbell had a drug problem and had sought to deal with it. The Editor thought two reasons justified it which were, firstly, that it G appeared Campbell had been committing a serious drug criminal offence over a period of years and, secondly, that as a role model to young people she had held herself out in the media as someone who had managed to remain immune from use of drugs in an industry where drug abuse was common. She had seriously misled the public.
H Campbell's lawyers wrote a letter to the Editor, enclosing a copy of

proceedings which were issued on 1 February 2001 complaining about any A further unlawful invasions of her privacy. The *Mirror* on 5 February 2001 published a second article headlined — "Pathetic" — under which was a photograph of Campbell and below it the heading: "Help, Naomi Campbell leaves Narcotics Anonymous meeting last week after receiving therapy in her battle

against illegal drugs". The article was headed — "After years of self-publicity and illegal drug use, Naomi Campbell whinges about privacy". B In the editorial of that issue, the closing words were — "If Naomi Campbell wants to live like a nun let her join a nunnery. If she wants the excitement of a show business life, she must accept what comes with it".

Morland J found that her regular attendance at Narcotics Anonymous meetings was easily identifiable as private and disclosure of that information D would be highly offensive to a reasonable person of ordinary sensibilities (using the words of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats (Pty) Ltd* [2001] HCA 63) or that there existed a private interest worthy of protection (the guide line test given by Lord Woolf CJ in *A v B & C* [2002] EWCA Civ 337). Reference was also made to *Douglas v Hello! Ltd* [2001] QB 967 at 1011-2 where Keene LJ said:

"164.... The claim is put in terms of breach of confidence in the particulars of claim, but it was said in argument by Mr *Tugendhat* that the case has more to do with privacy than with confidentiality. 165. It us clear that there is no watertight division between the two *concepts. Duchess of Argyll v Duke of Argyll* [1967] Ch 302 was a classic E case where the concept of confidentiality was applied so as, in effect, to protect the privacy of communications between a husband and wife. Moreover, breach of confidence is a developing area of the law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice.

… F

168. But any consideration of article 8 rights must reflect the Convention jurisprudence which acknowledges different degrees of privacy. The European Court of Human Rights ruled in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 that the more intimate the aspect of private life which is being interfered with, the more serious must be the reasons for the interference before the latter can be legitimate: see p. 165, para 52. G Personal sexuality, as in that case, is an extremely intimate aspect of a person's private life. A purely private wedding will have a lesser but still significant degree of privacy warranting protection, though subject to the considerations set out in article 8(2). But if persons choose to lessen the degree of privacy attaching to an otherwise private occasion, then the balance to be struck between their right and other considerations is likely to be effected." H

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A (The reference to "Convention" is to the European Convention for Protection of Human Rights.)

In *A v B & C supra,* Lord Woolf CJ said:

"4. ... under s 6 of the 1998 Act [Human Rights Act], the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the B rights which articles 8 and 10 protect.

…

6. The manner in which the two articles operate is entirely different. Article 8 operates so as to extend the areas in which an action for breach of confidence can provide protection for privacy. It requires a generous C approach to the situations in which the privacy is to be protected. Article

…

10 operates in the opposite direction. This is because it protects freedom of expression and to achieve this it is necessary to restrict the area in which remedies are available for breaches of confidence. There is a tension between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights D both articles are designed to protect. Each article is qualified expressly in a way which allows the interests in the other article to be taken into account.

…

11(iv) ... Any interference with the press has to be justified because it E inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified.

… F

11(x) If there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, then that intrusion will be capable of giving rise to liability in action for breach of confidence unless the intrusion can be justified.

… G

11(xii) Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his or her actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual H would not be the appropriate subject of comment can be the proper

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subject of comment in the case of public figure. The public figure may A hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public B attention then you have less ground to object to the intrusion which follows. In many of these situations, it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when C deciding on which side of the line the case falls. The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to the other parts of the media. On the difficult issue of finding the right balance, useful guidance of a general nature is provided by the Council of Europe Resolution 1165 of 1998. D
…
11(xiii) In drawing up a balance sheet between the respective interests of the parties courts should not act as censors or arbiters of taste. This is the task of others."
Morland J said in *Campbell v Mirror Group of Newspapers supra:* E
"54. Inevitably, a top fashion model of international renown will be the subject of media interest and publication. That interest and publication will be greatly increased if she has a colourful temperament and private life. This will be especially so if as in the case of Miss Naomi Campbell she exploits commercially her celebrity status ...
55. Miss Campbell has frequently discussed with journalists and given F interviews to the press or on television about aspects of her private life and behaviour when she should have known that her revelations would be published world-wide.
…
57. She has publicly acknowledged that she has had problems of G behavioural unpredictability and anger control which has required therapy. She admitted in evidence that she is notorious for tantrums.
58. She did not reveal that she was a drug addict and has been for some years a drug addict requiring and receiving therapy.
59. Indeed, she lied about her drug addiction, putting forward in H
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A interviews with the media a positively false case that, unlike many models, she had managed to avoid drugs.
…
65. On very many occasions over the years, her public and her personal private life have been subject of publication in the media.
66. Although many aspects of the private lives of celebrities and public B figures will inevitably enter the public domain, in my judgment it does not follow that even with self-publicists every aspect and detail of their private lives are legitimate quarry for the journalists. They are entitled to some space of privacy.
67. In my judgment, the media to conform with Article 8 should respect information about aspects or details of the private lives of celebrities and C public figures which they legitimately choose to keep private, certainly 'sensitive personal data', unless there is an overriding public interest duty to publish consistent with article 10(2).
…
69. Clearly, the *Mirror* was fully entitled to put the record straight and D publish that her denials of drug addiction were deliberately misleading
…
70. ... Article 10 is not an unqualified right as article 10(2) requires respect for the right of privacy has to be shown including by the media. Striking the balance having full regard to s 12(4) of the 1998 Act, clearly in my judgment Miss Naomi Campbell is entitled to the remedy of E damages and/or for compensation.
…
85. In my judgment, the contention, that the published photographs of the claimant are sensitive personal data because they consist of information as to her racial or ethnic origin, has no

materiality or relevance to the circumstances of this case. The claimant is proud to be a leading black F fashion model and it is part of her life style and profession to be photographed as a black woman. She has suffered no damage or distress because the photographs disclose she is black.
87. In my judgment, the information as to the nature of and details of the G therapy that the claimant was receiving at Narcotics Anonymous, including the photographs with captions, was clearly information as to her physical or mental health or condition, that is her drug addiction and therefore 'sensitive personal data'.
…
103 ... Thus the claimant was unaware that she was being photographed. H She had no opportunity of evading being photographed or refusing her
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consent to being photographed. A
104. In *R v Broadcasting Standards Commission ex p BBC* [2001] QB 885, at 899 Hale LJ said:
'43. I accept that it is open to BSC to hold that secret filming of an individual for potential use in broadcasting is in itself an infringement of that individual's privacy (although it may well be warranted). B Notions of what an individual might or might want to be kept "private", "secret", or "secluded" are subjective to that individual. 44. I also attach particular weight to the context, which is not only the secret filming without consent but also the potential use in the mass media without consent. Furthermore, we are not talking of legal rights but broadcasting standards. If there is a good reason for infringement then it will not be unwarranted. All this seems to me C to justify a wider view of the ambit of privacy than might be appropriate in some other contexts. There may well be contexts in which the concepts should be limited to human beings, whose very humanity is defined by their own particular consciousness of identity and individuality, their own wishes and their feelings. But that debate is for another day.' D
…
112. ... While the publication of the claimant's drug addiction and the fact that she was having therapy was necessary for the purposes of legitimate interests of the defendant, as a newspaper publisher, and was not an unwarranted intrusion into the claimant's right of privacy, it was not necessary to publish the therapy details complained of. All that E needed to be published in pursuit of the defendant's legitimate interests were the facts of the drug addiction and therapy — full stop. The therapy details complained of were an unwarranted intrusion into the claimant's right of privacy."
In the United States, the First Amendment freedom of expression and freedom of the press have not favoured prior restraint. In *New York Times Co* F *v United States* 403 US 713 (1971) (the "Pentagon Papers" case) the US Supreme Court said that "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity". *(Near v Minnesota* 283 US 697 (1931) and *Bantam Books Inc v Sullivan* 372 US 58 (1963)). The Government "thus carries a heavy burden of showing G justification for the enforcement of such a restraint" — *Organization For A Better Austin v O'Keeffe 402* US 415 (1971). In the Pentagon Papers case, the United States Government sought to enjoin the New York Times from publishing the contents of a classified study (generally known as the "Pentagon Papers"). The US Supreme Court held that the Government had not met the burden and the injunction was denied to it. Brennan J said: H
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A "The entire thrust of the Government's claim through these cases has been that publication of the material sought to be enjoined 'could', or 'might', or 'may' prejudice the national interests in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."
B The respondents' contention is that the interim relief in the form of a temporary interdict and the final order sought by the applicant would wrongly interfere with the respondents' right to address matters of public concern. The applicant asserts that the taking by the respondents of photographs of the applicant's immovable properties in Harare, Juliasdale and the Mazowe area without the authority or consent of the applicant violated his C right to privacy. The invasion was an unlawful intrusion upon his personal privacy and an unlawful publication of private facts about him.
There is little doubt that applicant is a public figure. The Mirror Reporter of *The Zimbabwe Mirror* described him, apart from his academic, professional and business profiles, as a renowned academician, author and publisher of D many books; that he has undertaken celebrated consultancies for the UNDP; that he is currently the Chairman of the Rainbow Tourism Group and on the NUST Council. The Chief Reporter of *The Daily News* said he is a man of substance.

The applicant's counsel accepts where the information for publication purpose was obtained by means of unlawful intrusion then, generally, any E publication would not be lawful — *Financial Mail (Pty) Ltd supra* at 463E- G. But the learned Chief Justice also pointed out that "in demarcating the boundary between lawfulness and unlawfulness on this field, the court must have regard to the particular facts of the case and judge them in light of contemporary *boni mores* and the general sense of justice of the community F as perceived by the court". Corbett CJ said that this often involves the consideration and weighing of competing interests. These are the right to privacy and the right to freedom of expression and the right to freedom of the press.

The applicant has not established that the photographs of the three immovable properties were obtained by means of unlawful intrusion in the sense that the G photographer entered either over his airspace or on to his immovable property. But the issue, as I understand it, is that the applicant's contention is that taking any photographs of his immovable property is a violation of his privacy.

In *La Grange v Schoeman & Ors* 1980 (1) SA 885 (E), the two respondents H had been "catapulted into the public eye" and had become "instant celebrities".

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The applicant, a freelance press photographer, was taking photographs of A witnesses and others engaged in a highly publicised civil trial. On one occasion, the two respondents prevented the applicant from taking photographs of them, The names of the respondents as members of the Security Police were mentioned at the trial. The applicant sought an interdict ordering the respondents not to impede him in any way taking photographs of witnesses B and other persons involved in the trial. Kannemeyer J held that the interdict claimed was too widely cast. He also held that what happened during the trial concerning the respondents was privileged and such privilege would attach to a fair and accurate report of this in the press. However, there was no justification in law which required the respondents to suffer the added indignity and inconvenience of having their photographs published in the C press to satisfy the curiosity and to make it possible for the public at large to identify them. He further held that publication of photographs would go further than the report of proceedings and beyond the privilege protecting the publication of such a report. He was unpersuaded that the applicant had a right to require unwilling subjects to submit to being photographed. Kannemeyer J then said at 895F-H and 896A: D

"It may be that to publish a photograph of a person which is taken against that person's will would not, were that person not one concerning whom injurious allegations have been made in court, ground an action for *injuria if that* person had been 'catapulted into the public eye' against his will. This, however, does not mean that the photographer can compel such an one to submit to being photographed or require him not to take E steps to prevent such photograph being taken ... there was nothing to prevent the first or second respondent from avoiding being photographed by, for instance, shielding his face with a newspaper. If this is so, as I am satisfied it is, the applicant has not shown a clear right in respect of which he is entitled to claim protection from the court.

The means that the respondents adopt to avoid being photographed F cannot create a clear right where one does not exist. If the photographer is assaulted in order to prevent him from taking the photographs he has a remedy in an action for damages but the fact that he is physically prevented from taking the photographs rather than prevented by the use of stratagems gives him no right to photograph an unwilling subject."

I do not understand Kannemeyer J as holding that there is no justification in G law for a press photographer taking photographs of persons connected with a sensational or unusual trial. His observations were certainly directed at a press photographer who sought an interdict to compel a witness or others engaged in a trial to submit themselves to be photographed.

The requisites for the right to claim a final interdict that the applicant has to H

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A establish are, a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy: *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S) at 89E.

The applicant has not established a clear right. In my view, it is not sufficient for the applicant to merely assert that the respondents have taken photographs B of his immovable property without his authority or consent. It cannot be maintained that the applicant has suffered any *injuria* merely by the publication of photographs of his immovable property. In my view, this does not fall under "sensitive personal data" and such intrusion cannot be categorised as unwarranted in the case of a public figure. If these photographs are meant to C be read together with the articles in *The Daily News* with the allegation in his founding affidavit of their extreme defamatory nature, then the

applicant has his ordinary remedy in a defamatory action for damages. The applicant has not cited any authority which supports his contention that just taking photographs of a person's movable or immovable property is a serious intrusion into his wife's, his children's and his own privacy. The applicant D may have had some basis if photographs, from outside his immovable property by use of telephoto lens, were taken of himself or his family on his immovable property which were offensive (falling under "sensitive personal data").
The applicant has established no clear right which he can seek to be protected E by a final interdict. Accordingly, the interim relief granted is not confirmed and the application for a final order in terms of the amended draft is dismissed with costs, along with the costs of the other two hearings.
Muzangaza & Partners, applicant's legal practitioners
F *Stumbles & Rowe,* respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/MADZIVANZIRA & ORS v DEXPRINT INVESTMENTS (PVT) LTD & ANOR 2002 (2) ZLR 316 (H)

[zRPz]MADZIVANZIRA & ORS v DEXPRINT INVESTMENTS (PVT) LTD & ANOR 2002 (2) ZLR 316 (H) 2002 (2) ZLR p316

Citation	2002 (2) ZLR 316 (H)
Case No	Judgment No.HH-145-02
Court	High Court, Harare
Judge	Ndou J
Heard	20 August 2002; 28 August 2002
Judgment	28 August 2002
Counsel	*D Pundu,* for the applicants *G Chikumbirike,* for the respondents
Case Type	Urgent application
Annotations	Link to case annotations

[zFNz]Flynote
Practice and procedure — application — urgent — certificate of urgency — D urgency alleged but not established — criteria by which urgency determined — need for applicant himself to have treated the matter as urgent
[zHNz]Headnote
The applicants had sought a provisional order, accompanied by a certificate E of urgency from their legal practitioner. The certificate showed some delay on the part of the applicant, and appeared to be based on opinions rather than facts.

Held, that for an application to be treated as urgent, not only must there be the danger of irreparable prejudice if the matter is not dealt with immediately, but also the applicant must himself have treated the matter F as one of urgency.
Held, further, that it was unnecessary to go into the merits of the application because the urgency of the matter had not been established.
Held, accordingly, that the application was not urgent and that there should be no order as to costs. G
[zCAz]Cases cited
Dexprint Invstms (Pvt) Ltd v Ace Property and Invstms Co (Pvt) Ltd HH-120-02
Power NO v Bieber & Ors 1995 (1) SA 490 (W)
X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments 2000 (2) ZLR 348 (S) H
2002 (2) ZLR p317
Ndou J
[zCIz]Case information
A *D Pundu,* for the applicants
G Chikumbirike, for the respondents
[zJDz]Judgment
Ndou J: Applicants seek a provisional order in the following terms:
"Terms of Order Made
B That you show cause to the Honourable Court why a final order should not be made in the following terms:-
1(a) That the 2nd Respondent be ordered to release ten million five hundred thousand dollars ($10 500 000), being the funds deposited into his Trust Account by the applicants, together with the accrued trust account interest amounts calculated from the date the principles C *(sic)* amounts were deposited, pending the final hearing of Court Application HC No. 6572/02 noted by Applicants.
(b) The costs of suit shall be borne by the respondents.
2. Interim Relief Granted
Pending the determination of this matter the Applicant is *(sic)* granted D the following relief:
(a) The 2nd Respondent be and is hereby ordered and directed forthwith to release to the Applicant's legal practitioners, the sum of ten million five hundred thousand dollars ($10 500 000,00) (the amount) together with all accrued trust account interest amounts, calculated from the date of principle amounts were deposited *(sic).*
E Alternatively
(b) The 2nd Respondent be and is hereby ordered and directed to release forthwith the amount, together with all the accrued Trust Account interests amounts, calculated from the date the principle amount was deposited, into the Trust Account of an independent law firm or the Law Society of Zimbabwe.
3. Service of Provisional Order
F Service of this application or Court Order shall be effected through the applicants' legal practitioners."
The applicants' legal practitioner certified the application as being urgent.
I propose to firstly determine whether the matter is urgent. Once I am satisfied that the matter is urgent I will then consider whether the applicants have G established a *prima facie* case on a balance of probability.
Urgency
The applicants have attached a recently cyclostyled judgment of Paradza J to prove a different point. In this judgment Paradza J also dealt with the question of urgency - see *Dexprint Investms (Pvt) Ltd v Ace Property & Investms Co* H *(Pvt) Ltd.* HH-120-02. At pages 2 and 3 the learned judge states as follows:
2002 (2) ZLR p318
Ndou J
"For a court to deal with a matter on an urgent basis, it must be satisfied A of a number of important aspects. This court has laid down the guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with that matter on an urgent basis. Further, it must also be clear that the applicant did on his own part treat the matter as urgent. In other words if an applicant does B not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis. I am fortified in my view by the remarks of Chatikobo J in the case of *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 at p 193. The learned judge had this to say: C

` There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency... What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arrives, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of D urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay.'

The reason why this argument must be strictly adhered to is obvious. Matters that come before the courts are without doubt dealing with prejudice or potential prejudice to the plaintiff or applicant in one way E or another. In asking that a matter be dealt with on an urgent basis one does not over emphasise the aspect of prejudice. What is most important to me is whether the matter can or cannot wait. If the matter can wait, there is no justification in hearing that matter as urgent. To do so will result in that matter unfairly jumping the queue of other matters that are waiting to be heard by the courts." F

I would add that if the application is one that cannot wait, then that opinion must be brought home to the court, not as an opinion but as a matter of fact. The affidavit must establish that the applicant will suffer some form of prejudice or harm, and probably irreparable at that, if relief is not afforded him *instanter.* As rightly emphasised by the learned judges in the above cases, the element of harm should not be confused with urgency – *Power* G *NO v Bieber* 1955 (1) SA 490 (W).

The salient facts of this case can be summarised in the following manner. On 10 January 2002 the applicants entered into agreements of sale with the first respondent, in terms of which the applicants purported to purchase certain pieces of land being the proposed sub-divisions of the remainder of Lot H of H

2002 (2) ZLR p319

Ndou J

A Borrowdale Estate situate in the District of Salisbury measuring 89,2623 hectares, otherwise known as Herons Gill Farm. The applicants have paid the purchase price of $10 500 000. This amount is being held in the Trust of the second respondent's legal practice. This application seeks to have this amount (with interest) either returned to the applicants or alternatively into a trust account of "an independent firm or the Law Society of Zimbabwe" B pending litigation that has already been instituted in this court in case number HC 6572/02. A preliminary point that I observe, which was not raised by the respondents, is that there are no affidavits from second and third applicants supporting or agreeing with what first applicant averred in his founding affidavit. In the circumstances, it is doubtful whether the second and third applicants are properly before me. I will return to this matter only if I find that C the matter is urgent. Coming back to the question of urgency, the applicants indicate that in February 2002 they became aware that the property they purported to purchase from first respondent was in fact under title of a company known as Carey Farm (Private) Limited. The applicants' papers do not show when the purchase price was paid but I can discern that it was well D after they became aware that the property belonged to Carey Farm (Private) Limited. I say so because the first applicant says the purchase price was financed through an overdraft facility granted by First Banking Corporation. Annexure "M" reveals that the facility was only approved on 20 May 2002. The applicants filed an aborted urgent application on 14 August 2002. They withdrew it on 15 August 2002. In that application the applicants are in the E same order they appear in this application. The first respondent in that matter is also cited as such in this application. In that application Carey Farm (Private) Limited was cited as second respondent and a Madzika as the third respondent and the Registrar of Deeds as fourth respondent. The present second respondent was not cited. The relief sought in the aborted application was to, *inter alia,* compel Carey Farm (Private) Limited to apply for sub- F divisional title and consequently transfer the property to the applicants. Those claims were obviously not legally sustainable because the cause of action was based on an agreement for the change of ownership of the unsubdivided portion of a stand without a permit to subdivide - see ss 39 and 40 of the Regional, Town and Country Planning Act [*Chapter 29:12*]; G *X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments* 2000 (2) ZLR 348 (S) and *Kanduru v Chihumbiri & Anor* HH-53-2002. The application was launched in its current form on 19 August 2002.

The applicants must have suspected there were some problems with the agreement in February 2002 when they became aware that the title was held H by Carey Farm (Private) Limited and not the first respondent. They did not

2002 (2) ZLR p320

Ndou J

act to verify the position. They paid the purchase price after May 2000. The A question of urgency is dealt with briefly both in the certificate of urgency and the first applicant's founding affidavit. In the

certificate of urgency it is captured in the following terms:
"7. Finally I submit that this matter is urgent in so far as the applicants secured the funds in this matter on overdraft facility. Interest continues B to accumulate and surely the applicants are entitled to relief."
It seems to me that the question being highlighted herein is one of prejudice. This averment does not say why the matter cannot wait. In any event, the amount has all along been accumulating interest from May (or whatever date the loan was advanced to the applicants). The applicants have not established what has changed. In any event even if I grant the main or the alternative relief C sought, interest will not cease to accrue. The applicants have not explained the abstention from action from February 2002 to August 2002. The so-called "deafening silence" which allegedly prompted the applicants to launch this application was in existence all along.
The applicants have failed to establish that the matter is urgent. The D application was characterised by allegations of potential prejudice to be suffered. There are several averments on the fear that the money will disappear from second respondent's trust account. Moneys in the trust account of a law firm are held in trust and there is nothing to show any change of circumstances necessitating the need to urgently remove the money from one trust account to another. The founding affidavit of the first applicant is E characterised by opinions and not matters of fact on the question of potential prejudice. It appears that generous legal advice proffered by the legal practitioner representing Carey Farm (Private) Limited in the aborted first urgent application prompted the launching of this urgent application. This does not necessarily make the application urgent. I do not think it is necessary for me to deal with the merits of the application. F
I accordingly make the following order.
1. This application is not urgent.
2. There is no order as to costs. G
Madzivanzira & Partner, applicants' legal practitioners.
Chikumbirike & Associates, respondents' legal practitioners. H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/MASENGA v GUTHRIE & ORS 2002 (2) ZLR 321 (H)

[zRPz]MASENGA v GUTHRIE & ORS 2002 (2) ZLR 321 (H)
2002 (2) ZLR p321

Citation	2002 (2) ZLR 321 (H)
Case No	Judgment No. HH-146-02
Court	High Court, Harare
Judge	Ndou J
Heard	7 March 2002; 28 August 2002
Judgment	28 August 2002
Counsel	*O Ziweni,* for the applicant *G S Wernberg,* for the respondents
Case Type	Opposed application

Annotations No case annotations to date

[zFNz]Flynote
D **Agency** — agent — authority — agent bringing application purportedly on behalf of principal — need to establish authority to do so
Practice and procedure — parties — *locus standi* — agent — agent bringing application purportedly on behalf of principal — need to establish authority to do so
Practice and procedure — parties — need to approach court with clean E hands — party having obtained provisional order requiring action to have been brought — party bringing application instead — court declining to hear party
[zHNz]Headnote
The applicant, purporting to act on behalf of a church, bought a sculpture F from an employee of the respondents. The respondents, on learning of the sale, repudiated it and offered to return the purchase price. They said the sculpture had already been sold abroad. The applicant obtained a provisional order, prohibiting the removal of the sculpture from Zimbabwe pending an action to be instituted by the church. The provisional order gave a deadline for the institution of the action, failing G which the order would be discharged.
In spite of the requirement to institute an action, the applicant instead approached the court by way of an application, seeking an order to direct the respondents to deliver the sculpture to her. The applicant brought the application in her own name, but still purported to be acting on behalf of the church. She produced a document, purporting to be a special H power of attorney and signed by a person describing himself as the cell
2002 (2) ZLR p322
Ndou J
administrator of the church. Her agency was disputed by responsible A officials in the church, which stated that the person in question was employed in a minor role in the church and had no authority to sign a special power of attorney. The applicant did not answer or rebut any of the points made by the church officials.
Held, that for the applicant to act as agent, she would have to establish her B authority to do so. As there was a material dispute, she had not established her authority.
Held, further, that the terms of the provisional order were that an action should be instituted, not an application. She was not approaching the court with clean hands and thus could not be heard. C
[zCAz]Cases cited
Clark v van Rensburg & Anor 1964 (4) SA 153 (O)
Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 1 All ER 630 (CA)
Hely-Hutchinson v Brayhead Ltd & Anor [1967] 3 All ER 98 (CA) D
Leslie's Trustee v Leslie 1903 TS 701
Maluleke v Dupont NO 1966 RLR 620 (A); 1967 (1) SA 574 (RA)
Min of Home Affairs v Bickle 1983 (2) SA 457 (ZS)
Mulligan v Mulligan 1925 WLD 164
Sentrakoop Handelaars Bpk v Lourens & Anor 1991 (3) SA 540 (W)
Tuckers Land & Development Corp (Pty) Ltd v Perpellief 1978 (2) SA 11 (T) E
Wilson v Zondi 1967 (4) SA 713 (N)
[zCIz]Case information
O Ziweni, for the applicant
G S Wernberg, for the respondents F
[zJDz]Judgment
Ndou J: Tapfuma Gutsa, perhaps more than any other of the "second generation" of Zimbabwean stone sculptors, has broken free from the traditions already established in this young movement. Often using a combination of materials, such as stone, metal, wood, wire, paper and string, he strives to express contemporary as well as traditional ideals in his work to G a local as well as international audience. This application is about one of his works known as "the Rainmaker". The "Rainmaker" was collected and displayed at Chapungu Sculpture Park (third respondent) by Douglas Roy Guthrie (first respondent). Taruwona Mushore (second respondent) is responsible for administration and sales of sculptures at Chapungu Sculpture Park. She is also the first respondent's assistant. She also happens to be the H
2002 (2) ZLR p323

Ndou J

A common law wife of the first respondent and they have a child together. The first respondent started the business of the third respondent about 30 years ago. The "Rainmaker" is a very large piece of sculpture. It had been at the Chapungu Sculpture Park for quite a few years. During this time, it was often admired but nobody bought it, mainly because the price was very high by local standards. On 24 June 2001, one Aaron Learnard, a salesman in the B employ of the respondents, sold the "Rainmaker" to the applicant, who purported to be acting on behalf of Hear the Word Ministries, Harare. The purchase price of $360 000 was paid on 24 June 2001. An invoice was made out which reflected "To collect when crated 25/06/2001". A receipt was issued acknowledging the payment of the purchase price. The applicant was also given a certificate of authenticity. The applicant went to collect the C "Rainmaker" on 25 June 2001. The applicant was not given the "Rainmaker". Instead, the respondents offered to refund the $360 000. The respondents' case is that when this transaction took place, the first respondent was in Europe. When the second respondent informed him of the sale, he immediately told the second respondent that he had already sold the "Rainmaker" to their D associate company in Britain and he asked the second respondent to arrange for the return of the purchase price and an apology to the applicant for the mistake. The respondents' case is, further, that they made valiant attempts to contact the applicant through Hear The Word Ministries, without success. The first respondent wrote a letter to Hear The Word Ministries on 5 July 2001 to ask for their assistance in resolving the matter. The latter did not E respond. Whilst still in Europe, the first respondent asked the second respondent to arrange for the "Rainmaker" to be removed from Chapungu Sculpture Park premises to their matrimonial home. This move resulted in the applicant seek a provisional order from this court by way of an urgent application. On 30 July 2001, Gillespie J issued a provisional order in the F following terms:

"Terms of the Order Made:

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the Sculpture known as 'Rainmaker' shall not be removed from Zimbabwe, pending the determination of an action to be instituted by G Hear The Word Ministries against Chapungu Sculpture Park and the Sculpture, which action shall be instituted not later than 3 September 2001, failing which, this order shall be deemed to have been discharged.
2. That costs of this application shall be determined on the return day.

Terms of the Interim Relief Granted

1. That H pending the confirmation or discharge of this provisional

order, the sculpture 'Rainmaker' shall not be removed from Zimbabwe. A

Service of This Provisional Order

That the applicant shall serve a copy of this provisional order upon the Sculptor."

On 3 August 2001, the applicant approached this court by way of a court application. The court application, contrary to the directions by this court, B was not served of the fourth respondent, Tapfuma Gutsa, although he now stands cited as the fourth respondent. The applicant seeks an order in the following terms:

"It is ordered:

1. That respondents be and are hereby ordered and directed to deliver C to applicant at the third respondent's place of business the sculpture known as the "Rainmaker" within 24 hours from the date of service of this order upon them.
2. That in the event of non-compliance by respondents with this order within the stipulated period after service of the order upon them, applicant be and is hereby given leave to set this matter down on the same D papers for the court to consider why respondents should not be held to be in contempt of court.
3. That the first, second and third respondents shall pay the costs of this application, including the costs of the proceedings in HC 7132/01 jointly and severally, the one paying, the others to be absolved on a legal practitioner and client scale." E

It is clear that, although the applicant purports to seek the confirmation of the provisional order granted by Gillespie J, the draft order suggests that the final order being sought is materially different from the terms of the one provisionally granted.

Two issues have to be determined in this matter. The first one is whether the applicant has the requisite legal standing to institute these proceedings on F behalf of Hear The Word Ministries. The second issue is whether the applicant is entitled to a final order in light of her failure to comply with the directions given by Gillespie J at the time he granted the interim order. Both these issues seem to centre around one question, namely: Is the applicant properly before me? G

The legal principle of *locus standi in iudicio* has been described as follows:
"The standard action procedure comprises the bilateral interaction of two parties: the plaintiff and the defendant. This basic principle which has been extended to include other persons as parties to an action ... The capacity to participate in legal proceedings is technically described by the phrase *locus standi in iudicio* and has been succinctly summed up in H
2002 (2) ZLR p325
Ndou J
A the following terms:
' The right to sue or the liability to be sued depends in the first place on capacity. In order to be capable of either suing or being sued, a person must have *locus standi in iudicio.* Consequently persons who are wanting in that capacity cannot be parties to any civil action unless that want has first been implemented.'
B In all cases, a plaintiff must allege sufficient facts in his declaration or particulars of claim to indicate that he has the necessary *locus standi* to institute proceedings."
See *Introduction to South African Law and Theory* 2 ed by W J Hosten, A B Edwards, F Barman and J Church, and also *Wilson v Zondi* 1967 (4) SA 713
(N).
C The exception to this basic principle is actions brought in terms of the provisions of the Class Actions Act [*Chapter 8:17*]. The provisions of the latter Act do not apply to the facts of this case. In order to establish her *locus standi* the applicant filed a special power of attorney, purporting to appoint her as an agent of Hear The Word Ministries. The power of attorney was D under signed by a Mr Kundishora Muringani, who stated that he was the Cell Administrator of Hear The Word Ministries. The power of attorney is dated 3 August 2001. On 2 November 2001, Hear The Word Ministries' legal practitioners addressed a letter in the following terms:
"We act on behalf of Hear the Word Ministries. We advise that we have been the legal practitioners acting on behalf of this *universitas* for at least E the past ten years in respect of all litigation and legal work required by it.
We note that you have instituted proceedings on behalf of Chengetai Masenga, purportedly acting under authority of Hear the Word Ministries in respect of the abovenamed matter. We note that the authority upon which you are basing such action is a Special Power of Attorney granted F on 3 August 2001 by Kundishora Muringani in favour of Masenga.
Please be advised that Mr Muringani is an employee of Hear the Word Ministries in a relatively minor administrative role. He possesses no capacity or authority from Hear the Word Ministries to prepare the Special Power of Attorney which he has purported to do. Hear the Word Ministries has not given any such authority to Mr Muringani and, G accordingly, Mr Muringani did not have the capacity to pass such authority on to Chengetai Masenga."
Notwithstanding such categoric challenge to her capacity to act as an agent of Hear the Word Ministries, the applicant seems determined to act on the said church's behalf. It is strange that she would want to act on behalf of such H an unwilling "principal". It seems understandable why a church like Hear the
2002 (2) ZLR p326
Ndou J
Word Ministries is unwilling to be associated with the "Rainmaker". The A circumstances of this case are such that the applicant would have easily litigated in her own right without involving Hear the Word Ministries. I cannot understand why she chose to sue as an agent of the church. From the facts, it does not seem the church has anything to do with the acquisition of this piece of art. Be that as it may, for whatever reason, she chose to be an B agent of Hear the Word Ministries and all I have to decide is whether she has established such authority to act as an agent. There is a material dispute of fact on the question of agency. The special power of attorney by a church employee is disputed by the church. This dispute cannot be resolved on paper, even if I adopt a robust approach. In the circumstances, the applicant has failed to establish that she has authority to bind her alleged principal, Hear C the Word Ministries. It is trite that the authority of the agent may be created expressly or impliedly. See *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) at 14-15; *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630 (CA) at 644 and *Hely-Hutchinson v Brayhead Ltd & Anor* [1967] 3 All ER 98 (CA) at 102. The applicant seems to be relying on expressly created authority D because she produced the special power of attorney. Even before this application was launched, the applicant was aware that the alleged principal, Hear the Word Ministries, challenged this agency. It is difficult to understand why she chose the route of court application instead of an action.
The second issue is that of ignoring the directions contained in provisional E order granted by Gillespie J on 30 July 2001. In the provisional order, reference is made to "pending the

determination of an action to be instituted by Hear the Word Ministries against Chapungu Sculpture Park and the Sculptor, which action shall be instituted no later than 3 September 2001, failing which this action shall be deemed to have been discharged." The applicant has ignored the express terms of this provisional order in many F respects. First, she proceeded by way of a court application when the order says the matter must proceed by way of an action. I am convinced that the term "action" was deliberately used. The facts are such that it could not have been used in the generic sense. Second, the order states that the action has to be instituted by Hear the Word Ministries. In this regard, both in principle and on the authorities, it is not proper for an agent to sue as representing his/her G principal by suing in his/her own (agent's) name where the claim being enforced is that of the principal and the principal is the true plaintiff. See *Sentrakoop Handelaars Bpk v Lourens & Anor* 1991 (3) SA 540 (W); *Leslie's Trustee v Leslie* 1903 TS 701; *Clark v van Rensburg & Anor* 1964 (4) SA 153 (O). In this case, the applicant does not purport to act on behalf H

2002 (2) ZLR p327

Ndou J

A of an undisclosed principal, so I will not deal with principles relating to suing on behalf of an undisclosed principal. Even in the face of explicit directions contained in the interim order, the applicant still chose to sue in her name. She, however, added next to her name *"(For and on behalf of Hear the Word Ministries duly authorised by a Special Power of Attorney)".* I have already indicated the problems with her authorisation to act on behalf of the Church B and as such the addition of the highlighted words does not advance her case any further. It is clear from the evidence in the applicant's papers that it is not being suggested that she acquired rights in her own name. The applicant clearly states that she made the offer for the sculpture on behalf of Hear the Word Ministries. To exacerbate the applicant's difficulty even further, the C question of whether she had authority to perform the sale has been specifically questioned by the respondents. The cell administrator's (Pastor Muringani's) authority to bind the church has been questioned. The second respondent places on record in her affidavit that she specifically spoke to Pastor Muringani with respect to the church's involvement, with respect to its interest in the sculpture and that Pastor Muringani categorically stated that D the church had no knowledge nor interest in the sculpture in question. The applicant has not rebutted these allegations by Pastor Muringani, as would be expected through an answering affidavit. In her answering affidavit, the applicant avoids altogether dealing with Pastor Muringani's statement that the church is not involved and furthermore she does not explain Pastor Muringani's comments in view of the purported special power of attorney E allegedly signed by him. No explanation is given by the applicant in her answering affidavit as to what a cell administrator is, despite the respondents' submissions challenging a cell administrator's authority to bind the church. Neither is there a document or even a letter from the church explaining that the cell administrator has authority to bind it. There is no affidavit from the cell administrator ratifying the contents of the special power of attorney. In F the result, the applicant has not established that she has any authority from the church to either purchase on behalf of the church or sue on behalf of the church. In the circumstances, Hear the Word Ministries has not instituted these proceedings as directed by the terms of the interim order. With such disregard of the terms of the interim order, this court cannot hear the G applicant. She is not approaching the court with clean hands. She did not comply with the express directions of this court when the interim order was granted. See *Maluleke v Dupont NO* 1966 RLR 620 (A) at 624D-625; 1967 (1) SA 574 (RA) at 577C-578; *Mulligan v Mulligan* 1925 WLD 164 and *Minister of Home Affairs v Bickle* 1983 (2) SA 457 (ZS) at 464E-F.

H In light of the above findings, the applicant is not properly before this court.

2002 (2) ZLR p328

Ndou J

It is, in the circumstances, not necessary for me to deal with the other issues A raised by the applicant. I, accordingly, dismiss the application with costs.

Ziweni & Company, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners B

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Source:

[zRPz]MINISTER OF LOCAL GOVERNMENT & ANOR v MADONDO 2002 (2) ZLR 329 (H)
2002 (2) ZLR p329

Citation	2002 (2) ZLR 329 (H)
Case No	Judgment No. HH-152-02
Court	High Court, Harare
Judge	Garwe JP
Heard	11 June 2002; 11 September 2002
Judgment	11 September 2002
Counsel	Miss *S Njerere,* for the applicant *P Nherere,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

[zFNz]Flynote
D **Arbitration** — award — grounds on which may be set aside — allegation that party unable to present his case — arbitrator granting award in absence of party's legal representative — written submissions previously received by arbitrator — legal representative failing to attend meeting called by arbitrator to discuss procedure to be followed — arbitrator entitled to E make award on basis of written submissions
[zHNz]Headnote
In referring a matter for arbitration, the High Court had ordered that if either party failed to provide documentation required by the arbitrator within 14 days of being so requested or failed to attend any arbitration proceedings as required by the arbitrator, the arbitrator could finalise F the matter as he saw fit and any decision reached would be binding on both parties. The applicant, having made written submissions, failed to attend a meeting called by the arbitrator to discuss the procedure to be followed. The arbitrator made his award on the basis of the documents submitted to him, which included the submissions made by both sides.
G The applicant applied for the award to be set aside on the grounds that (a) the meeting with the arbitrator was supposed to discuss the procedure to be adopted, not make a determination on the merits; (b) the respondent's legal practitioner had not, as arranged, given the applicants' legal practitioner a lift to the venue, and thus the latter was unable to be present.
H *Held,* that the arbitrator was empowered, in default of appearance of the
2002 (2) ZLR p330
Garwe JP
applicant's representative, to deal with the matter on the merits, even A though the initial intention had been to discuss and agree on the procedure to be adopted.
Held, further, that the allegation that the respondent's legal practitioner had failed to honour a commitment to give a lift to the applicants' practitioner was hearsay and not supported by direct evidence. This was not a B situation where the party was unable to present his case. The situation envisaged by article 34 of the First Schedule to the Arbitration Act was where a party was not given an opportunity to present its case at all. It was also clear from a reading of article 25 of the First

Schedule that if a party fails to appear at a hearing, the arbitral tribunal may proceed with the matter and thereafter make a determination on the basis of the C evidence before it.

[zSTz]Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, arts 25 & 34 D

[zCIz]Case information

Miss *S Njerere,* for the applicant

P Nherere, for the respondent

[zJDz]Judgment

Garwe JP: This is an application for the rescission of a default judgment granted on 31 October 2001 by Paradza J in case No. HC 9574/01. In that case Paradza J ordered the Registrar of this court to register an arbitral award as E a judgment of this court. The application is opposed by the respondent.

In the founding affidavit the applicants, represented by Jacqueline Mupamhanga, a law officer in the Civil Division of the Attorney-General's Office, say the respondent filed an application with this court seeking the registration of the final arbitral award granted by a Mr C A Mollat. That F application was served on the Civil Division of the Attorney-General's Office on 11 October 2001. On apprising the applicants of this development, Jacqueline Mupamhanga was advised that it was the intention to oppose the award granted by Mr Mollat in default. She says due to pressure of work she left it "to the last minute" to draft the opposing papers. On 19 October 2001 one of her relatives passed away and she had to attend the funeral in Gokwe. G By the time she came back, the *dies induciae* had already expired and the respondent had obtained a default judgment. She therefore submits that the applicants were not in wilful default. On the merits, she submits that the final award granted by the arbitrator was improperly obtained. The arbitrator had invited both sides to meet with him to settle the manner in which the H

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A arbitration would be conducted. The applicants' representative made arrangements with the respondent's representative to use the latter's transport. However the latter did not turn up, but instead proceeded to the meeting where he then applied for judgment in default. She submits that the objective of the meeting was to discuss how the arbitration was to be conducted and, although submissions filed on behalf of the applicant were considered in B arriving at the award, the applicants were not given the opportunity to give evidence as intended.

The respondent opposes the application for rescission. He submits that this application is misconceived in view of the order made by Bartlett J that the findings of the arbitrator were to be final and binding on the parties. He denies C that the default judgment was improperly obtained. He states that the applicants had previously failed to attend another meeting convened by the arbitrator on 6 August 2001. They have not explained that default. The applicants defaulted for the second time on 7 September 2001. On 31 October 2001 they were again in default, as a consequence of which Paradza J granted judgment in default. He further states that the applicants have not indicated D any proper basis for setting aside the arbitral award. In any event, the respondent submits that Jacqueline Mupamhanga is not the only law officer in the Civil Division and another lawyer could have attended court in her place. He denies that the award was improperly obtained. He further submits that, although the applicants defaulted, their submissions were nevertheless taken into account in arriving at the final decision.

E In the answering affidavit, the applicants maintain that the award was improperly obtained because the objective of the meeting on 7 September was to discuss the process and not the merits and, further, the respondent's legal practitioner failed to honour his undertaking to provide transport to the applicants' legal practitioner who was to attend the same meeting. The F applicants further submit that the order by Bartlett J referred only to two claims and not three.

THE EXPLANATION FOR THE DEFAULT

The applicants' legal practitioner has accepted blame for the failure to oppose the application to register the arbitral award. I have considered the explanation G she has tendered. I find it unsatisfactory. She was aware of the need to file opposing papers. She says that "due to pressure of work and the fact that I had other urgent files," she left it to the "last minute" to draft the opposing papers. Why she would want to leave the matter until "the last minute" is unclear. She says she left for a funeral on 19 October 2001 and by the time she came back the *dies induciae* had already expired and a default judgment had already H been granted. Having been served on 9 October 2001, the *dies induciae*

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would have expired on Tuesday 23 October 2001. The legal practitioner left A Harare to attend a funeral on Friday 19 October 2001. She has not explained why she was still away by 23 October 2001. She has not explained exactly when she came back or why she had to be away for that long. The judgment by Paradza J was given on 31 October 2001. She says by the time she came back default judgment had been granted. This suggests that on 31 October B 2001 she was still away in Gokwe. She has not explained why she did not make arrangements for another law officer to take over the matter in her absence or apply for an extension of the *dies induciae.* She has not explained why she would have been away in Gokwe for a period of almost two weeks. I am not persuaded that a reasonable explanation has been given for the default. C

DEFENCE ON THE MERITS

The gravamen of the applicants' submission is twofold. First, that the meeting called by the arbitrator was to discuss the procedure to be adopted and not to discuss the merits. Therefore, the applicants argue, the decision to make a determination was irregular. Second, they say, the respondent's legal D representative misled their legal representative into believing he would give him a lift to the venue of the meeting with the arbitrator. The legal practitioner thereafter proceeded there on his own and improperly sought a default judgment. I now proceed to look at the law and thereafter consider whether the determination by the arbitrator can be impeached on either of the two grounds advanced by the applicants. E

Article 34 of the First Schedule to the Arbitration Act [*Chapter 7:15*] provides for the situations in which an arbitral award may be set aside. For purposes of this application the relevant provision is para 2 (b) of article 34, which provides *inter alia* that an award may be set aside only if:

"the party making the application was not given proper notice of the F appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case".

That the applicants were given proper notice of the arbitral proceedings is not in issue. What is in issue is the decision by the arbitrator to grant an award in the absence of the applicant's legal representative.

On 29 August 2001, the arbitrator wrote to the Civil Division of the High G Court, acknowledging receipt of the applicants' submissions and advising of the need for a further opportunity for the two parties to meet with him in order to settle "the manner in which the arbitration will be conducted". The arbitrator then set the meeting down for Friday 7 September 2001 at 2.30 p.m. It is common cause that the applicants' legal representative did not attend that H

A meeting and that the arbitrator then proceeded to make an award on the basis of the documents before him, which included the submissions made by both sides.

The question that arises is whether the arbitrator acted improperly in dealing with the merits when he had called the meeting to discuss the procedure to be adopted. The matter in question had been referred for arbitration following B an order made by Bartlett J on 20 June 2001. Part of the order by Bartlett J was that if either party failed to provide documentation required by the arbitrator within 14 days of being so requested, or if either party failed to attend any arbitration proceedings as required by the arbitrator, the arbitrator may finalise the matter as he sees fit and any decision reached would be C binding on both parties.

It is true that the meeting of 7 September 2001 was called to discuss the procedure to be adopted. If both parties had attended, then that is the issue that would have been discussed. It is common cause the applicant's legal practitioner failed to attend. In these circumstances the arbitrator was entitled, in terms of Bartlett J's order, to finalise the matter on the basis of the D information before him. This happens in a number of instances. I find nothing irregular about it. For example, if a party fails to attend a pre-trial conference after being duly notified, the other party may apply for default judgment to be entered against the other party. Obviously there is need for finalisation in litigation. It would not be tenable in such a situation to argue that the E presiding judge should confine himself to the peripheral issues and not deal with the merits. I would accordingly find that the arbitrator was empowered, in default of appearance of the applicant's representative, to deal with the matter on the merits, even though the initial intention had been to discuss and agree on the procedure to be adopted.

The second aspect relates to the failure by the applicants' legal representative F to attend the meeting. In the applicants' heads in para 2.4, it is stated that:

"Applicants' representative made arrangements with the respondent's representative to be ferried to attend the meeting ... Although the respondent's representative had no obligation to ferry the said applicants' representative, he bound himself by agreeing to the arrangement. G Respondent's representative failed to turn up at the agreed time and venue. When attempts were made to get

hold of him, he duly switched off his cell phone. He therefore misled the applicants' representative into believing that he would honour his end of the bargain."

It is common cause that the applicants' representative referred to is a Mr Munyuki. No supporting affidavit by Mr Munyuki has been filed. All we H have is the unsubstantiated claim by Jacqueline Mupamhanga that this is

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what happened. It is a bald assertion which is based on hearsay. No attempt A has been made to explain why Munyuki has not filed an affidavit to explain exactly what happened. Indeed, the respondent's legal practitioner, Mr Ziweni, in an affidavit dated 7 January 2002 (p 37 of Case number HC 12041/ 01) denies reaching any firm arrangement on the issue of transport. He says he asked Mr Munyuki to phone him later when he would be in a position to B confirm. This happened when he was out of town. Thereafter his cell phone lost its network coverage. This has not been disputed by the applicants. As already noted, the version given by Jacqueline Mupamhanga is based on hearsay. In the circumstances that version cannot be accepted as representing what happened.

The question that arises, then, is whether the award should be set aside on the C basis that the applicants were "otherwise unable to present" their case. The answer, in my view, must be in the negative. That provision cannot possibly cater for a situation, such as the present, where a person is advised of the date of the proceedings, but does not attend. In my view, the provision applies to a situation where a party is not given the opportunity to present its case at all. It is clear from a reading of Article 25 of the First Schedule that if a party fails D to appear at a hearing, the arbitral tribunal may proceed with the matter and thereafter make a determination on the basis of the evidence before it.

In my view, the applicants have not raised any ground upon which the award made can be set aside. Accordingly, I hold that no *bona fide* defence on the merits has been established. E

In all the circumstances therefore, the application for rescission of judgment cannot succeed. It is dismissed with costs.

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

Ziweni & Co, respondent's legal practitioners F

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[zRPz]NGULUBE v ZIMBABWE ELECTRICITY SUPPLY AUTHORITY & ANOR 2002 (2) ZLR 335 (S)
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Citation	2002 (2) ZLR 335 (S)
Case No	Judgment No. S-52-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura CJ, Cheda JA, Malaba JA & Gwaunza AJA
Heard	4 June 2002; 17 September 2002
Judgment	17 September 2002
Counsel	*A P de Bourbon SC,* for the applicant

P Nherere, for the first respondent
No appearance for the second respondent

Case Type Constitutional application

Annotations No case annotations to date

[zFNz]Flynote
D **Constitutional law** — Constitution of Zimbabwe 1980 — Declaration of Rights — s 21 — right of freedom of association and assembly — Labour Relations Act [*Chapter 28:01*] — s 23(1) — proviso — provision that managerial employee may not be a member of a workers' committee — E not an infringement of s 21 — managerial employees entitled to form their own workers' committees
Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 24(1) — orders which may be granted — declaratory order — may be granted even if no "opponent" exists — abstract or F hypothetical question — not permissible to grant order in respect of such matter — need for there to be interested persons on whom declaratory order would be binding
[zHNz]Headnote
The applicant was employed by the first respondent in a managerial position. He joined the first respondent's workers' committee. He was G instructed to withdraw from the committee on the grounds that, as a managerial employee, he was ineligible. Because he refused to withdraw, he was, after disciplinary proceedings, dismissed. Apart from bringing an action before the Labour Tribunal, he brought a constitutional application, arguing that his rights of freedom of association and assembly had been contravened in two ways: (1) by s 45(1)(b)(i) of the H Labour Relations Act [*Chapter 28.01*], which provides that a trade
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union shall not represent employers or managerial employees; and (2) A by the proviso to s 23(1) of the Act, which provides that a managerial employee may not be a member of a workers' committee other than such a committee consisting solely of managerial employees.
Held, that there did not have to be an "opponent" for the court to be able to make a ruling; all that was required was that the applicant had an interest B in an "existing, future or contingent right or obligation" and that he satisfied the court that the case was a proper one for the exercise of the court's discretion. The court could make a declaratory order.
Held, further, that whatever the merits of the applicant's argument about s 45(1)(b)(i) of the Act were, the court had to be satisfied that the Declaration of Rights had been, was being or was likely to be contravened C *in relation to him.* The interest must be a real interest, not merely an abstract or intellectual interest. The applicant had not indicated that he had contemplated or even that at some future date he would contemplate or attempt to join, form or register a trade union. He had not indicated that a group of managerial employees existed which was interested in forming a trade union. His interest was no more than an idle one, not D grounded in any past, present or future action that he might wish to take or that might be taken against him and/or undefined managerial employees on whose behalf he purported to make the present application.
Held, further, that there must be interested persons on whom a declaratory order would be binding. The order sought would not be binding on the applicant, who had shown no intention of exercising the right in E question, nor on other managerial employees who, apart from being undefined, had not evinced an interest in the relief sought.
Held, further, that s 21(1) of the Constitution guarantees every individual the right of freedom of assembly and association, not simply for the sake of it, but for the sake of protecting his interests. The right is therefore, in that sense, qualified and restricted to such association as is meant to F protect the interests of the individual concerned. The proviso to s 23(1) of the Act is a permissible derogation from the general provisions of s 21 of the Constitution. There is of necessity a divide between management and non-managerial employees. The interests of workers *vis-à-vis* the employer are better protected by ensuring that workers' committees representing non-managerial employees have no managerial G employees on them; and the interests of managerial employees are protected and promoted by workers' committees representing managerial employees only. If

managerial employees were to be allowed to join ordinary workers' committees, there might be a conflict of interest. The provision to s 23(1) allowed the formation of workers' committees to H
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A represent managerial employees, so the applicant's right to join a workers' committee remained.
[zCAz]Cases cited
Adbro Investment Co Ltd v Min of Interior & Ors 1961 (3) SA 283 (T)
B Ex p *Chief Immigration Officer, Zimbabwe* 1993 (1) ZLR 122 (S); 1994 (1) SA 370 (ZS)
Family Benefit Friendly Soc v CIR & Anor 1995 (4) SA 120 (T)
Ex p *Ginsberg* 1936 TPD 155
In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)
Ex p *Nell* 1963 (1) SA 754 (A)
C *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S); 1996 (1) SA 636 (ZS)
Woods & Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS); 1995 (1) BCLR 56
[zSTz]Legislation considered
D Constitution of Zimbabwe 1980, ss 21(1) & 24(1)
Labour Relations Act [*Chapter 28:01*], ss 23(1) & 45(1)(b)
[zCIz]Case information
A P de Bourbon SC, for the applicant
P Nherere, for the first respondent
E No appearance for the second respondent
[zJDz]Judgment
CHIDYAUSIKU CJ: In this application, made in terms of s 24(1) of the Constitution of Zimbabwe, the applicant seeks an order in these terms:
"It is ordered that:
1. A *rule nisi* do issue calling upon the Minister of Labour and Social F Welfare to show cause why -
(a) Section 45(1)(b)(i) and the proviso to s 23(1) of the Labour Relations Act Cap 28:01 should not be declared to be in contravention of s 21(1) of the Constitution of Zimbabwe."
Section 21(1) of the Constitution of Zimbabwe is contained in the Declaration of Rights and provides as follows:
G "Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular, to form or belong to political parties or trade unions or other associations for the protection of his interests."
The background to the matter is as follows:
H In January 1995, the applicant was engaged by the respondent as an
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accounting officer. This placed him in the category of the respondent's A employees referred to as "managerial". Some time later the applicant joined a workers' committee considered by the respondent to be appropriate for employees falling outside the category of managerial employees. For this reason a letter was written to the applicant, by the respondent's Area Manager, stating and directing as follows: B
"As you are a managerial employee you cannot serve as a workers' committee representative. Therefore you are advised to resign from the workers' committee with immediate effect. Please send a copy of your resignation letter to me by Wednesday 14th May 1997."
Because the applicant disputed that he held the position of a manager, he refused to resign from the workers' committee as directed. He was, as a result, C suspended from his employment without pay and benefits, with effect from 11 July 1997. A disciplinary hearing was subsequently held, with the applicant facing, among others, charges of contravening sections of the relevant Code of Conduct relating to "disobeying lawful instructions given by an immediate superior" and "wilfully failing, neglecting, or refusing to comply with any of the Authority's (respondent's) regulations, laid down D policies or procedures, written standing instructions or rules."
The Disciplinary Committee found the applicant guilty of a "Charge D" offence, a circumstance that called for his dismissal with effect from his date of suspension. He was duly dismissed.
Although the applicant instituted separate proceedings in the Labour Tribunal E challenging his dismissal, he contends, in the proceedings before this court, that his right to freedom of assembly and association guaranteed in s 21 of the Constitution, has been infringed by s 45(1)(b) and by the proviso to s 23(1), of the Labour Relations Act [*Chapter 28:01*].

The application was opposed by both respondents, although only the first F respondent was represented at the hearing of this matter. The second respondent, despite filing heads of argument, did not make any appearance.

SECTION 45(1)(b)(I) OF THE LABOUR RELATIONS ACT

I will deal first with the applicant's claim in relation s 45(1)(b)(i) of the Labour Relations Act. The relevant part of this section reads as follows: G

"(1) In any determination of the registration or certification of a trade union or employers organisation or of the variation, suspension or rescission thereof, the Registrar shall —

(a) ...

(b) ensure compliance with the following requirements — H

(i) a A trade union shall not represent employers or managerial employees

(ii) …

(iii) ..."

Mr *de Bourbon,* for the applicant, contends that by prohibiting a trade union from representing employers or managerial employees, the section specifically B conflicts with the rights guaranteed in terms of s 21(1) of the Constitution. That being the case, Mr *de Bourbon* argues, the contention of the first respondent that the applicant was, as a managerial employee, not entitled to be a member of the workers committee, was in effect a contention that the applicant was not entitled to be a member of a trade union.

While the latter part of Mr *de Bourbon's* contention may, in practical terms, C be true, I am not persuaded that the intention of the first respondent in barring the applicant from belonging to the workers' committee in question was to prevent him from becoming a member of a trade union. There is nothing in the evidence before the court to suggest such an intention. Rather, it is evident the first respondent was interested primarily, if not solely, in the composition D of a workers' committee that existed to represent some of its workers. In that respect, I find the first respondent was within its rights to attempt to ensure that the proviso to s 23 (1) of the Labour Relations Act was enforced within its precincts. The applicant himself, in any case, does not suggest that he had joined the workers' committee in question simply to be able to join a trade union. Such a suggestion would in any case not have been tenable since the E Labour Relations Act does not require that a worker should join a workers' committee as a condition to being able to belong to a trade union. Therefore, since the applicant's competency or otherwise to join a trade union has nothing to do with whether or not he belonged to any workers' committee, I find there is nothing to justify his use of the action taken by the F first respondent (which relied on the proviso to s 23(1) of the Act) as a basis for challenging the constitutionality of a different section, i.e. s 45(1)(b)(i), of the same Act.

Mr *Nherere* takes this argument further and contends that, because the first respondent's actions were not based on s 45(1)(b)(ii), but the proviso to s 23(1), of the Labour Relations Act, this court is not obliged to rule on the G constitutionality or otherwise of s 45(1)(b)(i). I find this contention, which essentially is to the effect that there must exist a dispute between the parties before the court can make a declaratory order of the type sought by the applicant *in casu,* not supported by case authority. Herbstein and van Winsen *Civil Practice of the Supreme Court of South Africa,* 4 ed note at 1053 that, H even though in the past courts consistently held that such an order could not

be granted in the absence of a dispute, Steyn CJ in *Ex parte Nell* 1963 (1) SA 754 (A) at 759H-760G A departed from this stance and held that an existing dispute was not a prerequisite to the making of a declaratory order. On the same note, in Ex parte *Chief Immigration Officer, Zimbabwe* 1993 (1) ZLR 122 (S) at 129-130;1994 (1) SA 370 (ZS) at 376 (H-I), Gubbay CJ noted that, in an application of this nature, there need not be an opponent, and that the B court may determine the applicant's rights without the necessity for it to pronounce upon the respondent's obligations. In *Ex parte Ginsberg* 1936 TPD 155 at 163, cited with approval in Ex parte *Chief Immigration Officer, Zimbabwe supra,* the court held that a declaration of rights could be granted on an *ex parte* application.

These authorities are particularly relevant in this case where the first C respondent is not, in the strictest sense, an "opponent" in relation to the applicant's challenge to s 45(1)(b)(i) of the Labour Relations Act, and where the second respondent, who might possibly have been an opponent, did not appear to argue its case.

In the absence of a dispute, as *in casu,* the authorities (See for instance, Ex D parte *Chief Immigration Officer, Zimbabwe supra* at 337D & Ex parte *Nell supra)* are agreed that the requisites for the grant of such an order are:

(i) that the applicant has an interest in an "existing, future or contingent right or obligation" and, if the court is satisfied on that point,

(ii) that the case is a proper one for the exercise of the court's decision. E

It is within this context that the other part of the applicant's challenge to s 45(1)(b)(i) is to be considered.

In that respect it is contended as follows for the applicant:

"It is respectfully submitted that such a prohibition (that a trade union cannot represent employees or managerial employees) specifically F conflicts with the rights given in terms of section 21(1) of the Constitution. A law cannot prevent managerial employees from forming a trade union. Whether it can prevent employers from forming a trade union is another matter. But certainly managerial employees cannot be prevented from belonging to a trade union. It is to be noted that section 45(1)(b) does not provide for any form of representation by way of a trade union for managerial employees. This is contrary to the Constitution. Those G managerial employees who wish to form and belong to a trade union are entitled to do so in terms of the constitution."

The challenge, whatever its merits or demerits, is expressed in general terms and not in relation to any specific action taken or contemplated by or against the applicant. This raises the question of the applicant's interest, a point upon H

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A which, on the authority of the cases cited above, the court must first satisfy itself, and also given s 24(1) of the Constitution, which provides that a person may apply to the Supreme Court for redress if in that person's view the Declaration of Rights has been, is being, or is likely to be contravened *in relation to him* (my emphasis).

In *Family Benefit Friendly Society v Commissioner for Inland Revenue* & B *Anor* 1995 (4) SA 120 (T), where the court considered the issue or interest, it was stated:

"The interest must be a real interest, not merely an abstract or intellectual interest".

Indeed there is a plethora of authorities to the effect that courts will not deal C with abstract, hypothetical or academic questions in proceedings for a declaratory order (see the many authorities cited in Herbstein and Van Winsen *supra* at 1054). In *Adbro Investment Co Ltd v Minister of the Interior & Ors* 1961 (3) SA 283 (T) at 285D, the court stated that the plaintiff must not have a "mere academic interest" in the right or obligation in question but D that:

"... some *tangible* and justifiable advantage in relation to the applicant's position with reference to an existing[,]future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought" (my emphasis).

I find these *dicta* to be apposite in the present case. The applicant has not E indicated he has contemplated or even that he is at some future date going to contemplate or attempt, to join, form or register a trade union. Trade unionism, by its nature, pre-supposes a grouping or groupings of workers with similar interests, who associate for the purpose of advocating and advancing their special interests. Assuming his interest were to form or register a trade union of managerial employees, the applicant has not F suggested that such a group already exists within his or other workplaces, nor that such a group, if it existed, was interested in, was contemplating or had contemplated, forming or registering such a trade union. His argument, in effect, is that should some undefined managerial employees, who include him, wish at some future date to form, belong to or register a trade union, they G would find their way blocked by s 45(1)(b)(i)of the Act.

Given this context, I find the applicant's to be no more than an idle interest, not grounded in any past, present or future action that he may wish to take or that may be taken against him and/or the undefined managerial employees on whose behalf he purports to make the present application.

There is, therefore, H nothing to suggest that the ruling of the court, were it to be in his favour,

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would result in some tangible advantage to them, flowing from such ruling. A In other words, there is no indication that such a ruling would not end as a purely academic exercise.

There is also the requirement that the court's ruling should be binding on those alleging an interest in the relief sought. This requirement is succinctly set out by Van Dijkhorst J in *Family Benefit Friendly Society v Commissioner* B *for Inland Revenue supra,* as follows at 125H-126A:

"The court will not make a declaration of rights unless there are interested persons upon whom the declaration would be binding ... It follows that interested persons against whom or in whose favour the declaration will operate must be identifiable and must have had an opportunity of being heard in the matter. Ex parte C*Van Schalkwyk NO and Hay NO* 1952 (2) SA 407 (A) at 411C & D; *Anglo-Transvaal Collieries Ltd v South African Mutual Life Assurance Society* 1977 (3) SA 631 (T) at 636 C-F and see 1977 (3) SA 642 (A) at 655D."

The applicant, it has already been noted, has not indicated whether he has identified others in the category of managerial employee, either within his own workplace or in others, who were desirous of forming, joining or D registering a trade union, or who had contemplated or attempted to do so. Nor is there any indication that such employees can be identified. The order sought would, therefore, not be binding on the applicant (who on the papers has shown no intention of exercising the right in question) nor on other managerial employees who, apart from being undefined, have not evinced an E interest in the relief sought. They have not been heard, nor, assuming they share the applicant's interest, have they had an opportunity to explain, for example, whether and why they may not feel that their needs are adequately catered for by s 45(1)(b)(ii). This section provides that an employers' organisation shall not represent employees other than managerial employees. Therefore, the issue of whether or not these employees may ever be interested F in exercising the right sought by the applicant is left to speculation.

When all is said and done, I find, in the final analysis, that the applicant has failed to prove that he has the requisite interest in the subject matter of the part of the application regarding s 45(1)(b)(i) of the Labour Relations Act. Without that interest, the authorities consulted suggest the applicant may, further, not have *locus standi* in making the application in question (Herbstein G and Van Winsen *supra* at 1056).

I would, therefore, and in that respect dismiss the application.

In the light of this finding, it is not necessary for me to go to the second stage of the enquiry in matters like this, which is whether or not the case is a proper one for the exercise by the court of the discretion conferred on it. H

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SECTION 23(1) OF THE LABOUR RELATIONS ACT

I will now turn to the applicant's application in relation to the proviso to s 23(1) of the Act.

Mr *de Bourbon,* for the applicant, contends that the proviso is unconstitutional, in as much as it puts restrictions concerning who can associate within a B (general) workers' committee.

Section 23(1) reads as follows:

"... employees employed by any one employer may appoint or elect a workers' committee to represent their interests:

Provided that no managerial employee shall be appointed or elected to a workers' committee, and nor shall a workers' committee represent the C interests of managerial employees unless such workers' committee is composed solely of managerial employees appointed or elected to represent their interests."

Mr *Nherere,* for the first respondent, contends, to the contrary, that the proviso is not *ultra vires* the Constitution. He advances the following D arguments to support this contention:

(i) that the workers' committee that the applicant, as a managerial employee, is precluded from joining is a creature of statute, which does not include both managerial and non-managerial employees; and

(ii) that even if it is held that the proviso to s 23(1) is inconsistent with s 21(1) E of the Constitution, it is still not unconstitutional as it comes within the ambit of the derogations permitted by s 21(3)(b) of the Constitution, in that it is designed for the purpose of protecting the rights of other persons.

In this latter respect, Mr *Nherere* asserts that the applicant is, in effect, seeking that the definition of workers' committee in the Act should do away with the distinction between managerial and non-managerial employees. He F contends that the purpose of a workers' committee is to represent the rights and interests of the workers in dealings with the employer. Where the latter is a juristic *persona,* the employer would be represented by the management in negotiations with the workers' committee. Thus, Mr *Nherere* contends, if managerial employees were to be allowed to join ordinary workers' committees, there might be a conflict of interest with the same member of the G workers' committee seeking to represent the interests of both management and the workers, especially in matters relating to collective bargaining and recommendations for collective job action. To the extent that the proviso to s 23(1) of the Act was designed for the purpose of protecting the rights of both workers and employers, Mr *Nherere* contends, it was a derogation permissible H in terms of s 21(3)(b) of the Constitution. Such proviso was, therefore,

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Chidyausiku CJ

reasonably justifiable in a democratic society. *Mr Nherere* cited a number of A authorities, including *Nyambirai v National Social Security Authority & Anor* 1995 (2) ZLR 1 (S) at 13;

1996 (1) SA 636 (ZS) at 647, where the court set out the criteria to be considered in determining

whether or not a derogation from a constitutionally guaranteed right is permissible in the sense of not being shown to be arbitrary or excessive. B

I find much merit in Mr *Nherere's* submissions.

The applicant, in his papers, accepts that he is a managerial employee. In other words, he does not submit that he is a non-managerial employee who has been denied the right to join a workers' committee whose purpose was to represent and advance the interests of such employees. His contention is, rather, that regardless of being a managerial employee who is free, by virtue C of the proviso to s 23(1) of the Labour Relations Act, to join a workers' committee consisting entirely of managerial employees, he should, nevertheless, be allowed to join and be a member of a workers' committee for non-managerial employees.

The applicant thus wants to remain a managerial employee, yet participate in D the activities of a committee whose primary purpose is to represent the interests of non-managerial employees. By implication, the applicant is saying management, whose interests are of necessity different from those of general workers, should be free to join the latter's workers' committee. By the same token and further, that the reverse should also be allowed, that non- managerial employees should be free to join a workers' committee, where it E exists, consisting of managerial employees. I am not persuaded that there is merit in this reasoning.

It is trite that in any work situation there is a divide between managerial and non-managerial employees, not only in terms of responsibilities, but also interests and rights. As correctly contended for the first respondent, this F demarcation is designed to ensure orderliness in the running of the business/ operation concerned. Needless to say, it also creates an environment that ensures that the interests and rights of different categories of workers are articulated or identified, and specifically addressed, thereby reducing the potential for labour unrest. The legislative provision complained of reinforces this demarcation and for the same practical reasons. G

As correctly contended by Mr *Nherere,* s 23(1) of the Labour Relations Act creates a workers' committee which it vests with the special responsibility to represent the interests and rights of non-managerial employees. It also, in the same breath, creates the potential for the creation of another workers' committee to represent the special interests of managerial employees. It H

A specifically provides that workers belonging to the two different categories should not sit on the workers' committee, and therefore attempt to represent the interests of workers belonging to a category they do not fall into. The effect of this provision is that workers are free to appoint, from those belonging to their category, a workers' committee to represent their interests and rights, in other words, interests and rights that are peculiar to their special B category of workers.

Viewed in the context of s 21(1) of the Constitution, there is merit in the contention made for the first respondent that the applicant's eligibility to join a workers' committee has not been interfered with. Rather, the effect of the impugned proviso is to vary such eligibility to the extent that the applicant C is rendered eligible to join a workers' committee of managerial employees. In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S), which is cited as authority for the test in determining whether a law abridges a fundamental right or freedom, Gubbay CJ stated at p 62 of the judgment:

"The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject matter. If the D effect of the impugned law is to abridge a fundamental freedom, its object or subject matter will be irrelevant."

The object of the proviso complained of, as already indicated, is to ensure that the interests of different workers are separately articulated and represented. However, on the authority *of Munhumeso's* case *supra,* this object would be E irrelevant if the effect of the proviso in question has is to abridge a fundamental right or freedom. The question that then has to be answered is whether the proviso, in creating a committee to deal with the interests of different categories of workers, in the sense of "separate but equal" treatment, abridges the workers' fundamental rights, specifically the applicant's fundamental right to freedom of association? I am not persuaded that it does.

F My interpretation of s 21(1) of the Constitution is that it guarantees every individual the right of freedom of assembly and association, not simply for the sake of it, but for the sake of protecting his interests. The right is, therefore, in that sense, qualified and restricted to such association as is meant to protect the interests of the individual concerned. *In casu,* the G applicant has not indicated that he disputes the fact that the rights and interests of managerial employees are different from those of non-managerial employees. He has not challenged the argument that the interests of non-managerial employees are best, and appropriately, represented by a committee consisting of non-managerial employees. By the same token, the applicant H does not dispute that the interests of managerial employees are best represented

2002 (2) ZLR p346
Chidyausiku CJ
by other managerial employees. I find in this respect that the proviso to A s 23(1) of the Labour Relations Act in effect conforms with the spirit of s 21(1) of the Constitution by upholding the right of the applicant to associate with workers sharing his interest, i.e. managerial employees in a workers' committee composed of such workers.
However, even if the proviso were to be interpreted to mean that the B applicant's fundamental right of association has been abridged, the point has correctly been made for the first respondent that such proviso, in any case, was within the ambit of the derogations permitted by s 21(3)(b) of the Constitution which provides as follows:
"(3) Nothing contained in or done under the authority of any court shall be held to be in contravention of subsection (1) to the extent that the law C in question makes provision —
(a) ...
(b) for the purpose of protecting the rights or freedoms of other persons;
(c) ...
(d) ... 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."
Mr *Nherere* submits, correctly in my view, that the word "rights" in para (b) is not limited to the fundamental rights enshrined in Chapter 3 of the E Constitution, but should be given its ordinary jurisprudential meaning. Viewed in this light, it is logical to assume that non-managerial employees have the right to have their interests represented by those of their colleagues who share and, therefore, fully appreciate their needs and interests. The involvement of a managerial employee whose interests they may not share would, in my view, undermine such right. To that extent, the proviso to F s 23(1) of the Labour Relations Act does make provision for the protection of the rights and freedoms of other persons, that is, the non-managerial employees. This means that the possibility of a conflict of interest where the same member of the workers' committee might seek to represent the interests of both management and workers is eliminated.
By virtue of s 21(3) this provision would be unconstitutional only if its effect G were shown not to be reasonably justifiable in a democratic society.
The effect of the proviso to s 23(1) of the Labour Relations Act, as already indicated, is to ensure that the interests of managerial and non-managerial employees are represented equally but separately, ie, through the medium of representatives who share the same interests and concerns. I therefore find H
2002 (2) ZLR p347
Chidyausiku CJ
A merit in the contention made for the first respondent that the proviso complained of was clearly designed for the purpose of protecting the rights of both workers and management employees and is for that reason reasonably justifiable in a democratic society.
Counsel for the first respondent cited a number of authorities outlining the B criteria the court should use to determine whether or not the provision is permissible in the sense of not being shown to be arbitrary or excessive *(Woods & Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors* 1995 (1) SA 703 (ZS); 1995 (1) BCLR 56; *Nyambirari v National Social Security & Anor* 1995 (2) ZLR 1 (S) at 33; 1996 (1) SA 636 (ZS) at 647). Briefly these are:
(i) that C the legislative objective is sufficiently important to justify limiting a fundamental right;
(ii) that the measures designed to meet the legislative objective are rationally connected to it, and
(iii) that the means used impair the right or freedom no more than is necessary D to accomplish the objective.
I am satisfied, *in casu,* that these criteria are fully satisfied. In this respect I would concur with the following contention made on behalf of the first respondent (Para 23 of the first respondent's Heads of Argument):
"The purpose of the proviso to s 23(1) is to protect and promote the interests of workers *vis-à-vis* the employer and, to facilitate the smooth E functioning of collective bargaining. Such rights are better protected by ensuring that workers' committees representing non-managerial employees have no managerial employees on them and the right and interests of managerial employees are protected and promoted by workers' committees representing managerial employees only. It is, therefore, perfectly rational to insist that managerial employees may not F be members of ordinary workers' committees."
I am persuaded that the proviso does no more than is necessary to serve this desired purpose. To the extent that managerial employees are not precluded from forming their own workers'

committee to represent their rights, I am not satisfied the infringement of his freedom of assembly that the applicant G alleges (even if he were correct) is excessive.
When all is considered, I am satisfied in all respects that the impugned proviso to s 23(1) of the Labour Relations Act does not contravene s 21(1) of the Constitution.
In relation to costs, the applicant's prayer is that, should the application H succeed, he be paid his costs, but that each party should bear its own costs in
2002 (2) ZLR p348
Chidyausiku CJ
the case where the application is dismissed. The first respondent, in praying A that the application be dismissed, has not asked that it be awarded costs. There will, accordingly, be no order as to costs.
The applicant, having failed to prove a case for the relief sought, the application is, accordingly dismissed. B
Chidyausiku CJ, Sandura JA, Cheda JA, Malaba JA & Gwaunza AJA concurred.
Gill, Godlonton & Gerrans, applicant's legal practitioners *Ziumbe and Mtambanengwe.* first respondent's legal practitioners C

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v PRIOR 2002 (2) ZLR 349 (H)

[zRPz]S v PRIOR 2002 (2) ZLR 349 (H)
2002 (2) ZLR p349

Citation	2002 (2) ZLR 349 (H)
Case No	Judgment No. HH-163-02
Court	High Court, Harare
Judge	Smith J
Heard	17 September 2002
Judgment	17 September 2002
Counsel	*J Samkange,* for the appellant Mrs *F Ziyambi,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure — bail — conditions on which bail granted — person arrested on charge under Land Acquisition Act [*Chapter 20:10*] — not reasonable to order that such person should not return to farm — such condition amounting to eviction before conviction

[zHNz]Headnote
The appellant was charged with failing to vacate her farm, in respect of E which an acquisition order had been made under s 8 of the Land Acquisition Act [*Chapter 20:10*]. She was granted bail, one of the conditions of which being that she should not return to the farm other than to collect her possessions. She appealed in respect of that condition.
Held, that it was not reasonable to order that she should not return to her home. She was contesting the acquisition, and until that issue had been F determined, she was entitled to exercise her rights of ownership. The section provided for eviction only after conviction, and the bail condition effectively amounted to eviction before conviction. The condition would be altered to require her to reside at her home.
[zSTz]Legislation considered G
Criminal Procedure and Evidence Act [*Chapter 9:07*]*,* s 118(3)
Land Acquisition Act [*Chapter 20:10*]*,* s 9
[zCIz]Case information
J Samkange, for the appellant
H Mrs *F Ziyambi,* for the respondent
2002 (2) ZLR p350
Smith J
[zJDz]Judgment
Smith J: This is an appeal against the conditions fixed by a magistrate in A granting bail to the appellant. The appellant was charged with contravening s 9(1)(b) of the Land Acquisition Act [*Chapter 20:10*] as amended by the Land Acquisition Amendment Act No. 6 of 2002. The charge was that she was "defying or resisting to comply with a notice to vacate designated farm" *(sic).* Section 9 of the Act reads as follows: B
"Eviction of owner or occupier
(1) The following provisions shall, subject to subsection (5) of section *seven* and subsections (2). (3), (4) and (7) of section *eight,* apply to the vacation by the owner or occupier of land acquired in terms of this Act —
(a) in relation to land other than agricultural land required for resettlement C purposes, any person who, immediately prior to the date on which an order is made in terms of subsection (1) of section *eight,* owned, occupied, held or used the land to which such order relates shall, if so required by not less than three months' notice in writing by the acquiring authority, cease to occupy, hold or use that land, and if he fails to do so. he shall be liable to be evicted by order of a competent D court;
(b) in relation to any agricultural land required for resettlement purposes. the making of an order in terms of subsection (1) of section *eight* shall constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land forty-five days after the date of service of the order upon the owner or occupier, and if he fails to do so, he E shall be guilty of an offence and liable to a fine not exceeding twenty thousand dollars or imprisonment for a period not exceeding two years or to both such fine and such imprisonment:
Provided that:
(i) the owner or occupier of that land may remain in occupation of his living quarters on that land for a period of not more than ninety days F after the date of service of the order;
(ii) the owner or occupier shall cease to occupy his living quarters after the period referred to in proviso (i), and if he fails to do so he shall be guilty of an offence and liable to a fine not exceeding twenty thousand dollars or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.
(2) A court which has convicted a person of an offence in terms of G paragraph (b) of subsection (1) or proviso (ii) thereto shall issue an order to evict the person convicted from the land to which the offence relates."
The appellant appeared in court on 21 August 2002. She advised the police that she was denying the charge and, when she appeared in court, she was not asked to plead. She was remanded to 19 September and released on bail on H the following conditions:
2002 (2) ZLR p351
Smith J
(a) she A deposits $5 000 with the Clerk of Court
(b) she does not return to her farm or homestead unless in the company of a police officer and for the purposes of removing her personal belongings.
Mr *Samkange* argued that the magistrate erred in imposing condition (b) as it is tantamount to convicting the appellant when she is pleading not guilty B to the charge. To impose that condition was tantamount to sentencing the appellant before conviction. She should be allowed to return to

her farm or homestead until the State had proved the case against her. The appellant is seeking an order setting aside condition (b) and substituting a condition that the appellant be required to reside at her homestead until her case is finalised.

Mr *Samkange* also submitted that an additional condition of bail should be C inserted. There should be a condition to the effect that the police were interdicted from arresting, detaining or harassing the appellant until such time as the criminal proceedings in case CRB 4196/02 were finalised. He said that a number of his clients had obtained court orders authorising them to return to their farms but, on doing so. they were detained and/or harassed by crowds of so-called war veterans and settlers who were sometimes aided D and abetted by police officers and members of the CIO. When his clients appealed to the police for protection it was never afforded.

Mrs Ziyambi submitted that in terms of s 116 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. the magistrate has the discretion to impose bail conditions which he deems fit in the circumstances. Condition (b) does not E amount to sentencing the appellant before conviction. It is only a temporary measure pending the determination of the matter and does not infringe on the presumption of innocence. She argued that in the past, conditions have been imposed where an accused is asked to move from his place of residence pending the outcome of the matter for various reasons. In this case the F magistrate felt it was necessary for the appellant to stay away from the farm pending litigation. The farm forms the basis of the matter and there have been settlers at the farm. The magistrate may have felt obliged to impose that condition for the purposes of preserving peace between the settlers and the applicant. She finally submitted that this is a criminal matter and that, as far as bail conditions are concerned, the discretion is left to the magistrate. The G conditions he fixed are not excessive and are necessary, especially having regard to the nature of the case.

Ordinarily, when bail is granted, there are three standard conditions fixed: firstly, the amount of money to be deposited; secondly, the place where the applicant for bail is to reside until his case is finalised; thirdly, the place where, and the times at which, the applicant for bail is to report to the police. H The reason why the applicant for bail is required to reside at a particular place

is so that the police know where to contact the accused person if they wish A to do so. In this case the magistrate has not considered it necessary to require the appellant to reside at a particular address or to report. Therefore, there is no way that the police will be able to contact the appellant unless she or her legal practitioner decides to contact them or to give them her address. That is not a reasonable state of affairs. B

I accept that, in terms of s 116 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], it is the magistrate who must exercise his discretion in granting bail. However, he must act reasonably in so doing. Can it be said that condition (b) is reasonable? I do not think so. The appellant is the owner of the farm in question. The right of ownership confers on her the right to occupy the property and to live in the house. Her right of ownership is being C contested at present, but until such time as it is decided that she has lost her rights, she is entitled to exercise them. Subsection (2) of s 9 of the Act requires that a court convicting a person of contravening para (b) of subs (1) thereof shall issue an order evicting the person from the land in question. It is clear, therefore, that it is only after conviction that the owner can be evicted from his land. Condition (b), in effect, amounts to an eviction of the appellant D from her land before she is convicted of any offence. That cannot be lawful. It was argued that the condition was probably imposed to preserve peace between the settlers and the appellant. That argument seems to accept that the police are not able to preserve law and order in the commercial farming areas. The magistrate must be well aware of the conditions prevailing in the E area where the farm is situated and he clearly has no confidence either that the police would be able to preserve the peace or else that they would be interested or willing to do so. If condition (b) fixed by the magistrate requires that the appellant can only return to her farm or homestead in the company of a police officer and for the purpose of removing her personal belongings. What if she cannot get a police officer to accompany her? There is no F obligation on a police officer to accompany her. If she cannot get one to accompany her, she cannot return to her farm even to collect her belongings. Furthermore, the condition permits her to return to her farm solely for the purpose of removing her personal belongs. What about the other movable property on the farm that belongings to her or, if she owns a company, to her company? If there are tractors, irrigation equipment or other farm implements G on the farm which belong to her she is entitled to remove them. They are her property. They are not affected by any section 8 notice, whatever the so- called war veterans or settlers may feel. Surely she should be able to return to her home to get her property?

The prohibition from returning to live in her home probably also has H

2002 (2) ZLR p353
Smith J
A economic consequences for the appellant. Unless she has family or friends that she can sponge off, she will have to lease alternative accommodation.
I consider it to be completely unreasonable to require the appellant to leave her home, with all its contents, and seek alternative accommodation, at whatever financial cost, merely because if she returns to her home the so- called war veterans and settlers might disrupt the peace. It would be more B appropriate and consistent with the bail conditions ordinarily fixed, to require that the appellant reside at her normal fixed place of abode until such time as her case is finalised, so that the police know where they can contact her if they wish to do so.
The additional condition sought by Mr *Samkange* that the police be interdicted C from arresting, detaining or harassing the appellant is not appropriate as a bail condition. The court cannot impose such a condition as the police are not cited as parties to this action. It is deplorable that conditions in this country have deteriorated to such a condition that legal practitioners feel obliged to seek orders such as the one suggested by Mr *Samkange.*
It is ordered that condition (b) imposed by the magistrate on 21 August 2002 D be and is hereby set aside and the following substituted:
"That the applicant resides at the homestead on the farm until the finalisation of her case:
Provided that if she considers that it is unsafe to do so and that the police cannot or will not provide adequate protection, she may relocate but shall E advise the police of her new place of residence within 14 days of relocating."
Byron Venturas & Partners, appellant's legal practitioners
F *Office of the Attorney-General,* for the State

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/BUSINESS EQUIPMENT CORPORATION v BAINES IMAGING GROUP 2002 (2) ZLR 354 (S)

[zRPz]BUSINESS EQUIPMENT CORPORATION v BAINES IMAGING GROUP 2002 (2) ZLR 354 (S)
2002 (2) ZLR p354

Citation	2002 (2) ZLR 354 (S)
Case No	Judgment No. S-78-02
Court	Supreme Court, Harare
Judge	Malaba JA
Heard	12 June 2002; 19 September 2002
Judgment	19 September 2002
Counsel	*J C Andersen SC,* for the applicant *P Nherere,* for the respondent
Case Type	Application in Chambers
Annotations	Link to case annotations

[zFNz]Flynote
Interest — liability for — agreement to pay — failure to pay when demand D made — interest payable from that date
[zHNz]Headnote
The applicant supplied medical equipment to the respondent. The equipment turned out to be faulty and the applicant agreed to refund the purchase price. When the applicant failed to pay. the respondent demanded E payment. It also claimed interest. The applicant argued that the respondent had to prove breach of contract in order to lay a foundation for its claim for the payment of interest on the purchase price.
Held, that by undertaking to refund the purchase price, the applicant had assumed a duty to pay. Its failure to pay when demand was made constituted *mora* and interest ran from that date. F
[zCAz]Cases cited
A v B & Anor 1976(1) RLR 397 (G)
Applebee v Berkovitch 1951 (3) SA 236 (C)
Baliol Invstm Co (Pty) Ltd v Jacobs 1946 TPD 269
Hubert Davies & Co (Pvt) Ltd v Educational Business Suppliers (Pvt) G *Ltd* 1997 (2) ZLR 223 (S)
Jensen v Acavalos 1993 (1) ZLR 216 (S)
Linton v Corser 1952 (3) SA 685 (A)
Talbert v Yeoman Products (Pvt) Ltd S-111-99
van der Merwe v Peebles 1976 (2) RLR 115 (A) H
2002 (2) ZLR p355
Malaba JA
[zSTz]Legislation considered A
Supreme Court Rules 1964 (RGN 380 of 1964), rr 29 & 31
[zCIz]Case information
J C Andersen SC, for the applicant
P Nherere, for the respondent
[zJDz]Judgment
B **Malaba JA:** This application is for an extension of time in which to appeal against a judgment of the High Court delivered on 27 October 2000. The applicant ("BEC") is a company incorporated in terms of the laws of Zimbabwe. It was sued in the High Court by the respondent ("BIG"), an association of doctors and radiologists carrying on business in partnership, C for the refund of an amount of $122 474 with interest thereon at the prescribed rate from 1 December 1998 to the date of final payment and costs of suit.
What had happened is this. On 5 February 1997 BIG ordered from BEC an X-ray tube for its Shimadzu X-ray machine. The purchase price in the amount of S122 474 was paid in two instalments of S64 600 on 5 February and D S57 874 on delivery of the tube on 16 April 1997. It was one of the terms of the contract that BEC would install the X-ray tube. When BEC's technician attempted to fit the tube into the X-ray machine it broke. A second tube was ordered but it also broke when the same technician attempted to fit it into the machine.
E On 30 July 1998 BIG wrote to BEC suggesting that it should refund the purchase price with interest. It would appear that BEC responded by a letter dated 11 September 1998 (not filed of record) in which it agreed to refund the purchase price to BIG but without interest. BIG responded by demanding that BEC should refund the purchase price with interest on 1 December 1998.
F On 18 January 1999 BEC forwarded to BIG two cheques with a total amount of $122 474 under cover of a letter in which it said:
"we wish to state that we stand by our letter of 11 September 1998 in which we agreed to pay you the full amount owing but would not be paying any interest. We enclose our cheques for $122 474 in full and final settlement."
G BIG was also claiming from BEC damages for loss of income and interest thereon. It did not accept the tender of the purchase price by BEC in full and final settlement of its claim for interest thereon and damages. The cheques were not deposited for payment.
On 22 January 1999 BIG issued summons out of the High Court claiming H against BEC the refund of the purchase price with interest thereon at the
2002 (2) ZLR p356
Malaba JA
prescribed rate from 1 December 1998 to the date of payment. It also claimed A damages in the amount of $1 900 502.96 for loss of income with interest thereon at the prescribed rate from 16

April 1997 and costs of suit. Following entry of appearance to defend, BIG made an application for summary judgment on 21 June 1999 in respect of the claim for the refund of the purchase price with interest and costs. On 7 July 1999 BEC again confirmed B that BIG was entitled to the refund of the purchase price which it paid on 9 July 1999. It withdrew the condition that the payment was in full and final settlement. BIG agreed to withdraw the application for summary judgment and have the case go to trial on the issues of interest on the purchase price, costs and damages. BEC said it agreed to refund the purchase price because it knew that the X-ray tube had got damaged and intended to protect its good C name. It, however, denied responsibility for the damage to the tube, alleging that the damage was a result of a faulty X-ray machine which had been tampered with by unnamed third parties BIG had asked to fit a Siemens X-ray tube.

When the matter finally came up for trial, BIG withdrew the claim for damages but persisted with the claim for payment of *mora* interest on the D purchase price and costs. It is not clear from the record whether oral evidence was led, but the court *a quo* held that BEC was liable for the payment of interest on the purchase price at the prescribed rate from 1 December 1998 to the date of final payment. BEC was also ordered to pay costs of suit.

On 16 November 2000 BEC purported to note an appeal against the whole E judgment of the court *a quo.* The notice of appeal did not have all the matters required by r 29 of the Rules of the Supreme Court ("the Rules"). It was fatally defective because it omitted to include the address of service of the Registrar of the High Court and did not state the date on which the judgment appealed against was given.

In *Talbert v Yeoman Products (Pvt) Ltd* S-111-99 Muchechetere JA held that F a notice of appeal which suffers from these defects is null and void. The learned Judge of Appeal quoted with approval at p 3 of the cyclostyled judgment from a judgment of Korsah JA in *Jensen v Acavalos* 1993 (1) ZLR 216 (S) where it was stated at p 220:

"The reason is that a notice of appeal which does not comply with the G Rules (in that case the notice did not have a prayer for relief) is fatally defective and invalid. That is to say, it is a nullity. It is not only bad, but incurably bad, and unless the court is prepared to grant an application for condonation of the defect and allow a proper notice of appeal to be filed the appeal must be struck off the roll with costs: *De Jager v Diner & Anor* 1957 (3) SA 567 (A) at 574 C-D. H

2002 (2) ZLR p357

Malaba JA

A In *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183, Klopper JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule."

On noticing that the notice of appeal filed on 16 November 2000 was fatally B defective, BIG made an application on 28 February 2002 for an order striking out the notice of appeal. NEC's legal practitioners sought to solve the problem by remedying the notice of appeal and thereafter applying for condonation. It was only a day before the hearing of this application that they followed the procedure stated in *Talbert's* case *supra* as a result of advice from Mr *Andersen.*

C In *Jensen's* case *supra* at 220 F-G it is stated:

"The broad principles an appellate court would have regard to in determining whether to condone the late noting of an appeal are: the extent of the delay; the reasonableness of the explanation proffered for the delay; and the prospects of success of the appeal. See *de Kuszaba*- D *Dabrowski ex Uxor v Steel NO 1966* RLR 60 (A) at 62 and 64, 1966 (2) SA 277 (RA); *HB Farming Estate (Pty) Ltd & Anor v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134 A-B; *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) at 57G-58A. And as Beadle CJ observed in *R v Humanikwa* 1968 (2) RLR 42 (A) at 44B:

'The longer the delay in applying for condonation in the late noting of an E appeal the more certain the court must be that there is a real chance of the appeal succeeding.'"

The delay in making this application can only be categorised as considerable. BEC has put the blame for the delay on lack of diligence on the part of its legal practitioner who drew up the defective notice of appeal. There has been no explanation from the legal practitioner of his failure to comply with the F Rules, nor has there been any explanation as to why the defect in the notice of appeal was not discovered much earlier by BEC's lawyers. The lack of diligence on the part of the legal practitioner, however, relates to the technical aspect of the case. The legal practitioner was, strictly speaking, exclusively responsible for this aspect of the case. BEC as a litigant would ordinarily not G be expected to have control over the drafting of the notice of appeal.

Although the delay was considerable and there was no explanation from the legal practitioner as to why he acted in the manner he did, I do not hold BEC culpable. The same conclusion was reached by Muchechetere JA in *Talbert's case supra* where he said at p 5:

"It is clear from the above that the fault in this matter was that of the H applicant's counsel and not of the applicant himself. In these
2002 (2) ZLR p358
Malaba JA
circumstances the courts usually take the view that a client ought not to A be punished for the 'sins' of his legal representative unless he connived with the legal representative in the commission of the sins or sat back and did nothing when he became aware of the impending default. The applicant cannot be accused of that in this case and therefore the default can be excused."

As was observed in *Talbert's* case *supra* the crucial factor is the prospects of B success on appeal. Mr *Andersen* argued that as there was no agreement by BEC to pay anything other than the capital amount, evidence had to be led by BIG in the court *a quo* to prove breach of contract in order to lay a foundation for its claim for the payment of interest on the purchase price. He said because no evidence appears to have been adduced in the court *a quo* C contractual liability was not established. So there was no legal basis upon which BIG's claim for interest could have been awarded by the learned judge. I disagree.

It was not necessary for BIG to prove facts which did not constitute its cause of action. BIG claimed *mora* interest, the liability for the payment of which depended upon proof of *mora* on the part of BEC. Its claim for the payment D of *mora* interest on the refunded purchase price was not dependent upon proof of the alleged breach of contract by BEC. The general rule is that interest is not payable unless there is an agreement to pay it or there is default or *mora* on the part of the part of the defendant: *Baliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 269 at 272. There was, of course, no agreement to pay interest on the purchase price. There was, however, an agreement recorded E in the letter of 11 September 1998 to pay the purchase price. In my view, by undertaking to refund the purchase price, for whatever reason, BEC assumed for itself the duty to do so. When BEC failed to pay the money, BIG wrote a letter demanding that it should pay on 1 December 1998.

In the letter dated 18 January 1999 BEC clearly admits that it was under an F obligation to pay the money. It could not have tendered the payment of the money as it did under cover of that letter if the money was not due and payable. The money had been made due and payable by the letter of demand, and failure by BEC to refund the money on 1 December 1998 constituted a default or *mora* on its part.

It is clear from the papers that BIG claimed interest on the purchase price at G the prescribed rate from 1 December 1998 to the date of final payment. The basis of BEC's liability for the payment of the interest claimed by BIG was default of refund of the money on 1 December 1998. The liability of BEC to pay the interest was based on the fact that it became in *mora* on the day it was obliged to pay the purchase price but failed to do so. H
2002 (2) ZLR p359
Malaba JA
A This was a case of a rescission of a contract accepted by BEC when it agreed to repay the purchase price. In the circumstances, contractual liability, in the sense that BIG had to prove that BEC breached the contract in that it did not properly fit the X-ray tube into the machine, was not necessary for the purposes of establishing BEC's liability for the payment of *mora* interest on the purchase price admitted to have been due and payable to it. *See Applebee* B *v Berkovitch* 1951 (3) SA 235 at 244D; *Linton v Corser* 1952 (3) SA 685 (A); *Hubert Davies & Co v Educational Business Suppliers (Pvt) Ltd* 1997 (2) ZLR 223 (S) at 227 D-E.

The court *a quo* awarded BIG, as the successful party, costs of suit. There is nothing in the papers to suggest that in the exercise of its discretion the court C *a quo* erred. It certainly applied the general rule that costs follow the result. In my view, BIG was entitled to its costs because it had been compelled by BEC's refusal to pay interest on the purchase price to seek the relief it eventually obtained from the court *a quo.* In prosecuting its claim, it incurred costs and BEC had to reimburse it.

The complaint was also that the court *a quo* did not award BEC costs on the D claim for damages which BIG withdrew. It is important to remember that an award of costs is a matter within the discretion of the court hearing the case. An appellate court will not interfere with the exercise of the discretion unless that is done unreasonably: *Van der Merwe v Peebles* 1976 (2) RLR 115.

A large part of the time in this case was spent on the claim for payment of E interest on the purchase price. It was not shown by BEC in this application that it applied for judgment on costs following the withdrawal of the claim for damages. The question of costs in respect of that claim would have been an issue before the court *a quo* and it was for BEC to ask the court to resolve that issue in its favour when the claim was withdrawn, particularly if BIG did not offer to pay the costs.

In *A v B & Anor* 1976 (1) RLR 397 (G) Goldin J F (as he then was) said at 400 C-D:

"When litigation has been commenced or instituted, the question of costs is an issue before the court and both litigants are entitled to have that issue determined by a judgment. This right is not dependent upon a judgment on the merits of the action. The question of costs can be distinct from that of a judgment on the merits of the case. Thus, a notice of withdrawal does G not automatically end the litigation, and if a defendant or respondent does not ask the court for an opportunity of establishing the right to judgment on the merits, the court may nevertheless grant a judgment for costs only."
As there was no evidence that BEC asked for judgment on costs following H the withdrawal of the claim for damages, there is no basis upon which I can
2002 (2) ZLR p360
Malaba JA
arrive at the conclusion that it has prospects of success on appeal on this point. A The application is dismissed with costs.
Chihambakwe, Mutizwa & Partners, applicant's legal practitioners *Coghlan, Welsh & Guest,* respondent's legal practitioners B

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Source:
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[zRPz]MUTARE RESIDENTS AND RATEPAYERS ASSOCIATION v CITY OF MUTARE 2002 (2) ZLR 361 (H)
2002 (2) ZLR p361

Citation	2002 (2) ZLR 361 (H)
Case No	Judgment No. HH-165-02
Court	High Court, Harare
Judge	Smith J
Heard	27 March 2002; 25 September 2002
Judgment	25 September 2002
Counsel	*R M Fitches,* for the applicant *L T Biti,* for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

[zFNz]Flynote
D **Local government** — urban council — rates and charges — objection to — procedure for dealing with objections — effect of failure to observe strict requirements of legislation
[zHNz]Headnote

The applicant ratepayers' association objected to certain rates and charges E set by the respondent urban council. Objections had been submitted. and over 2000 signatures were included in a booklet. The town clerk did not attach the booklet to the agenda for the council meeting; he advised the councillors that the booklet was voluminous and was not being attached in order to save costs. However, he circulated the booklet F among the councillors present at the meeting. The council meeting was convened at short notice, when five out of 17 members were unable to be present. No vote was taken at the meeting, the decision to implement the rates having been reached "by consensus". The applicant argued, *inter alia,* that the provisions of the Urban Councils Act had not been complied with, either in the submission of the objections to councillors G or in the manner the resolution was passed.

Held, that a copy of each objection must be sent to councillors before the meeting; it was not enough to send part of the objection. Section 219(4) of the Urban Councils Act [*Chapter 29:05*] was quite clear in its requirements: a copy of each objection lodged must be sent to councillors. It was not enough to send a copy of part of the objection together with H an explanation of what the other part of the objection consisted of.

2002 (2) ZLR p362

Smith J

Held, further, that s 219(3) of the Act stated that a rates increase should not A come into operation unless passed by a majority of the total membership of the council. It was not enough to reach the decision by consensus. A vote had to be taken and the number of voters in favour of the resolution recorded.

Held, further, that there was conflicting evidence on the question of whether B the objections were dealt with or considered at various ward consultation meetings, and it was thus not necessary to decide whether the applicant had a legitimate expectation that its objections would be dealt with.

[zCAz]Cases cited

Admin, Tvl & Ors v Traub & Ors 1989 (4) SA 731 (A) C

Claude Neon Ltd v Germiston City Council & Anor 1995 (3) SA 710 (W)

Gencor SA Ltd v Transitional Council for Rustenburg & Environs & Anor 1998 (2) SA 1052 (T)

Health Professions Council v McGown 1994 (2) ZLR 329 (S)

Metsola v Chrmn, PSC & Anor 1989 (3) ZLR 147 (S)

Mokgoko & Ors v Acting Rector, Setlogelo Technikon & Ors 1994 (4) SA 104 (B) D

Sec for Transport & Anor v Makwavarara 1991 (1) ZLR 18 (S)

[zSTz]Legislation considered

Urban Councils Act [*Chapter 29:05*], s 219 E

[zCIz]Case information

R M Fitches, for the applicant

L T Biti, for the respondent

[zJDz]Judgment

Smith J: The applicant filed its application on 31 March 2001, seeking an F order setting aside the owners rates, levies and charges set by the respondent for the year 2001 and requiring the respondent to convene a meeting of the full City Council to reconsider its proposals to deal with all the objections received. On 15 May 2001, the applicant applied for and was granted default judgment. At the time, the applicant and its legal representative were unaware that the respondent had in fact filed papers in opposition. After an G exchange of correspondence, it was agreed that the default judgment had been applied for and granted in error and should be rescinded. By consent, the default judgment was rescinded and it was ordered that the costs of the application for rescission and the wasted costs incurred by both parties be costs in the cause. H

2002 (2) ZLR p363

Smith J

A In its founding affidavit, the applicant alleged that the Mutare City Council (hereinafter referred to as "the Council") failed to comply with the provisions of the Urban Councils Act [*Chapter 29:05*] (hereinafter referred to as "the Act") in the promulgation of its budget for the year 2001 and therefore that budget is *ultra vires* the Act and should be declared null and void. The allegations made by the applicant can be separated into five groups, which B I will deal with individually.

Firstly, it is alleged that the objections to the proposed budget were not dealt with in terms of s 219 (4) of the Act. That provision reads as follows:

"(4) The notice to councillors of any meeting at which the proposed tariffs, charges or deposits are to be reconsidered for the purposes of C subsection (3) shall contain a copy of all objections lodged in terms of subsection (3), unless all councillors have been previously circulated with a copy of the objections."

The applicant had submitted a booklet containing the signatures of over 2000 residents who had objected to the proposed increases. The Acting Town Clerk advised the councillors at the meeting on 14 December that the booklet D was voluminous and had not been attached to the agenda for the meeting as a cost-saving measure. However, he did circulate the booklet amongst the councillors present at the meeting. The applicant claims that the clear purpose of the law is that the councillors need to see that the people they represent have made objections in order to enable them to have time for meaningful discussions. Clearly, a petition without a single page of signatures E carries less weight than a petition with almost 1000 signatures. The respondent submits that the letter containing the objections, plus other objections from the citizens of Mutare, were circulated with the agenda for the meeting. The circular letter to the councillors had contained some of the signatures to the petition and an indication that at least 2000 people had appended their F signatures to the petition.

Subsection (4) of s 219 of the Act requires that a copy of all the objections lodged shall be sent to all councillors with the notice for the meeting. That means that a copy of each objection that has been lodged must be sent to councillors. The objection lodged by the applicant contained the signatures of over 2000 people. Therefore any copy of that objection should also contain G the same number of signatures. The requirements of s 219(4) of the Act are quite clear. A copy of each objection must be sent to councillors, not a copy of part of the objection together with an explanation of what the other part of the objection consists of.

I consider, therefore, that the requirements of s 219(4) of the Act were not H complied with.

2002 (2) ZLR p364

Smith J

Secondly, it is alleged that the proposed budget was not put to the vote at the A meeting on 14 December.

Subsection (3) of s 219 of the Act provides that if a statement setting out the proposed tariffs and charges has been advertised in terms of subs (2) thereof and objections are lodged by 30 or more persons who are voters, such tariffs and charges shall be reconsidered by the council, together with the objections B so lodged, and they shall not come into operation unless the resolution is again passed *by a majority of the total membership of the council.* The applicant contends that the convening of the meeting on 14 December was *mala fide.* It was convened on 24 hours' notice, when the Mayor well knew that at least five councillors would be unable to attend as they were attending a ZANU (PF) Congress. The Council consists of 17 members. Only C 11 councillors attended the meeting. At least nine councillors would have had to vote in favour of the resolution to approve the proposed tariffs and charges before it could be said to have been passed by a majority of the total membership of the council. The respondent submits that it was not aware that the missing councillors were attending a ZANU (PF) congress. There was the D requisite quorum at the meeting. It is the practice in the Council that decisions are taken by consensus and a vote is hardly ever taken.

The requirements of s 219(3) of the Act are also crystal clear. Where the requisite number of objections to the proposed tariffs and charges has been lodged, the proposed tariffs and charges shall not come into operation unless the resolution is passed by a majority of the total membership of the council. E In order to ascertain whether that test has been passed, a vote must be taken. It is not sufficient for the respondent to say that the Council acts by consensus and seldom resorts to votes. That may well be the case, and it obviously suffices, for the vast majority of the resolutions that come before the Council. However, the requirements of the Act must be strictly observed. Section F 219(3) requires that in the circumstances specified therein, proposed tariffs and charges *shall not come into operation* unless the resolution has been passed by a majority of the total membership of the Council. That means that a vote must be taken and the number of voters in favour of the resolution must be recorded. If that is not done, it cannot be established that the resolution was passed in accordance with the requirements of s 219(3) of the Act. That being G the case, the proposed new tariffs and charges cannot come into operation.

I consider that the requirements of s 219(3) of the Act were not complied with.

Thirdly, it is alleged that objections raised at consultation meetings held by various councillors in their respective wards were not mentioned at the H

2002 (2) ZLR p365

Smith J

A Council meeting on 14 December. Furthermore, the meeting on 14 December was flawed because false information was given by Council officials and by councillors about the budget increases on a number of occasions prior to the meeting.

The respondent denies the allegations concerning false information.

B I consider that the court cannot resolve the dispute on the papers sufficiently to reach a conclusion that the Council meeting on 14 December can be treated as a nullity.

Fourthly, it is alleged that the Council meeting on 14 December was not held outside the 30-day period prescribed by s 219(2) of the Act.

C Subsections (2) and (3) of s 219 of the Act read as follows:

"(2) Before any tariffs, charges or deposits fixed in terms of subsection (1) come into operation a statement setting out the proposed tariffs, charges or deposits and existing tariffs, charges or deposits for the same matters shall —

(a) be advertised in two issues of a newspaper; and D

(b) be posted at the office of the council for a period of not less than thirty days from the date of the first advertisement in the newspaper.

(3) If a statement has been advertised in terms of paragraph (a) of subsection (2) and within the period of thirty days referred to in that paragraph objections to the proposed tariffs, charges or deposits are lodged — E

(a) by thirty or more persons who are voters or who are users of the service to which the tariff, charges or deposit relates; or

(b) where there are less than thirty such users of the service concerned, by not less than fifty *per centum* of the number of such users ..."

The applicant contends that the Council was required to advertise a statement setting out the proposed tariffs and charges in two issues of a newspaper and F to allow 30 days from the last publication of the advertisement for objections. The statement of the proposed increases was advertised on 10 and 17 November 2000. The closing date for objections, which was said to be 11 December, and the subsequent Council meeting on 14 December, ostensibly to discuss the objections, were both *ultra vires* as they were within 30 days G of the second publication. The respondent submits that the Council cannot act within 30 days from the date of the first advertisement of the statement in the newspaper. As the Council meeting was held on 14 December, which was more than 30 days after the first advertisement on 10 November, it was in order.

H The requirements of sub (3) of s 219 of the Act are not very clear. In subs (2)

2002 (2) ZLR p366

Smith J

thereof, para (a) requires that a statement of the proposed tariffs and charges A must be advertised in two issues of a newspaper and para (b) requires that the statement be posted at the offices of the Council for not less than 30 days from the date of the first advertisement. Subsection (3) then provides what must be done when a statement has been advertised in terms of para (a) of subs (2) and within the period of 30 days "referred to in that paragraph", objections B are lodged. The problem is that the period of 30 days is referred to in para (b) of subs (2) and not para (a). In my view, it would make more sense for the 30- day period to run from the date of the second advertisement. That would mean that a voter or user of a service who missed the first advertisement but saw the second, would have 30 days within which to lodge an objection. By virtue of the provisions of subs (5) of s 2 of the Act, the statement must be advertised C in weekly consecutive issues of a newspaper circulating in the council area. That means that a voter who missed the first advertisement but read the second would have only three weeks in which to lodge an objection. However, whatever good sense requires, one must endeavour to interpret the subsection as worded. As I have pointed out, there is no period of 30 days referred to in para (a) of subs (2). There is, however, a period of 30 days D referred to in para (b) of subs (2). That period commences to run from the date of the first advertisement.

I consider that subs (3) must be read as though it referred to the 30-day period referred to in para (b) of subs (3). Accordingly, the Council meeting on 14 December was held on a date after the expiry of the 30-day period from the E date of the first advertisement. Therefore, there was no failure to comply with the requirements of s 219(3) of the Act in this regard.

Fifthly, and finally, Mr *Fitches* submitted that the applicant had a legitimate expectation that its objections to the proposed tariff and charges would be considered fairly and properly and the Council failed to do so. He referred the court to *Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731 (A), F *Mokgoko & Ors v Acting Rector, Setlogelo Technikon & Ors* 1994 (4) SA 104 (B), *Claude Neon Ltd v Germiston City Council & Anor* 1995 (3) SA 710 (W) and *Gencor SA Ltd v Transitional Council for Rustenburg and Environs & Anor* 1998 (2) SA 1052 (T). Mr *Biti* submitted that the doctrine of legitimate expectation was not relevant in this case, since s 219 of the Act specifically provides that the Council must consider the objections of voters who object G to any proposed increase in tariffs and charges. That, however, does not mean that they have a right to demand that they must be given a hearing. See *Metsola v Chairman, Public Service Commission* 1989 (3) ZLR 147 (S), *Secretary of Transport & Anor v*

Makwavarara 1991 (1) ZLR 18 (S) and *Health Professions Council v McGown* 1994 (2) ZLR 329 (S).
H
2002 (2) ZLR p367
Smith J
A In my view, whilst there is conflicting evidence as to how the objections were dealt with or considered at various ward consultation meetings, and whether or not false information was given by councillors and council officials, those factors cannot justify setting aside the tariffs and charges that were brought into effect.
The provisions of s 219(3) of the Act are very clear and unambiguous. They B specifically state that where objections to proposed tariffs and charges have been lodged by 30 or more persons who are voters, the proposed tariffs and charges must be reconsidered by the council, together with the objections, and they *shall not* come into operation unless the resolution is passed by a majority of the total membership of the council. The resolution was passed C by the Council but there is no proof that it was passed by the necessary majority. That being the case, the proposed tariffs and charges cannot come into operation.
It is ordered that —
1. the owners rates, charges and levies set by the respondent for the year 2001 be and are hereby declared to be of no force and effect; D
2. the respondent pay the costs of the application, including the costs of the application for rescission of default judgment.
Henning, Lock, Donagher & Winter, applicant's legal practitioners
E *Bere Brothers,* respondent's legal practitioners

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Source:
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[zRPz]CHIRAGA v MSIMUKO 2002 (2) ZLR 368 (H)
2002 (2) ZLR p368

Citation	2002 (2) ZLR 368 (H)
Case No	Judgment No. HH-167-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	17 September 2002; 25 September 2002
Judgment	25 September 2002
Counsel	*N Mandikumba,* for the applicant *L Uriri,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

[zFNz]Flynote
Contract — performance — impossibility of performance — need for impossibility to be absolute — shortage of foreign currency in Zimbabwe D — whether renders it impossible for debtor to repay debt in foreign currency
Evidence — judicial notice — shortage of foreign currency — whether may be judicially noticed
Practice and procedure — judgment expressed in foreign currency — power E of court to grant such order
[zHNz]Headnote
The doctrine of judicial notice is confined within very narrow limits. Whilst the courts can take notice of matters so notoriously or clearly established that evidence of their existence is unnecessary and can rely on general F information and knowledge of the common affairs of life which men of ordinary intelligence possess, they may not act on their own private knowledge or belief regarding the facts of a particular case. It would be going outside the narrow confines of the doctrine for a court to take judicial notice of the fact that there is an acute shortage of foreign currency in Zimbabwe. G
The applicant had signed an acknowledgement of debt in which he undertook to pay a foreign national an amount in South African currency. He failed to honour the undertaking, so his creditor obtained judgment in the High Court of Zimbabwe requiring him to pay the debt in South African currency. More than four years later he applied for an order permitting him to pay the amount in Zimbabwean currency, averring that there was H
2002 (2) ZLR p369
Chinhengo J
A an acute shortage of foreign currency in Zimbabwe. He led no evidence to establish such a shortage, and the creditor did not admit it. The creditor insisted on payment in South African currency since he had no interests in Zimbabwe to which local currency could be applied.
Held, that in the absence of evidence on the point it was for the Executive, not the courts, to say whether or not there was an acute shortage of B foreign currency in Zimbabwe, since such a statement might adversely affect the country's economic well-being. The Minister responsible for finance should have been asked to issue a certificate as to the non- availability of foreign currency.
Held, further, that the court could not amend the earlier judgment to permit C the debt to be paid in local currency. The creditor had sought and obtained an order that the debt should be paid in South African currency, and the court had power to grant such an order — although if it were to be enforced by execution, the judgment creditor would have to accept payment in Zimbabwean currency at the official rate of exchange.
Held, further, that the undertaking entered into by the applicant was not D absolutely impossible to perform. There had been no *vis major* or *casus fortuitus* or any act of State to make performance impossible.
[zCAz]Cases cited
Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co (2) 1998 (2) ZLR 229 (H)
E *Crone v Crone* 2000 (1) ZLR 367 (S)
Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd 2002 (1) ZLR 632 (H)
Elgin Brown & Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd 1988 (4) SA 671 (N)
Green v Green 1976 (1) RLR 254 (A)
F *Lowveld Leather Products (Pvt) Ltd v International Finance Corp Ltd & Anor* HH-176-02
Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe 1988 (2) ZLR 482 (SC)
Moyo v Sifelani 1988 (1) ZLR 98 (S)
Peters, Flamman & Co v Kokstad Municipality 1919 AD 427
S v Hartlebury & Anor 1985 (1) ZLR 1 (H)
G *S v Mavunga* 1982 (1) ZLR 63 (S)
S v Ndlovu 1983 (2) ZLR 263 (S)
R v Sitimela 1962 (4) SA 60 (SR)
[zCIz]Case information
N Mandikumba, for the applicant
H *L Uriri,* for the respondent
2002 (2) ZLR p370
Chinhengo J
[zJDz]Judgment
Chinhengo J: The main facts of this case are not in dispute. The applicant A in his personal capacity and in his capacity as a director of Pisces Intercontinental Private Limited ("the company")

acknowledged himself and the company to be jointly and severally indebted to the respondent in the sum of 65 000 South African Rands together with interest thereon calculated at the rate of one per *cent per annum,* being monies loaned and advanced to B himself and the company. The applicant bound himself and the company to pay the debt by no later than 2 March 1996. If the debt was not repaid on time, the applicant agreed that the debt would become immediately payable without notice to him and that interest on the outstanding indebtedness would commence running at the rate of two per cent per month calculated monthly in arrears. In that event the respondent would also be entitled to recover all C the costs and expenses incurred in recovering the money loaned and advanced, including legal costs on the scale as between legal practitioner and client, collection charges and tracing agency commission and fees. The applicant also acknowledged that any addition, variation or cancellation of the agreement should be of no force and effect unless it was reduced to writing and signed by the respondent. D

The applicant failed or neglected to meet his obligations in terms of the acknowledgement of debt. He failed to pay the debt on due date. The respondent sued him in the High Court of Zimbabwe and obtained judgment with costs:

"in the sum of 65 000 Rand (sixty five thousand South African Rands) E together with interest at 1 per cent per annum from March, 1995 to 2 March 1996 and interest at 2 per cent per month from 3 March 1996 to date of final payment."

The judgment was obtained in default on 5 February 1998.

The applicant is a Zimbabwean national and the respondent is either a Zambian national or a Swazi national. He is a management consultant F operating under the style AMCO International. He is based in Mbabane, Swaziland, and resides at Plot 38, Waterford Park, Mbabane. It is not clear what nationality he is, however. In para 6 of his opposing affidavit he states that he is a Swazi national but in para 28 he states that:

"I am a Zambian national who advanced the sum of ZAR65 000 to the G applicant in Mbabane, Swaziland for his personal use ..."

I do not think that the respondent's nationality is important in my consideration of this application. Whatever his nationality, and I attribute the lack of clarity in respect thereto to a typographical error, the affidavits clearly establish that the respondent carries on business in Swaziland and resides there. H

2002 (2) ZLR p371

Chinhengo J

A After obtaining the judgment the respondent registered, on 18 August 1999, a caveat (No. 2130/99) against the applicant's title to stand 95 Merwede Township 3 of Merwede A, an immovable property owned by the applicant in Zimbabwe ("the property"). The applicant is indebted to other persons who also registered caveats against his title to the property. These other creditors are Standard Chartered Bank (for $980 831.49 and $250 000), B Satvision Digital Satellites (for $64 193.89), CABS (for $256 541.73) and legal practitioners Messrs Honey and Blanckenberg, Wintertons, and Gollop and Blank for legal fees ($7 405,15, $60 000 and $2 500 respectively). The applicant is also indebted in respect of agents commission in the sum of $125 000. He sold the property for $2 500 000. He would, but for the problem arising from the present dispute, receive the purchase price upon transfer to C the purchaser of the property. The applicant avers in his affidavit that the creditors, except for the respondent, have agreed to remove the caveats registered against his title to the property. This would enable him to receive the purchase price and pay all his creditors including the respondent. The refusal by the respondent to remove the caveat has dealt a blow to his scheme D of payment. The refusal means that the transfer of the property cannot be done. It means that he cannot receive payment from the purchaser. And it means that he cannot pay his creditors. The consequences thereof are that the interest on the amounts he owes to his creditors continues to escalate, and he has become exposed not only to the sale of his property in execution but also to personal attachment in civil imprisonment proceedings.

E The applicant averred that he is willing and ready to pay his indebtedness to the respondent if only the respondent agreed to remove the caveat. The reason that the respondent refuses to remove the caveat is that he wants the applicant to pay the amount owed to him in South African Rands as provided in the acknowledgement of debt. The applicant, on the other hand, pleaded F impossibility of performance. He averred that he can pay the respondent in Zimbabwean dollars only. He said that he has tried to persuade the respondent to accept payment in Zimbabwe dollars to no avail. He said that he has also offered to pay the equivalent in Zimbabwe dollars of the capital debt and interest, which now stand at R130 000, into a trust account to he held in the respondent's favour until South African Rands are available. Again the G respondent has not accepted this proposal. The applicant averred that at the time that he signed the acknowledgement of debt, foreign currency was readily available and that there is now an acute shortage of foreign currency

in Zimbabwe. He averred that the obligation in clause 1 of the acknowledgement of debt in terms of which he undertook to pay the debt in H South African Rands is now impossible of performance.
2002 (2) ZLR p372
Chinhengo J
The applicant has, as a consequence of the respondent's refusal to remove the A caveat applied for an order:
"1. That the order made by this Honourable Court on the 5th February 1998 in case No. 11021/97 be and is hereby amended by the insertion of the phrase "or its equivalent in Zimbabwe dollars" between the words "Rands" and "together".
Alternatively B
2. That it be and is hereby ordered that the contract entered into by the parties on 4 March 1995 and the order made by this Honourable Court on 5 February 1998 in Case No. HC 11021/97 be and are hereby declared to be impossible of performance and the applicant be and is now ordered to pay Respondent the sum of sixty five thousand rands or its equivalent in Zimbabwean dollars together C with interest at 1 percent per annum from 4 March 1995 to 2 March 1996 and interest at 2 percent per month from 3 February 1996 to the date of final payment.
Alternatively
3. That caveat No. 2130/99 be and is hereby uplifted from stand 95 D Merwede Township 3 of Merwede A upon payment to the Registrar of the High Court of Zimbabwe the equivalent of R130 000 in Zimbabwe dollars at prevailing official exchange rate on the date of payment.
4. That respondent pays the costs of suit."
The terms of the draft order sought require this court to amend its order or, E in the alternative, to declare that the contract between the parties and the existing court order are now not capable of performance or being complied with, as the case may be. The applicant would, if so ordered, pay the principal debt plus interest in Zimbabwe dollars. In the further alternative the terms of the draft order require this court to permit the removal of the caveat upon payment of the sum of the capital debt and interest thereon by the applicant F to the Registrar of this court. It seems to me that although the applicant sought three alternative relief's, the effect of granting any of the relief's sought is the same - the applicant will be absolved from paying his debt in South African Rands.
The applicant averred that the respondent agreed that he should be paid in G Zimbabwe dollars but later changed his mind. The respondent denied ever having agreed to be paid in Zimbabwe dollars. This is the only dispute of fact in this application. It can be resolved on the papers. On 4 February 2002 the African Banking Corporation wrote to the respondent through his legal practitioners that the bank was holding "at your disposal" the equivalent in Zimbabwe dollars of R130 000 and that it would pay out to H
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A him upon receiving a written confirmation that the respondent accepted the payment. This letter was sent to and received by the respondent's legal practitioners, Messrs Honey and Blanckenberg. The letter was accompanied by another from the applicant's legal practitioners, Lofty and Frazer, in which a request was made to uplift the caveat. The following response was made by the respondent's legal practitioners on 7 February 2002:
B "Thank you for your letter dated 6th February.
We hereby advise that as soon as we have an additional undertaking for payment of the legal costs in the sum of $7 405,15 we will arrange the upliftment of caveat number 2130/99."
On 19 February 2002, apparently after certain telephonic conversations C between the respondent and the applicant's legal practitioners, the respondent's legal practitioners in writing
"Confirm(ed) our oral advice that our client, Mr Msimuko, has rejected the undertaking from African Banking Corporation to settle the judgment against Mr Chiraga in Zimbabwe dollars on the basis that the judgment he obtained against Mr Chiraga is for payment of South African rand, D and therefore Mr Chiraga must settle the debt in the currency of the judgment. In the circumstances, we await an undertaking on the terms laid down by our client in order that we may uplift caveat No. 2130/99."
It seems that the letter by the respondent's legal practitioners dated 7 February 2002, which indicated that the caveat would be uplifted if an additional undertaking to pay the legal fees was given, was written before the E legal practitioners had obtained the respondent's instructions with regard to the undertaking from African Banking Corporation. On 11 February 2002, the respondent, in response to a fax letter from his legal practitioners, had rejected the undertaking from African Banking Corporation and had insisted that he expected payment in South African rand. He had specifically stated F in his letter that:
"Since the judgment in our favour is designated in South African Rand and this is the currency in which the debt was incurred, the onus should be on the defendant and his agents (his bank and his

lawyers) to ensure my payment in that currency. The existence of Zimbabwean Dollars equivalent to so many Rand does not mean much to me, until that money G is translated into the currency adjudged by the Court i.e. into South African Rand, which should be in a state to be fully transferred to me,"

The respondent thus flatly refused to be paid in Zimbabwean dollars. While the respondent's legal practitioners had indicated that the payment in Zimbabwe dollars was acceptable, they had apparently done so without their H client's consent. When they sought that consent, it was not forthcoming. I am

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satisfied therefore that any hopes that the respondent would accept A Zimbabwean dollars in payment of the debt were only raised by the respondent's legal practitioners: the respondent himself did not agree to that arrangement. The position thus remained what it had been. The respondent was insisting on payment in Rands and he would not agree to the removal of the caveat.

The respondent's reasons for rejecting payment in Zimbabwe B dollars appear to me to be sound. In his affidavit he pointed out that he has no knowledge of the applicant's inability to source foreign currency or of the acute shortage of foreign currency in Zimbabwe. He said that he did not, in fact, accept that there was such a shortage in Zimbabwe. He pointed out that he has no interest in Zimbabwe. He also rejected the applicant's proposals because, as he said, there is no guarantee that the applicant will ever source C the foreign currency. In respect of the respondent's alleged lack of any interest in Zimbabwe, the applicant stated that the respondent had indicated that if he (applicant) did not have the money in South African Rands, he could sell to him his Ashdown Park house for the amount of the debt. To the applicant this was an indication that the respondent had an interest in Zimbabwe. Interest, in this context, must mean a stake in something in D Zimbabwe, whether proprietary or financial to which the respondent can apply the money if paid in Zimbabwe dollars. I am satisfied that the respondent has no such interest in Zimbabwe. The respondent is not a Zimbabwean. He advanced the money to the applicant in South African Rands in Swaziland. He would have no use in Zimbabwe of Zimbabwean dollars because he has no interest in Zimbabwe. I am satisfied that his E rejection of the payment in Zimbabwe dollars is reasonable.

The issues which arise for determination in this case are:

a) whether I can amend the order of this court issued on 5 February 1998 so as to permit the applicant to discharge the debt in Zimbabwe dollars; and F

b) whether I can, without amending the order, nonetheless make an order that, due to the non-availability of foreign currency as alleged by the applicant, the applicant may discharge the debt in Zimbabwe dollars on the basis that either the contract is incapable of being performed or the existing order of the court is not capable of being complied with because G of the unavailability of foreign currency or the inability of the applicant to source the foreign currency with which to pay the debt.

These issues beg an examination of the question not only whether the applicant cannot source foreign currency but also whether in fact there is an acute shortage of foreign currency in Zimbabwe. The applicant has urged this court to take judicial notice of the fact that there is an acute shortage of foreign H

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A currency in this country. I did not understand him to urge me to take judicial notice of his own inability to source foreign currency. The court is entitled to take judicial notice of a fact in the circumstances outlined in S v *Ndlovu* 1983 (2) ZLR 263 (S) at 267C where Georges CJ quoted the following passage from Hoffmann, *Law of Evidence* (2 ed) at 291:

"A court takes judicial notice of a fact when it accepts it as established, B although there is no evidence on the point. Generally speaking, judicial notice will be taken of facts which are either so notorious as not to be the subject of reasonable dispute, or which are capable of immediate and accurate demonstration by resort to sources of indisputable accuracy. The date of Christmas would fall within the first category, while the date of Easter in a particular year would be an example of the second."

C The doctrine of judicial notice is confined within very narrow limits. Whilst the courts can take notice of matters so notoriously or clearly established that evidence of their existence is unnecessary and can rely on general information and knowledge of the common affairs of life which men of ordinary intelligence possess, they may not act on their own private knowledge or belief regarding the facts of a particular case. See *R v Sitimela* 1962 (4) SA 60 (SR) at 61B-62, D quoted with approval in *S v Mavunga* 1982 (1) ZLR 63 (S). In S v *Mavunga* the Supreme Court strongly criticised a magistrate for taking judicial notice of the behavioural characteristics and criminal

tendencies of "mujibhas", "terrorists" and "ex-guerrillas". The Supreme Court said that no evidence had been led in the court *a quo* on the *modus operandi* or E behavioural characteristics of those persons and that, in relying on his own personal knowledge of those people in order to take notice, the magistrate had seriously misdirected himself.

Judicial notice may, for example, be taken of historical facts *(Moyo v Sifelani* 1988 (1) ZLR 98 (S) at 103D) or of the fact that the Government publishes F a *Quarterly Digest of Statistics* which contains a section entitled "Consumer Price Index" which is generally accepted as a rough guide to the rate at which the cost of living for everyone is increasing *(Crone v Crone* 2000 (1) ZLR 367 (S) at 370A). In *Green v Green* 1976 (1) RLR 254 (A) at 256F-H the court took judicial notice of the fact that the cost of living increased between 1973 and 1976. It relied on figures produced by the respondent in a claim for G variation of maintenance which indicated that the means she had at the time of her claim were not sufficient to maintain herself and the child and to meet her reasonable needs. Evidence was presented to the court that the cost of living had increased sharply. I prefer the approach in *Crone's* case *supra* where notice was taken of the increase of the cost of living based on official H information contained in the Quarterly Digest of Statistics.

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In this application the applicant merely averred that there is an acute shortage A of foreign currency in Zimbabwe. He stated in para. 4 of the founding affidavit that:

"At the time when the agreement was made the said clause 1 of the agreement was capable of performance since foreign currency was readily available. However there is now an acute shortage of foreign B currency to an extent that the said clause 1 of the agreement is impossible of performance."

In para. 5 of the answering affidavit he stated that:

"It is not a secret that there is a critical shortage of foreign currency in this country. I urge this court to take judicial notice of this fact ..."

Judicial notice of a fact must be taken if, as I have noted above, the fact is C notorious or where it can be clearly established without the necessity of evidence of its existence. I would not be within the narrow confines of the application of the doctrine of judicial notice if I were to take judicial notice of the fact of the acute shortage of foreign currency in this country. No evidence was placed before me that that is the position. In a matter such as D the present, the court must accept the superior authority of the Executive and should not take judicial notice of facts which are properly within the sphere of the Executive. If there is an acute shortage of foreign currency, it is for the Executive to say so. The Minister of Finance and Economic Development should have been requested to issue a certificate to that effect. There is, in addition, no official statement from the Reserve Bank of Zimbabwe that that E is the position. It may adversely affect the economic well-being of this country if this court were to take judicial notice of the alleged acute shortage of foreign currency without the Executive providing an official statement or certificate to that effect. The pronouncement by the court may well reduce the confidence of those who transact business with this country. This is what McNally J recognised in *S v Hartlebury & Anor* 1985 (1) ZLR 1 (H) at 9B- F D where he said:

"The prosecutor has invited this court, without leading any evidence at all on the subject, to take judicial notice that South Africa [then under Apartheid rule] is an enemy. Without clarification, it may seem to persons who are unfamiliar with the law that the court is either so stupid that it does not realise South Africa is an enemy or so perverse that it G refuses to accept that South Africa is an enemy. The clear and established legal situation is that the courts acknowledge the superior authority of the Executive in this matter and do not take judicial notice of facts which are properly within the sphere of the Executive. It might well embarrass the government of Zimbabwe if a court were to make a finding that one country or another is an enemy. If the prosecutor requires such a finding, H

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A the proper procedure is for him to obtain a certificate from the appropriate Minister and place it before the court. Such a certificate will be regarded by the court as conclusive. It is not a matter of evidence. It is not a matter for cross-examination. It is accepted as conclusive."

This reasoning is, in my view, applicable to the question whether or not there is an acute shortage of foreign currency in the country today. The Executive B has superior authority to make a pronouncement on the state of the State coffers. The courts cannot make the pronouncement particularly where, as in this case, no evidence has been led to prove that fact. And if evidence were led, then quite clearly the fact sought to be established will, by the very fact of leading evidence, not be notorious. I would therefore not be able to take judicial notice of the fact, as urged upon me to do, that there is an acute C shortage of foreign currency. In any case an acute shortage

of foreign currency, even if it existed, does not mean a complete shortage or complete non-availability. Some people must be able to secure foreign currency even in a situation of acute shortage. The applicant could well be one such person.

Having declined to take judicial notice of the alleged acute shortage of D foreign currency, I must also comment on another finding which has been urged upon me to make by the applicant. The applicant has averred that he has tried to source foreign currency without success. The question is: should the court accept this averment without anything to show what effort the applicant has put into the sourcing of foreign currency? In para. 5 of the answering affidavit, which I have already quoted in part, the applicant further E stated that:

"... if the Respondent was unaware of this fact that there is a critical shortage of foreign currency in this country why would he refuse payment in local currency other than because he knows there simply is no foreign currency in this country. The little there is, is to be found on the so-called "parallel market" and dealing on that market is unlawful. F If this court were to accept that I must obtain the foreign currency by hook and crook, then it will be aiding, abetting and promoting an illegality which it should not. The courts are there to uphold the laws of Zimbabwe."

Indeed the courts are there to uphold the laws of Zimbabwe but I think that G the above averment by the applicant is an overstatement. I think there are a myriad of ways in which an enterprising individual can obtain foreign money with which to pay an indebtedness which he assumed in that currency. I am not prepared to make a finding that, without going outside the lawful means, an individual can assert that he cannot source foreign currency at all. If the court were to go that far it would kill that entrepreneurial spirit which exists H in the people of this country. It may also unwittingly create an excuse for

those who, in contract, assume obligations to pay what they owe in foreign A money and then neglect to meet those obligations in the comfortable knowledge that the courts will not oblige them to meet those obligations on the terms agreed in the contract. I would not therefore be in a position to make a finding that the applicant is unable to source the foreign currency with which to pay a debt he has willingly assumed in foreign money. He has not B led any evidence to enable me to make such a finding.

The next issue for my consideration is whether this court can amend the order made against the applicant on the basis that either the learned judge who made the order "overlooked", as the applicant alleges, the necessity at law to order that the debt might also be discharged by the payment of the equivalent sum in Zimbabwe dollars or that the judge was, in not so providing, wrong C at law. None of these assumptions have any validity at all. The order was made in default. There is nothing placed before me to show that the learned judge overlooked anything. The acknowledgement of debt provided that the applicant would pay the debt in South African Rands. That was the claim made by the respondent. That was the relief he sought. That was the claim and relief which the applicant did not oppose and that was the relief which the D learned judge granted in default.

As for the second assumption, it is quite clear from the authorities that the learned judge did not err at all. This court can grant a judgment sounding in foreign money. In *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC) the court approved two E principles - that a court order may be expressed in units of foreign currency and that it may provide in its order that the foreign currency be converted into local currency at the date when leave is given to enforce the judgment. It noted that execution cannot be levied in foreign currency and for that reason it approved the principle that there must be a conversion into local currency and at the rate obtaining at the date of enforcement for that limited purpose. F See also *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N) in which it was held that there is no absolute bar to a South African Court's granting judgment in a foreign currency. It was also held that if the foreign currency is the currency in which the plaintiff's loss "had been felt" the only way to properly compensate the plaintiff was to grant judgment in the foreign currency concerned. I was referred to *Echodelta Ltd* G *v Kerr & Downey Safaris (Pvt) Ltd* ZLR 2002 (1) 632 (H) as authority that the court can grant leave to a debtor to pay a judgment debt in local currency where he has led evidence on the obstacles pertaining to the acquisition of foreign currency. The issue for determination in *Echodelta supra* was not whether the court can amend an existing order, which I am asked to do in this H

A application. In that case the existing order provided for the payment of the debt in the sum of the equivalent of Zimbabwe dollars of US$86735.50. The issue for decision was whether the exchange

rate between the United States dollars and the Zimbabwe dollars was to be the parallel market rate or the official rate. The court held that it was to be the official rate. I am in agreement with that finding. The issue for decision in this application is entirely B different, as I have already shown. The *ratio decidendi* in *Echoldelta (supra)* is not applicable to this case. The courts in many countries leave the matter of the money of payment to the discretion of the court whether to grant judgment in a foreign currency or not. A blanket rule that all claims in foreign currency if successfully proved should result in a judgment in that currency would not meet the nationalistic persuasions of the courts or be sufficiently C aligned to the dictates of enforcement of the judgment by execution. In this case however no question of execution of judgment arises.

It must be clear therefore that the judgment of this court on 5 February 1998 was a correct judgment. If the applicant thought it was not correct or that it contained a serious omission, as he now alleges, he should have moved for D its rescission. This court is *functus* in respect of that order and it cannot revisit it unless it was challenged on grounds that would support a rescission of judgment, or unless the order was found to contain an error which required the judgment merely to be supplemented by dealing with an accessory matter - see *Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co (2)* 1998 (2) ZLR 229 (H).The difficulties which the applicant faces arise not from the E respondent's desire to enforce the judgment by normal execution, but from his insistence on a pressure point, a compulsive factor, which should force the applicant to find the foreign currency required. The respondent merely refused to remove a caveat registered against the applicant's property.

I think that on the facts of this case, the applicant must also fail in this F application for other reasons as well. The judgment which he now seeks to amend or alter in its effect was issued on 5 February 1998. The foreign currency situation in this country, as alleged by the respondent and accepted by the applicant, was healthy at that time. The applicant did not pay the debt when it became due on 2 March 1996. He did not pay it when judgment was entered against him on 5 February 1998. It is some four years later that he now G wishes to alter the effect of the judgment. As he is wont to do, he makes a very generalised statement as to his inability to source foreign currency. He makes the same generalised assertion that as at the time that the debt fell due or judgment was entered against him he did not have the money to pay the respondent. An additional factor to consider here is that the applicant is a H foreign national who has no interest in Zimbabwe to which he could channel

the funds if he was paid in Zimbabwe dollars. It would be unfair to deny him A payment in a currency in which the loan was made or the currency in which he feels the loss. Should the impasse created by the respondent not produce favourable results for him and he is then constrained to issue a writ of execution he will have to accept Zimbabwe dollars the amount of which will have to be arrived at by using the official rate of exchange. In the meantime, B the applicant has to find the money with which to pay the debt as he undertook to do. Some support for the approach I have taken in this case is to be found *in Lowveld Leather Products (Pvt) Ltd v International Finance Corporation Ltd & Anor* HH-176-02, a judgment handed down by Karwi J on 7 August 2002.

The last issue, which I think I can quickly dispose of, is whether the term of C the contract between the applicant and the respondent, i.e. the applicant's obligation to repay the loan in foreign currency, is impossible to perform. The simple answer is that the term is not absolutely impossible to meet. There has been no *vis maior* or *casus fortuitus* or any act of State to make performance impossible. See generally *Peters, Flamman & Co. v Kokstad Municipality* 1919 AD 427 and Christie on *The Law of Contract in SA 2* ed at 563-5 at p D 524-528. There is therefore no basis for altering the parties' contract which was entered into in 1995. Its sanctity must be preserved.

The application is accordingly dismissed with costs.

Sinyoro, Muunganirwa & Company, applicant's legal practitioners.

E *Honey & Blanckenberg,* respondent's legal practitioners.

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Source:

[zRPz]FAWCETT SECURITY OPERATIONS (PVT) LTD v ZBC & ORS 2002 (2) ZLR 381 (H)
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Citation	2002 (2) ZLR 381 (H)
Case No	Judgment No. HH 169-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	23 September 2002; 24 September 2002; 25 September 2002
Judgment	25 September 2002
Counsel	*I Chagondo*, for the applicant *W T Manase,* assisted by *L T Musekiwa,* for the first and second respondents
Case Type	Urgent application
Annotations	No case annotations to date

[zFNz]Flynote
Constitutional law — State — statutory corporation — when may be regarded as an organ of the State — Zimbabwe Broadcasting Corporation — not an organ of the State — Corporation's property not State property Court — official — Deputy Sheriff — powers and duties of — right to enter E premises to execute judgments
Practice and procedure — parties — Zimbabwe Broadcasting Corporation whether an organ of the State — property of the Corporation — liability to attachment
[zHNz]Headnote
F A civil judgment had been obtained against the respondent, the Zimbabwe Broadcasting Corporation (ZBC). When the Deputy Sheriff attempted to execute against the Corporation's property, he was prevented from doing so by police and military personnel, as well as a security officer employed by the ZBC. He was informed that he could not execute against State property. Attempts by the Deputy Sheriff to get assistance G from various police stations failed, with each one advising him to go to another one. The applicant sought an order compelling the ZBC to permit the Deputy Sheriff to enter the premises.
The ZBC did not dispute its liability to the applicant; it averred only that it was unable to pay because of "dire financial constraints". It offered to H pay in instalments. It claimed that it was not responsible for the Deputy
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Sheriff's inability to enter the premises; security was provided by A uniformed services which fell under the Ministries of Defence and Home Affairs. These forces took orders from their own superiors, not from officials of the ZBC. It also claimed that if the order sought by the applicant were granted, peace and security in the country would be compromised. Its offer to pay in instalments was a way to avoid the "impending dangers" of the order being granted. B
Held, that the ZBC's property is not State property, and is liable to attachment and sale.

Held, further, that the Deputy Sheriff was entitled to use force to gain entry. It was an offence to obstruct him in the execution of his statutory duties. It was clear that he had been obstructed in the performance of his duties. C It would be extremely remiss of the court not to assist him in carrying out its own processes. That would stultify the court's own processes and would amount to conniving at and condoning the conduct of a person who is in defiance if the law.
Held, further, that even if the ZBC's premises were a protected place in terms of the Protected Places and Areas Act [*Chapter 11:12*] (and there D was no evidence that the responsible Minister had declared the premises to be a protected place), that did not debar the Deputy Sheriff from entering the premises. The ZBC could not rely on the assertion that members of the armed forces would not take orders from anyone other than their own superiors. There was no suggestion that they had been instructed to prohibit the Deputy Sheriff from entering the premises. It E would be an offence for them to do so.
Held, further, that the ZBC's course was to apply for a stay of execution, which it had not done.
Held, further, that the execution of a writ by an officer of the court and the granting of the order sought was unlikely to compromise the security F and peace of the country. The ZBC was blowing the matter out of all proportion.
[zSTz]Legislation considered
Broadcasting Services Act [*Chapter 2:06*]
High Court Act [*Chapter 7:06*], ss 22(2), 55(1)(b) & 55(3) G
High Court Rules 1971, r 335(2)
Zimbabwe Broadcasting Corporation (Commercialisation) Act 26 of 2002 H
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[zCAz]Cases cited A
Botes v Goslin 1987 (2) SA 716 (C)
Gundani v Kanyemba 1988 (1) ZLR 226 (S)
Ex p *Kaefer Insulation (Pty) Ltd:* in re *Kaefer Insulation v Sharneck* 1984 (3) SA 533 (W)
[zCIz]Case information
B *I Chagondo,* for the applicant
W T Manase, assisted by *L T Musekiwa,* for the first and second respondents
[zJDz]Judgment
Chinhengo J: On 8 April 2002, the deponent to the first and second respondents' opposing affidavit, in the capacity of Acting Chief Executive C Officer of the first respondent, which was indebted to the applicant, wrote the following letter to the applicant's legal practitioners —
"Reference is made to our telephone conversation of the instant.
The letter serves to confirm our discussion that the ZBC will pay the plaintiff the sum of $3 630 780.02 by 18 April 2002, and the interest and D costs of suit thereafter.
We would also like to confirm that it is no longer necessary to proceed with case No. HC 3298/2002 which is pending before the High Court".
The first respondent failed to act in terms of the above-quoted letter and the applicant proceeded with the court action. The applicant obtained a judgment E in default on 7 May 2002. The judgment reads:
"That judgment with costs be and is hereby entered against the defendant in the sum of $3 630 780,02 together with interest thereon *a temporae morae* at the current prescribed rate of 30%*per annum* from 28 February 2002, to date of full payment".
The first respondent did not pay. The applicant sought to enforce the F judgment and served a writ of attachment on 25 June 2002. The writ was also served on the deponent to the first and second respondents' opposing affidavit. She accepted service on behalf of the first and second respondents.
The Deputy Sheriff, acting on the instructions of the applicant's legal practitioners, attempted to remove the first respondent's property on 30 July G 2002. The remarks column of the Deputy Sheriff's return reads:
"Documents are herewith returned as defendant is not paying as per return number 232484 and goods can not be removed since assets at this address belong to the State which is not executable".
The applicant's legal practitioners, in a letter dated 9 August 2002, protested to the Deputy Sheriff at his failure to effect execution and pointed out that:
H "...the property at ZBC belongs to ZBC and not the State. ZBC is not
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governed by the State Liabilities Act as it is a body corporate capable of A being sued and suing in its own right.

We accordingly ask you please to attach and remove the property today. We hereby indemnify you against any claims. Please ensure that interest is recalculated.

Following upon this and other letters of protest by the applicant's legal B practitioners, further attempts were made by the Deputy Sheriff to remove the first respondent's property for a sale in execution. In a return dated 22 August 2002, the Deputy Sheriff stated that he was denied entry into the first respondent's premises by—

"armed police and Mr Mapope, the ZBC Security Officer who said the area is a protected one. They further advised that I cannot remove C property from ZBC without authority from their superiors. I waited two and half hours discussing with the officers."

The Deputy Sheriff made other returns to the applicant's legal practitioners. The return dated 23 August states that he attempted to obtain the assistance of the police at Borrowdale Police Station, but was advised that the appropriate police station was Highlands Police Station. The return dated 26 August D states that he proceeded to Highlands Police Station but was advised to seek assistance from the Officer Commanding "Suburban at Harare Central Police Station". The return dated 27 August states that he proceeded to Harare Central Police Station and was advised to go back to Highlands Police Station. After he contacted Highlands Police Station he made a return E indicating that "Highlands Police Station... seem not to give any help. Documents are returned as I failed to get police assistance".

It is against this background that the applicant lodged an urgent application to this Court for a provisional order seeking, as the terms of the final order:

"1. That the first and second respondents should be ordered to allow the third respondent into first respondent's premises for the purposes F of removing property placed under judicial attachment.

2. That the fourth respondent should be ordered to give the third respondent all such assistance that he may require in this matter.

3. That the first respondent should pay the costs of this application on the scale as between legal practitioner and client scale".

And as to the temporary relief sought G

"That this order shall operate as a temporary order directing the third respondent to enter into the premises of the first respondent with the assistance of the fourth respondent and thereat remove sufficient property for the purposes of satisfying the applicant's writ of execution".

The applicant gave the full background as I have outlined it, and averred that, H

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A by returning the writ of execution, the Deputy Sheriff has either given up because he has been frustrated by the conduct of the first and fourth respondents or he is simply scared or reluctant to carry out his obligations. The applicant pointed out that the situation postulated in this case sets a bad precedent in our legal system because the judicial system cannot function smoothly "if a debtor becomes so arrogant to the extent that it is above the B law". It complained that it is impossible to access the first respondent's premises and that the fourth respondent should be reminded of his obligation to ensure that the functions of the Deputy Sheriff are carried out smoothly by giving him such protection as he may require. It observed that the first respondent is a reputable organisation and its Chief Executive, the second C respondent, must ensure that his organisation complies with the laws of this country. The applicant averred that this application is urgent because it has serious implications on the administration of the law in this country and because of the great prejudice already occasioned to the applicant who has not been paid the amount lawfully due to it. I have no difficulty in accepting that the process of the court must not be impeded by a debtor or other agency D in such a manner as leaves a creditor without a remedy where he seeks to enforce a judgment given in his favour.

The first and second respondents did not dispute that it is indebted to the applicant or that the judgment against it has not been met. The first and second respondents averred that the only reason that the first respondent did not pay the amount of the debt was that it is in "dire financial constraints". E It does not give content to the words "dire financial constraints", but its position emerges clearly that it does not have sufficient funds with which to pay the debt. It averred that it made out a cheque for $1 000 000 as part payment to show its commitment to settling the debt. It prayed the court to issue a provisional order requiring it to pay the applicant in three instalments. F In other words, the first respondent prayed in substance that the court should alter or amend its order issued on 7 May 2002 to provide for payment in three instalments.

The first respondent considered that it was not responsible for the Deputy Sheriff's inability to access its premises for purposes of removing goods for a sale in execution. It averred that it is not responsible for providing security G at its premises. The security is provided by uniformed forces

which fall under the Ministries of Home Affairs and Defence and these forces received instructions or orders only from their superiors, and not from the Chief Executive of the first respondent. For this reason, it averred that it would be inappropriate to order the second respondent to give orders to the uniformed H forces protecting the premises. It averred that the first respondent's premises

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are protected in terms of s 5 of the Protected Places and Areas Act [*Chapter* A *11:12*] because of the services which the first respondent "renders to State Security". It averred that if the order sought by the applicant were granted, State security and peace in the country would be compromised. It emphasised that the "army personnel will not take orders from any person other than their respective authorities or superiors". It described its offer of payment as "a B way of trying to avoid the impending dangers in case of the order being granted".

It is significant that the first and second respondents did not allege that the first respondent's property is State property, despite the applicant having stated that that was the position adopted by the first and second respondents or some of their agents. The absence of that allegation is significant, because C it means that the first and second respondents accept that the first respondent's property, not being State property, is liable to attachment and sale to satisfy a judgment debt against the first respondent. The first respondent was correct in not making that allegation in view of the provisions of the Broadcasting Services Act [*Chapter 2:06*] (No 3 of 2001) and the Zimbabwe Broadcasting Corporation (Commercialisation) Act 26 of 2002 which repealed the D Zimbabwe Broadcasting Corporation Act [*Chapter 12:01*] and provided for the formation of successor companies to take over the functions, assets and liabilities of the Zimbabwe Broadcasting Corporation.

The return of service of an officer of the court such as the Sheriff or the Deputy Sheriff or the messenger of court is accepted *as prima facie* proof of E what is stated therein, but it is capable of being rebutted by clear and satisfactory evidence: *Gundani v Kanyemba* 1988 (1) ZLR 226 (S) at 229 F. The High Court Act [*Chapter 7:06*] provides to similar effect in s 20(3). The first and second respondents did not seek to meaningfully challenge or dispute the contents of the various returns rendered by the Deputy Sheriff. I must accept that what is stated therein is true. F

The Deputy Sheriff is empowered by law — r 335 (2) of the High Court of Zimbabwe Rules 1970 — to use force to gain entry into premises. The subrule provides that:

"So far as may be necessary to the execution of any such writ, the Sheriff or his deputy may open any door of or in any premises, or of any piece G of furniture in any premises, if opening is refused or if there is no person there who represents the execution debtor; and the Sheriff or his deputy may, if necessary, use force to that end".

Section 55 of the High Court Act provides for the appointment of a Sheriff for Zimbabwe. His office is, in terms of s 55(1)(b), a public office. The Sheriff is empowered by s 55(3) to appoint deputies for whom he shall be H

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A responsible. In terms of s 22(2), any person who obstructs the Sheriff or a Deputy Sheriff or his assistant or a sheriff's agent in the execution of his duties shall be guilty of an offence and liable to a fine not exceeding five hundred dollars (now "level five") or to imprisonment for a period not exceeding six months.

B It is clear from the above cited provisions of our law that the Sheriff and his deputy are creatures of statute. They are officers of the court and Parliament, in its wisdom, conferred on them the function of serving court process and executing writs. Rule 335(2) indicates the power which the legislature intended him to have. See Ex parte *Kaefer Insulation (Pty) Ltd: in re Kaefer Insulation v Sharneck* 1984 (3) SA 533 (W) at 536G. It is also clear that C Parliament, in its wisdom, created an offence in relation to the obstruction of the Sheriff or his deputies in the performance of their work. The evidence before me, which was not challenged in the opposing affidavit of the first and second respondents, suggests, as borne out by the several returns made by the Deputy Sheriff, that he was obstructed in the performance of his duties, hence his last return to the effect that he was unable to carry out his task when the D police did not render him the assistance which he had requested. Having regard to the powers of the Deputy Sheriff and the manner in which Parliament sought to secure the efficient carrying out of his functions, it would be extremely remiss of this court if it did not assist him to carry out its own processes. That would stultify the court's own processes and it would, E in fact, amount to conniving at and condoning the conduct of a person who is in defiance of the law. This court does not enforce its judgment if the judgment creditor does not set the court's machinery into motion: *Botes v Goslin* 1987 (2) SA 716 (C) at 721 G. The applicant has done just that and this court cannot but assist the applicant in enforcing its own judgment.

The applicant made much out of the fact that the first respondent's premises F are a protected place or area in terms of the Protected Places and Areas Act [*Chapter 11:12*]. When challenged by the applicant's legal practitioner to show that the appropriate Minister issued an order in terms of either s 4 or s 5 of the Protected Places and Areas Act, the first respondent's legal practitioner was unable to do so. I allowed him time until the day after the hearing to establish this fact and he still was unable to do so. He filed a written G submission to the following effect:

"As promised yesterday I write to advise that the first respondent falls under the Protected Places and Areas Act. The Act does not specifically mention any area as such but via s 4 of Chapter 11:12, the Zimbabwe Broadcasting Corporation is included under the Act. Section 3 also H shows that the Zimbabwe Broadcasting Corporation is a protected place

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or area as the Commander of the Army and Commissioner of Police have A placed soldiers and policemen thereat to exercise powers of authorised officers. The Act is silent on specific areas but the description given in the Act covers Zimbabwe Broadcasting Corporation as it is strategic institution for State Security reasons and for dissemination of information to the nation."

On the evidence before me, I am satisfied that the appropriate Minister has B not declared the first respondent's premises to be a protected place or a protected area. The premises may be *de facto* protected, which is not unreasonable, but that does not bring them within the ambit of the relevant statute. But even if the first respondent's premises were a protected place or a protected area, that by itself would not debar the Deputy Sheriff from C accessing the premises for the purposes of carrying out his lawful functions. That much is clear from a reading of ss 4 and 5 of the Protected Places and Areas Act. I am not persuaded that the first respondent was correct to base its explanation for the Deputy Sheriff's inability to perform his functions due to obstruction, on the provisions of the Protected Places and Areas Act.

The first respondent sought to justify the obstruction of the Deputy Sheriff D by stating that the army personnel "will not take orders from any person other than their respective authorities or superiors". It also stated in para 6 that:

"If the order is granted it will still be impossible for it to be executed since of all cited parties no one can give orders to members of the army".

I think that the respondent has not only missed the point but it has also E misrepresented the position of the uniformed forces. There is no suggestion on the affidavits that the members of the uniformed forces were instructed to prohibit the Deputy Sheriff from entering the premises to perform his statutory function. The members of the uniformed forces, especially the police force, are the same that would routinely assist the Deputy Sheriff to perform his function if he meets with resistance. They would smooth his way. F The return made by the Deputy Sheriff on 22 August indicates that Mr Mapope, the first respondent's security officer, played a significant role in denying him access. I do not think that it would be proper to make a finding against members of the uniformed forces who guard the first respondent's premises and bring them into this matter. For this reason I will decline to order that any documents be served on them. If indeed they were actively G involved, as the respondent seems to suggest, then it would be a matter for the law enforcement agents to act in terms of s 22(a) of the High Court Act. In my view, any person who guards the premises of the first respondent would be subject to the direction of the occupier of the premises in regard to who may or may not access the premises. H

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A The first respondent did not counter-apply for a stay of execution. Where a judgment of the court is to be executed, the only way the judgment debtor may stop the attachment and removal of property is by applying for a stay of execution and show good cause thereafter. On considering such an application the court may grant or refuse a stay. The first respondent has not done that. Instead, it urged the court to deny the applicant the relief it sought on the B grounds that the first respondent was prepared to pay the debt in three instalments. In para 7 of the opposing affidavit the first and second respondents stated that:

"the respondent had not paid because of the crisis indicated above (the dire financial constraints) but however has made out a cheque in the sum of C $1 000 000 being part payment to show its commitment to settling the debt".

This averment suggested that the cheque was made out in response to this application. It turned out at the hearing that the cheque referred to was for $1 509 095.42 and that it was made out on 26 April 2002. The first respondent's legal practitioner explained that the cheque was not delivered D to the applicant because the first respondent was short of funds at that time. He also stated that he was instructed by the first respondent that the balance of the judgment debt would be paid by 15

October 2002. The applicant did not accept the *bona fides* of the first respondent and expressed doubts that it had the funds to pay the debt. It seemed to me that there was some basis for disputing the first respondent's *bona fides.* When the summons was served E on it the first respondent by its letter dated 8 April 2002 undertook to pay the amount owed by 18 April 2002. It did not pay. When judgment was entered against it on 7 May 2002 it still did not pay. It is only when this application was lodged that it produced the cheque made out on 26 April 2002 to show its commitment to pay. The first respondent had known as from 25 June 2002 F when the writ of execution was served upon it, that the applicant intended to enforce its judgment by attachment and removal of property and its sale in execution. The removal of the property was, as per the return dated 25 June 2002, to be effected on 17 July 2002. Still the first respondent did not pay. It did not (and this is significant) apply to court for a stay of execution. I therefore find the applicant's misgivings about the first respondent's *bona* G *fides* to be reasonable. The only point which the first respondent's legal practitioner seemed to me to have made with some degree of conviction is that this matter should not be dealt with on an urgent basis. I think that the urgency arises from the fact that the Deputy Sheriff was obstructed from carrying out his function and in consequence thereof the judgment creditor was denied his right to execute against the judgment debtor's property H without lawful excuse. The precedent that would be set if the court did not

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move quickly to ensure that its processes are complied with would, without A doubt, not be in the interests of the administration of justice in this country. It is of utmost importance that the courts must quickly come to the assistance of court officials where there is evidence that they are being impeded in the performance of their functions. A failure by the court to respond in this manner would have serious implications on the administration of justice B

At the first hearing on Monday 23 September 2002 I directed the legal practitioners to file their heads of argument. The first and second respondents' legal practitioner did not comply with that directive and was content to make his submissions orally. Because he asked to do so, and the applicant's legal practitioner did not object, I allowed him to do so in order to save the court's time and the convenience of all the parties. I had also directed the legal C practitioners to address me on whether or not this was a case where the court should deal with the matter to finality. Both legal practitioners addressed me on it. I was satisfied that this was a case which I had to determine with finality because, as pointed out by Mr *Manase,* the terms of the temporary relief sought were in the nature of the final relief. The lack of merit in the first respondent's case, the illegality of the conduct leading to the obstruction of D the Deputy Sheriff and the importance of the application for the administration of justice are factors favouring the final determination of the application. The third and fourth respondents were served with the application on 20 September, 2002 and they were notified of the date of the hearing. They did not file any papers in opposition. I must therefore hold that they did not intend to oppose E the relief sought by the applicant and that they would abide by the decision of the court.

In my judgment, the applicant is entitled to execute a judgment in its favour. It is entitled to seek the enforcement of the judgment through the Deputy Sheriff who is empowered by law to execute writs. The Deputy Sheriff cannot, without lawful excuse, be hindered in the performance of his work. F I am satisfied that, from the returns that he made to the applicant's legal practitioners, he was hindered from carrying out his lawful function. The first respondent has not counter-applied for a stay of execution. I therefore have no basis for staying the execution of the order of this court in case No HC 3298/02 issued on 7 May 2002. G

I may, however, observe that in my view the execution of the writ by an officer of this court, and by a statutory appointee at that, and the granting of the order sought is unlikely, contrary to the first respondent's averment to that effect, to "actually compromise the security and peace of the country". I am certain that a little of the movable property of the first respondent will, if attached and sold, raise enough money to meet the amount of the judgment H

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A debt. I may also observe that the first respondent's legal practitioner failed, despite being invited to do so, to explain what the deponent to the opposing affidavit meant in para 8 when she stated that the undertaking made by the first respondent to pay the debt was not intended to frustrate the judicial process but that it was made in good faith, "and also as a way of trying to avoid the impending dangers in case of the order being granted". That the legal B practitioner could not fully explain that statement was not surprising as, in my view that statement was not necessary to make in light of the straightforward nature of the issue before the court. The issue is simply whether a judgment creditor and the Deputy Sheriff may be barred from attaching sufficient property to satisfy

a judgment of this court. It was not necessary in any event C for the first and second respondents to blow out of all proportion such a simple matter. It was also unnecessary for them to draw in the members of the uniformed forces who, by all indications, are neutral parties to this dispute and who guard the first respondent's premises to provide the necessary security to a national asset of strategic importance. In conclusion, I think this is an application which should not have been made if the parties had D negotiated on the repayment terms in good faith. If the first respondent showed greater good faith it seems to me that as a big organisation it will be able to pay off the debt immediately. In the meantime, the removal must proceed, unless the parties on their own can reach an amicable solution in regard to the payment terms.

There being no basis to deny the applicant the relief it seeks as well as the E costs it asked for, I make the following order:

It is ordered that—

1. The first and second respondents shall permit the third respondent to enter the first respondent's premises for the purposes of removing the first respondent's property under judicial attachment; F
2. The fourth respondent shall give to the third respondent all such assistance as he may require;
3. The first respondent shall pay the costs of this application on a scale as between legal practitioner and client.

G *Atherstone & Cook,* applicant's legal practitioners

Manase & Manase, first and second respondents' legal practitioners

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[zRPz]CHISESE v GARAMUKANWA 2002 (2) ZLR 392 (S)
2002 (2) ZLR p392

Citation	2002 (1) ZLR 392 (S)
Case No	Judgment No. S68-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Gwaunza AJA
Heard	17 June 2002; 30 September 2002
Judgment	30 September 2002
Counsel	*P C Paul,* for the appellant *TP Kawonde,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote

Costs — legal practitioner and client costs — when to be awarded — party showing lack of bona fides. D

Interest — debt expressed in foreign currency — rate of interest applicable

Practice and procedure — judgment expressed in foreign currency — date of conversion into local currency

[zHNz]Headnote

The appellant paid tuition fees for the respondent's son in the United E Kingdom. The payment was made in pounds sterling and the parties regarded it as a loan by the appellant to the respondent. The respondent avoided repaying the loan for nine years and, when the appellant finally sued him for repayment, raised a series of specious defences. The High Court found that the respondent was indebted to the appellant, but the F appellant appealed to the Supreme Court on the issues of how much was owing, the currency in which it was to be paid, the appropriate exchange rate and the rate of interest payable. The Supreme Court, having determined the outstanding amount and that it was to be paid in Zimbabwe dollars, dealt with the questions of the appropriate exchange rate, the rate of interest, and costs: G

Held, that in the absence of any stipulation to the contrary the general rule should be followed, that the applicable rate of exchange is the one prevailing at the time of payment and not at the time the contract was entered into.

Held, further, that although the money of account in this case was pounds sterling, the money of payment was Zimbabwe currency. Hence the rate H

A of *mora* interest payable on the outstanding amount was the rate prescribed in Zimbabwe.

Held, further, that costs on the legal practitioner and client scale can be awarded only in exceptional cases, but lack of *bona fides* on the part of a party may justify such an award. While it is acceptable for a litigant to argue points in his defence, there is a line to be drawn between that B and a deliberate attempt such as the respondent's to abuse court process in an endeavour to evade his legal obligations.

[zCAz]Cases cited

AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd C 1997 (2) ZLR 77 (S)

Barry Colne & Co (Tvl) Ltd v Jackson's Ltd 1922 CPD 372

Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co (2) 1998 (2) ZLR 229 (H)

Davidson v Standard Finance Ltd 1985 (1) ZLR 173 (H)

Industrial Equity Ltd v Walker 1996 (1) ZLR 269 (H)

D *Mawere v Mukuna* 1997 (2) ZLR 360 (H)

[zCIz]Case information

P C Paul, for the appellant

TP Kawonde, for the respondent

[zJDz]Judgment

E **Gwaunza AJA**: This is an appeal against a judgment of the High Court, in which the respondent was ordered to pay the appellant $22 341.26 together with interest on the sum of $66 000 from 7 April to 14 August 1995 and on the sum of $22 341.26 from 15 August 1995 to the date of payment. Although the respondent had also, initially, filed a cross-appeal in relation to F the part of the judgment concerning his counter-claim in the court *a quo,* he later abandoned such appeal.

The events that gave rise to this dispute arose nine years ago, in 1993. The appellant was then living and working in the United Kingdom, while the respondent owned, and was resident on, a farm in Chegutu, Zimbabwe. The two were related by marriage. The respondent had a son studying at a G university in the United Kingdom.

It is not in dispute that at that time the respondent's son was facing imminent deportation from the United Kingdom following his father's failure to pay the required tuition fees for his education. Even though the parties gave different versions of the background to, and nature of, the transaction, it is H also not in dispute that the appellant came to the rescue and, in three

instalments, paid the whole amount outstanding or required in relation to the A university fees in question. The fees totalled £5 490 and were paid in August and October 1993.

The appellant averred that the fees paid constituted a loan to the respondent, while the respondent's evidence was that the fees represented the purchase price of a tractor bought by the appellant from him. Despite this conflict in B the parties' evidence, the learned trial judge correctly considered that the respondent did not dispute that the fees were paid on his behalf by the appellant, nor that

he had a personal obligation to repay to the respondent in cash or kind the amount disbursed. The trial judge was satisfied, however, that at the time the fees were paid, there was no definite arrangement between the parties as to how and when the amount was to be repaid. Nor was anything C said at that stage about interest.

It is evident from this, and the many other conflicts in the parties' interpretation of the transaction, that they did not foresee what must have been regarded as an intra-family arrangement of mutual benefit, ever becoming the subject of protracted litigation between them. This explains the difficulty the appellant, D in particular, has had in attempting to fit the events surrounding this transaction into a legally acceptable mould.

Having considered the evidence of both parties, the learned judge in the court *a quo* accepted, correctly in my view, the evidence of the appellant that while he avoided committing anything to writing, the respondent had later undertaken to repay the amount owed through the provision of a tractor, valued at over E Z$50 000, to the appellant. The appellant, however, never saw this tractor. On her visit to the respondent's farm in 1994, the appellant mistakenly believed the tractor in question was one of two that were then at the farm, which both parties agree were not in a good state of repair. The respondent did not correct this misconception, and in addition refrained from informing F the appellant that the tractor meant for her was at that time in Harare.

The trial judge, however, rejected the evidence of the appellant that in addition to the tractor, the respondent had agreed to build for the appellant a six-bedroomed house on a portion of his farm which he had, incidentally, sold to a company owned by the appellant and her children. Having considered the evidence before the court on this matter, I find no fault with G the trial judge's rejection of that evidence.

It will be gathered from this that the matter of the university fees was not the only interaction between the parties. In November 1993 they signed a deed of sale, in terms of which the company, JV Itayi Farming Enterprises (Private) Limited, represented by the appellant, bought a subdivision of the H

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A farm owned by the respondent. The purchase price was to be paid, after the initial deposit of $200 000, in instalments over a period of time.

The two agreements, though separate and distinct, nevertheless impacted on the other in one significant way. This was that somewhere along the line, as the dispute concerning the repayment of the university fees to the appellant by the respondent raged, it was agreed that the arrears which the appellant's B company then owed to the respondent be offset against part of the fees owed to the appellant by the respondent. It is not in dispute that these arrears, which totalled Z$43 658.74, fell short of the university fees paid by the appellant on behalf of the respondent. The arrears, by way of set-off, were only paid after 14 August 1995.

C While acknowledging this set-off, the appellant, in her notice of appeal, asserts that the balance owing to her was £3 011. I have failed to find justification for this amount, especially since no breakdown was provided to show how it was arrived at. This is because the parties are agreed:

(i) that the amount of fees paid by the appellant was £5 490; and D

(ii) that Z$43 658.74, offset against the £5 490 owed to the appellant by the respondent, translated to £4 365.87 at the conversion rate of £1 = Z$10 (see the respondent's summary of evidence in the court *a quo).*

When the latter amount is subtracted from the £5 490 the balance is, by my calculation, £1 124.13. I will accept, therefore, that this is the amount, exclusive of any interest, that the appellant was entitled to claim against the E respondent in the court *a quo.*

This is, however, not the amount that the learned judge in the court *a quo* found was owed to the appellant. She found, instead, that even though the demand was made for the Zimbabwe dollar equivalent of £5 490, less the set- off, the appellant had, herself, quantified the Zimbabwe dollar equivalent at F $66 000. This amount is referred to in a letter written by the appellant's legal practitioners to the respondent's legal practitioners. The learned judge, after observing that the appellant in her evidence confirmed this amount and that the respondent had not in effect disputed it, ruled that this was the Zimbabwean equivalent of what was owed, minus the set-off of Z$43 658.74. She then granted the order alluded to in the first paragraph of this judgment.

G It is important to note that before this court, neither party, albeit for different reasons, accepts $66 000 as the amount that was owed by the respondent to the appellant. The appellant's claim is as set out in the summons. The respondent's position, on the other hand, is that the total amount owing was Z$54 490.05, leaving, after subtracting the set-off (i.e. Z$43 658.74), a H balance of $10 831.31.

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I will consider first the correctness or otherwise of the learned trial judge's A finding that the capital amount owed to the appellant was Z$66 000. There seems to be no dispute that the first reference to this amount was made in a letter from the appellant's legal practitioners to the respondent, in these words: *

"You are aware that Mr Garamukanwa borrowed the sum of $66 000 B from Mrs Mapondera during 1993." ("Mapondera" being the appellant's maiden name).

Mr *Kawonde,* who appeared for the respondent in the court *a quo,* expressed doubt as to the basis for arriving at this figure since, according to him, even the appellant's lawyer was not aware of the exchange rate at the time the letter was written. Indeed, there is no indication that in that letter the exchange rate, C if any, that was used to arrive at that figure, was mentioned. It appears the amount was arbitrarily arrived at without reference to any exchange rate. Finally, it is significant that the letter in question was not a letter of demand and, more significantly, that in her summons the appellant made no reference to the figure of Z$66 000, since her claim was for payment of £5 490 less the amount that was set-off. D

Against this background, I am persuaded by the arguments advanced on behalf of both parties that the court *a quo* should not have accepted as proved that the amount of Z$66 000 was the Zimbabwean equivalent of the capital amount owed by the respondent to the appellant. I will accept and proceed on the basis that the amount, exclusive of any interest, that the appellant should E rightly have claimed, both in the court *a quo* and in this Court, is £1 124.13, payable in Zimbabwe dollars.

In reaching this conclusion, I should note that I agree with the learned trial judge's finding that the appellant, on her earlier visit to the respondent's farm in 1994 and after her return to the country some time later, neither saw, nor had delivered to her, the tractor in question. Nor is the delivery of the tractor F in question still an option. The respondent submitted he has since sold the tractor to someone else, and that he had not transmitted the money to the appellant. Therefore, the respondent, not having fully repaid the amount owed to the appellant, even after the set-off, still owed the appellant £1 124.13, exclusive of any interest payable. G

The respondent's argument that the appellant compromised her entire claim by agreeing to the set-off, was correctly rejected by the court *a quo.* In this connection, I would agree with Mr *Paul's* contention that the failure of the

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A agreed method of payment (i.e. the tractor) did not extinguish the respondent's obligation to pay the full amount owed.

This then brings me to the crux of this appeal, which is, firstly, the rate at which this amount is to be converted to Zimbabwe dollars and, secondly, the interest rate to be applied.

B It is contended for the appellant that the amount owing must be converted to Zimbabwe dollars and paid, at the rate applicable at the time payment is effected by the respondent. The respondent, on the other hand, argues that this amount must be paid, in Zimbabwe dollars, at the rate prevailing at the time it was paid to the university in question, in 1993.

On the question of interest, the appellant contends this must be paid, in C relation to pound sterling, at the rate of 8 per cent per annum, as being the applicable rate in the Supreme Court of Judicature in the United Kingdom. The respondent, on the other hand, avers no interest was payable by him since no agreement on this issue was ever reached by the parties.

CURRENCY OF REPAYMENT

D I will deal first with the question of the currency of payment.

Despite the tenseness of the relationship between the parties, there is no doubt that the two understood that the respondent was not expected to pay the appellant in pounds sterling. Since the agreed means of payment, that is the tractor, was in the end never handed over to the appellant (nor, as appears E from the evidence before the court, did the respondent ever make any serious attempt to hand it over), I am satisfied, as was the learned judge in the court *a quo,* that it was in the contemplation of both parties that any payments would be made in Zimbabwe and in Zimbabwe currency. This is so regardless of the fact that the details of where and how the money was to be paid in Zimbabwe were not canvassed.

F The conduct of the parties also confirms this understanding. The amount of the set-off was calculated and paid locally in Zimbabwe dollars. In addition to his other defences, the respondent contends before this court that if Z$54 490.05 was the amount owing less set-off in the sum of Z$43 658.74, then the balance due by him to the appellant was $10 831.31. Even though no indication of how this figure was arrived at was given, and despite it G having been rejected as the amount owing to the appellant, the amount of $66 000.00, referred to in the letter written to the

respondent's legal practitioners on behalf of the appellant, was expressed in Zimbabwe dollars. All these figures were converted from pounds sterling to Zimbabwe dollars and were to be payable in Zimbabwe.

H In the light of this, I find there is no merit in the contention made for the

respondent that the agreement between the parties was illegal as it contravened A s 8(1) of the Exchange Control Regulations. That section specifically prohibits actions that involve the making, or the incurring of any obligation to make, payment outside Zimbabwe.

APPROPRIATE EXCHANGE RATE

To be determined next is the issue of the exchange rate at which the amount B owing to the appellant should appropriately be converted. That this is an issue at all is evidence of the parties neither having specifically addressed their minds to the matter nor having reached any agreement on it.

It is contended as follows for the appellant:

"... had the arrangement relating to the tractor been fulfilled (the) C appellant would have received a tractor which was worth at least the sterling equivalent of the amount of the loan. If in the year between the time of the loan and the time of delivery there had been a devaluation of the Zimbabwean dollar, this would have no effect because the appellant would not be receiving Zimbabwe dollars but would be receiving a tractor which would be worth at least £5 490.00."

Mr *Paul* went on to say, accordingly, that the implied agreement between the D parties was that if the tractor was unacceptable, the respondent would repay to the appellant the Zimbabwean equivalent of the pounds sterling as at the date of payment.

There is authority to support Mr *Paul's* submission on the question of the rate at which the conversion should be made. The learned author, R H Christie, E in *The Law of Contract in South Africa* 3 ed pp 458-459, stated that the general rule governing situations like the one at hand was laid out as follows in *Barry Colne & Co (Tvl) Ltd v Jackson's Ltd* 1922 CPD 372 at 376-377:

"... failing any such special stipulation (i.e. that payment must be made in foreign currency), payment may be made in the currency of the place F of payment equivalent to the value there of the foreign currency. An agreement, therefore, to pay 100 dollars at Cape Town is satisfied by payment of the value at Cape Town in Cape currency of 100 dollars. At what date must the value be taken, at the date when the contract was entered into, or at the date fixed for payment? ... In a case where foreign trade and foreign currency is concerned, if one must look at the place of payment and not at the place of contract, I think it is not an unreasonable G deduction that as regards time one must look at the time of payment and not at the time of contract - a principle which is in accord with modern commercial usage."

The learned author continues at p 459, in relation to fluctuations in rates of exchange: H

A "Once the place, time and currency of payment have been settled by reference to the terms of the contract and to the above general rule, where not excluded by those terms, any profit or loss accruing to either party as a result of fluctuations in rates of exchange must lie where it falls *[Joffe v African Life Assurance Society Ltd* 1933 TPD 189; *Aktiebolaget Tratalja v Evelyn Haddon & Co Ltd* 1933 CPD 156; *Tropic Plastic and* B *Packaging Industry v Standard Bank of SA Ltd* 1969 (4) SA 108 (D)]."

Applying these principles to the dispute at hand, it is evident that there is no dispute as to the place of the contract. As for the currency of the payment, I have determined from the parties' conduct, that it was understood to be Zimbabwean currency. The dispute as to the time at which the rate of exchange applicable is to be reckoned must therefore be resolved on the basis C of the authority cited above. The time must be the time of payment and not the time of contract. The question of exchange rates' gain or loss that arises in this case, where the exchange rates for pound sterling *vis-à-vis* the Zimbabwe dollar have fluctuated considerably since 1993, must also be resolved on the same basis. In other words, the profit or loss accruing to either party as a result of these fluctuations must lie where it falls. In this case the D loss will lie with the respondent. Had the Zimbabwe dollar firmed, rather than weakened, against the pound, the loss would have had to lie with the appellant.

The respondent therefore is obliged to pay to the appellant the value of £1 124.13 in Zimbabwean currency, exclusive of interest, calculated at the E exchange rate prevailing at the time he effects such payment.

INTEREST

It is not in dispute that from the time the appellant paid the educational fees for the respondent's son, through to the time the parties agreed that the respondent would give the appellant a tractor in repayment of such fees and F thereafter, the question of interest was never discussed between them.

The first reference made by the appellant to this issue would appear to have been in a letter addressed to the respondent's legal practitioners dated November 15, 1993. It should be recalled that the last payment by the appellant in respect of the university fees had been made on 29 October 1993 (£41.00). The other two payments had been made on 17 August 1993 G (£1 300.00) and 20 October 1993 (£4 149). The letter reads as follows:

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Gwaunza AJA

"Dear Sirs, A

SALE FROM B B GARAMUKANWA TO JV ITAYI FARMING ENTERPRISES - LOT 1 OF BENESYDE

This covering letter serves to give notice that should Mr Garamukanwa B fail to sign the document concerning the loan he has received from us, which states that he is to pay interest at the rate of 33% on all outstanding loans from us and from the commencing date of such loans, then he must immediately repay all loaned money.

Yours sincerely, C

E Mapondera V Chisese."

Despite the misleading title, it is not in dispute that the content of the letter D relates to the university fees paid by the appellant on behalf of the respondent. The letter reinforces the appellant's assertion that the money had been paid and was to be repaid by the respondent, as a loan advanced to him. It also supports her evidence that she had unsuccessfully tried to get the respondent to commit to writing his acknowledgement of the debt that he owed to the appellant. E

In the summons the appellant claimed interest on the amount owed, from the date of the letter cited above, i.e. 15 November 1993. Her contention is that that letter had the effect of placing the respondent *in mora.* The learned trial judge, relying on the test set out in the headnote to the judgment in *Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co (2)* 1998 (2) ZLR 229 (H) ruled that the appellant's letter of 15 November 1993 did not meet the relevant F criteria for placing the respondent *in mora.* The headnote reads:

"The demand must be unequivocal or unambiguous. It must specify a date on which payment must be made or performance given and clearly indicate that the plaintiff requires to be paid or receive performance by that date." G

The learned trial judge found the letter of 15 November 1993 to be "ambivalent" and not to have the effect of placing the respondent *in mora.*

I concur with the learned trial judge's finding. A closer look at the letter suggests:

(i) that the appellant prepared and sent to the respondent, for his signature, H

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A a document purporting to be an acknowledgement of debt;

(ii) that the document stated that he was to pay interest on all outstanding "loans" from her, of 33 per cent;

(iii) that such interest was to be reckoned from the commencement date of the loans; and B

(iv) that the respondent had not, as of the date the letter was written, signed the document in question.

The appellant, therefore, demanded in the same letter that the respondent either sign the document or "immediately" repay all the money owed.

It is clear from the above analysis of the contents of the letter that its import c was to demand that the respondent sign the document or else pay all "loaned" money immediately. It does not say that the "loaned" money was to be repaid with interest, nor, consequently, what interest rate would apply. The reference to 33 per cent made by way of hinting at what the document required of the respondent in terms of interest, is not a categorical statement or demand for payment of that interest. While it is evident that the demand encapsulated in D the letter was for immediate payment of the money "loaned", i.e. the capital, it cannot be said that the same applied in relation to the interest or any other amount.

The letter, insofar as it is said to have been a demand for the payment of interest, therefore does not, in my view, satisfy the criteria set out in the headnote cited above, which was relied upon by the learned trial judge.

E Having correctly rejected the letter of 15 November 1993 as containing a proper demand for interest from that date, the learned trial judge was satisfied that the letter of demand to the respondent dated 25 March 1995 constituted a proper demand. Although not constituting part of the

record before this Court, it is not in dispute that such letter demanded payment of interest with F effect from 7 April 1995. Hence the order of the trial court that interest be paid on the amount determined by it as being the Zimbabwe dollar equivalent of the amount advanced (i.e. Z$66 000) from 7 April to 14 August 1995. Thereafter interest was to be paid on the balance left after the set-off, from 15 August 1995 to the date of payment.

G I agree with the trial judge's calculation of the dates from and up to which interest on the capital amount and balance after the set-off is to be calculated.

I have already determined that up to the date of the set-off, which was 14 August 1995, the respondent still owed the appellant the full amount paid by her as university fees, i.e. £5 490. This amount, for lack of a proper H demand, was owed without interest up to 7 April 1995. This state of affairs

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continued until the capital amount owed was reduced by the set-off with A effect from 14 August 1995 to £1 124.13. What therefore is to be determined is:

(i) the interest rate applying to £5 490 from 7 April 1995 to 14 August 1995; and

(ii) the interest rate applying to £1 124.13 from 15 August 1995 to the date B of payment.

The two amounts, together, in Zimbabwe dollar terms, constitute the correct amount of interest owed to the appellant.

The appellant claims interest on the pound sterling amounts owed at the rate of 8 per cent per annum, which is the rate charged by the Supreme Court of C Judicature in England. The learned trial judge rejected this rate and determined that the amount owed was to be paid in Zimbabwe dollars with interest calculated at the rate applicable in Zimbabwe. She correctly observed, on the basis of *Mawere v Mukuna* 1997 (2) ZLR 360 (H), that while it was common cause that the money of account was pound sterling, the court had to determine the money of payment. In *Mawere v Mukuna supra* Chinhengo J D stated at 363H-364 A-B:

"It is important to draw this distinction (between money of account and money of payment) for, if the money of payment is the same as the money of account, then, in my view, the rate at which interest should be calculated is dependent on the money of account. But if the money of payment is different from the money of account, and unless a specific E rate of interest is agreed upon, the rate of interest to be used should be the legal rate applying to the money of payment. Such an interest rate would be based on the assumption that by agreeing to a different currency for the money of payment the parties by implication agreed that the rate of interest applicable to the money of payment would apply."

In casu, I have determined that the parties' understanding was that the money F of payment would be Zimbabwe dollars. It is evident that the parties did not agree on any specific rate of interest. Under these circumstances, I see no reason to depart from Chinhengo J's reasoning (above) concerning the rate at which interest is to be calculated. It has to be the rate prescribed in Zimbabwe. (See also *Industrial Equity Ltd* v G *Walker* 1996 (1) ZLR 269 (H) and *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S)).

The current prescribed rate of interest in Zimbabwe is 25 per cent per annum. This is by virtue of Statutory Instrument 273/93, which became operational from 10 September 1993. This would be the appropriate rate to apply *in casu,* where, as has been determined, proper demand for interest was made with H

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A effect from 7 April 1995.

Taken together with my earlier determination as to the appropriate rate of exchange to apply in converting the amount owed to Zimbabwe dollars, the respondent therefore has to pay to the appellant:

(i) the equivalent in Zimbabwe dollars of £1 124.13 at the exchange rate B applicable at the time of payment, plus interest on that amount at the prescribed rate of 25 per cent per annum from 15 August 1995 to the date of payment; and

(ii) interest on the Zimbabwe dollar equivalent of £5 490 at the prescribed rate of 25 per cent per annum, from 7 April 1995 to 14 August 1995.

There appears to be no dispute that the exchange rate at that time was £1 : C Z$10.

COSTS

In the written submissions for the appellant at the close of the case in the court *a quo,* a request was made on behalf of the appellant that the respondent should pay the costs of suit in the High court on a legal practitioner and client D scale. Before this court the appellant prays that the respondent pays the costs of this appeal on the ordinary scale. In her judgment, the learned trial

judge did not address the request for costs on the higher scale but entered judgment in favour of the appellant with costs on the ordinary scale.

It is submitted in this court that the argument for an award of legal practitioner E and client costs is so strong that the learned trial judge either did not apply her mind to the matter or misdirected herself. This misdirection, it is further submitted, would be that the learned trial judge did not think that the conduct of the respondent was reprehensible.

Whether or not the learned trial judge was persuaded to order punitive costs, I agree that the reasons for her decision on that point should have been given.

F Mr *Paul,* for the appellant, lists, among others, the following actions taken by the respondent, which he submits are indicative of his "deplorable behaviour" and an attempt to do everything in his power to "wriggle" out of his responsibility to effect payment; *viz,* that the respondent:

(i) "studiously" avoided committing himself in writing, to the terms under G which repayment was to be made;

(ii) initially raised the defence, in his first plea, that the loan in question was only repayable on completion of his son's education;

(iii) failed to repay the loan after his son's education was completed, only to raise for the first time in 1998, four years after the event, the defence of H a counter-claim against the appellant;

(iv) shortly before the trial in the court *a quo,* sought to withdraw the A admission that there was a loan and to contend that the money which was paid to the university constituted payment for a tractor which he had sold to the appellant;

(v) made the "ridiculous" assertion that in accepting a set-off, the appellant had waived payment of the balance of moneys owed to her; B

(vi) contended that since the appellant indicated she was no longer interested in the tractor, he could keep the tractor and not pay back the fees in question; and

(vii) attempted to rely on the fact that repayment of the loan could not be enforced because of a contravention of the Exchange Control Regulations. C

It is further contended for the appellant that all these defences were either dishonest or without merit.

Mr *Paul* cited other examples of what he termed the respondent's ineptitude or unreasonable behaviour. These examples, however, relate to the other transaction between the parties, that is, the sale of part of the respondent's farm to the appellant's company and not the dispute at hand. To the extent that D these examples are meant to reinforce the appellant's claim for costs on the higher scale in the present case, I shall not take them into account. The proper time for them to be taken into account is in the context of the litigation said to be right now pending between the parties, and in that respect, in the High E Court.

Mr *Paul* contends further that the gap between legal practitioner and client costs and party and party costs is considerable, meaning that a party who is obliged to take a defendant to court, in this case the appellant, would be considerably out of pocket even if she wins. As a result of the respondent's unjustified failure to effect payment, at the latest by August 1994, the appellant, it is contended, had been forced to institute action against him. F

The respondent opposes the claim for costs on the higher scale but does not address all of the points raised by the appellant in support of such a claim. It is submitted for the respondent that the appellant has not established that the case was so exceptional that such costs were warranted. * It is contended in this respect that the appellant persisted with the claim of £5 490 even after a G set-off had been agreed on, and that up to the last minute she had insisted that the payment should be in pound sterling as at the date of payment, and lastly that against the "sum of evidence" she had insisted that interest should be reckoned from the date when the amount was paid in the United Kingdom.

A As all these points were arguable, it is further contended, it would be prejudicial if the courts penalised litigants for taking such points.

It is correct that costs on a higher scale can only be awarded in exceptional cases. Lack of *bona fides* on the part of the party against whom such costs are sought may justify an award of costs on the higher scale. See *Davidson v Standard Finance Ltd supra* at 178 D-E where the following passage is cited B with approval:

"Absence of *bona fides* in conducting litigation may constitute a ground for awarding costs on an attorney and client scale." *

The appellant is in effect alleging a lack of *bona fides* on the part of the respondent. I do not find this allegation to be without merit. As the learned C judge in the court *a quo* correctly found, the respondent was not being truthful when he asserted that the £5 490 paid on his behalf by the appellant constituted the purchase price of the tractor. Given the evidence before the court, the probabilities are very strong that the agreement concerning the tractor was reached after the money had been paid, and following the respondent's refusal to commit his obligation to repay this money to writing.

D This refusal, itself an indication of his lack of *bona fides* in the light of the appellant's obvious act of kindness towards him, left the way open for the respondent to come up with various defences to the action. A closer look at the defences shows they were advanced with only one purpose in mind — to avoid making any payment at all to the appellant.

E Firstly, albeit that plea was withdrawn, the respondent's immediate response to the summons was to admit the loan but give the defence that it was only to be repaid at the completion of his son's studies.

Having withdrawn this defence, the respondent came up with the discredited one that the £5 490 was the purchase price of a tractor. By his admission, he F never showed the appellant this tractor, but instead did nothing to disabuse the appellant of the misconception that she laboured under, that the tractor was one of the two that she saw at his farm, which were in a bad state of repair. Also by his own admission, the respondent used the tractor that he had meant to give to the appellant throughout the period of the dispute and in the end sold it and kept the proceeds. When the appellant communicated that she was not G interested in either of the two tractors she had seen, the respondent did not, as one would have expected him to do had he been honest and genuine in his dealings with her, correct the misconception she suffered under, nor inform

her about the existence of the other tractor - presumably in good condition A - that he said he meant to give to her.

The other defence that the respondent proffered, that the transaction contravened the Exchange Control Act, was another attempt to evade the payment in question.

As if to make sure no stone was left unturned in his efforts to avoid having B to pay, the respondent, much later in the proceedings, came up with a counter- claim relating to storage and accommodation fees, respectively, for the appellant's goods and for the appellant and her relatives. The quantum of the counter-claim was calculated to exceed the balance that the respondent still owed the appellant. The court *a quo* found that the respondent failed to prove any agreement between the parties concerning the storage and accommodation C fees and, in my view, correctly dismissed the counter-claim.

The respondent did not give up. After the set-off was agreed upon, he came up with the defence, correctly found by the trial court to have no legal basis, that by agreeing to the set-off the appellant had compromised her entire claim and was therefore not owed anything by him. It is not in dispute that through D the set-off only a part of the amount owed to the appellant was applied towards repayment of her company's debt to the respondent.

Taken together, all these efforts by the respondent paint the picture of a calculated and sustained campaign to avoid repaying a loan that was advanced, in good faith and with good intentions, by the appellant to and on behalf of the respondent. It is not disputed that without such payment the E respondent's son would have been expelled from the university and deported to Zimbabwe. While it is acceptable for a litigant, as contended for the respondent, to argue points in his defence, a line must be drawn between this and a deliberate attempt to abuse the court process in an endeavour to evade one's legal obligations. It is abundantly clear that from the time he was F requested, and refused, to reduce this obligation to writing (if not before), right up to the time of this appeal, the respondent never intended to repay the loan in question. This was despite the fact that he admitted he had an obligation to repay it. Because of his conduct, the appellant was undoubtedly put through unnecessary stress and the high cost of this litigation.

The respondent, in any case, has failed to disprove this lack *of bona fides* on G his part. Contrary to what was contended for him, the appellant was, in the event, within her rights to claim payment of the amount owed to her, in Zimbabwe currency converted from pound sterling at the exchange rate prevailing at the time of payment. Nor did she persist with her original claim of £5 490, having conceded the set-off and reduced her claim accordingly. H

A The appellant's claim for interest has turned out to be justified, albeit not from the intended date. The respondent's attitude was to deny any obligation to pay interest on the amount owed, even

though proper demand for it was made as long ago as 1995, and even though he himself demanded interest from the appellant in relation to what she owed him.
The effect of all this is to remove any doubt in my mind as to the respondent's B lack of *bona fides* in his entire relationship with the appellant, and in his dealings with the courts of law that have considered this dispute.
I am satisfied that the respondent's conduct in this whole affair calls for an award against him of costs on the higher scale.
It is accordingly ordered as follows: C
1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and is substituted with the following:
(i) Judgment is entered against the respondent in favour of the appellant for the payment of: D
(a) the equivalent in Zimbabwe dollars of £1 124.13, calculated at the exchange rate applicable at the time of payment, with interest on that amount at the prescribed rate of 25% per annum with effect from 15 August 1995 to the date of payment; and
(b) interest on the Zimbabwe dollar equivalent of £5 490, calculated at the E exchange rate of £1 : Z$10, at the prescribed rate of 25 per cent per annum, with effect from 7 April 1995 to 14 August 1995.
(ii) The respondent will pay the costs of this action on a legal practitioner and client scale.
F Chidyausiku CJ & Cheda JA concurred
Wintertons, appellant's legal practitioners
G *Kawonde & Co,* respondent's legal practitioners

* See the respondent's heads of argument above — *Editor*
* *Davidson* v *Standard Finance Ltd* 1985 (1) ZLR 173 (H) is cited as authority for this proposition.
* Quote from Cilliers *Law of Costs* at pp 66-67.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/GALANTE v GALANTE (3) 2002 (2) ZLR 408 (H)

[zRPz]GALANTE v GALANTE (3) 2002 (2) ZLR 408 (H)
2002 (2) ZLR p408

Citation	2002 (2) ZLR 408 (H)
Case No	Judgment No. HH-177-02
Court	High Court, Harare
Judge	Smith J
Heard	22 July 2002; 26 July 2002; 1 October 2002
Judgment	1 October 2002
Counsel	A P de Bourbon SC and C P Hunt, for the plaintiff E W W Morris, for the defendant

Case Type Civil trial

Annotations No case annotations to date

[zFNz]Flynote
Conflict of laws — marriage — proprietary rights of spouses — law D governing
Family law — child — custody — interests of child paramount — factors to be considered in assessing interests of child — whether young children must necessarily be placed in custody of mother
Family law — divorce — reform of law — need for mediation in cases involving children — desirability of introducing family court system E
Family law — husband and wife — property rights — law governing proprietary rights of spouses
[zHNz]Headnote
Zimbabwe's adversarial system of civil litigation is, on occasion, inimical to the interests of children when questions of divorce, custody and F access are involved and when one or both of the parents try to use their children as a lever or weapon against the other. The Law Development Commission should investigate the merits of establishing a system in which mediation is possible in such cases, particularly where the children are suffering from Parental Alienation Syndrome, and of introducing a system of family courts which are easily accessible, less G formal and able to deal with domestic disputes more expeditiously than the ordinary courts can.
The plaintiff sought an order of divorce from his wife, division of their property and custody of their children, a boy of 14 and a girl of 12. For some years his wife had poisoned the children's minds against the H plaintiff and had tried to keep them from having any meaningful contact

A with him, despite several court orders granting him rights of access to them. As a result, both children suffered from Parental Alienation Syndrome. About six months before the trial, the plaintiff's wife had taken the children with her to California in the United States, where the plaintiff had been domiciled at the time of their marriage, and had defied a court order directing her to return the children to Zimbabwe. She had B instituted proceedings in California for custody of the children, falsely alleging to the court there that the issue of custody was not pending in Zimbabwe.
Held, that a court dealing with a dispute over the custody of a child must approach it on the basis of "what are the best interests of the child?" It C is the interests of the child that are of paramount importance, and there is no rule of law that the mother should be awarded custody of young children.
Held, further, that in determining what is in the best interests of a child there are many factors that must be taken into account, in particular those listed in *McCall v McCall* 1994 (3) SA 201 (C) which relate to the D capabilities, character, temperament and capacity of the parents, the ties between the parents and the child, the child's existing environment and preferences, the desirability or otherwise of keeping siblings together, and the desirability or otherwise of applying the doctrine of same-sex matching.
Held, further, that it was highly desirable that the plaintiff should be E reintroduced into the children's lives, but it would be too traumatic for them to be suddenly removed from all contact with their mother. The plaintiff's wife should therefore be ordered to return the children to Zimbabwe. The question of their custody should be decided after a qualified child psychologist had interviewed them and made F recommendations as to their custody and guardianship and the rights of access of the non-custodian parent.
Held, further, in regard to the division of the parties' property, that since the plaintiff was domiciled in California at the time of their marriage the parties' proprietary rights *inter se* were governed by the law of California, which had a system of community of property acquired during the G marriage.
[zCAz]Cases cited
Bell v Bell 1991 (4) SA 195 (W)
Critchfield & Anor, ex parte 1999 (3) SA 132 (W)
Esterhuizen Esterhuizen 1999 (1) SA 492 (C)
H *Kuperman v Posen* 2001 (1) ZLR 208 (H)

McCall v McCall 1994 (3) SA 201 (C) A
Sperling v Sperling 1975 (3) SA 707 (A) *T v M* 1997 (1) SA 54 (A)
[zCIz]Case information
A P de Bourbon SC and *C P Hunt,* for the plaintiff
E W W Morris, for the defendant B
[The judgment has been altered slightly to conceal the names of the children of the parties.]
[zJDz]Judgment
Smith J: C
BACKGROUND
The parties were married in Harare in September 1985. At the time of the marriage the plaintiff was domiciled in California, in the United States of D America. After their marriage the parties lived in California where the two children were born. The eldest child is a boy, born on 1988, and the other is a girl who was born in 1990. In November 1992 the family moved to this country. The plaintiff abandoned his domicile of origin and acquired a domicile of choice in this country. He has a permanent residence permit. On 3 November 1998 the defendant instituted proceedings against the plaintiff E for a decree of divorce and other relief. However, on 5 December 2000 the defendant withdrew her summons because she wanted to institute similar proceedings in California. The plaintiff then instituted these proceedings for a decree of divorce on the following day, 6 December. At that stage he accepted that it was in the best interests of the two children that their custody should be awarded to the defendant. F
The defendant entered a special plea alleging that the plaintiff was not domiciled in Zimbabwe as he had not abandoned his domicile of origin. That plea was dismissed — see *Galante v Galante* HH 31-2000. The defendant appealed to the Supreme Court against the dismissal of her plea but her appeal was dismissed, on the basis that it constituted an abuse of the process of the G court. The defendant also filed a claim in reconvention in which she submitted that, in accordance with the principles of international law and the laws of California, the proprietary consequences of the marriage are governed by the laws of the country or state of the domicile of the husband (i.e. the plaintiff) at the time of the marriage and the parties are accordingly married in community of property in accordance with the laws of California. The H
2002 (2) ZLR p411
Smith J
A defendant agrees that the marriage has broken down irretrievably and that there are no prospects of a normal marital relationship being restored. The defendant claimed a decree of divorce, custody of the two minor children, with the plaintiff having right of reasonable access, maintenance for herself and the children, some of the movable matrimonial property and a sizeable cash payment. B In June 2001 the plaintiff filed an amended declaration in which he claimed that it would be in the best interests of the minor children if their custody was awarded to him. He based this claim on the grounds, *inter alia,* that the defendant had, over the years, slowly and effectively alienated the childrens' affections from him, by ensuring that they had minimal contact with him. He C alleged that the defendant is not an appropriate role model to bring up the children. He agreed to pay the defendant $15 million and to transfer to her a Cessna aeroplane and a Rolls-Royce motor vehicle. The defendant's special plea was argued on 5 December 2001 and dismissed. The matter was set down for trial on 25 February, 2002. The defendant failed to appear. She had taken the children and gone to California. Her legal D practitioner claimed that she had suffered a pulmonary embolism on the flight to California and been advised that she should not fly for at least six months. The court agreed to postpone the hearing and fixed 22 July as being the date trial would commence. The trial did commence on that date, but again the defendant was not present. She had remained with the children in California. In the interim she had instituted legal proceedings in California. E In those proceedings she requested that the Superior Court of California assume full jurisdiction of issues regarding child and spousal support and for division of the marital estate, saying that those issues are not currently raised or pending in any other court in Zimbabwe, in the United States or elsewhere in the world. In her summary she said that the pending action in Zimbabwe F between the parties concerns only the termination of marital status and issues regarding custody and visitation; there are no issues pending in Zimbabwe between the parties regarding child and spousal support or the division of the property.
The defendant left Zimbabwe with the children in December 2001 or January 2002. In the summary she filed in the Superior Court of California she said G that she left Zimbabwe in December 2001 but she also said that she spent three full days in January 2002 in the airport in Zimbabwe trying to obtain a flight to London and then on to the United States. In February 2002 the plaintiff filed an application for an order directing the defendant to return to Zimbabwe with the children or,

alternatively, to return them to Zimbabwe H where they would be placed in the plaintiff's custody. The plaintiff made
2002 (2) ZLR p412
Smith J
arrangements to make money available in California for the purchase of the A tickets and meet any costs incurred in the course of the journey.
The plaintiff gave evidence and called one witness, Francois de Marigny, who is a clinical psychologist who practises in South Africa. As she was still in California the defendant did not give evidence. Her legal practitioner called only one witness, Sally Tasker, who is a clinical social worker and B therapist who practises in this country. At the conclusion of the trial, as it was abundantly clear from the evidence before the court that the marriage had broken down irretrievably, a decree of divorce was granted but the determination of the remaining issues was reserved.
CUSTODY
The main bone of contention between the parties is the question of custody. C De Marigny had interviewed both parties and the two children, as well as the parents of the defendant, friends of the family and teachers. The conclusion reached by de Marigny is that the alienating behaviour by the defendant has been longstanding, extreme and highly detrimental to the psychological well-being of the two children. The daughter, in particular, showed many D features of Parental Alienation Syndrome (PAS), as described by an American psychologist, Richard Gardner. According to Gardner, PAS is a disturbance in the child who, in the context of divorce, becomes preoccupied with deprecation and criticism of one parent, which designation is unjustified or exaggerated or both. PAS arises primarily from a combination of parental influence and a child's active contribution to the campaign of deprecation, E factors which may mutually reinforce one another. In de Marigny's opinion, the defendant's active involvement in alienating the children from the plaintiff reflects negatively on her suitability as custodian of the children. Since the separation of the parties, however, the defendant has become the children's primary parent, especially since they have been taken to California. Her relationship with the daughter appears to be more enmeshed than her F relationship with the son. Therefore, the degree and effects of alienation appear to have had a deeper impact on the daughter. De Marigny considered that the defendant's emotional stability is highly questionable. He considered that the plaintiff's emotional and financial circumstances appeared to be more stable than those of the defendant. Furthermore, the plaintiff is able to G provide the children with the lifestyle to which they are accustomed and his situation and circumstances would provide them with schools and a social support system with which they are most familiar. In his opinion the plaintiff would be the more suitable custodian of the children at this point. He strongly recommended that the children be returned to their familiar environment where they can be more comprehensively assessed and that an independent, H
2002 (2) ZLR p413
Smith J
A suitably qualified psychologist be appointed to monitor the children's reactions and adjustments. In testifying on the subject of PAS, de Marigny referred to a number of symptoms one should look for in recognising a severely alienated child. They are: the child has a relentless hatred for/toward the targeted parent; the child parrots the obsessed alienator; the child does not want to visit or spend any B time with the targeted parent; many of the child's beliefs are enmeshed with the alienator; the child's beliefs are delusional and frequently irrational; the obsessed alienator is not intimidated by the courts; frequently the child's reasons are not based on personal experiences with the targeted parent but reflect what she is told by the obsessed alienator; the child has no ambivalence C in his or her feelings — it's all hatred with no ability to see the good; the child has no capacity to feel guilty about how he or she behaves towards the targeted parent or to forgive any past indiscretions; the child shares the obsessed alienator's cause — together they are in lockstep to denigrate the hated parent; the child's obsessional hatred extends to the targeted parent's extended family without any guilt or remorse; the child can appear to be a D normal healthy child until asked about the targeted parent and then that triggers his or her hatred. De Marigny said that the daughter exhibited most, if not all, of these symptoms. He said that it is not normal for a child to see one parent as being good and doing no wrong and the other as being all bad.
De Marigny said that cases of PAS may be divided into three categories: E severe, moderate and mild. Although there is actually a continuum, and many cases do not fit neatly into one of the three classifications, the differentiation is important. The alienation of the child is gradual and consistent. It becomes worse if the child has no time with the targeted parent. Time is on the side of the alienating parent. Children who are exposed to PAS may develop mental illnesses; it can have profound long term consequences. Studies of adults F who had been victims of PAS when they were young showed that the PAS impacted on their ability to trust and to believe in things like honesty

and openness and that relationships with members of the opposite sex can work. Parents should be able to trust each other but children who had been victims of PAS believed that the alienated parent could not be trusted. The studies showed that, as the persons concerned had grown up and severed ties with the G alienating parent, they discovered that many of the things that they had been told by that parent were not true. They discovered that the targeted parent was not as bad as they had been led to believe and, in some cases, that he was in fact "a good guy". The young person then found himself or herself in the position that he or she could no longer trust the alienating parent but at the H same time could not trust the targeted parent. In many of the cases, the studies

2002 (2) ZLR p414

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showed that the person concerned was maladjusted and failed in inter- personal A relationships. Typically, when a child is aware of the alienation it is not happy. In October, when he interviewed the son, he reached the conclusion that the son was not happy. He was of the view that the daughter was very maladjusted. He considered that the long-term effect of PAS on the two children would be more profound. B

De Marigny said he concurred with the view expressed by Gardner that treatment for the children is most often not possible while the children are still living in the mother's home. No matter how frequently they are seen in treatment, and no matter how skilled the therapist, the time in therapy is only a small fraction of the total exposure time to the mother's vilification of the father. There is a pathological psychological bond between the mother and C children that is not going to be changed by therapy as long as the children live with the mother. The court cannot order the defendant to co-operate and to undergo therapy. In a case of severe PAS, the law is the only therapeutic intervention. Part of the treatment is that the children must be shown that their father is not the devil and they must experience that, not just be told. De Marigny said that it would be in the best interests of the children if the plaintiff D was awarded custody with some quarantine period. He said that in his opinion the therapeutic advice given to the defendant by Sally Tasker was wrong.

De Marigny was subjected to lengthy cross-examination. He said that he had been approached by the plaintiff and asked to do an assessment of the children's emotional state and a psychological report on why his rights of E access were being frustrated. He felt that the letters the children had written to the plaintiff showed that they were angry and maladjusted. He considered that the defendant was mentally abusing the children and they should be removed from her custody. He felt that the plaintiff was more focused on the children's needs than his own whereas the defendant was more focused on her own needs. F

Sally Tasker, on behalf of the defendant, testified as follows. She first saw the defendant in October 1997 and then had eight sessions with both parties in the period November 1997 to April 1998. She had been asked by the defendant to help the parties deal with some marital problems. She found the defendant to be a loving, devoted mother who put her children first. The bond G between her and the children was not a sick psychological bond. The plaintiff would like to be a good father but he lacked the necessary skills. She felt that the report of de Marigny was completely biased. She herself was not *au fait* with PAS but felt that it was just a fancy term to describe a situation which is familiar and has been known for a long time. Treatment for PAS is fairly straightforward. If the PAS is severe then the alienating parent should be H

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A deprived of all contact with the children for a period and then gradually be introduced back into the lives of the children. In this case, to remove the defendant completely from the lives of the children would not be a good solution because it would be extremely traumatic for the children. It would most likely make them very angry and they would hold the plaintiff responsible. In the case of the son, he is already 14 years old so the issue of B custody would apply for only four more years. It would not be good for the children to separate them by awarding custody of the son to the plaintiff and that of the daughter to the defendant. Under cross-examination Tasker admitted that some of the letters written by the children showed that they were very alienated. She agreed that all children need a father to whom they C can talk and relate.

PAS as described by Gardner has been criticised. One criticism is that his conceptualisation of the problem and the dynamics underlying the problem prove, at best, incomplete, if not simplistic and erroneous. Gardner portrays the alienating parent as virtually solely responsible for the dynamic, turning the vulnerable child against the innocent target parent. However, more D extensive research on the topic has more clearly established the complex involvement and motions of all of the actors in this disastrous family drama. Each of the family members takes a role in the alienation process, which usually begins well before the divorce event. Not all instances in which a child is rejecting a parent reflect PAS. Usually, PAS is not just the work of the alienating parent. It is a family dynamic

in which all of the family E members play a role, have their own motives and have their own reasons for resisting the efforts of others at correction. I accept these criticisms. Human nature is so diverse, and different people react so differently to the many and varied events and happenings in daily life, that it could not possibly be contemplated that the very many cases world-wide of children rejecting, to some degree, one or other of their parents could all be classified into three F categories as Gardner has suggested in his works on PAS. However, as Sally Tasker said, whatever name is given to the syndrome, it is well known to psychologists. The views expressed by Gardner may well be simplistic because he is trying to encapsulate, in a work that can be easily assimilated, a very wide range of cases.

G However, I am satisfied that the evidence in this case does show that the defendant has deliberately tried to keep the children, especially the daughter, from having any meaningful contact with their father and has poisoned their minds against him. The contents of the letters they have written express thoughts that could only have come from the defendant. The defendant's H sudden flight with the children to California shows the lengths to which she

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is prepared to go to keep them from him. Her *bona fides* in relation to her A flight to California are very suspect. I say that because of the contents of the papers she filed in proceedings before the Superior Court of California. In one declaration (page 139 of Exhibit 3) she refers to the fact that in March 1999 the children conversed directly with Judge Smith (that is me) regarding a trip to Greece and Switzerland with the plaintiff. She then says: B

"At that time, in chambers, [the daughter] told Judge Smith that she unequivocally did not want to go anywhere with Ted, and tearfully described how Ted had physically abused her".

That is a lie. I remember the interview well. In the judgment I handed down in that case, I said that I had interviewed the two children and commented "Both of them have a maturity beyond their years and were soon put at ease. C They spoke freely of their feelings". At no time was the daughter anywhere near tears. Moreover, she never told me that she had been physically abused. If she had, I would have had the allegation investigated and, if it proved to be true, the necessary action taken. She then goes on to say that Chinhengo J, who issued the order that the children be returned to Zimbabwe, "is on good terms with Ted's counsel", thereby suggesting that the judge did not act D impartially. At p 10 of that same declaration (p 142 of Exhibit 3) the defendant says that although a visitation agreement was ratified as an order of court "Ted made no efforts whatsoever to exercise his visitation rights under that order". In fact it was the defendant who frustrated his attempts to exercise his rights. The guard at Machero farm, where she was living with the E children, was instructed not to allow the plaintiff to enter the property, so when he collected them for a visit they had to walk about 1 km to the gate where he was waiting. Moreover, the defendant did not insist that the children had to go to their father. The plaintiff, in a letter to Sally Tasker, said that he was in total disagreement that the daughter should cease her visits to him. As he put it, he was placed in an impossible position; if he insisted that the F daughter visited him he would be branded "a cruel and uncaring father" and if he did not the defendant would tell the daughter that "your father does not want to see you".

In another declaration filed in the Superior Court of California (p 198 *et seq* in Exhibit 3) she makes a number of false statements. In para 4 a she refers G to this action in Zimbabwe and says "There are no issues pending in Zimbabwe between the parties regarding child and spousal support or the division of property". Yet in her counterclaim she is claiming both maintenance and a division of the matrimonial property. In para 12 the defendant refers to an affidavit filed in proceedings in this court by a David Fink in which he alleges she had said that the Zimbabwe government is corrupt and that all the H

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A blacks and whites hate each other. She then goes on to say that making such statements amounts to treason which is punishable by death and that political killings are common in Zimbabwe following the general elections. Political killings may well be common but by no stretch of the imagination could her statement be regarded as treasonable. In para 13 she says that any communication with her parents is limited because any support they might B offer her could be very dangerous for them. There is no basis for that allegation. In para 14 she says that the plaintiff wants her to return to Zimbabwe "so that I will be exposed to the risk of loss of my life if he presses charges for treason against me". It is not possible for a private citizen to press such charges.

C In para 23 the defendant makes the following statements:

"I did not raise the issue of Ted's abuse toward me and the children in the Zimbabwe proceedings, because physical contact must reach extreme levels in Zimbabwe before it can be deemed abuse in that country and emotional abuse is simply not recognized as a phenomenon. In Zimbabwe, it is permissible to beat children and spouses, i.e., wives, so long as the D stick that is being used is no thicker than the wrist of the man wielding it. Corporal punishment is widespread and is used in the schools even for minor offences. For example, [the son] was beaten in school because his hair touched his ears. His hair was then shaved off in the school auditorium in front of the student body as an example of what happened if school regulations were not strictly followed. On another occasion, as E an example, the wife of one of my employees (house staff) was beaten with a stick by her husband, and after the beating she was thrown outside naked and her clothes were burned. Under Zimbabwe standards, these incidents do not amount to abuse and are condoned, even though they clearly would be abuse in the United States. For that reason, and because I was advised against it, I never raised the issue of Ted's abuse towards me and the children in the Zimbabwe proceeding."

F I don't think any comment as to the accuracy of these allegations is necessary. When there is a dispute between parents as to the custody of any child of the marriage, the Court dealing with the matter must approach it on the basis of "what are the best interests of the child". It is the interests of the child that are of paramount importance. In Ex p *Critchfield & Anor* 1999 (3) SA 132 (W) G at 142 A-C Willis AJ said:

"Even if *Myers v Leviton* 1949 (1) SA 203 (T) is taken as the high-water mark of judicial conservatism with regard to custody matters in South Africa, it is clear that the so-called 'maternal preference rule' has never been a rule of law. (See also *Kennedy v Kennedy* 1929 EDL 257; *Steyn v Steyn* 1948 (3) SA 127 (T) at 135; *Tromp v Tromp* 1956 (4) SA 738 (N) H at 746; *Bashford v Bashford* 1957 (1) SA 21 (N) at 24). It is has rather

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been a statement of judicial preference or, if you will, a statement of the A prevailing practice and, perhaps, prevailing policy. For decades, the law in South Africa with regard to the award of custody is that the best interests of the child must prevail. (See *Cook v Cook 1937 AD* 154 at 163; *Calitz v Calitz* 1939 AD 56 at 60; and *Fletcher v Fletcher* [1948 (1) SA 130 (A)], which has been followed in innumerable cases since then)."

In determining what is in the best interests of the child there are many factors B which must be taken into account. In *McCall v McCall* 1994 (3) SA 201 (C) at 204-205, King J said as follows in relation to the criteria to be used:

"In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by C reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

(a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;

(b) the capabilities, character and temperament of the parent and the D impact thereof on the child's needs and desires;

(c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;

(d) The capacity and disposition of the parent to give the child the guidance which he requires; E

(e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts' such as food, clothing, housing and the other material needs — generally speaking, the provision of economic security;

(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular; F

(g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;

(h) the mental and physical health and moral fitness of the parent; (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo;*

(j) the desirability or otherwise of keeping siblings together; G

(k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;

(l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father; and H

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(m) any A other factor which is relevant to the particular case with which the Court is concerned."

In that case there were two children of the marriage, a boy about to turn 12 and a girl of 14. The mother had *de facto* custody of the two children. The father applied for custody of the boy. In reaching a conclusion King J, at p 208E-209B said:

B "As to (l), the question is whether Rowan, about to turn 12, should be placed in the custody of the father by reason of the fact that he is a boy. This was central to Mr Loebenstein's recommendation that custody should be awarded to applicant, and it was also regarded as important in the view of both Mr Van Zyl and Dr Mudie. It is based on the premise that boys as they grow older should be placed with their father. It is a C well-established proposition. In my view, it is of particular application here. Rowan is, so to speak, ripe for his father. He needs the masculine environment, including the discipline that his father will provide. With his mother Rowan is in an all-female environment, his mother, his sister, his grandmother and to a lesser extent his aunt. The only male person with whom Rowan has come into contact with in the maternal milieu is D a Mr Chant, a friend of respondent, who is many years younger than she and who suffers from some form of brain damage. Far from being a male role model for Rowan he is a negative factor, so much resented by Rowan and his sister that respondent has arranged that his visits take place after the children have gone to bed, thereby avoiding contact between them.

There is one other factor. It is implicit in what has been said above. If this E Court rules that he is to remain in the custody of his mother, Rowan will be devastated. He told me of the strain he is under in his mother's home; he desperately wants to go to his father. This is not just a child's whim, nor is this a child who has been bought over by an indulgent father; quite the contrary. I am satisfied that it is in Rowan's best interests that effect be given to this longing on his part. If there had been any compelling F reason for not giving effect to Rowan's wishes, a reason such as to indicate that it would nevertheless not be in his interests, that reason would have had to prevail, the deleterious effect it would have had on Rowan notwithstanding. There is, however, no such reason. I am satisfied that Rowan's best interests will be served by placing him in the custody of his father. Because this arrangement is new and G uncharted, it would be appropriate if it was to be monitored by the Family Advocate. This was suggested by applicant's counsel, and the Family Advocate has expressed her willingness for her office to undertake this role."

In *T* v *M* 1997 (1) SA 54 (A) the court was considering the case of the father of an illegitimate child who wanted right of access to the child. Scott JA said H that a full psychological evaluation of the child in question, a girl of about 10

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called Koketso, by a Mr Jacobs confirmed the presence of PAS. At p 59 B- A C Scott JA said:

"Mr Jacobs concluded that the stress and anxiety which Koketso had shown with regard to the appellant did not stem from the appellant himself (as alleged by the respondent) but was caused by a fear of refusal and rejection from the respondent and Mr Mamabolo. Mr Jacobs accordingly recommended that the appellant be allowed access to B Koketso but suggested, presumably because of the little contact between father and daughter over the previous two years, that for an initial period of approximately four months the access be limited to 'structured contact under supervision' following which the position would have to be reassessed."

In this case, despite the views expressed by Sally Tasker, I am satisfied that C with the daughter there is a severe case of PAS and with the son it is a moderate case. Having regard to the evidence before the court, I consider it to be highly desirable that the plaintiff be reintroduced into the lives of the children. I agree with Sally Tasker, however, that it would be too traumatic for the children to be suddenly removed from all contact with the defendant, D at this stage.

The defendant has not made the situation of the children any easier by her conduct. On 16 March 2001 Mungwira J granted an order, by consent, in which the access rights of the plaintiff were spelt out in great detail. Clearly the terms of the order were settled only after much discussion and hard bargaining. However, the order had little effect. Within a short period after E it was issued it became a dead letter. The defendant refused to ensure that the terms of the order were observed. Although the children were under her control and authority, she let them decide whether or not they wanted to go and see their father. The fact that a judge of the High Court issued the order meant little or nothing to the defendant. Her attitude to the courts is also F shown by her actions following

the order granted by Chinhengo J on 19 March 2002. After the defendant secretly abducted the children and took them off to California, the plaintiff made an application for an order for the return of the children. Chinhengo J ordered that the children be returned to Zimbabwe and, if the defendant refused to do so, the children should return on their own and be handed over to the interim custody of the plaintiff. The G defendant has ignored that order which, I understand, is still a provisional order which has not been confirmed.

In *Kuperman v Posen* 2001 (1) ZLR 208 (H) the court was also dealing with a case where the mother had secretly removed her children from this country and the father had been unable to trace the whereabouts of the children. He eventually ascertained that the children had been taken to Israel. He applied H

A for an order in terms of the Child Abduction Act [*Chapter 5:05*] which was duly granted. The children were returned to this country and interim custody granted to the father. Some 10 months later the mother made an application for an order granting her interim custody. Chatikobo J at p 209-210 said:

"In the context of the present case, I find the two *dicta* quoted in the judgment of the Israeli Court apposite. The first is to this effect:

B 'The kidnapping of children is a deplorable phenomenon, an evil and malaised feature which permeates the society of every country ... The sudden disengagement from one of the parents is a traumatic experience which undoubtedly leaves a scar on the young soul.'

And the second is the following:

C 'The damage is caused to the children themselves and to their mental state. Every day and every week that passes with the child held by the kidnapper creates *a fait accompli.* The child becomes accustomed to his new situation, and under this influence cannot be eradicated from his mental state. That is, in point of fact, where the kidnapper looses *(sic)* out. He relies on the slow pace of the legal process and knows that even D if he loses in law immediately after the kidnap, in the course of time experts on mental condition and education will come along and prove to us by all means that by now the child has become accustomed to his new surroundings in the country and he should not be uprooted from it. And who is to believe that during the time it takes to maintain the proceedings the kidnapper will indeed not succeed in winning the heart E of the child and inciting him against the parent from whom he has been kidnapped?'

The conduct of the applicant in surreptitiously removing the children from Zimbabwe and keeping them secreted away from their father for over ten months, assumes significance in the determination of this dispute because it has a direct bearing on whether it is in the best interests of the children that they be cut off from their father, who should F under normal circumstances have access to them on a regular basis'".

He went on at p 210 F-G to say:

"An order which does not give effect to the cardinal rule that the court is concerned with the welfare of the children should not readily be made, especially when it is based on facts contained in affidavits which, more G likely than not, contain facts which are biased, inaccurate and unreliable".

The defendant has deliberately flouted orders of this court. That is not acceptable. She deprived this court of an opportunity to hear from the children their views on the question of access. She must return the children to this country as soon as possible. If she is unwilling or unable to come H herself, she must send the children. They are of an age that they can travel

unaccompanied. The plaintiff is prepared to pay for their tickets and incidental A expenses.

The plaintiff has suggested that Dr Brakarsh, who is a child psychologist, be appointed *curator ad litem* of the children with a mandate to render whatever professional services he considers to be necessary. Sally Tasker considers that Dr Brakarsh is well qualified and suited for such an appointment. The B access order granted by Mungwira J has, I feel, been overtaken by events. I consider that the best way forward, in the interests of the children, is that Dr Brakarsh interviews and evaluates them and then recommends what access rights should be granted to the plaintiff. Thereafter, Dr Brakarsh should continue to treat the children and, within three months, submit a report as to custodianship of the children and access rights of the non-custodial parent. C Dr Brakarsh, as *custodian ad litem,* will be free to make a direct approach to this court, whenever he considers it necessary or desirable to do so. If he considers that the defendant is frustrating or undermining his efforts to rehabilitate the children, he will be free to approach this court for the necessary order. D

MAINTENANCE

Since the issue of custody has not been settled, it is not possible to order the payment of maintenance in respect of the children. If the defendant returns with the children and has interim custody, then she may make an urgent application to this court for an order for maintenance for them. In the absence of any submissions from her as to the level of such maintenance, no order can E be made. As regards maintenance for herself, Mr *de Bourbon,* submitted that the defendant did not really need any maintenance. He said that she obtained a B.A. and an LL.B. degree at the University of Cape Town. In an E-mail to a friend she said:

"I have just found an opportunity and begin, this week, running the most F unique and luxurious safari camp in Southern Africa. I have spent the last three years studying and working like crazy, and now I hold a professional hunters/guide licence, a commercial pilots licence and a scuba masters licence. Apparently I am the only woman to hold all these qualifications and who can truly run a full adventure safari single-handed."

Clearly she is highly intelligent, well qualified and well able to maintain G herself.

The order by Baretlett J that the defendant be paid $100 000 a month maintenance *pendente lite* for herself and the children was in force until the date of the divorce. The plaintiff has offered to pay that amount for a period of three years, during which time the defendant should be able to embark on a career. The plaintiff has offered to pay that amount in one lump sum which H

A means that he will pay the defendant $3,6 million. I consider the offer to be reasonable. Mr *Morris* made no submissions to the contrary.

MATRIMONIAL PROPERTY

It is common cause that since the plaintiff was domiciled in California at the time of the marriage, the proprietary rights of the parties *inter se* are governed B by the laws of California. In *Sperling v Sperling* 1975 (3) SA 707 (A) at 716 E-H Corbett JA, as he then was, said:

"In considering this matter it is as well to start at the beginning. As I have mentioned, the problem is one of that branch of our law known as Private International Law. The claims of the parties to the matrimonial property - for the moment I leave to one side plaintiff's claim under sec. 3 of the C Matrimonial Affairs Act - are to be classified as relating to the proprietary consequences of marriage. In a case such as this, where no ante-nuptial contract has been entered into, the choice of law rule is that the proprietary consequences of a marriage are to be determined by reference to the law of the domicile of the husband at the time of the marriage *(Frankels Estate and Another v The Master and Another,* 1950 (1) SA 220 (AD)), D sometimes referred to for the sake of brevity, as 'the law of the matrimonial domicile'. This connecting factor, the domicile of the husband at the time of the marriage, fixes once and for all and by operation of law the system which will constitute the *lex causae* whenever questions concerning the property relations between the spouses arise in a South African court *(Frankel's* case, *supra; Brown v Brown* 1921 AD 478 at p 482). The position is not affected by a E subsequent change of domicile (the so-called doctrine of immutability being accepted); nor is any distinction drawn in this regard between movable and immovable property or between property brought into the marriage or after-acquired property *(Shapiro v Shapiro,* 1904 TS 673; *Union Government (Minister of Finance) v Larkan,* 1915 CPD 681 at p 685). What is termed the 'unity principle' is applied."

F The views expressed so lucidly by the learned judge of appeal were cited with approval by Kuper AJ in *Bell v Bell* 1991 (4) SA 195 (W). See too *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).

The plaintiff produced an affidavit from a Mr David Fink, who is a Certified Family Law Specialist in California, and, as such, very familiar with the G California laws pertaining to marital dissolutions and related actions. Mr Fink was prepared to come to Zimbabwe if his evidence was challenged but no such challenge was mounted. Mr *de Bourbon* submitted that the affidavit of Mr Fink was admissible in terms of s 25 of the Civil Evidence Act [*Chapter 8:01*]. I agree. According to the affidavit by Mr Fink, California is one of seven U.S. states which use community of property as its marital property H regime. Assets and liabilities acquired during marriage through the labour,

skill or efforts of one or both of the spouses is the community property of the A parties. Upon legal separation or marital dissolution, community assets and liabilities are divided equally, unless the parties agree to an unequal division. Property acquired by a party before marriage or after the parties have separated, and property acquired during the marriage by gift or inheritance, is the separate property of the acquiring party. The court has no authority to B award the separate property of one party to the other party. It may, however, divide property which is jointly held by the parties' separate estates in accordance with their respective interests. The court must classify the matrimonial property as separate, community or quasi-community, in order to determine the

rights and liabilities of the parties with respect to a particular asset or obligation. That classification is an integral part of the division of C property on marital dissolution. Generally, factors determinative of whether property is separate or community are the time the property was acquired; the operation of various presumptions, particularly those concerning the form of title; and whether the spouses have converted the property from separate to community and *vice versa.* Determination of the date of separation plays a key role in the characterisation of property, as it is from this date that D community property ceases to accrue. The character of property as separate or community is determined at the time of its acquisition. If it is community property when acquired, it remains so throughout the marriage unless the spouses agree to change its nature or the spouse charged with its management makes a gift of it to the other. Property acquired by purchase during marriage is presumed to be community property and the burden is on the spouse E asserting its separate character to rebut the presumption. That could be done either by "tracing" the money or other assets used to acquire the property or by establishing the absence of any community property source from which the acquisition could have been made.

Mr *de Bourbon* said that the offers made by the plaintiff in the pleadings had F been premised on a wrong legal basis and had therefore been withdrawn. The plaintiff produced a list of the various items of matrimonial property, giving a value to each where possible, and classifying the property into three separate classes as required for the purpose of applying the relevant California laws — namely his property, the defendant's property and community property. He testified as to how and when the various items were acquired in G order to justify their classifications. He also testified as to the values of the various items. According to his calculations, the defendant's share in the marital property amounted to $7 700, which was more than compensated for by the money he had spent on preserving community property and the value of his property which the defendant had disposed of after the separation of H

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A the parties. Mr *de Bourbon* submitted that the evidence led by the plaintiff showed beyond doubt that the defendant's interest in the joint matrimonial property was in fact negative. Therefore there was nothing to be awarded to her. *Mr Morris* submitted that there was no proper valuation of the different properties in the matrimonial estate. The valuation of Machera farm, the former matrimonial home, was a pure "thumb-suck". He suggested that the B best way to resolve the issue was to refer the matter to the California Superior Court. The experts in California could get proper valuations from sources in this country.

I accept that Mr *Morris* found himself in a very difficult position on this aspect of the case, because the defendant was outside the country and could C not give any evidence to counter or disprove that of the plaintiff. However, that situation existed because of the actions of the defendant. She deliberately chose to flee the country with the children, well knowing that this action had been instituted. The matter was set down for hearing in February 2002 but the defendant was not present. The case was postponed for six months to 22 July to give her time to return. She chose not to do so. She did not file any evidence D to the effect that she had been unable to fly to Zimbabwe because of her pulmonary embolism. She did not file any affidavit dealing with any of the matters which she well knew were before the court. She deliberately chose to distance herself from these proceedings so she must bear the consequences. I accept the evidence led by the plaintiff and will therefore order that the defendant is not entitled to any share in the matrimonial estate.

E In the amended declaration filed by the plaintiff on 27 June 2001 he included a list of the marital property (Annexure A). He said in the preamble thereto that it was not a complete list but was compiled "from recollection 18 months ago". He then listed those items which he regarded as his sole and separate property and those items which he regarded as the sole and separate property F of the defendant. When the plaintiff testified, however, little mention was made of the assets. He did file letters from the defendant which showed that she had sold some of the paintings which he claimed were his. Mr *de Bourbon* submitted that the court should declare all the property which, in Annexure A referred to above, is said to be his, to be his sole and separate property. Mr *de Bourbon* said that the plaintiff wanted a final order issued in relation to the G property in question, since Ndou J, who had heard an application in respect of the property, had issued only an interim order. From the plaintiff's own evidence, it is clear that the defendant has already disposed of some of the property which he claims to be his. In the circumstances I feel that I cannot issue the order sought in relation to the movable property. If the plaintiff H believes that the defendant has in her possession movable items of matrimonial

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property which he considers to be his, and she refuses to hand them over, then A he may institute legal proceedings to recover the same.

COSTS

Mr *de Bourbon* submitted that the plaintiff should be awarded costs, including the costs of two counsel. He had had substantial success. The court should demonstrate its disapproval of the conduct of the defendant, in failing B to appear and failing to provide affidavits to assist the court come to a just decision with regard to the various matters in dispute. *Mr Morris* argued that if the defendant were to be ordered to pay costs, that would amount to giving with one hand and taking with the other, because the maintenance awarded to her would be absorbed in the payment of costs. He contended that ordinarily in divorce cases there was no order as to costs. He argued that in this case the C court had initially ordered the plaintiff to make a contribution towards the defendant's costs when she had instituted the original action but that contribution had become redundant. He submitted that the defendant was entitled, as a former wife, to a contribution towards her costs. Since much of the costs in this case have been necessitated by the defendant's conduct, first D in withdrawing the case she had instituted and then in fleeing to California, I do not think it would be fair to order that the plaintiff pay any part of her costs. Accordingly it will be ordered that each party pays his or her own costs.

CHANGES IN THE LAW

This case has shown very clearly that the adversarial system that applies in this country in relation to civil litigation is, on occasions, inimical to the E interests of children when questions of divorce, custody and access are involved. This is not the first time that I have been seized with a divorce action where one or both of the parents have tried to use the children as a lever or weapon against the other. When a professional psychologist is called by one of the parents, the other usually attacks his or her professional opinion as F being biased in favour of the party calling him or her. In South Africa there is a system in terms of which Family Advocates are appointed. Writers in Great Britain have suggested that mediation should play a much larger role in the British judicial system in cases of PAS. They say that several significant studies in the 1990s have expanded their understanding of PAS and parental acrimony in general. A study undertaken by L F Lowenstein G over 10 years in dealing with 16 cases which used a purely adversarial approach and 16 which relied almost totally on the mediation method showed, very clearly and definitely, that there was greater satisfaction among both children and parents in those cases where mediation was used as opposed to an adversarial approach. I would strongly recommend that the Law Development Commission give consideration to establishing a system H

A in this country in which mediation is available. There should be some machinery in place whereby the court can, where it considers it to be necessary to determine what is in the best interests of the child, appoint an expert in the field who would be independent and who could report to the court with his or her recommendations. In looking into this matter the Law Development Commission should also, I feel, investigate the merits of B introducing a system of Family Courts. The aim should be to introduce courts which are easily accessible, less formal and able to deal with domestic disputes more expeditiously. Where there is a dispute as to access to children, for example, the quicker the dispute is resolved and access rights defined, the better it would be for the children.

C IT IS ORDERED THAT:

1. The defendant ensures that the children be returned to Zimbabwe as soon as possible and, in any event, before 31 October 2002, and she shall notify the plaintiff of the date of their arrival before they leave California.
2. The plaintiff provide the foreign currency necessary to purchase air tickets for the defendant and the children to fly to Zimbabwe and for D incidental expenses.
3. If the children do not return to Zimbabwe before 31 October 2002 or, if they return before that date and they are not accompanied by the defendant, their custody is awarded to the plaintiff.
4. If the defendant accompanies the children to Zimbabwe and they arrive F before 31 October, their custody is awarded to the defendant subject to the following provisions:

4.1 Dr Jonathan Brakarsh is appointed *curator ad litem* of the two children;

4.2 as soon as is practicable after the children arrive in Zimbabwe they F shall be interviewed by Dr Brakarsh and he shall commence providing whatever therapy or counselling he considers to be appropriate;

4.3 as soon as possible after he has seen the children, Dr Brakarsh shall submit to this court a suggested programme of access rights for the plaintiff;

G 4.4 as soon as he feels able to do so, and in any case within three months of him first seeing the children, Dr Brakarsh shall submit to this court a report concerning the attitude of the children

towards their parents and any recommendations relating to their custody and the H access rights of the non-custodian parent;
2002 (2) ZLR p428
Smith J
4.5 if at any time Dr Brakarsh considers that the defendant is interfering A with or hindering the therapy he considers to be appropriate for the children or that any circumstances have arisen which necessitate a report to this Court, he shall submit his report, together with any recommendations he thinks fit;
4.6 after receiving any report from Dr Brakarsh the court shall make B such arrangements as it thinks fit for the report to be served on the parties and for the matter to be heard.
5. The plaintiff shall pay the professional fees of Dr Brakarsh.
6. The plaintiff shall pay to the defendant $3 600 000 (three million six hundred thousand dollars) within 30 days after the children have arrived in Zimbabwe, as lump sum maintenance for the defendant in terms of C s 7(1)(b) of the Matrimonial Causes Act [*Chapter 5:13*].
7. Since, in terms of the matrimonial property laws of California, as set out in the affidavit of David Alan Pink, the defendant has a negative equity in the matrimonial estate, no property of any description falls to be distributed to her consequent upon the dissolution of her marriage to the D plaintiff.
8. Each party shall bear his or her costs in relation to this trial.
Atherstone & Cook, legal practitioners for plaintiff
V H Fitzpatrick & Co, legal practitioners for defendant E

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Source:
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[zRPz]C & S WERRETT (PVT) LTD v MINISTER OF LANDS & ANOR 2002 (2) ZLR 429 (H)
2002 (2) ZLR p429

Citation	2002 (2) ZLR 429 (H)
Case No	Judgment No. HH-172-02
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	11 September 2002; 2 October 2002
Judgment	2 October 2002
Counsel	*J J Callow,* for the applicant *W Mutsonziwa,* for the respondents
Case Type	Urgent application
Annotations	No case annotations to date

[zFNz]Flynote
D **Land** — acquisition — notice of proposal to acquire land for resettlement purposes — description of land — whether description must precisely tally with description in title deeds — application to Administrative Court to confirm acquisition — notice to affected party — when notice must be served
[zHNz]Headnote
E The applicant was the owner of a farm. A notice of acquisition was gazetted, listing the farm for compulsory acquisition in terms of s 5 of the Land Acquisition Act [*Chapter 20:10*]. However, the name and description given in the notice did not precisely match that in the title deeds, the name in the notice omitting the words "Remaining extent of" and the F area not being exactly that in the title deeds. The following year, an acquisition order under 5 8 of the Act was served on the applicant. An application was subsequently filed in the Administrative Court by the respondent under s 7 of the Act, seeking confirmation of the acquisition. The applicant was not served with a copy of the application, although G s 7(3) required that such notice be given "as soon as reasonably practical". Nine months later, when the present proceedings were brought, a copy of the application had still not been served. The applicant sought to have the notice of acquisition set aside as a nullity and a declaration that the delay was such as to render the acquisition H process invalid.
2002 (2) ZLR p430
Hlatshwayo J
Held, that the purpose of describing the property in terms of s *5* of the Act A is to enable interested persons to be informed of the intended acquisition and to invite them to inspect the actual map or plan of the land concerned. The initial description need not be mathematically accurate; it must merely be sufficient to adequately inform as it is subject to additional verification and specification upon examination of the map or plan required to be kept by the acquiring authority. B
Held, further, that the concern in s 7(3) is for interested parties to be given due notice of the hearing at the Administrative Court. The "reasonable practicability" of the service of the notice must be interpreted in relation to the hearings. A delay in the notification may be declared unreasonable where in the totality of the circumstances the acquiring authority by the C delay can be held to have evinced an intention no longer to proceed with the acquisition. This could not be said to be the case here.
[zCAz]Cases cited
Union Guarantee & Ins Co Ltd v Potgieter 1959 (3) SA 881 (E)
Wamambo v General Accident Ins Co (Zimbabwe) Ltd 1997 (1) ZLR 299 (H) D
[zSTz]Legislation considered
Land Acquisition Act [*Chapter 20:10*]*, s 7*
[zCIz]Case information
J J Callow, for the applicant E
W Mutsonziwa, for the respondents
[zJDz]Judgment
Hlatshwayo J: Craig William Werrett is a director of the applicant company, C & S Werret (Pvt) Ltd, which company is the registered owner of certain two pieces of land situate in the District of Urungwe called F Remaining Extent of Sapi Valley measuring 575.5755 hectares and Remaining Extent of Rowa N'goma measuring 404.2812 hectares, both held under one Deed of Transfer 912/97. The first respondent is the Minister of Lands, Agriculture and Rural Resettlement, cited in his official capacity as the acquiring authority as defined in s 2 of the Land Acquisition Act [*Chapter* G *20:10*] ("the Act"). The second respondent, the Attorney-General, was cited as the Government Attorney by virtue of the provisions of s 24(6) of the Constitution. However, since the constitutional remedies were subsequently abandoned, no relief was eventually sought from the second respondent.
A property described as "Sapi Valley measuring 535.58 Hectares", instead of "Remaining Extent of Sapi Valley measuring 575,5755 Hectares" as H
2002 (2) ZLR p431
Hlatshwayo J
A appears in the title deed, was listed for compulsory acquisition on 8 September 2000 in the Government *Gazette* in terms of s 5 of the Act. On 19 December 2001 a s 8 acquisition order for a property described as Sapi Valley, as appeared in the s 5 notice, was served on the applicant. On 18 January 2002, a s 7 Administrative Court application was filed. However, to date, some nine months later, the Administrative Court application has not been served on the B applicant. Thus, the applicant has approached the court on two issues:
1. For a declaration that the s 5 preliminary notice and the s 8 acquisition order concerning Sapi Valley are a nullity "as the property described therein does not, in fact or law, exist".

2. For a declaration that the delay in the service on them of the s 7 C Administrative Court application has been so unreasonably long as to render the earlier procedures of s 5 preliminary notice and s 8 acquisition order null and void.

Accordingly, the application, after the abandonment of the constitutional and interim reliefs and the agreement between the parties for the court to make D a final decision on the matter, seeks the following declaratory order:

"1) IT D IS DECLARED that the Section 5(1) Notice and Section 8 Order signed by the first respondent in respect of Sapi Valley do not apply to Remaining Extent of Sapi Valley, are invalid and of no force and effect.

2) IT IS DECLARED that the Section 7 Administrative Court Application, Case No. LA 977/02, for want of timeous service upon E the Applicant and the Zimbabwe Banking Corporation Limited is set aside wherein the section 5 preliminary notice and section 8 acquisition order are invalid and of no force and effect." I shall deal with the two prayers *seriatim* below:

LAND DESCRIPTION

F Mr *Mutsonziwa,* for the respondents, submitted that the omission of the words "Remaining Extent of" to the farm name "Sapi Valley" should not be regarded as fatal since the description of the property is substantially correct and a reasonable person cannot be misled as to the identity of the property being acquired and that in any event the first respondent intended to make an application in the Administrative Court to rectify the omission. Mr *Callow,* G for the applicant, on the other hand submitted that the transfer and registration and acquisition of land in the Deeds Registry is an exact discipline with no margin for error as to the name of the land in issue and its area. The intention to make an application to the Administrative Court does not cure the immediate effect before this court, he argued. He further urged the court to H dismiss the concept advanced by the respondents of substantial compliance,

2002 (2) ZLR p432

Hlatshwayo J

"something similar to but not the same as", as an irrelevant test as well as the A concept of "the reasonable man".

However, on close examination of the matter, I am of the view that the description of the land for the purposes of the s 5 preliminary notice and the s 8 acquisition order must be distinguished from the description for the purposes of registration at the Deeds Office. The description in the former b cases need not be mathematically exact, whereas in the latter case a mis-description may be fatal. The purpose of the description in the former cases is to inform the owner or any person with an interest in the land to take steps to safeguard those interests. In this case, the words "Remaining Extent of" were omitted before the farm name "Sapi Valley", and the extent or area of the land was rounded off from four to two decimal points leading to a mathematical overstatement of the area by 0.0045 of a hectare. In this context, one cannot help remark on how the applicant's mathematical fastidiousness contrasts so sharply with the colonialists' atrociously cavalier linguistical mis-descriptions of indigenous place, to say nothing of personal, names as they carved and parcelled out the land along racial lines, the very historical iniquity that the land reform exercise seeks to redress. "Sapi D Valley" and "Urungwe" are sorry excuses for the original indigenous place names. The purpose of describing the property in terms of s 5 of the Act is to enable interested persons to be informed of the intended acquisition and to invite them to inspect the actual map or plan of the land concerned as stated in E s 5(1)(a)(i) thus: "describing the nature and extent of the land which he intends to acquire and stating that a plan or map of such land is available for inspection, at a specified place and at specified times". It is clear, therefore, that the legislature did not intend the initial description to be mathematically accurate, but merely to be sufficient to adequately inform, as it is subject to additional verification and specification upon examination of the map or plan F required to be kept by the acquiring authority. Since there is no allegation that such a plan or map was misleading or that the description given made it impossible to locate such a place on a map, the objection in this regard must be and is hereby dismissed.

SERVICE OF APPLICATION G

The new s 7(3) of the Act reads:

"(3) The acquiring authority shall give notice of an application in terms of subsection (1) to the owner of the land concerned and to every other person on whom the relevant preliminary notice has been served as soon as is reasonably practicable after the application has been lodged with the Administrative Court". H

2002 (2) ZLR p433

Hlatshwayo J

A The original s 7(3), which was repealed and substituted by s 5 of Act 15 of 2000, read as follows:

"(3) Where an acquiring authority intends to apply for an order in terms of subsection (1), he shall, not less than fourteen days before the date on which the application is to be heard by the Administrative Court, give notice of the application to every person on whom the preliminary notice B has been served."

The respondents argued that the non-service of the s 7 application in the circumstances of this matter is not fatal, even though a period of about nine months has passed before service has been effected, for the reason that the compulsory acquisition of land is being effected on such a large scale C involving large volumes of work such that there are bound to be some logistical problems resulting in delays in the service of s 7 applications. It was suggested on behalf of the respondents that, along the lines of s 5(4) of the Act which allows a preliminary notice to remain valid for an initial period of two years, that a period of "two years or more" be regarded the as" reasonably practicable" period within which a s 7 application should be served. The D applicant maintained that the phrase "as soon as is reasonably practicable" must be given the meaning ascribed to the phrase "as soon as reasonably practicable" in the cases of *Union Guarantee & Insurance Co Ltd v Potgieter* 1959 (3) SA 881 (E) and in *Wamambo v General Accident Insurance Co (Zimbabwe) Ltd* 1997 (1) ZLR 299 (H), where in the latter case Malaba J interpreted the phrase thus: "It implies the need to do the stipulated act E without further delay, the moment an opportunity or occasion arises for its performance." The applicant then submitted that the opportunity to perform arose upon the filing of the s 7 application or shortly thereafter and that therefore, the enormity of the land reform programme notwithstanding, a reasonable time within which to serve the application should be 45 days, and F not nine months, let alone two years.

To arrive at the correct meaning of this provision in this matter, one must appreciate the purpose for the notification of the application. This becomes clear from an examination of the legislative history of the provision in question and the examination of its place within the broader legislative structure of the Act. The original s 7(3) required the application to be served G at least 14 days before the matter was to be heard by the Administrative Court. Thus, the purpose of the service of the application was to enable the interested parties to prepare themselves for the hearings. The amendment was intended to make the procedures less cumbersome, given that the magnitude of land reform exercise had become apparent. It cannot, therefore, be correct to give H the new provision a more restrictive meaning than the original one.

2002 (2) ZLR p434

Hlatshwayo J

An examination of the structure of the procedures in the Act also confirms A this understanding of the purpose of s 7(3): a preliminary notice is issued in terms of s 5(1); where there is an objection, an application must be made to the Administrative Court for the confirmation or authorisation of the acquisition; thereafter the remaining procedures, including s 7(3), relate to preparations for hearings before the Administrative Court. B

The concern in s 7(3) is for interested parties to be given due notice of the hearing at the Administrative Court. It must also be pointed out that, although the parties kept on referring to the service of a s 7 application, the exact wording is "shall give notice of an application". Since the contents of a s 7(1) application are identical to those of a s 5(1) preliminary notice which is served on the owner and holders of registered real rights in the property, it C would be a costly and meaningless duplication to require the same documents to be served on all those parties once again. The notice in this regard would be a simple "take note that the acquiring authority has filed an application for the authorisation/confirmation of the acquisition of the property. The documents served on you in the preliminary notice shall be used in support D of the application."

All in all, the spirit of s 7(3) is forward-looking, towards the Administrative Court hearings, and the "reasonable practicability" of the service of the notice must be interpreted in relation to the hearings. For it must be asked: what prejudice does the applicant suffer if there is only a delay, and nothing more, in the notification of the lodging of the application? The answer is not E any prejudice of much substance, besides being put to the trouble of checking at the Administrative Court whether or not an application for confirmation was made. If the application was not made timeously to the Administrative Court, the owner can apply to have requisite procedures quashed. If it was timeously made, but the owner was not notified, the acquiring authority cannot move on to the next stage of getting the confirmation or authorisation F without proof of notification of the owner and other interested parties.

It is therefore difficult to fix an actual period by which notification of the application must be made, and the case authorities cited above are of limited assistance in the present case. One can only say a delay in the notification may be declared unreasonable where in the totality of the circumstances the G acquiring authority by the delay can be held to have evinced an intention no longer to proceed with the acquisition. Where, as in this case, the application for the confirmation or authorisation of

the acquisition is pending before the Administrative Court, the explanation has been given but not seriously challenged that the enormity of the exercise has occasioned the delay, it would give an artificial construction to s 7(3) to hold that the delay in the H
2002 (2) ZLR p435
Hlatshwayo J
A notification of the pending application should nullify all the previous acquisition procedures. The delay can only have such a fatal effect, if, as I have already said, it shows an intention on the part of the acquiring authority of having abandoned the acquisition process. Thus, in the absence of any allegations to that effect, I cannot grant the order sought by the applicant.
As far as costs are concerned, I have been given no reason for departing from B the standard approach that the costs follow the outcome.
Accordingly, this application is dismissed with costs.
Stumbles & Rowe, applicant's legal practitioners
C *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 2/PETHO v MINISTER OF HOME AFFAIRS & ANOR 2002 (2) ZLR 436 (S)

[zRPz]PETHO v MINISTER OF HOME AFFAIRS & ANOR 2002 (2) ZLR 436 (S)
2002 (2) ZLR p436

Citation	2002 (2) ZLR 436 (S)
Case No	Judgment No. 5-80-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza AJA
Heard	3 September 2002; 9 October 2002
Judgment	9 October 2002
Counsel	*A P de Bourbon SC,* for the appellant *A Dururu,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Practice and procedure — parties — class action — representative — duty of court to appoint representative if applicant not a suitable person — D notice to class of persons to be represented — duty of court to specify how notice to be given
[zHNz]Headnote

The appellant sought leave from the High Court, in terms of s 3 of the Class Actions Act [*Chapter 8:17*], to institute a class action on behalf of all E persons who had been born in Zimbabwe to foreign-born parents but who had never applied for or been granted citizenship of a foreign country. In the class action, he proposed to seek an order declaring that such persons were not required to renounce foreign citizenship in order to retain their Zimbabwean citizenship in terms of s 9(7) of the Citizenship of Zimbabwe Act [*Chapter 4.01*]. The class of persons the appellant F sought to represent was huge and of varying social, economic and educational background. Most members of the class, however, were likely to be poor, ill-educated rural dwellers. The appellant proposed to notify them of the impending class action by publishing notices in two English-language newspapers published in Harare.

The High Court dismissed the application on the ground that the appellant G was not a suitable person to represent the best interests of all the members of the class, bearing in mind the need to carry out the task of reaching out to the largely rural, poor and unsophisticated members of the class. He also held that the people likely to see the notices in the newspapers constituted a small portion of the class of persons concerned. H

2002 (2) ZLR p437

Sandura JA

A *Held,* that, in terms of s 7(1)(a) of the Act, where the High Court grants leave to institute a class action, the court must specify the manner in which the representative must give notice to the members of the class to be represented. It is not for the applicant or representative to do so. The judge, by failing to give directions, had failed to comply with the provisions of the section.

B *Held,* further, that if the applicant himself is found to be unsuitable to be a representative, that is not the end of the matter: the court must appoint some other suitable person.

Held, further, that the members of the class should be notified by way of press notices and by having the notices broadcast on the national radio C in the three main languages of the country.

[zCAz]Cases cited

Carr v Registrar-General 2000 (2) ZLR 433 (S)

Ngxusa & Ors v Permanent Sec, Dept of Welfare, Eastern Cape & Anor 2001 (2) SA 609 (E)

D *S v De Jager* 1965 (2) SA 612 (A)

S v Kuiper 2000 (1) ZLR 113 (S)

S v Mutters & Anor 1987 (1) ZLR 202 (S)

S v Osborne 1989 (3) ZLR 326 (S)

[zSTz]Legislation considered

E Class Actions Act [*Chapter 8.17*], ss 3, 5 & 7

[zCIz]Case information

A P de Bourbon SC, for the appellant

A Dururu, for the respondents

[zJDz]Judgment

F **Sandura JA**: This is an appeal against a judgment of the High Court which dismissed the appellant's application, brought in terms of s 3(1) of the Class Actions Act [*Chapter 8:17*] ("the Act"), for leave to institute a class action on behalf of the following class of persons:

(1) all persons who are citizens of Zimbabwe by birth; and

G (2) either of whose parents was or both of whose parents were born in a foreign country; and

(3) who have never applied for and/or been granted the citizenship of another country.

The background facts are as follows. Before December 1984 the law of

H Zimbabwe permitted dual citizenship. However, that state of affairs changed

2002 (2) ZLR p438

Sandura JA

on 1 December 1984 when the Citizenship of Zimbabwe Act, No. 23 of 1984 A (now [*Chapter 4:01*]) abolished dual citizenship and, in terms of s 9(7), provided that a citizen of Zimbabwe who, on 1 December 1984, was also a citizen of a foreign country would cease to be a citizen of Zimbabwe one year after that date unless, on or before the expiry of that period, he renounced his foreign citizenship in the form and manner prescribed. Subsequently, it transpired that the renunciation forms signed by the citizens B of Zimbabwe intending to renounce their foreign citizenship did not have the desired effect. That was so because the law of Zimbabwe at the time did not require a person intending to renounce his foreign citizenship to do so in accordance with the law of the foreign country in question. See *Carr v Registrar-General* 2000 (2) ZLR 433 (S). C

As a result, on 6 July 2001 the Citizenship of Zimbabwe Amendment Act, No. 12 of 2001, was promulgated and came into effect on the same day. It repealed subs (7) of s 9 of the Citizenship of Zimbabwe Act [*Chapter 4:01*] and substituted the following:

"(7) A citizen of Zimbabwe of full age who - D

(a) at the date of commencement of the Citizenship of Zimbabwe Amendment Act. 2001, is also a citizen of a foreign country; or

(b) at any time before that date, had renounced or purported to renounce his citizenship of a foreign country and has, despite such renunciation, retained his citizenship of that country;

shall cease to be a citizen of Zimbabwe six months after that date unless, E before the expiry of that period, he has effectively renounced his foreign citizenship in accordance with the law of that foreign country and has made a declaration confirming such renunciation in the form and manner prescribed."

Subsequently, a dispute arose in respect of the interpretation of the new subs (7) because the second respondent insisted that what had to be renounced was F not merely the fact of holding a foreign citizenship, but also any right to claim a foreign citizenship, arising out of the place of birth of the parents of a person born in Zimbabwe. The purpose of the class action which the appellant intended instituting was to determine whether that interpretation was correct.

The learned judge in the court *a quo* dismissed the appellant's application on G the ground that he did not consider the appellant a suitable person to represent the best interests of all the members of the class, bearing in mind the need to carry out the task of reaching out to the largely rural, poor and unsophisticated members of the class.

Aggrieved by that decision the appellant appealed to this court.

Before considering the main issue in this appeal, I would like to deal with the H

A appellant's application for leave to adduce further evidence in the form of an affidavit. The additional evidence was intended to remove the basis for what the learned judge in the court *a quo* perceived to be limitations on the appellant's ability to communicate with the class of persons he purported to represent.

B The basic requirements of an application for the leading of evidence on appeal were set out by Holmes JA in *S v de Jager* 1965 (2) SA 612 (A) at 613C-D as follows:

"(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial. C

(b) There should be *a prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

These requirements have been quoted with approval by this court in *S v Mutters & Anor* 1987 (1) ZLR 202 (S) at 204G-205A; *S v Osborne* 1989 (3) ZLR 326 (S) at 336C-G; and *S v Kuiper* 2000 (1) ZLR 113 (S) at 116A-C. D The non-fulfilment of any of the requirements would ordinarily be fatal to the application.

Applying the test set out above, I am satisfied that the application for leave to adduce additional evidence cannot be granted. I say so because the evidence which it is sought to adduce was available when the application was E heard by the learned judge in the court *a quo,* and no explanation has been given as to why the evidence was not adduced then, other than that it was not considered necessary to adduce such evidence as the appellant believed that all the requirements of the Act had been complied with. In my view, that explanation cannot be a basis for granting the leave sought. There must be finality to litigation. If, at the hearing of an application, a party elected to F stand by the evidence he had adduced, he should not be allowed to adduce further evidence on appeal unless there are special reasons for not having adduced the evidence when the application was heard. No such reasons exist in this case, and that is the end of the matter.

I now wish to deal with the main issue in this appeal, which is whether the G learned judge was correct when he dismissed the appellant's application for leave to institute a class action. I shall set out the relevant provisions of the Act. Subsections (1), (2) and (3) of s 3 of the Act read as follows:

"(1) Subject to this section, the High Court may on application grant H leave for the institution of a class action on behalf of any class of persons.

(2) An application for the institution of a class action - A

(a) may be made by any person, whether or not he is a member of the class of persons concerned; and

(b) ...

(3) The High Court may grant leave in terms of subsection (1) if it considers that in all the circumstances of the case a class action is appropriate, and in determining whether or not this is so the court shall B take into account —

(a) whether or not *a prima facie* cause of action exists; and

(b) the issues of fact or law which are likely to be common to the claims of individual members of the class of persons concerned; and

(c) the existence and nature of the class of persons concerned, C having regard to —

(i) its potential size; and

(ii) the general level of education and financial standing of its members; and

(iii) the difficulties likely to be encountered by the members enforcing their claims individually; and

(d) the extent to which the members of the class of persons D concerned may be prejudiced by being bound by any judgment given in the class action; and

(e) the nature of the relief claimed in the class action, including the amount or type of relief that each member of the class of persons concerned might claim individually; and

(f) the availability of a suitable person to represent the class of E persons concerned; and

(g) any other relevant factor."

It is pertinent to note, in passing, that in terms of s 3(2)(a) of the Act an application for the institution of a class action may be made by any person, whether or not he is a member of the class of persons concerned. The learned judge in the court *a quo* was alive to this fact. Consequently, the decision to F dismiss the appellant's application was not based upon the finding by the learned judge that the appellant was not a member of the class of persons concerned.

Section 5 of the Act reads as follows —

"5 Appointment of representative G

(1) When the High Court grants an application under section *three* for leave to institute a class action it shall appoint the applicant or any other suitable person to be the representative of the class of persons concerned in the class action.

(2)In making an appointment for the purpose of subsection (1), the H

A High Court shall have regard to —

(a) the suitability of the appointee to represent the best interests of all the members of the class of persons concerned; and

(b) any conflict of interest between the appointee and the members of the class of persons concerned; and

(c) the ability of the appointee to make satisfactory arrangements to pay B for the class action and to pay any order of costs that may be made."

After considering the provisions of this section and the averment by the appellant that the Test Case Committee of the Legal Resources Foundation, a non-governmental organisation, had agreed to finance the application, the learned judge said:

"From this averment it seems that the applicant has made some C arrangements to pay for the class action. ... In the circumstances I think the only key issue for determination is (the) suitability of the applicant to represent the best interests of all the members of the class of persons concerned as required by section 5(2)(a). In other words, I am satisfied that the applicant has made satisfactory financial arrangements as required by section 5(2)(c)."

D The learned judge then considered whether the appellant was a suitable person to represent the best interests of all the members of the class and concluded that he was not.

In reaching that conclusion, the learned judge relied upon what the appellant said about the manner in which he intended bringing the class action to the E notice of the members of the class, as he was required to do in terms of s 7(1)(a) of the Act. In his draft order the appellant indicated that he would cause to be published in *The Daily News* and *The Herald* a notice, a copy of which was attached to the draft order.

After considering the manner in which the notice was to be published, the learned judge concluded that the appellant's target was a small portion of the class of persons concerned. He said:

"Although the applicant declared an intent to represent all members of the class, his draft order and the notice reflect that his target is those who read and have access to newspapers or print media. In my view, that is a minority of the persons in the class."

G For that reason, the learned judge concluded that the appellant was not a suitable person to represent the best interests of all the members of the class. Accordingly, he dismissed the application.

I have no doubt in my mind that the learned judge misdirected himself and erred.

Section 7 of the Act, in relevant part, reads as follows: A

"**7 Notice of class action**

(1) Where —
(a) the High Court has granted leave to institute a class action, the representative shall cause a notice specifying the matters referred to in subsection (2) to be given to members of the class of persons B concerned in such manner and within such period as the court shall specify;
(b) ...
(2) A notice referred to in subsection (1) shall specify —
(a) the cause of action giving rise to the class action, with sufficient detail to enable the circumstances giving rise to the action to be C identified; and
(b) the nature of the relief being sought in the class action; and
(c) the class of persons concerned in the class action, with sufficient detail to enable the members to identify themselves with the intended action;
and shall advise members of the class concerned that —
(i) each member of the class concerned will be bound by the class action D and its results unless the member notifies the Registrar of the High Court, within a period fixed by the court or rules of court, as the case may be, and specified in the notice, that he wishes to be excluded from the action; and
(ii) ...
(3) A failure on the part of a member of a class of persons concerned in E a class action to receive notice in terms of this section shall not -
(a) invalidate the class action; or
(b) prevent the member from being bound by the class action and its results."

It is pertinent to note that in terms of s 7(1)(a) of the Act it was the duty of F the learned judge in the court *a quo,* and not that of the appellant, to specify the manner in which and the period within which the notice was to be given to the members of the class of persons concerned. Accordingly, having accepted that the class of persons existed and that a class action was appropriate, the learned judge should have given directions to the appellant on the best way of notifying as many members of the class as possible about G the proposed class action.

The learned judge could, for example, have directed, as was done in *Ngxuza & Ors v Permanent Secretary, Department of Welfare, Eastern Cape, & Anor* 2001 (2) SA 609 (E), that, in addition to the publication of the notice in the newspapers, the notice was to be read in various languages on one of the radio stations operating in the country. H

A Regrettably, the learned judge gave no directions on the matter and, therefore, failed to comply with the provisions of s 7(1)(a) of the Act. In the circumstances, the only basis on which the appellant was found to be unsuitable falls away.

However, even if the appellant were not a suitable person to represent the B class of persons which the learned judge found to exist, that would not have justified the dismissal of the appellant's application. I say so because, in terms of s 5(1) of the Act, when the court grants the application for leave to institute a class action "it shall appoint the applicant or any other suitable person to be the representative of the class of persons concerned in the class action". Assuming, therefore, that the appellant were unsuitable, the learned C judge should have appointed some other suitable person to represent the class.

Finally, it seems to me that the learned judge overlooked the fact that the members of the class in this case had nothing to lose. That is so because, if the class action succeeds, it would mean that the provisions of s 9(7) of the Citizenship of Zimbabwe Act [*Chapter 4:01*]*,* as amended by the Citizenship D of Zimbabwe Amendment Act, No. 12 of 2001, do not apply to the members of the class. In other words, it would mean that the second respondent's interpretation of s 9(7) of the Citizenship of Zimbabwe Act [*Chapter 4:01*]*,* as amended, is incorrect.

On the other hand, if the class action does not succeed and the appellant is E ordered to pay the respondents' costs, those costs would be paid by the Test Case Committee of the Legal Resources Foundation, and not by the members of the class. It is, therefore, very unlikely that any member of the class would like to be excluded from the class action.

Having said that, I wish to consider the best way of notifying as many F members of the class as possible about the class action.

Mr *de Bourbon,* who appeared for the appellant, submitted that in addition to the publication of the notice in *The Herald* and *The Daily News,* the members of the class should be notified about the class action by way of five separate announcements in the three main languages on Radio Two (now Radio Zimbabwe) of the Zimbabwe Broadcasting Corporation during prime G time. I agree with that submission. Undoubtedly, the notice would have a much wider coverage than it would have if it were merely published in the two newspapers.

In the circumstances, the following order is made -
1. The appeal is allowed with costs, which costs shall be borne by the H second respondent.
2002 (2) ZLR p444
Sandura JA
2. The order of the court *a quo* is set aside and the following is substituted A —
"The application is granted in terms of the draft order, with paragraph 4 thereof amended so that it reads as follows —
'In terms of s 7(1)(a) of the Class Actions Act [*Chapter 8:17*] the applicant shall by 30 November 2002 —
(a) cause to be published in *The Herald* and *The Daily News* on five B different dates a notice in the form attached hereto; and
(b) cause the said notice to be read in Shona, Ndebele and English during prime time on Radio Zimbabwe of the Zimbabwe Broadcasting Corporation on five different dates.'"
Cheda JA and Gwaunza AJA concurred. C
Gill, Godlonton & Gerrans, appellant's legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/GALANTE v GALANTE (2) 2002 (2) ZLR 445 (S)

[zRPz]GALANTE v GALANTE (2) 2002 (2) ZLR 445 (S)
2002 (2) ZLR p445

Citation	2002 (2) ZLR 445 (S)
Case No	Judgment No. S-82-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza AJA
Heard	5 September 2002; 9 October 2002
Judgment	9 October 2002
Counsel	*R M Fitches,* for the appellant *A P de Bourbon SC,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Court — abuse of process — court's jurisdiction to protect itself from abuse D — appeal noted on point which had previously not been disputed — appeal dismissed
[zHNz]Headnote

During divorce proceedings brought by the appellant against her husband, she averred, in order to confirm the jurisdiction of the High Court to E grant her the relief she sought, that he was domiciled in Zimbabwe. She obtained maintenance *pendante lite,* but her divorce action was subsequently withdrawn. Her husband then brought a divorce action against her. She entered a special plea, in which she disputed his domicile in Zimbabwe and thus the High Court's jurisdiction to hear the divorce action. The High Court held that she was estopped from F denying his domicile. She appealed against that decision, but before the appeal was heard the divorce action took place. During the trial, the husband's statement that he was domiciled in Zimbabwe was not challenged. A decree of divorce was granted in his favour.

Held, that the decree of divorce having been granted, there was no justification whatever for persisting with the special plea. The court has an inherent G power to prevent abuse of its process. In the circumstances the appeal was an abuse of process and should be dismissed with costs.

[zCAz]Case cited

H *Soundcraft (Pty) Ltd v Jacobs* 1982 (4) SA 685 (W)

2002 (2) ZLR p446

Sandura JA

[zCIz]Case information

R M Fitches, for the appellant A

A P de Bourbon SC, for the respondent

[zJDz]Judgment

Sandura JA: This is an appeal against the dismissal by the High Court of the appellant's special plea in which she alleged that the High Court did not have the jurisdiction to hear the divorce action instituted against her by the B respondent.

The background facts are as follows. The parties were married to each other in Harare in September 1985 and two children were subsequently born. Thereafter on 3 November 1998 the appellant ("Ronnie") instituted a claim for divorce and other relief in the High Court ("the first divorce case"). In para C 3 of her declaration she stated that the respondent ("Edward") was domiciled in Zimbabwe. That averment was admitted by Edward in his plea filed in February 1999. After the first divorce case had been instituted, Ronnie filed a court application in the High Court in January 1999 ("the maintenance application") seeking maintenance *pendente lite* for herself and the two minor children, and a contribution towards her costs in the first divorce action. In order to confirm the jurisdiction of the High Court to grant her the relief which she sought in the application, she incorporated, under oath, the contents of her declaration in the first divorce case, which included the averment that Edward was domiciled in Zimbabwe. E

The maintenance application was heard on 25 November 1999 and Ronnie was awarded maintenance *pendante lite* for herself and the two minor children in the sum of $100 000 per month, and a contribution towards costs in the sum of $50 000.

On 4 December 2000 a pre-trial conference for the first divorce case was held F and the case was set down for hearing on 5 December 2000. On that day, Ronnie made an application for the postponement of the trial, but the application was dismissed. She then withdrew the first divorce case and was ordered to pay the costs which had been incurred by Edward. She did not claim that the High Court did not have jurisdiction over the matter.

Following the withdrawal of the first divorce case, Edward issued a summons G against Ronnie claiming a decree of divorce and other relief ("the second divorce case") on 6 December 2000. In his declaration he averred that he was domiciled in Zimbabwe.

Subsequently, on 9 April 2001, Ronnie filed a special plea alleging that the High Court did not have the jurisdiction to hear the second divorce case because Edward was not domiciled in Zimbabwe. She did not allege any H

2002 (2) ZLR p447

Sandura JA

A change of domicile by Edward between 3 November 1998, when she instituted the first divorce case and averred that Edward was domiciled in Zimbabwe, and 6 December 2000 when the second divorce case was instituted. However, she averred that Edward had never lost his domicile of origin, which was the United States of America.

In his reply to the special plea, Edward took the point that Ronnie was B estopped from raising the issue of his domicile, bearing in mind her averments concerning his domicile in the first divorce case and the maintenance application.

Thereafter, the special plea was set down for hearing on 6 December 2001. On that day, the learned judge heard argument on the point *in limine* which C was taken by Edward. The point was that Ronnie was estopped from denying that Edward was domiciled in Zimbabwe. The point *in limine* was

subsequently upheld by the learned judge in the court *a quo,* and the special plea was dismissed with costs. Aggrieved by that decision, the appellant appealed to this court.
D At the hearing of the appeal Mr *de Bourbon,* who appeared for the respondent, informed the court as follows:
1. The trial in the second divorce case commenced on 22 July 2002 and was completed on 26 July 2002. The jurisdiction of the High Court was not in issue.
2. The first witness to give evidence was Edward. In his evidence, Edward E stated that he was domiciled in Zimbabwe. That evidence was not challenged by Mr Morris who appeared for Ronnie.
3. At the end of the trial, the trial judge granted Edward a decree of divorce, but reserved his judgment in respect of all the other matters which had been raised during the trial.
F I did not understand Mr *Fitches,* who appeared for Ronnie, to disagree with the facts set out above. In addition, after the appeal had been argued, a copy of the divorce order issued on 26 July 2002 was sent to the Registrar of this court by Mr de *Bourbon* at the request of the court. The order clearly indicates that on 26 July 2002 Mr Justice Smith granted Edward a decree of divorce and reserved his judgment in respect of all the other matters which had arisen G during the trial.
In the circumstances, it was submitted by Mr *de Bourbon* that the appeal was an abuse of the process of this court and ought to be dismissed with costs because the trial in the second divorce case had already been concluded and a decree of divorce granted. I am in complete agreement with that submission. H
The special plea was filed because Ronnie contested Edward's claim for a
2002 (2) ZLR p448
Sandura JA
decree of divorce and other relief and, therefore, intended preventing the A hearing of the second divorce case. Now that the trial has been concluded and a decree of divorce granted, with the decision on the remaining issues reserved, there is no justification whatsoever for persisting with the special plea and the appeal. There is no longer any reasonable prospect that Ronnie could succeed in her defence to Edward's claim for divorce because a decree B of divorce has already been granted. In addition, it is no longer possible to prevent the hearing of the second divorce case because the trial has already been concluded.
In my view, persisting with the special plea and with the appeal in these circumstances is an abuse of the process of this court. The court has an inherent power to prevent the abuse of its process. C As Van Dyk J said in *Soundcraft (Pty) Ltd t/a Advanced Audio v Daan Jacobs t/a Radio Spares and TV* 1982 (4) SA 685 (W) at 687H-688A:
"Although it is well established that our courts will be very slow to interfere in a litigant's right to ventilate his case before it, nevertheless, where there is no reasonable prospect that a party can succeed in an D action or in his defence to an action, the court can summarily veto the action or defence if a prosecution thereof would constitute an abuse of its process. See, in this regard, *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271 and 275 where the learned Chief Justice pointed out with reference to the case of *Reichel v Magrath* 14 AC 665 that:
'every court has an inherent right to prevent an abuse of its process in the E form of frivolous or vexatious litigation.'
See, too, *Ravden v Beeten* 1935 CPD 269 at 276; *Sussman v Testa* 1951 (2) SA 226 (O) at 230C-231D; *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W) at 73-4."
Similar views on the inherent power of the court to prevent an abuse of its own F process appear at p 1110 of the 4 ed of Herbstein & Van Winsen *Civil Practice of the Supreme Court of South Africa.*
Mr *Fitches* was unable to put up any valid argument as to why Ronnie's conduct should not be viewed as an abuse of the process of this court. However, the court appreciated the difficult position in which he found G himself. In the circumstances, the appeal is dismissed with costs.
Cheda JA & Gwaunza AJA: concurred
N H Franco & Co, appellant's legal practitioners
Atherstone & Cook, respondent's legal practitioners H

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Source:

[zRPz]MEAD v MINISTER OF LANDS, AGRICULTURE & RURAL RESETTLEMENT & ANOR 2002 (2) ZLR 449 (H)
2002 (2) ZLR p449

Citation	2002 (2) ZLR 449 (H)
Case No	Judgment No. HH-173-02
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	11 September 2002; 10 October 2002
Judgment	10 October 2002
Counsel	Miss *E Mushore,* for the applicant *D D Chirindo,* for the respondents
Case Type	Civil application
Annotations	Link to case annotations

[zFNz]Flynote
D **Administrative law** — administrative decision — failure by person exercising public authority to exercise powers — Minister having listed farm for acquisition — subsequently failing to respond to request by farmer to continue farming — such failure not rendering original decision illegal
Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 16 — protection against acquisition without compensation — E Land Acquisition Act [*Chapter 20:10*] — whether s 5(1)(b) thereof constitutional — notice of acquisition — whether must be served on lessee of property
[zHNz]Headnote
The applicant was the lessee of a farm, which was listed in the Government F *Gazette* for compulsory acquisition. He occupied the property in terms of an unregistered lease. A notice of acquisition was served on the owner under s 5 and s 8 of the Land Acquisition Act [*Chapter 20:10*]. No notice was served on the applicant. When he became aware of the notice, he wrote to the respondent Minister for authority to continue farming. The respondent did not reply. The applicant challenged the G validity of the notice of acquisition on the grounds that the notice of intention to acquire the property issued in terms of s 5 of the same Act was defective in that it had only been served on the owner of the property and not, in addition, upon the applicant. The applicant sought an order declaring that the notices were invalid in respect of him, and that, through failure to exercise a discretion, the respondent's actions became H unlawful.
2002 (2) ZLR p450
Hlatshwayo J
Held, that the clear intention of the amendment to s 5 introduced by Act 15 A of 2000 was to restrict the persons entitled to service of the notice of acquisition to owners of the land and holders of any registered real right in the land.
Held, further, that "or" in s 16(1)(b) of the Constitution should be read as "and/or". The section then merely requires that reasonable notice of acquisition be given. Publication as provided in s 5(1)(a) (without B personal service) *in casu* constitutes the reasonable notice required by s 16(1)(b) to persons other than the owner or holders of registered rights in the property.

Held, further, that a subsequent failure to exercise a discretion or to decide did not make the underlying decision illegal. C

[zCAz]Cases cited

Barclays National Bank Ltd v Love 1975 (2) SA 514 (D)

Federal Steam Navigation Co v Dept of Trade and Industry [1974] WLR 505

Lewin v Sanders 1937 SR 147 D

Reeskens v Registrar of Deeds 1964 (4) SA 369 (N)

[zSTz]Legislation considered

Constitution of Zimbabwe 1980, s 16(1)(b)

Land Acquisition Act [*Chapter 20.10*] ss 5 & 8 E

[zCIz]Case information

Miss *E Mushore,* for the applicant

D D Chirindo, for the respondents

[zJDz]Judgment

Hlatshwayo J: The applicant, David Leon Mead, through a company F under his control, Capton Enterprises (Private) Limited, leases a farm called Greenfields from a third party, Chimusenga Farm (Private) Limited, which company, controlled by one Mrs Viljoen ("the owner"), owns the land concerned. The first respondent identified Greenfields Farm for compulsory acquisition and published in both the government *Gazette* and a newspaper G circulating in the area such intention to acquire the property and also served notice on the owner in terms of s 5(1) of the Land Acquisition Act [*Chapter 20:10*] ("the Act"). Subsequently, a s 8 order of acquisition was issued and served on the owner in respect of the property. The s 8 order required the owner or any occupier of the property to desist from any further work on the land after 45 days and to vacate the premises by 7 September, being 90 days H

2002 (2) ZLR p451

Hlatshwayo J

A after service of the s 8 order on the owner.

Although this application was initially for a provisional order, it was agreed between the parties that a final decision be made on the basis of the following draft order:

"IT IS ORDERED THAT:

1. The B section 8 acquisition order already issued in respect of the farm Greenfields situate in the District of Lomagundi and owned by Chimusenga (Private) Limited is declared to be of no force and effect in respect of the Applicant, his family or the workers employed by Capton Enterprises (Private) Limited who are presently employed by the Applicant through the company on the aforesaid Greenfields C farm.
2. Any attempt to arrest or evict the Applicant, his wife and family or the aforesaid workers from their homes on Greenfields farm on the strength of the aforesaid section 8 order issued in May 2002 and served on the owner on 6 June 2002 shall accordingly be unlawful.
3. No order as to costs shall be made unless either of the respondents D opposes this application in which case costs shall be costs in the cause."

The material facts on which this case is based are the following. Upon the service of the s 5(1) notice on her, the owner objected to the compulsory acquisition of the property and also advised the first respondent that the farm was leased by Capton Enterprises controlled by the applicant. The lease E agreement, which was never registered, was entered into before the property was listed for acquisition. No copy of the s 5 notice was served on the applicant or the company, Capton Enterprises. Likewise, no copy of the s 8 acquisition order was served upon the applicant or his company. Nonetheless, the applicant became aware of the service of the s 8 order on the owner and F on 19 June and again on 18 July 2002, the applicant wrote to the first respondent seeking leave to continue farming operations "at least until the end of September and preferably to the beginning of November 2002". The first respondent has not replied to either of the letters. The applicant sought the granting of the above order on the following G grounds:

1. That the s 8 order can have no application to him because of the failure to serve the s 5 notice and the s 8 order upon him.
2. That the failure by the first respondent to reply to the applicant's letters requesting authority to continue farming constituted a blatant refusal to exercise a discretion and was thus unlawful, entitling the applicant to H seek an order setting aside the action.

2002 (2) ZLR p452

Hlatshwayo J

LEGAL EFFECT OF FAILURE TO SERVE S 5 NOTICE AND S 8 A **ORDER ON THE LESSEE**

The first issue to consider is the legal effect of the failure by the first respondent to serve on the lessee the s 5 notice and the s 8 acquisition order. Now s 5(1) in the material parts reads as

follows:

"(1) Where an acquiring authority intends to acquire any land otherwise B than by agreement, he shall—

(a) publish once in the *Gazette* and once a week for two consecutive weeks, commencing with the day on which the notice in the *Gazette* is published, in a newspaper circulating in the area in which the land to be acquired is situated and in such other manner as the acquiring authority thinks will best bring the C notice to the attention of the owner, a preliminary notice —

(i) ...

(ii) ...

(iii) calling upon the owner or occupier or any other person having an interest or right in the land who —

A. wishes to contest the acquisition of the land, to lodge a D written objection with the acquiring authority within thirty days from the date of publication of the notice in the *Gazette;* or

B. wishes to claim compensation in terms of Part V for the acquisition of the land, to submit a claim in terms of section *twenty-two,* where the land is not designated rural E land; and

(b) *serve on the owner of the land to be acquired and the holder of any other registered real right in that land whose whereabouts are ascertainable after diligent inquiry at the Deeds Registry and, if necessary, in the appropriate companies register, notice in writing providing for the matters referred to in subparagraphs (i), (ii) and (iii) of paragraph (a).”* (emphasis added) F

Section 8 reads:

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

What is clear from the above quotations is that the s 8 order need be served only on the owner of the land concerned. In this case, therefore, the challenge on the validity of the s 8 order can only be based on the premise that the underlying s 5 notice was defective for failure to serve on the lessee. I shall, accordingly, focus on the s 5 provisions. It is important at this juncture to H

2002 (2) ZLR p453

Hlatshwayo J

A point out that s 5(1)(b) pertaining to service of the notice of acquisition was amended by Act 15/2000 essentially to restrict the persons entitled to service of the notice of acquisition to owners of the land and holders of any registered real right in that land. Before the amendment, s 5(1)(b) read thus:

"(b) serve on—

(i) the owner of the land to be acquired and the holder of any B other registered real right in that land; and

(ii) any other person who it appears to the acquiring authority may suffer loss or deprivation of rights by such acquisition;

whose whereabouts are ascertainable after diligent inquiry, notice in writing providing for the matters referred to in subparagraphs (i), (ii) and (iii) of paragraph (a)."

C It is obvious that the legislature intended to remove the category of persons falling under paragraph (b)(ii) from the entitlement to receive notices - a category under which the applicant falls squarely, for it was properly admitted that the applicant was not a holder of a real right in the property. The justification for the removal of such a group of persons can be discerned as having been informed by the imprecise nature, number and identity of D persons who could potentially fall under the subparagraph.

The submission made on behalf of the applicant that in terms of s 5(1)(a)(iii) an occupier is specifically mentioned as entitled to contest the acquisition does not change, but in fact bolsters (on the principle of *expressio unius est exclusio alterius)* the fact that an occupier falls outside the category of those entitled to notification in terms of s 5(1)(b). Similarly, the repeal on 10 May E 2002 of the provision (s 9(2)) entitling a lessee to at least two months' notice, goes to show the intention by the legislature to remove occupiers and others with unregistered real or personal interests in the land from entitlement to direct notification.

The final submission on behalf of the applicant in this regard was that by disentitling persons with personal or unregistered real interests in the land to F direct notification, s 5(1)(b) was in contravention of s 16(1)(b) of the Constitution, which reads in the relevant parts as follows:

"16 (1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that—

(a) ... G

(b) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition; and"

Mr *Chirindo,* for the first respondent, submitted, and rightly so in my view, that the word "or" in subparagraph (b) of s 16(1) should be given a H conjunctive rather than an alternative effect. He cited the case of *Lewin* v

2002 (2) ZLR p454

Hlatshwayo J

Sanders 1937 SR 147, which concerned a clause in a contract in restraint of A trade prohibiting a medical practitioner from practising medicine "within four years, or within 50 miles of the Post Office within Salisbury, either directly or indirectly". The court interpreted the first "or" as "and". A similar decision was arrived at in the case of *Barclays National Bank Ltd v*

Love 1975 (2) SA 514 (D), where the court observed (at 516 G-H):

"It is by no means uncommon to find in contracts, affidavits, letters and B even statutes that "or" is used when "and" would clearly be more accurate and appropriate, and the other way round."

The case of *Reeskens v Registrar of Deeds* 1964 (4) SA 369 (N) concerned the definition of a "notarial bond" which read thus: "In this Act, unless inconsistent with the context, "notarial bond" means a bond attested by a C notary public hypothecating immovable property generally or specifically". The court held that the word "or" should be given the extended meaning of "and/or", since there is no prohibition against the inclusion in one and the same deed of a general and special mortgage bond hypothecating property.

The word "or" in "owner or master" in the British Oil in Navigable Waters D Act, 1955 was also held to be conjunctive and thus to be read as "and" (See *Federal Steam Navigation Co. v Dept of Trade and Industry* [1974] WLR 505)

If the word "or" in subparagraph (b) of s 16(1) was given its ordinary meaning, it would lead to absurd results where the State could, at its discretion, choose to serve the notice of the intention to acquire, not on the E owner or other persons with real rights in the property, but on persons with lesser rights who would be unlikely to challenge the acquisition. Therefore, in order to remove such absurdity, the word "or" must be given the extended meaning of "and/or".

Now, what kind of notice does s 16(1)(b) of the Constitution require? Does F the section enjoin the State to issue personal notices to owners and any other persons having any interest or right in the property? The provision merely requires that a reasonable notice be given. It was then left to specific legislation to spell out the type of notices that need be issued to specific interested parties. Section 5(1) of the Land Acquisition Act, as already noted, states that direct notification should be given to the owner or holder of a G registered real right in the property. Persons with lesser rights are notified indirectly through publication of the intention to acquire in the government *Gazette* and a newspaper circulating in the area. Therefore, in my view, s 5(1) of the Land Acquisition Act fully complies with the stipulation of s 16(1)(b) of the Constitution. The one basis upon which indirect notification could be challenged is whether it does constitute "reasonable notice", and *in casu,* it H

2002 (2) ZLR p455

Hlatshwayo J

A does. A s 5 notice which was published once in the *Gazette* and once a week for two consecutive weeks in a newspaper circulating in Lomagundi where Greenfield Farm is situated, called upon the owner or occupier or any other person having an interest or right in Greenfields Farm to lodge written objections with the acquiring authority within 30 days, but applicant did not B lodge any objection with the acquiring authority.

FAILURE TO RESPOND TO APPLICANT'S REQUEST TO CONTINUE FARMING

It was submitted on behalf of the applicant that the first respondent's failure to respond to the applicant's letters of 19 June and 18 July 2002, requesting authority to continue farming and wind up farming operations, constituted a C fatal refusal to decide or failure to exercise a public power which must be held against the first respondent, more so because s 8(7) of the Land Acquisition Act imposes criminal sanctions on any owner or occupier who interferes with the exercise of the rights of the acquiring authority "without permission in writing of the Acquiring Authority".

D In support of this contention, the following passages from Baxter's *Administrative Law* were quoted:

"If the empowering legislation does create powers directed at specific individuals, the public authority is always under a duty to *decide* whether or not to exercise them. Failure to do so will entitle a complainant to obtain an order of mandamus from a Court, and where an authority has E acted inconsistently with its duty the complainant may seek to have the action set aside." (At page 412).

and the following passage appearing on page 414 immediately under the subheading "Refusal to Decide":

"Persons who are entitled to do so may call upon a public authority to exercise its powers. Where a power is discretionary, they are at least F entitled to a decision in one way or other; a blatant refusal to exercise the discretion is unlawful."

It was then submitted that the first respondent had acted unlawfully in disregarding the application made by the applicant, and that this invalidated the s 8 order requiring the applicant to desist from any further work on the G land and vacate the premises by 7 September, being 90 days after the service of the s 8 order on the owner. However, I did not find merit in these submissions for the simple reason that nothing in the passages referred to attested to the illegality of the underlying decision where there is a subsequent failure to exercise a discretion or to decide. The remedy under such circumstances is to apply for a mandamus to force the public authority to H reply or to seek the setting aside of the action on the basis that the public

2002 (2) ZLR p456
Hlatshwayo J

authority has acted contrary to its duties. The application before this court A is not a mandamus, nor is there any allegation that the acquiring authority has acted outside its mandate or contrary to its duties. Furthermore, given the magnitude of the land reform exercise, it would be unreasonable to expect the acquiring authority to reply to each and every request from any interested party who makes an application on the pain of having preceding acquisition B procedures declared null and void. Accordingly, this ground of challenge of the validity of the s 8 order fails as well.

CONCLUSION

As far as costs are concerned, I have been given no reason from departing from the standard approach that the costs follow the outcome. C

Accordingly, this application is dismissed with costs.

Stumbles & Rowe, Applicant's legal practitioners D
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 2/MASINA v CHIKOWORE & ANOR 2002 (2) ZLR 457 (H)

[zRPz]MASINA v CHIKOWORE & ANOR 2002 (2) ZLR 457 (H)
2002 (2) ZLR p457

Citation	2002 (2) ZLR 457 (H)
Case No	Judgment No. HB-121-02
Court	High Court, Bulawayo
Judge	Ndou J
Heard	4 October 2002; 11 October 2002
Judgment	11 October 2002
Counsel	*C Hikwa,* for the applicant First respondent in person
Case Type	Civil application

Annotations No case annotations to date

[zFNz]Flynote
Family law — child — interests of child — paramountcy of — guardian D parent objecting to temporary removal of child from Zimbabwe — need for court to ascertain reasonableness of objection
[zHNz]Headnote
The applicant had been exercising *de facto* custody over her eight-year-old granddaughter for four years, since the child's mother died. During that E time the child's father did not seek access to the child and had to be compelled by a court order to pay adequate maintenance for her. The applicant wanted to take the child to the United States for a month-long holiday to visit a relative, but the child's father refused to sign the necessary passport forms to enable the child to travel. The applicant accordingly sought an order directing the father to sign them.
F *Held,* that the paramount consideration in matters of this kind are the best interests of the child.
Held, further, that the father's rights of access to the child would be reduced if the child was to be removed to a foreign country, even for a short period, so his consent was relevant and it became necessary to inquire whether he was acting reasonably or unreasonably in withholding his G consent.
Held, further, that in the circumstances the father's refusal to consent was unreasonable and was not informed by the genuine interests of the child. H The application was accordingly granted.
2002 (2) ZLR p458
Ndou J
[zCAz]Cases cited A
B v B (Custody of Children) [1985] FLR 166
Bailey v Bailey 1979 (3) SA 128 (A)
C (a Minor) (custody of child), re [1980] 2 FLR 163
Dolby v Lewis S-34-87
Shawzin v Laufer 1968 (4) SA 657 (A) B
Stock v Stock 1981 (3) SA 1280 (A)
[zCIz]Case information
C Hikwa, for the applicant
First respondent in person
[zJDz]Judgment
Ndou J: The applicant is the grandmother of a minor child. She has been C staying with the minor child since 1998, when her daughter, i.e. the minor's mother, passed away. The first respondent, as the surviving parent, should under normal circumstances have custody of the minor child. However, since the death of the minor's mother the first respondent does not seem to have shown any serious interest in exercising the custodial rights due to him over D the minor. He has made no serious effort to collect the minor. From the time the minor was four years old to date when she is aged eight years, the applicant has exercised *de facto* custody over the child.
The result is that the child is now in grade 3 and although the first respondent has a right over the minor (i.e. *de jure)* he has never exercised such rights. A responsible and caring father does not let his minor child remain in the E custody of another person for over four years. He does not seem to have bothered to have access to the child from the age of four years to age of eight. He obviously has no bond with the minor child other than being the natural father. Even if I accepted that the applicant had shouted at him, or chased him away for that matter, the fact remains that for a period of over four years he did not take any meaningful steps to assert his custodial rights over the child. F He has not approached the courts to have custody restored to him. He does not seem to have been paying adequate money for maintenance. He had to be taken to the maintenance court by the applicant to carry out this parental legal obligation.
The applicant and the minor were invited for Easter holidays 2002 by the G applicant's daughter (and minor's aunt) to the United States of America for a month-long visit. The child has no travel documents to go to the United States. In terms of statutory requirements, the natural father has to sign the passport forms to enable the second respondent, the Registrar-General, to issue a travel document. The first respondent refuses to sign the necessary forms. He is using this opportunity to state that he wants his child back. This H

2002 (2) ZLR p459
Ndou J
A is not a custody application. The applicant merely wants this court to compel the first respondent to sign the necessary forms, failing which the court has to intervene as the upper guardian of minor child.
The intended visit is a short one, i.e. for a month. In exercising my powers as upper guardian I have to bear in mind that minors, like adults, need travel documents to facilitate visits and holidays. The paramount consideration in B matters of this kind is the best interests of the child. Is it reasonable for the first respondent to refuse the minor an opportunity to travel outside the country? Put in another way: Is it in the best interests of the child to travel outside the country from time to time? This case does not involve emigration from Zimbabwe.
C As alluded to earlier on, the applicant does not have custodial rights over the minor child. She has, in the circumstances, approached this court to intervene as upper guardian of the minor child. In such inventions by the upper guardian the question of the interests of the child is paramount: see *Dolby v Lewis* S-34-87 at page 14 of the cyclostyled judgment. In this context, one asks, "Is the father's objection unreasonable?" In this regard, I find the words of D Rumpff JA in *Shawzin v Laufer* 1968 (4) SA 657 (A) instructive. At pages 662H to 663A the learned judge commented as follows:
"In view of the circumstances of this case, I think it necessary to make a few comments on the duty of a court, sitting as upper-guardian of minor children, when it has to resolve a dispute concerning custody. To the
court, as upper-guardian, the problem of custody is a somewhat singular E subject, in which there is substantially one norm to be applied, namely the predominant interests of the child. The singularity of the subject is evidenced by a number of features. An order of the court as to custody and access may at any time be varied by the court for good cause. An agreement relating to custody may be made an order of the court if the court is satisfied that what has been agreed upon is in the best interests F of the children, but such order also can be varied by the court for good cause. Also, from the procedural point of view, an application to vary an agreement is different from the ordinary application, in that the court need not consider itself bound by the contentions of the parties and may, in suitable cases, notwithstanding the fact that the onus is on the applicant to show good cause, depart from the usual procedure and act G *mero motu* in calling evidence, irrespective of the wishes of the parties. In the result, it could be said that, while in form there is an application for variation of the order of court, in substance there is an investigation by the court, acting as upper guardian; *cf Kotze v Grove* 1959 (2) SA 213 (O) at p 215. Also on appeal the court may, in an exceptional case, take H cognisance of facts which are by consent admitted or which are
2002 (2) ZLR p460
Ndou J
unquestionable; cf *Goodrich v Botha and Others* 1954 (2) SA 540 (AD) A at p 546."
Although I am not dealing with a custody matter the legal principles stated in these cases are, in my view, equally applicable. The rights of access of the first respondent, as the natural father of the child, will be reduced and possibly jeopardised if the child is to be removed to a foreign country, albeit B for a short period. For that reason alone his consent to the removal is relevant, and if he withholds his consent it becomes necessary to inquire whether he is acting reasonably or unreasonably — see *Stock v Stock* 1981 (3) SA 1280 (A) and also *Bailey v Bailey* 1979 (3) SA 128 (A).
In this case the second respondent, as the Registrar-General, requires the consent of the parent before issuance of travel documents. The applicant C approached the first respondent who declined to give the consent, leaving her with no option but to launch this application. The question to be asked is why the applicant wishes to take the child away from the land of her birth to a foreign country? She advanced reasons that show that the proposed steps are not drastic and far-reaching. The intended removal is temporary in nature. It involves taking the child on a month-long (or shorter period) holiday in the D United States of America. The applicant has a daughter who is married there and also resident there. She contends that she is motivated by the interests of the child. She stays with the child and wishes to take her along when she goes to the United States. A vital factor is the need to cause as little disruption as possible to the child's already disrupted life. The court has to take cognisance E of the child's need for stability and continuity, not only in relationships with parents, but also in physical surroundings, school, friends and above all relatives — see *Re C (a minor) (Custody of Child)* [1980] 2 F.L.R. 163 and *B v B (Custody of Child)* [1985] F.L.R. 166.
The child has lived with the applicant since the death of the mother in 1998. The applicant was *de facto* her parent. She was there for her when she started F schooling. The child is now in grade 3.

Even in his own papers the first respondent does not pretend to have a father-daughter bond with the child. He does not even allege that he had seen the child in the last three or so years. He is trying to use this consent issue to claim custodial rights over the child. As I indicated earlier on, he did not take any meaningful proactive steps to G have custody of the child. He is merely reactive to a situation created by the applicant's desire to have travel documents for the child. His refusal to consent to have the child obtain travel documents is not reasonable. He is not informed by the genuine interests of the child.

It is accordingly ordered as follows:

1. **That the first respondent be** and is hereby ordered, within seven (7) days H

2002 (2) ZLR p461

Ndou J

A of the service of this order upon him, to sign the relevant parts of the passport application form to enable the applicant to proceed to the second respondent's offices in Bulawayo and there to take all the necessary steps to apply for a passport or travel document on behalf of the minor child, failing which the Registrar of this court shall sign in place of the first respondent in the relevant parts on the application form, B which the second respondent shall take to be the necessary authority and shall proceed to issue a passport or travel document in the name of the said minor child.

2. Before each journey out of the country is undertaken, the first respondent and the Registrar of this court shall be informed in writing. C

3. Each party to bear its costs.

E *Mabhikwa, Hikwa & Nyathi* applicant's legal practitioners

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Source:
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[zRPz]MATUNGAMIRE v POSTS & TELECOMMUNCATIONS CORPORATION 2002 (2) ZLR 462 (S)
2002 (2) ZLR p462

Citation	2002 (2) ZLR 462 (S)
Case No	Judgment No. S-84-02
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Malaba JA
Heard	19 September 2002; 15 October 2002
Judgment	15 October 2002
Counsel	*L Uriri,* for the appellant *E T Matinenga*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Employment — contract — termination — application to labour relations D officer for authority to dismiss employee E — employee governed by unregistered code of conduct — when permissible for employer to apply under Labour Relations (Termination of Employment) Regulations, 1985, for authority to dismiss employee
[zHNz]Headnote
The Labour Relations (Termination of Employment) Regulations, 1985 (SI E 371 of *1985),* override the provisions of unregistered codes of conduct. Hence if an employee to whom such a code is applicable commits an act of misconduct which warrants dismissal under the code, the employer is entitled to suspend the employee in terms of the code and then seek authority for the employee's dismissal under the regulations, without F exhausting the disciplinary procedures set out in the code. If, however, the employee's misconduct does not warrant dismissal under the unregistered code, then the employer cannot seek the employee's dismissal in terms of the regulations but is confined to the procedures and the penalties laid down in the code. G
[zCAz]Cases cited
Colcom Foods Ltd v Chatira S-135-2000
Makuwaza v NRZ 1997 (2) ZLR 453 (S)
Matoi v Zimbabwe Iron & Steel Co Ltd S-231-93 H
2002 (2) ZLR p463
Sandura JA
[zSTz]Legislation considered A
Labour Relations Act [*Chapter 28:01*], s 17(2)
[zCIz]Case information
L Uriri, for the appellant
E T Matinenga, for the respondent
[zJDz]Judgment
B **Sandura JA**: This is an appeal against a judgment of the Labour Relations Tribunal ("the Tribunal") which upheld the decision by the labour relations officer authorising the respondent ("the PTC") to dismiss the appellant.
The relevant facts are as follows. The appellant was employed by the PTC as C an executive officer and was stationed at Masvingo. In March 1994 he made two official trips to Mashava. In terms of his conditions of service, he was entitled to claim travelling and subsistence allowances from the PTC for the period during which he was away from his station on official business. He could claim the reimbursement of proved or unproved expenses. However, the maximum amount he could claim in respect of proved expenses was more D than the maximum amount for unproved expenses.
As he did not have any official receipts with which to prove his expenses, but wished to claim the reimbursement of an amount more than that for unproved expenses, he made out his own receipts and tendered them as proof of his expenses.
E The fraud was subsequently discovered and the appellant was suspended from duty without pay in terms of the PTC's unregistered Code of Conduct. Thereafter, the PTC wrote to the principal labour relations officer at Masvingo seeking authority to dismiss the appellant.
In due course, the matter came before a labour relations officer, who authorised the appellant's dismissal. That decision was subsequently upheld F by the senior labour relations officer and by the Tribunal. Aggrieved by the Tribunal's decision, the appellant appealed to this court.
This appeal raises only one issue. It is whether the PTC, having suspended the appellant from duty in terms of its unregistered code of conduct, was obliged to exhaust the disciplinary procedure set out in that code. I do not G think so.
In my view, the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, published in Statutory Instrument 371 of 1985 ("the Regulations"), in terms of which the appellant was dismissed, override the unregistered code of conduct. The Regulations H were made in terms of s 17(1) of the Labour Relations Act [*Chapter 28:01*]
2002 (2) ZLR p464
Sandura JA
("the Act"), and s 17(2) of the Act, in relevant part, reads as follows: A
"Regulations made by the Minister in terms of subsection (1) shall, unless such regulations otherwise provide, prevail over any other statutory instrument or any agreement or arrangement whatsoever ...".
The Regulations do not have any provision to the contrary. In the circumstances, they override the provisions of the unregistered Code of B Conduct, and the PTC was, therefore, obliged to proceed in terms of the Regulations before dismissing the appellant.

In fact, the argument advanced by the appellant in this case was considered and rejected by this court in *Matoi v Zimbabwe Iron and Steel Co Ltd* S-231-93 (unreported). The facts in that case were as follows. Phinras Matoi ("Matoi") was employed by the Zimbabwe Iron and Steel 'Company C ("ZISCO"). He was charged with an act of misconduct, the allegation being that he had wilfully disobeyed a lawful order. He was suspended from duty without pay and benefits, and authority for his dismissal was sought from the Ministry of Labour. That authority was granted and he was dismissed. At the relevant time, ZISCO had an unregistered Code of Conduct which set out the D disciplinary procedure to be followed when an employee was charged with misconduct. It was submitted on behalf of Matoi that ZISCO should have proceeded in terms of the unregistered code and not in terms of the Regulations. This court rejected that argument and held that the provisions of the Regulations prevailed over the provisions of the unregistered code.

However, if the employee commits an act of misconduct, for which an E unregistered code of conduct provides a punishment less than dismissal, the employer should not proceed in terms of the Regulations and seek authority for the employee's dismissal. This point was made by this court *in Makuwaza v National Railways of Zimbabwe* 1997 (2) ZLR 453 (S). At 454G-455B McNally JA said the following:

"However, if an offender commits a minor offence, for which the F unregistered Code of Conduct provides a specific punishment short of dismissal, it must surely be a defence before (a labour relations officer) to say 'I admit the offence, but our unregistered Code of Conduct provides for a warning in such a case. How can my employer now apply for my dismissal? ...' G

If the grounds upon which the employer seeks to suspend pending dismissal are not proper grounds, because his own Code of Conduct provides for a penalty less than dismissal, or for any other reason, then he has not proved grounds of suspension. He has proved grounds for a reprimand, or grounds for a written warning, or grounds for a fine, or whatever it may be." H

2002 (2) ZLR p465

Sandura JA

A The same conclusion was arrived at by this court in *Colcom Foods Ltd v Felix Chatira,* S-135-2000 (not reported). In that case, Colcom Foods Ltd ("Colcom") had an unregistered code of conduct, in terms of which the penalty for the act of misconduct committed by Felix Chatira ("Chatira"), its employee, was a written warning for a first offender, which Chatira was. However, notwithstanding that fact, Colcom proceeded in terms of the B Regulations and sought the approval of the Ministry of Labour for Chatira's dismissal. This Court held that as the unregistered code of conduct provided for a penalty less than dismissal, Colcom could not seek Chatira's dismissal in terms of the Regulations.

The main difference between the unregistered codes of conduct in the C *Makuwaza* and *Chatira* cases *supra* and the unregistered code of conduct in the present case, is that in terms of the code in the present case the act of misconduct committed by the appellant attracted the penalty of dismissal, which was not the position in the other two cases. Had the act of misconduct committed by the appellant in this case not attracted the penalty of dismissal in terms of the code, the PTC would not have had any basis for seeking the D appellant's dismissal.

In the circumstances, the appeal is devoid of merit and is dismissed with costs.

E Ziyambi JA and Malaba JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

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Source:
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[zRPz]LATIF v LATIF 2002 (2) ZLR 466 (H)
2002 (2) ZLR p466

Citation 2002 (2) ZLR 466 (H)

Case No	Judgment No. HH-150-02
Court	High Court, Harare
Judge	Adam J
Heard	7 August 2002; 16 October 2002
Judgment	16 October 2002
Counsel	*A Ebrahim,* for the plaintiff Respondent in default
Case Type	Divorce action
Annotations	No case annotations to date

[zFNz]Flynote
Conflict of laws — domicile — acquisition by choice — what must be shown D Court — jurisdiction — divorce action — domicile — what must be shown to establish that husband had acquired domicile in Zimbabwe
Family law — husband and wife — divorce — domicile — what must be shown — husband resident in Zimbabwe for less than a year — not shown to have been domiciled here E
[zHNz]Headnote
The plaintiff sought a divorce from her husband, a Pakistani citizen. She averred that he had established a domicile in Zimbabwe. He had arrived in Zimbabwe in August 2001 and married the plaintiff in the same month. The marriage was troubled from the outset. The divorce action was instituted about a year later. The defendant was employed but there F was no evidence that he had any financial stake in the country.
Held, that domicile had to be distinguished from residence. A person can be domiciled in one place but have his residence elsewhere. The fact that a person was in the country other than as a permanent resident does not necessarily prevent him from acquiring domicile.
Held, further, that to establish domicile, it was necessary for the defendant G to have been actually resident in the country for over a year and for it to have been shown that he intended to reside here permanently. This had not been shown in the present case. H
2002 (2) ZLR p467
Adam J
[zSTz]Legislation considered A
Immigration Act [*Chapter 4:02*], ss 2(1) & 3(4)(a)
Matrimonial Causes Act [*Chapter 5:13*], s 3(1)
National Registration Act [*Chapter 10:17*], s 2
[zCAz]Cases cited
Bowie (or Ramsay) v Liverpool Royal Infirmary [1930] AC 588
Carter v Carter 1953 (1) SA 202 (A)
Evans v Evans 1942 SR 12
Fenner v Fenner 1943 SR 188
Foord v Foord 1924 WLD 81
C *Hooper v Hooper* 1908 EDC 474
Howard v Howard 1966 RLR 182 (G)
Joosub v Salaam 1940 TPD 177
Mason v Mason (1885) 4 EDC 330
Medeiros v Rebello 1924 SR 167
Ex p *Min of Native Affairs* 1941 AD 53
D *Thompson v Thompson* 1940 SR 187

van *Rensburg v Ballinger* 1950 (4) SA 427 (T)
van Zyl v van Zyl 1928 WLD 195
Weatherley v Weatherley (1878) Kotzé 66
E *Webber v Webber* 1915 AD 239
[zCIz]Case information
A Ebrahim, for the plaintiff
Respondent in default
[zJDz]Judgment
Adam J: The plaintiff sought a decree of divorce and ancillary relief. At the F hearing on the unopposed roll, I ruled that the plaintiff had not established that this court had jurisdiction in this divorce matter. These are my reasons.
In her declaration she averred that:
"4. The Defendant was born in Pakistan and came to Zimbabwe in August 2001, and has since been residing in Zimbabwe and he now regarded Zimbabwe as his permanent home. The defendant is G domiciled in Zimbabwe and presently lives and works in Zimbabwe."
The Matrimonial Causes Act [*Chapter 5:13*] in s 3 provides:
"(1) Without prejudice to any other basis of jurisdiction which the High Court has, the High Court shall have jurisdiction to entertain an action for divorce, judicial separation or nullity of marriage, where the wife is H the plaintiff or applicant —
2002 (2) ZLR p468
Adam J
(a) if the wife has been deserted by her husband and, immediately A before the desertion, the husband was domiciled in Zimbabwe, notwithstanding that the husband has changed his domicile since the desertion; or
(b) if the marriage was celebrated in Zimbabwe and the wife has resided in Zimbabwe for a period of at least two years immediately before the date of the commencement of the action and is still so residing, B notwithstanding that the husband has never been domiciled in Zimbabwe; or
(c) if at the date of commencement of the action the wife is a citizen of Zimbabwe and, immediately before that date, she has ordinarily been resident in Zimbabwe for a period of not less than two years and is still so residing." C
It is clear from the foregoing that the above statutory provision gives additional jurisdiction to the High Court. In *Foord v Foord* 1924 WLD 81 at 82 Mason JP observed:
"The Privy Council has in the case of *Le Mesurier v Le Mesurier* [1895] AC 517 laid down in clear terms the general rule that the domicile of the husband at the time the action is instituted is the necessary foundation of D the court's jurisdiction in a claim for divorce, and the South African courts have followed that decision."
See also *Hooper v Hooper* 1908 EDC 474 at 476-7 and *van Zyl v van Zyl* 1928 WLD 195 at 197. The High Court in this country has also followed this decision in matrimonial matters: *Thompson v Thompson* 1940 SR 187*, Evans v Evans* 1942 SR 12 and *Howard v Howard* 1966 RLR 182 (G). E
In *Mason v Mason* (1885) 4 EDC 330 Barry JP said at 337:
"Domicil means the place or country which is considered *by law* to be a person's permanent home. The law also says that no person can at any time be without a domicil" (my emphasis).
In *Evans v Evans supra,* the plaintiff, an officer in the Royal Air force and F an instructor originally domiciled in England, was drafted to this country in 1940 at his own request, leaving his wife and child in England. About a month after his arrival, he formed the intention of remaining in this country and settling here after the war so he wrote to his wife to that effect. In 1941 he was left a legacy and had it transferred to this country. He rented a house in Gweru G and sent for his wife and child to join him. After being here, the wife deserted him. The plaintiff was still on duty in the Royal Air Force at that time. It was accepted that the plaintiff had no free choice in the matter since he was under orders. It was stated that the presumption was against the plaintiff having her domicile in this country but he could rebut this. This court was entitled to assume jurisdiction on his action for restitution of conjugal rights, it would H appear on the basis that the plaintiff had rebutted the presumption.
2002 (2) ZLR p469
Adam J
A It is pertinent to mention that the Immigrants Regulation Act [*Chapter 60 of 1939*] defined at that time "domicile" as meaning the place in which a person has his present home or in which he resides, or to which he returns as his place of present permanent abode and not for a mere special or temporary purpose. It also had a proviso that no person shall be deemed to have a domicile in this country unless he had resided in this country for three years otherwise than B under terms of conditional or temporary residence issued under that Act.

In *Fenner v Fenner* 1943 SR 188, the plaintiff was born in England but had gone to South Africa in 1920 and came to this country in 1941 with the fixed intention of making this country his permanent home. He came to seek employment although this terminated because of the closing down of the C firm, but he had reasonable expectation of other employment. He had a small military pension and sons of his by a former marriage were here to assist him. The plaintiff was a prohibited immigrant upon a temporary permit in terms of the Immigrants Regulation Act under an order of the Governor made as a war measure until normal conditions were restored. The plaintiff was a British subject of a type that would not ordinarily be denied entry to this D country and there was every probability that when the order of the Governor was cancelled he would be permitted to stay. Tredgold J held that he could not acquire a domicile within the meaning of that Act but the requisites for the acquisition of domicile were actual residence coupled with the intention to remain permanently in the country concerned and so the plaintiff had established a matrimonial domicile in this country for purposes of his action E against his wife for the restoration of conjugal rights, failing which a decree of divorce.

In *Webber v Webber* 1915 AD 239 Innes CJ said at 242:

"The Roman-Dutch law recognised that any person, being *sui juris* could acquire a domicile of choice in a new country by establishing his actual F residence in that country with the intention of making it his permanent home: *Censura Forensis.* (Pt. 1.2.125); Voet *Commentarius ad Pandectas* (5.1.98 etc). Both elements (*factum et animus)* were essential; intention without residence, and residence without intention, were alike ineffective. And it also adopted the rule that the burden of proving a change of domicile lay upon the person alleging it; in case of doubt the domicile of G origin was presumed to have continued: see *(Voet* 5.1 paras 97 and 99) ... The choice of a new domicile, therefore, involves the abandonment of the old one; and the prominence given to this aspect of the matter by the courts has resulted in a demand for strict proof of an intention to give up the old home and to acquire the new."

In *Howard v Howard supra,* the parties were married in 1962. The plaintiff H returned to this country, her place of birth, in October 1963. In December

1963 the defendant joined her and a child was born in 1965. The defendant A came to this country with intention to make it his permanent home. He was a prohibited immigrant with a temporary residence permit to be validated at three-monthly intervals for a period of two years, after which consideration would be given allowing him to take up permanent residence in this country. In January 1966 his lawyers wrote to the Chief Immigration Officer that the B defendant had acquired a sincere affection for and love of this country, that his son was born here and that he had acquired a farm here with a definite financial stake in this country. Goldin J said at 186:

"For the plaintiff to succeed, she must prove that the defendant had acquired a domicile of choice in Rhodesia. It has been held that it is more difficult to prove a change from a person's domicile of origin than a C change from his domicile of choice (see *Bowie (or Ramsey) v Liverpool Royal Infirmary* [1930] AC 588, *and Rayden on Divorce* 9 ed pp 27-33). The use of the words that proof is required 'with perfect clearness and satisfaction' (see *Johnson v Johnson* 1931 AD 391 at 398 and *Winans v Attorney-General* [1904] AC 291) must not be taken that the standard of proof of this type of case forms an exception to the requirement, in civil cases, of proof on preponderance of probability." D

Further, it is also clear that mere consent of the parties does not confer jurisdiction in matrimonial proceedings. In *Weatherley v Weatherly* (1878) Kotzé 66 it was stated by Kotzé J at 71:

"Now, although the law of domestic relations is treated as a portion *of jus privatum,* the institution of a tribunal to decide on questions relating to E status, arising out of domestic relations, and the exercise of jurisdiction in such cases, is a matter which pertains *ad statum publicum* — to the public welfare of the whole community (Cf. Huber *Jus Hodiernum* V1 14.529). Marriage is not a mere ordinary private contract between the parties. It is a contract creating a status, and gives rise to important consequences directly affecting society at large. It lies, indeed, at the root F of civilized society. If, then, in a matter of divorce the bare consent of the parties can be held sufficient to give jurisdiction, there is no protection, no safeguard, against the parties acting *in fraudem legis;* but this, it is policy, as well as the duty of every court of justice to discourage and prevent."

See also *Carter v Carter* 1953 (1) SA 202 (A) at 205. G

Presently the Immigration Act [*Chapter 4:02*] provides in s 2(1) that, subject to this section, a person shall be regarded as being domiciled in a country, if (a) he resides permanently in that country or (b) that country is the country to which he returns as a permanent resident. Section 3(3) states that no person shall, for purposes of this Act, have domicile in Zimbabwe unless he has H

Adam J
A lawfully ordinarily resided therein for a continuous period of 10 years. Section 3(4)(a) provides that a person shall, for the purposes of this Act, lose his domicile in Zimbabwe if he (i) has voluntarily departed from and resides outside Zimbabwe with the intention of making his home outside Zimbabwe, or (ii) is absent from Zimbabwe for a continuous period of five years or such longer as may be period fixed by the Minister of Home Affairs. Section B 3(4)(b) stipulates that the fact one has taken up residence outside shall be *prima facie* evidence of his intention of making his home outside Zimbabwe and the onus of proving otherwise is on him. The National Registration Act [*Chapter 10:17*] in s 2 defines a "resident" as any inhabitant of Zimbabwe over 16 years of age who has resided in Zimbabwe for a continuous period of not less than six months. This Act makes provision for the issuance of C identity discs to various persons, including residents. Under the National Registration Regulations 1977 (RGN 47 of 1977) the classification code of the Second Schedule the identity disc for citizens is CIT; for non-citizen residents who are permanent residents or deemed permanent residents is NCR and for others not covered by the above it is Alien.
D In *Medeiros v Rebello* 1924 SR 167 the applicant had entered into a three year contract of employment with the respondent whereby he undertook to repatriate the respondent to Goa. The respondent sued the applicant on the contract. The applicant sought security for costs from him. Russell J (as he was then was) stated that the respondent was a stranger, i.e. a person domiciled in India but resident in this country. As a resident for some lengthy E period (an *incola)* he did not fall in the category of persons who had to provide security for costs. He was not a permanent resident.
In Ex p *Minister of Native Affairs* 1941 AD 53 Centlivres JA (as he then was) summarised three general principles as follows:
(i) The question to be considered is not one of domicile but of residence; a F person may have his domicile in one place and his residence for the time being in another place.
(ii) A person may have more than one residence.
(iii) A person cannot be said to reside at a place where he is temporarily visiting, nor does he cease to reside at a place even though he may be G temporarily absent on certain occasions and for short periods.
The learned Judge of Appeal then said at 59:
"Apart from the above general principles which have been enunciated by the courts, the courts have studiously refrained from attempting the impossible task of giving a precise or exhaustive definition of the word H 'resides'
2002 (2) ZLR p472
Adam J
… A
To put the matter in another way, the question whether a person resides at a particular place at any given time depends upon all the circumstances of the case read in light of the general principles referred to above."
In *van Rensburg v Ballinger* 1950 (4) SA 427 (T) the respondent's election as a Senator was challenged on the basis that he did not have the required B qualifications in that he had not acquired South African nationality by domicile as a British subject. The respondent arrived in South Africa in 1928 and, by an order made by the Minster of Home Affairs, he was deemed to be a prohibited immigrant on a temporary permit. Thereafter temporary permits were issued authorising his continued residence in South Africa. The respondent, prior to 1925, was a British subject by birth, domiciled in C Scotland. He came to South Africa with the intention of taking permanent residence in South Africa. The respondent had resided in South Africa continuously for approximately 22 years; he married a lady who was a South African national by birth; he at times was owner of immovable property in South Africa; he was registered as a parliamentary voter; he was issued with a South African passport in 1934 replacing his British passport and in 1946 D he was given another South African passport; he was in 1945 appointed a commissioner of oaths by the Minister of Justice. The case of *Joosub v Salaam* 1940 TPD 177 was cited, where the respondent was a prohibited immigrant under a temporary permit that had been renewed from time to time. It was his intention to continue to reside in South Africa and it was likely E that he would be allowed to remain in South Africa permanently. The issue arose as to whether his rights or status were affected by the position that he really was not the person who had the last word on the subject; the order declaring him a prohibited immigrant might be put into effect and the possibility existed that he might be deported. Greenberg J considered that fact as not operating against the acquisition of a domicile. Murray J in the *van* F *Rensburg* case *supra* observed at 441:
"In the present case, as in the alien cases, residence persists and is lawful, the only difficulty is the possibility of the right of termination and, as the alien cases show, domicile is lost only when the higher authority has actually invoked that right of termination. The individual is, in fact, to quote the

phrase used, the master of his own destiny. He can decide to G have his home in a particular place and he can carry that decision into effect.

Those are the authorities which were quoted to us and it seems to me that they are directly in point here. Apart from authority, I have come to the conclusion on general principles that the power of the higher authority to terminate a person's residence in a particular area cannot *per se* affect H

2002 (2) ZLR p473

Adam J

A the question whether that person intended to make his permanent abode there. If the power of termination is actually exercised, then naturally, with the disappearance of physical residence, the domicile thus acquired is brought to an end. Until such termination, the only effect of the possibility of that power of deportation being exercised by a higher authority is that the person may (I do not say he must) be taken to realise B the precarious character of his residence and consequently may not be held to have formed the intention of making his permanent home in such area."

It is clear from the foregoing that the *de cujus* in every case had had his place of abode in this country for a period of time in excess of a year and had manifested the idea of some permanence by what each of them had done.

C In the present case the defendant arrived in August 2001 and on 30 August 2001 married the defendant. From that date there has been persistent antagonism between the parties. The defendant is employed, but there is nothing on the papers before me to show that he has some financial stake in this country. The facts in *Evans v Evans supra, Fenner v Fenner supra, Howard v Howard supra* and *van Rensburg v Ballinger supra* can be D distinguished from this case. In *Howard v Howard supra,* Goldin J said that it is more difficult to prove a change from a person's domicile of origin. In *Bowie (or Ramsay) v Liverpool Royal Infirmary & Ors* [1930] AC 588 *supra,* the deceased, George Bowie, was born in Scotland in 1845, worked as a commercial traveller but ceased work in 1882. In 1892 he went to join the E other members of his family who had moved to Liverpool so that he could be closely attached to his mother and sister. His mother died in 1905 and was buried in Glasgow, but he did not go there for his mother's funeral. He had lived in some lodgings in Liverpool for 20 years. He died in 1927 leaving a holograph will that was valid under Scottish law but invalid under English law. Lord Buckmaster said at 593:

F "It is proved that George Bowie refused to go to Scotland when his sister desired to remain there in 1915. He is reported to have said that he never wished to set foot in Glasgow again, and he arranged for his burial in Liverpool beside his brother and sisters. On the other hand he referred to himself as a Glasgow man both during his life and in his will. As evidence of definite intention upon the question of domicil this evidence is G **fragmentary and insufficient**."

The House of Lords concluded that he could not be said to have had any real attachment to Liverpool. George Bowie was held not to have abandoned his domicile of origin in Scotland.

The defendant has been in this country for one year and his residence status in H terms of the Immigration Act has not been revealed to this court. As

2002 (2) ZLR p474

Adam J

pointed out by Murray J, the only effect of the possibility of use of the power A by the Minister of Home Affairs is that the defendant may be taken to have realised the precarious character of his residence and may not be held to have formed the *animus* of making his permanent home in Zimbabwe. I am not satisfied that the defendant has met the requisites of domicile of choice.

This does not preclude the plaintiff from continuing with these proceedings B should s 3 of the Matrimonial Causes Act apply to her, in which case she is at liberty to apply to amend her declaration.

Ali Ebrahim, plaintiff's legal practitioner *Muhammed Feroz Latif,* defendant's legal practitioner C

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/MNENSA & ANOR v CHINGWENA NO & ANOR 2002 (2) ZLR 475 (H)

[zRPz]MNENSA & ANOR v CHINGWENA NO & ANOR 2002 (2) ZLR 475 (H)

2002 (2) ZLR p475

Citation	2002 (2) ZLR 475 (H)
Case No	Judgment No. HH-179-02
Court	High Court, Harare
Judge	Smith J
Heard	3 October 2002; 16 October 2002
Judgment	16 October 2002
Counsel	*D N Gijima,* for the applicants *D M Foroma,* for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

[zFNz]Flynote
Employment — code of conduct — disciplinary action under — appeal D following conviction by disciplinary committee — appeal upheld — effect
[zHNz]Headnote
The applicants were suspended from their employment on allegations of misconduct. They were found guilty by the employer's disciplinary E committee, but on appeal the chief executive set aside the committee's decision on the procedural ground that there were breaches of the *audi alteram partem* principle. He referred the matter back for a fresh hearing.
The applicants sought an order that, once the decision of the disciplinary committee had been set aside, the *status quo ante* applied: they remained F employees and were entitled to reinstatement. They argued that the chief executive had no jurisdiction to order a fresh hearing, as there was no provision in the code of conduct for such an event. In any event, the legislation required that proceedings in terms of an employer's code of conduct had to be determined within 30 days. The code of conduct itself required that proceedings had to be completed within 14 days of their G commencement.
The employer argued that the applicants should either have appealed to the Labour Relations Tribunal in terms of the code of conduct or have noted an application for review. They should have exhausted their domestic remedies before approaching the court. Even if the situation reverted to the *status quo ante,* they were still on suspension and were not entitled H to reinstatement.
2002 (2) ZLR p476
Smith J
Held, that the code of conduct did not specifically give the chief executive A power to remit a case for hearing afresh. Even if it did, this would not be an appropriate case to do so, since the committee chairman had already determined the applicants' B guilt. He had cast a deliberative vote, the rest of the committee being equally divided on whether the applicants were guilty. This meant that he had already determined the applicants' guilt. As the code of conduct did not provide for an alternate for the chairman, he could not be seen to be impartial at any rehearing. In any event, the time limits set out in the code of conduct had long passed. The applicants remained employees and were entitled to their salaries and benefit from the date of suspension. C
[zCAz]Cases referred to
Commercial Careers College (1980) (Pvt) Ltd v Jarvis 1989 (1) ZLR 344 (S)
Marimo v National Breweries Ltd S-125-00
Minerals Mktg Corp of Zimbabwe v Mazvimavi 1995 (2) ZLR 353 (S)

Muringi v Air Zimbabwe Corp & Anor 1997 (2) ZLR 488 (S) D
Musandu v Chairperson, Cresta Lodge Disciplinary & Grievance Cttee HH-115-94
Standard Chartered Bank of Zimbabwe v Chikomwe & Ors S-77-00
Winterton, Holmes & Hill v Paterson 1995 (2) ZLR 68 (S) E
[zSTz]Legislation considered
Labour Relations Act [*Chapter 29:01*], s 101
Labour Relations (Code of Conduct) Regulations 1990 (SI 379 of 1990), s 4(2)
[zCIz]Case information
D N Gijima, for the applicants F
D M Foroma, for the respondents
[zJDz]Judgment
Smith J: Application was made for these two cases to be consolidated. I granted the application. G The applicants were both employees of the second respondent (hereinafter referred to as "Air Zimbabwe"). On 16 November 2001 they were suspended from work on allegations of misconduct. The charge was put to each. The disciplinary committee of Air Zimbabwe found the applicants guilty of misconduct and recommended their dismissal. Acting in terms of the Air Zimbabwe code of conduct the applicants appealed to the first respondent H
2002 (2) ZLR p477
Smith J
A (hereinafter referred to as "Chingwena"), who is the Acting Chief Executive of Air Zimbabwe. Chingwena upheld the appeals. He set aside the determination of the disciplinary committee that the applicants were guilty of misconduct and referred the matters back to the disciplinary committee for a fresh hearing. The appeals were upheld on the basis that there were breaches of the *audi alteram partem* principle in the hearings conducted by the B disciplinary committee and the merits of the cases were not considered.
The applicants filed applications seeking a *declaratur* that, since their appeals were upheld, they remained employees of Air Zimbabwe and were entitled to be reinstated. They submitted that Chingwena had no authority to order that there should be a fresh hearing of their cases. The code of conduct C does not provide for such an event and, furthermore, s 101 (6) of the Labour Relations Act [*Chapter 28:01*] requires that proceedings in terms of an employment code of conduct must be determined within thirty days.
The respondents oppose the applications. They contend that there is nothing in the code of conduct which precludes Chingwena from remitting the cases to the disciplinary committee for a fresh hearing. Since the appeals were D upheld because of the procedure followed by the disciplinary committee, and not on the merits, the automatic reinstatement of the applicants was not justified.
Mr *Gijima* took the point *in limine* that there was no opposition by the respondents to the application filed by Miss Mwarweye. The grounds for his E submission are that in the opposing affidavit, which was deposed to by the Assistant Secretary of Air Zimbabwe, she stated that she had perused the court application and affidavit "sworn to by Chiku Mwensa", who is actually the applicant in the other case. That being the case, the opposing affidavit was not applicable to the application filed by Miss Mwarweye. Mr *Foroma* argued that clearly there had been an error which had not been noticed by the F Assistant Company Secretary or the legal practitioners concerned. The applications and supporting documents were voluminous and virtually identical. The respondents had prepared one set of documents for the one case and then made a few necessary amendments so that the documents could be used for the second case. In making the amendments, the necessity to change G the name of the applicant in para 2 of the opposing affidavit had clearly been overlooked.
I agree with the submissions by Mr *Foroma.* This is clearly a grammatical error. It has not caused any confusion on the part of Miss Mwarweye. In her answering affidavit in dealing with para 2 of the opposing affidavit she does H not take issue with the fact that the wrong name is used. She accepts that the
2002 (2) ZLR p478
Smith J
opposing affidavit relates to her case. Furthermore, in the heads of argument A filed on her behalf, no submission is made that her application is not opposed. It was only at the commencement of the hearing of these two applications, after they were consolidated, that the point was raised. In my view, the use of the wrong name was clearly a clerical mistake. Had Miss Mwarweye objected timeously, either before filing or when she filed, her answering B affidavit, I might have insisted that the respondents remedy their mistake. Since, however, the objection was raised at the very last minute, I think that it would cause great injustice if I were to uphold the objection. The function of the courts is to see that justice is done. In doing so, obviously the rules of court must be observed. Departures from the rules cannot be ignored or blindly condoned. In this case, however,

the error is one of little actual C significance. It is obvious how the mistake occurred. Mistakes are not unknown in legal circles. Even judges are known to have made mistakes. In this case, it is clear that the Assistant Company Secretary clearly intended to refer to Miss Mwarweye. Miss Mwarweye understood that she was being referred to, notwithstanding that the name Mnensa was used. The court will deal with the matter as though the intention of the Assistant Company D Secretary had been properly and accurately expressed. Courts have a discretion to correct or overlook mistakes where that is necessary in the interests of justice. Strict formalism and adherence to the letter of the law has no place in judicial circles in this day and age. Obvious errors must not be allowed to obstruct or delay justice.

Mr *Gijima* argued that it was not competent for Chingwena to refer the cases E back to the disciplinary committee for a fresh hearing. Once he set aside the decision of the disciplinary committee, the *status quo ante* applied. Clause 9.3 of the code of conduct provides that all disciplinary actions initially determined shall be implemented notwithstanding any appeal. Therefore, once the decision to dismiss the applicants was set aside by Chingwena, they F automatically reverted to their status as employees of Air Zimbabwe. There is no provision in the code of conduct for suspension without pay. Therefore Air Zimbabwe has no legal basis for withholding the applicants' salaries and other benefits. Mr *Gijima* also submitted that on an appeal to him, Chingwena could confirm, set aside or vary the determination appealed against. He could not exercise powers of review and remit the case for hearing afresh. G Furthermore, s 4 (2) of the Labour Relations (Employment Codes of Conduct) Regulations 1990 (SI 379 of 1990) (hereinafter referred to as "the Codes of Conduct Regulations") prohibits any proceedings commenced in terms of a code of conduct from continuing beyond fourteen days from the date of their commencement. As the proceedings in these two cases commenced in December 2001, the fourteen-day period has elapsed. H

2002 (2) ZLR p479
Smith J

A Mr *Foroma* argued that the applications are not reviews as they do not comply with the requirements of the High Court Rules in relation to review applications. Since the applicants were aggrieved by the decision to remit the cases for a fresh hearing, they should either have appealed to the Labour Relations Tribunal in terms of the code of conduct or have noted an application for review. The applicants should have exhausted their domestic B remedies before approaching the court. See *Musandu v Chairperson, Cresta Lodge Disciplinary and Grievance Committee* HH-115-94. The appeals were upheld on technical grounds and not on the merits. Reinstating the applicants would have implied that they were innocent of the charge of misconduct levelled against them. See *Standard Chartered Bank of Zimbabwe v Chikomwe & Ors* S-77-00. Even if the applicants reverted to the *status quo* C *ante,* that did not mean that they must be reinstated. They are still on suspension pending the rehearing. The court will not order reinstatement where the relationship between the parties has been impaired. See *Winterton, Holmes & Hill v Paterson* 1995 (2) ZLR 68 (S), *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S) and *Muringi v Air Zimbabwe Corporation & Anor* 1997 (2) ZLR 488 (S). Finally, Mr *Foroma* submitted that s 4(2) of the Codes of Conduct Regulations does not preclude the disciplinary committee from rehearing the matter. It could not have been the intention of the legislature to insist that all proceedings under a code of conduct are confined to a period of fourteen days. It is possible for such proceedings to continue beyond fourteen days if the parties consent or fail to E object. See *Marimo v National Breweries* S-125-00.

The order sought, as outlined by Mr *Gijima* at the hearing of the matter, is a *declaratur* to the effect that the dismissal of the applicants on 16 November 2001 is unlawful and that they are employees of Air Zimbabwe and therefore are entitled to their salaries and benefits with effect from 16 November 2001, F the date they were suspended.

Clause 5 of the code of conduct sets out the objectives of the code. They include in paras (d) and (e) of clause 5.2, that disciplinary action is promptly applied without unnecessary delay and that provision is made for appeal procedures. Clause 7.1 of the code sets out the composition of the disciplinary committee. There are six standing members. Half of them are appointed by G Air Zimbabwe to represent management and the other half are appointed by the trade unions and main workers committee to represent workers. There is a specified alternate to each of the standing members. The chairman of the disciplinary committee is the Assistant General Manager (Human Resources), who has no deliberative vote but, in the event of a deadlock, has a casting H vote. The appeal procedures are set out in clause 9 of the code. Clause 9.1

2002 (2) ZLR p480
Smith J

provides for the right of appeal and how it shall be exercised. In cases of A misconduct which have been determined by the disciplinary committee, the appeal lies to the General Manager. Clause 9.2 provides that the appeal shall be dealt with as a matter of priority within seven days of receipt. However, there is no indication in clause 9.2 as to what the person hearing the appeal may do. Obviously he must be able to allow the appeal or to dismiss it, B although that is not stated in clause 9.2. However, clause 9.3 does give some indication of what the person hearing the appeal may do. It provides as follows:

"All disciplinary actions initially determined shall be implemented, notwithstanding any appeal, and shall continue in force until voided, superceded or set *(sic)* by any subsequent determination resulting from any appeal". C

Clearly, the person concerned may dismiss the appeal, in which case the disciplinary action initially determined shall remain in force. Also he may "void, supercede or set aside (presumably)" the disciplinary action. Therefore, if he allows the appeal he may "void or set aside" the disciplinary action. Also he may substitute a less severe penalty, in which case he would supersede the D disciplinary action. In this case Chingwena set aside the penalty imposed by the disciplinary committee.

Chingwena also referred the matter back to the disciplinary committee for hearing afresh. Is he empowered to do so? Clause 9.3 does not specifically state that he may do so. Likewise, clause 8, which provides for the procedure E to be followed on misconduct by an employee, does not specifically provide for the rehearing of an allegation of misconduct. There is, however, one factor which persuades me that it would not be just to remit the case back to the disciplinary committee for rehearing. According to the applicants' founding affidavits, the workers' representatives on the disciplinary committee argued that her guilt had not been proved whereas the management F representatives found that her guilt had been proved and recommended her dismissal. That means that the chairman must have exercised his casting vote in favour of the management representatives. If the case were referred back to the disciplinary committee, although the alternates could replace the standing members, the Assistant General Manager (Human Resources) would have to remain as chairman. There is no alternate. The chairman could G hardly be seen to be impartial at the rehearing, since he has already determined that the applicants are guilty of the offence charged and should be dismissed. In *Minerals Marketing Corp of Zimbabwe v Mazvimavi* 1995 (2) ZLR 353 (S) at 363-364 Gubbay CJ said:

"It follows that the respondent is to be placed in the position he was in prior to 13 July 1994. H

2002 (2) ZLR p481

Smith J

A I would add, however, that if there is to be another hearing by the disciplinary committee into the allegations of misconduct, members on the management side, as well as those from the workers' committee, must be different from those who previously comprised the disciplinary committee."

Even if the code of conduct does permit Chingwena to refer a case back to B the disciplinary committee for rehearing, it is now too late for that to be done. Section 4(2) of the Codes of Conduct Regulations provides as follows:

"No proceedings commenced in terms of a code in respect of any misconduct or breach of the rules and procedures shall continue beyond fourteen days from the date of their commencement without a decision being reached."

C This provision is highly desirable. When an employee has been suspended for misconduct and his or her salary stopped, a decision on the charge alleged against the employee must be reached as soon as possible. Very few employees are in a position where they can exist for any length of time without getting their salary. That is why the regulations provide that a D decision must be reached within fourteen days.

Section 101 of the Labour Relations Act [*Chapter 29:01*] (hereinafter referred to as "the Act") provides for the registration of employment codes of conduct. It also provides for appeals by any person aggrieved by proceedings under a registered code of conduct. The appeal lies to the Labour Relations Tribunal. Subsection (8) provides that on an appeal the Tribunal may confirm E the determination or proceedings appealed against, remit the matter for determination or substitute its own determination. In subs (6) of s 101 it is provided that, if any matter under a registered code of conduct is not determined within thirty days of the date the person who is alleged to have breached the code has been notified that proceedings are to be commenced F against him in respect of the alleged breach, then the employer or employee concerned may refer the matter to a labour relations officer, who may then determine or dispose of the matter. It is not clear, however, what the position is if the employer or employee does not refer the matter to a labour relations officer. The subsection does not state, specifically, that the proceedings lapse. I do not think that it can be implied that the proceedings lapse. If the G legislature had intended such a drastic step, it would

have said so. All that could have been intended is that where proceedings have dragged on for more than thirty days and one of the parties wants to expedite matters, that party may approach a labour relations officer to take over the matter. If, however, both parties are quite prepared to let the proceedings drag on, they may let H sleeping dogs lie and the proceedings will merely carry on at a snail's pace.
2002 (2) ZLR p482
Smith J
It is difficult to reconcile subs (6) of s 101 of the Act with the provisions of A s 4 (2) of the Codes of Conduct Regulations. In terms of the latter, proceedings cannot continue for a period of more than 14 days. If that is the case, how can an employer or employee exercise the power conferred on him by subs (6) of s 101 of the Act? If the legislature envisaged that proceedings under a registered code of conduct could drag on for 30 days before one of the parties B could take the matter direct to a labour relations officer for him to handle it, can the appropriate Minister validly make regulations reducing the maximum period for disciplinary proceedings to fourteen days? That, in effect, deprives an employer or employee of the right given to him by s 101 (6) of the Act.
What is not in dispute in this case is that the disciplinary committee conducted a hearing, determined that the applicants were guilty of misconduct C and dismissed them. Despite their noting of an appeal, the dismissal meant that they ceased to be employees of Air Zimbabwe on 14 November 2001. Chingwena set aside their dismissals. That meant that the applicants resumed their status as employees of Air Zimbabwe. They are accordingly entitled to their salaries and benefits with effect from that date. I would emphasise that it was the Acting General Manager of Air Zimbabwe who set aside their D dismissals. It is not a question of this court ordering their reinstatement. I have concluded that Chingwena did not have the power to refer the matter back to the disciplinary committee for a fresh hearing. It may well be that Chingwena can start proceedings all over again by preferring fresh charges against the applicants and suspending them afresh. The problem that Air E Zimbabwe would have to face, however, is that of finding a chairman for the disciplinary committee. The code of conduct provides for only one person to be chairman and that is the Assistant General Manager (Human Resources). As that member of management has already presided over hearings in relation to the applicants and has exercised his casting vote against them, he could hardly be considered to be impartial and therefore suitable to preside F over a fresh hearing.
The respondents do not dispute that the applicants are still employees of the second respondent. They agree that their dismissal from the employment of Air Zimbabwe was set aside by Chingwena. It is not necessary therefore to issue a *declaratur* to the effect that they are still employees. It is necessary, G however, to issue a *declaratur* to the effect that they are entitled to their salaries and benefits from 16 November 2001, the date of their dismissal by the disciplinary committee.
It is declared that each applicant is entitled to his or her salary and other employment benefits with effect from 16 November 2001. H
2002 (2) ZLR p483
Smith J
A It is ordered that the applicants' costs be paid by the respondents jointly and severally, the one paying the other to be absolved.
Gill, Godlonton & Gerrans, legal practitioners for applicants B *Sawyer & Mkushi,* legal practitioners for respondents

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Source:
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[zRPz]BAILEY NO v TRINITY ENGINEERING (PVT) LTD & ORS 2002 (2) ZLR 484 (H)
2002 (2) ZLR p484

Citation 2002 (2) ZLR 484 (H)

Case No	Judgment No. HH-181-02
Court	High Court, Harare
Judge	Matika J
Heard	16 September 2002; 16 October 2002
Judgment	16 October 2002
Counsel	*W Ncube,* for the plaintiff *G Chikumbirike,* for the defendants
Case Type	Civil action
Annotations	Link to case annotations

[zFNz]Flynote
Practice and procedure — absolution from the instance — principles — court D should lean in favour of case continuing — defence peculiarly within knowledge of defendant
[zHNz]Headnote
The plaintiff, who was the liquidator of a merchant bank, issued summons against the defendants, claiming monies plus interest owed as a result E of the bank having advanced money to the first defendant. In their plea, the defendants admitted that the bank had advanced the money, but claimed that the interest charged breached the *in duplum* rule and that the money had been repaid. After the plaintiff's main witness had given evidence, the plaintiff reduced the amount of its claim. At the close of F the plaintiff's case, the defendants applied for absolution from the instance, alleging that the plaintiff's evidence was unreliable because, among other things, some of the documents produced were copies, not originals.
Held, that in an application for absolution from the instance, the test to be applied is whether there is evidence upon which a reasonable court G might find for the plaintiff. If so, and particularly if the defence is something peculiarly within the knowledge of the defendant, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance. In this case, because the H
2002 (2) ZLR p485
Matika J
A plaintiff was a financial institution, it was not necessary for the documents to be originals; copies were admissible. The defendants had admitted taking the loans and it was necessary for them to prove their defence. The defence that the money had been repaid was something peculiarly within the defendants' knowledge.
[zCAz]Cases cited B
Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei 1993 (3) SA 184 (Tk)
Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (H)
C *Supreme Svc Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971* (1) RLR 1 (A)
Theron v Behr 1918 CPD 443
[zSTz]Legislation considered
D Civil Evidence Act [*Chapter 8:01*], ss 11, 40, 41 and 43
[zCIz]Case information
W Ncube, for the plaintiff
G Chikumbirike, for the defendants
[zJDz]Judgment

E **Matika J**: This is an application for absolution from the instance which was made by the defendants' counsel at the close of the plaintiff's case. The said application was opposed by the plaintiff's counsel.

The plaintiff issued summons against the defendants claiming payment of the sum of $39 144 549.39 plus interest at the rate of 31 *per centum per annum* F from 1 July 1999 to the date of payment in full, collection commission and costs. The plaintiff's claim was based on monies allegedly lent and advanced to the first defendant by the United Merchant Bank during the period June 1996 to March 1998. The defendants filed a plea in which they denied paragraph 5(a) of the plaintiff's declaration but H United Merchant Bank, lent and admitted the rest of para 5(b), (c) and (d) of plaintiff's declaration. The first sentence of para 5 of the G plaintiff's declaration read as follows:

"Between June 1996 and March 1998, the Bank lent and advanced to First Defendant various sums of money subject to the following terms and conditions ..."

So, in my view, the defendants were specifically admitting that the Bank, United Merchant Bank, lent and advanced the first defendant various sums

2002 (2) ZLR p486

Matika J

of money during the period in question. The defendants went further to raise A the defence that the plaintiff had charged the first defendant interest in contravention of the *in duplum* rule. The defendants further alleged in para 5 of their plea that "whilst various amounts were loaned to it, from time to time over the period in question, it denies that plaintiff was entitled, as it did, to charge interest in contravention of the *in duplum* rule". Furthermore, the B defendants aver "that the full amount of its indebtedness was discharged by various remittances which were forwarded to the plaintiff by its various customers. These payments were reflected in the defendants' ledger cards compiled and kept by the plaintiff."

The defendants, in my view, are again admitting that the plaintiff advanced to the first defendant various sums of money over the period in question. The C defendants, in my view, are raising two defences in their plea, namely, an alleged contravention of the *in duplum* rule by the plaintiff and an alleged repayment made on first defendant's behalf by its customers to the plaintiff.

The plaintiff called one witness, a Mrs Greener, an accountant. She, through two massive exhibits, namely, Exhibits 1 and 2, was able to show to the court D that the various sums were lent to the first defendant. The plaintiff's witness referred to requests for loans by the first defendant, cheque stubs were produced and at times bank statements reflecting that the cheques in question were honoured. The evidence led to the court was simply that the first defendant requested payment, cheques were raised and honoured. Even in instances where no records of requests for money were produced, such as in E respect of loan 8 for the sums of $600 000 and $750 000, the plaintiff's witness referred the court to 44, 45, 46 47 of Exhibit 2, which tended to show that the said amounts were paid to the first defendant. Lastly, plaintiff's counsel, in his submissions in opposition to the defendants' application for absolution from the instance, produced Annexure YY which shows the request for the loans in question, the cheque stubs and, in some cases, the F actual cheques, the advice to the first defendant from the Bank, the telex instructions to the Bank where foreign currency transactions were involved and the relevant extracts from the Bank statements showing that the cheques or telex requests for payments were honoured.

In the re-examination of its witness, the plaintiff sought an amendment to its G summons and declaration, which was granted. The amendment had the effect of reducing the plaintiff's claim from $39 144 549.39 to $27 300 972.68 or alternatively $15 768.41, as per Exhibit 7. The alternative prayer related to loans where no requests were found in the Bank's records. It also took into account repayments made by the first defendant of $3 928 236.97 plus interest. It is against the aforementioned background of the plaintiff's case H

2002 (2) ZLR p487

Matika J

A that the defendants have brought this application for absolution from the instance. The test to be applied in cases of such applications for absolution from the instance was restated by my brother, Smith J, in a case coincidentally involving the second defendant, namely, *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H) at 552-553. Smith J cited with approval the case of *Supreme Service Station (1969) (Pvt)* B *Ltd v Fox & Goodridge(Pvt) Ltd 1971* (1) RLR 1(A) at 5D, where it was held by Beadle CJ that:

"The test, therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than C by

saying that it is the sort of mistake a reasonable court might make ... a definition which helps not at all."

Further, the learned judge cited with approval *Theron v Behr* 1918 CPD 443 at 451, where Juta J stated as follows:

"according to the practice in this court in latter years judges have become D very loath to decide upon questions of fact without hearing all the evidence on both sides."

The learned judge further quoted with approval *Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei* 1993 (3) SA 184 (Tk) at 185B-D where Hanck J stated as follows:

"The legal test to be applied at this stage appears to be common cause, E namely, whether there is evidence upon which a reasonable man might find for the plaintiff. ... Counsel for the defendant accepted that at this stage of the trial neither the weight of any of the evidence tendered, nor any evaluation of the probabilities are relevant to the enquiry, save where such findings are clearly manifest from the evidence. ..."

F Mr *Chikumbirike* submitted that the plaintiff included inaccurate figures, allegedly used dubious methods of accounting, etc. He submitted that the weakness in plaintiff's case lay in its attempt to construct the United Merchant Bank's books from scratch. Mr *Chikumbirike* submitted that Exhibits 1, 2 and 3 were not original documents and therefore inadmissible. He submitted that even in circumstances where it is permissible to submit G copies, the copies must be certified as true copies of the original. He submitted that there was no documentary evidence before the court. Mr *Chikumbirike* relied on s 41(1)(a), (b) and (c) of the Civil Evidence Act [*Chapter 8:01*]. He submitted that, since at the close of the plaintiff's case, no affidavit as is envisaged by s 41(1)(a), (b) and (c) had been filed, no H affidavit can be filed at this stage. Mr *Ncube* submitted that in terms of s 43

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of the Act the provisions of ss 40 and 41 had no application in an action where A the financial institution was a party. Mr *Ncube* went to submit that the relevant provision of the Act is in fact s 11 which allows the admissibility of copies at the discretion of the court on being satisfied that the original document cannot be produced, *inter alia,* for any good and sufficient cause. Lastly, *Mr Ncube* submitted that in this case the original documents had been B produced and shown to the defence counsel. The said documents were tendered to the court. I agree with Mr *Ncube*'s submissions that the provisions of ss 40 and 41 of the Act do not apply in a suit where a financial institution is a party. It is common cause that the plaintiff who is representing the United Merchant Bank in liquidation is a financial institution. Further, I also agree with Mr *Ncube* that in terms of s 11 of the Act, copies of documents are C admissible at the discretion of the court. However, in this case the original documents were produced and shown to the defence counsel at his instance.

There can therefore be no question about original documents not being produced. I find that the exhibits which were produced to the court are admissible into evidence. In my view, Exhibits 1 and 2, which I previously described as voluminous and bulky, clearly establish a *prima facie* case D against the defendants. The onus is now on the defendants to take the witness stand and try to prove their defence. As I previously said, the defendants must try to prove their defence which they pleaded in their plea. As aforesaid, the defendants pleaded that the first defendant had paid all the amounts which had been advanced to it through its customers. Secondly, the defendants E pleaded that the plaintiff had charged interest on the capital sum outstanding in contravention of the *in duplum* rule. The defendants, in their plea, specifically admitted that various amounts had been advanced to the first defendant by the United Merchant Bank. As was stated *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd supra,* at p 5-6:

"I must stress that rules of procedure are made to ensure that justice is done F between the parties, and, so far as is possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not G be permitted to shelter behind the procedure of absolution from the instance."

I agree with these sentiments expressed by Beadle CJ in *Supreme Service Station.* The first defendant is alleging that its customers repaid the amounts H

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Matika J

A which were advanced to it by the plaintiff. This defence is peculiarly within the knowledge of the first defendant and I consider that the plaintiff has made out a case for the defendants to answer. The court should hear what the defendants have to say before depriving the plaintiff of its remedy.

I accordingly find that the defendants' application for absolution from the B instance has no merit at all and it is hereby dismissed with costs.
Coghlan, Welsh & Guest, plaintiff's legal practitioners. C *Chikumbirike & Associates,* defendants' legal practitioners.

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Source:
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[zRPz]MFUNE v MUTITI & ORS 2002 (2) ZLR 490 (H)
2002 (2) ZLR p490

Citation	2002 (2) ZLR 490 (H)
Case No	Judgment No. HB-122-02
Court	High Court, Bulawayo
Judge	Ndou J
Heard	6 September 2002; 9 September 2002; 12 September 2002; 17 October 2002
Judgment	17 October 2002
Counsel	*V Majoko,* for the applicant Mrs *N Moyo,* for the first and second respondents
Case Type	Civil application
Annotations	No case annotations to date

[zFNz]Flynote
Court — contempt of court — constructive contempt — what is — requirements
Practice and procedure — interdict — anti-dissipation interdict — nature and requirements D
[zHNz]Headnote
For a person to be guilty of constructive contempt of court, i.e. contempt of an order that the court has not yet made but probably will make, he or she must have engaged in the conduct complained of in bad faith in order to prevent the court from properly trying the main issues between the parties. E
The respondents secured a postponement of an anti-dissipation application in which the applicant sought to prevent the respondents withdrawing money from their bank account, and then proceeded to withdraw large sums of money from that account. When the application was heard the applicant contended that the respondents were in contempt of court and therefore could not be heard.
Held, that there was an onus on the applicant to establish *dolus* on the part F of the respondents, that is to establish that they were deliberately interfering with his right of free access to the courts.

Held, further, that the acts complained of, though reprehensible, could not prevent the trial of the main issue between the parties, which was whether the respondents were indebted to the applicant. So long as the main issues remained triable the respondents could not be held to be in G constructive contempt of court.
Held, further, that an anti-dissipation order is a form \ill\ interdict, and while the applicant did not have to show that the respondents had no *bona fide* defence he had to establish *a prima facie* case, as well as an infringement or reasonable apprehension of an infringement of a right, the absence of any other satisfactory remedy and a balance of convenience in favour of granting the interdict. H
2002 (2) ZLR p491
Ndou J
[zCAz]Cases cited A
Aleni v Minister of Law & Order & Ors, Lamani v Minister of Law & Order & Ors 1989 (1) SA 195 (A)
Bluebell Inc v Lennard Clothing Mfrs (Pvt) Ltd 1984 (1) ZLR 49 (H)
Botswana Football Assoc v PG Notwane FC [1994] BLR 37
Bozimo Trade & Development Co (Pvt) Ltd v First Merchant Bank of B *Zimbabwe Ltd & Ors* 2000 (1) ZLR 1 (H)
Consolidated Fish Distributors (Pty) Ltd v Zive & Ors 1968 (2) SA 517 (C)
Fein & Cohen v Colonial Govt (1906) 23 SC 750
First Rand Bank of SA Ltd v Pretorius & Anor 2002 (3) SA 489 (C)
Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law & C *Order & Ors* 1994 (1) SA 387 (C)
Knox D'Arcy Ltd and Others v Jamieson and Others 1995 (2) SA 579 (W)
Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)
McLeod v Rolindo HH-47-02
Mobil Oil Zimbabwe (Pvt) Ltd v Travel Forum (Pvt) Ltd 1990 (1) ZLR 67 (H)
Noormohamed v Patel 1987 (2) ZLR 324 (S)
D *R v Secretary of State for the Home Dept, ep Muboyayi* [1991] 4 All ER 72
Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd 1997 (1) SA 646 (C)
Roper Trust v District Administrator, Hurungwe, & Ors 2001 (2) ZLR 345 (H) E
S C F Finance Co Ltd v Masri & Anor [1985] 2 All ER 747 (CA)
Yamomoto v Athersuch & Anor 1919 WLD 105
[zCIz]Case information
V Majoko, for the applicant
Mrs *N Moyo,* for the first and second respondents
[zJDz]Judgment
F **NDOU J:** In this urgent chamber application the applicant seeks an order in the following terms:
"INTERIM ORDER:
1. Pending the return date this order operate as a temporary interdict G prohibiting and barring Power Systems (Pvt) Ltd from withdrawing from account number 24057429 kept at Kingdom Bank, Bulawayo or any of the said banks' branches, the funds held in that account.
2. Kingdom Bank Ltd be and is hereby interdicted and prohibited from processing any transaction the effect of whom *(sic)* would be to transfer from, withdraw from or in anyway diminish the sums held H in the account referred to in paragraph 1.
2002 (2) ZLR p492
Ndou J
FINAL ORDER SOUGHT A
1. All monies standing to the credit of Power Systems (Pvt) Ltd or in account number 24057429 are declared to be the lawful monies of Felix Mfune and should be paid to him or his nominee within 7 days of this order.
2. First and second respondents pay costs of suit on the scale as between attorney and client. B
3. The deputy Sheriff be and is hereby directed and authorised to seize and take into his possession the following motor vehicles pending the final outcome of this application:
(a) Nissan Sunny (registration to be provided) and
(b) Peugeot 504 (registration to be provided)
4. Respondents be and are hereby interdicted and prohibited from in D anyway alienating of any property they may be possessed of at the time of the service of this order.
5. Upon service of this order the deputy Sheriff prepare an inventory of all property, including stock as he may find at the respondent's company premises and also at Mutiti's residence number ... Shortly Road. Morningside.
SERVICE

(a) Service on the Kingdom Bank be effected by the applicant's legal practitioners
(b) Service on the first and second respondents be effected by the deputy Sheriff."

The salient facts of this case are that the applicant is a Zambian national E currently residing at Number 27A Connaught Avenue, Bulawayo. The applicant is seeking the above-mentioned relief *pendente lite.* It is trite that the purpose of an interdict *pendente lite* is the preservation of the *status quo,* or the restoring thereof, pending the final determination of the parties' rights. It does not affect or involve the final determination of such rights. See *McLeod v Rolindo* HH-47-02; *Apleni v Minister of Law and Order & Ors,* F *Lamani v Minister of Law and Order & Ors* 1989 (1) SA 195 (A) at 200J - 201C; *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646 (C) at 651 *D-E; Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order & Ors* 1994 (1) SA 387 (C) at 390 A-B.

The applicant's case is that he is suing the respondents in this court under case number HC 2120/02. He has since learnt that the first and second respondents G are dissipating "their" resources apparently with the aim of frustrating him should he eventually obtain judgment against them. It is common cause that the applicant paid $7 000 000,00 to first and second respondents for the latter to supply him with bags of cement. The issue for determination in the main application is whether the applicant received value for his money. It is the applicant's case that he did not receive a single bag of cement. The first and H

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Ndou J

A second respondents contend that they, however, issued applicant with some of the bags of cement and partially refunded him save for the balance of $35 000.00, which they tender. These issues are not for final determination at this stage.

PRELIMINARY ISSUE

Before I deal with the main issue I propose to deal with the preliminary issue B raised by *Mr Majoko,* for the applicant. The basis of this point *in limine* is that the first and second respondents are in contempt of this court, and, therefore cannot be heard. It is common cause that this application and notice of set down were served on the respondents' legal practitioner of record. Unfortunately, due to circumstances beyond her control, first and second respondents' legal practitioner had to go to South Africa urgently. So when the matter came up for hearing on 6 September 2002 she was still out of the C country. The first and second respondents, however, appeared and sought a postponement. This was granted by consent. The terms of the relief sought made it very clear on the initial papers that the applicant was seeking an anti- dissipation order against the first and second respondents. During the interim period (between 6 September 2002 and 9 September 2002) the first and second respondents made two substantial withdrawals from the account that D is the subject-matter of these proceedings. At the time they made these withdrawals they were aware what the application was all about. The first withdrawal was carried out in a dramatic fashion. The first respondent and some members of the second respondent on Saturday 7 September 2002 (i.e. a day after their initial appearance at which the postponement was granted) approached their bankers to withdraw $500 000. Their request was turned down as their bankers had already been served with this urgent court E application. The first and second respondents could not accept this and their request appears to have turned into a demand. The bankers then contacted the applicant's legal practitioner. The respondents refused to budge and the police had to be called as they had threatened not to leave the bank. The matter was only resolved at 1500 hours when the bankers gave in and let first and second respondents' withdrawal to go through. On Saturday the bank closes F in the morning but because of the conduct of the respondents, the bankers attended to the issue until 1500 hours. This is not only unusual but is indicative of the behaviour of the first and second respondents on the day in question. Hot on the heels of this dramatic withdrawal the first and second respondents on Monday (i.e. the day the matter was scheduled to resume) made another withdrawal of $900 000.

G The attitude of the first and second respondents is that because there was no court order barring them from doing so, they were not in contempt of court. The applicant, whilst accepting that there was no court order, relies on what is termed constructive contempt of an order that the court has not yet made, but probably will make, the respondents being guilty of an act of commission performed with deliberate intention of frustrating the court's order, if and when made: see *Botswana Football Association v P G Notwane F C* [1994] H BLR 37.

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Ndou J

According to Baker AJ in *Consolidated Fish Distributors (Pty) Ltd v Zive &* A *O*rs 1968 (2) SA 517 (C) at 523, constructive contempt could be constituted by the commission of some act with the ulterior object of preventing an application from being heard. In *R v Secretary of State for the Home*

Department, ex parte Muboyayi [1991] 4 All E R 72 at 81C, Lord Donaldson M R stated in this regard:

"As has been said in the context of Mareva injunctions (see *Derby & Co.* B *Ltd v Weldon (No. 2)* [1989] 1 All ER 1002 at p 1006-7; [1990] 1 Ch. 65 at 76:

'...within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case.

In this context "designed to" does not mean "intended" but rather C "having the consequence that." The court should not permit a would-be immigrant to be compulsorily removed from its jurisdiction if he has sought the protection and assistance of the court and the result would be to render any subsequent order quashing a decision to refuse leave to enter less effective."

Fein & Cohen v Colonial Government (1906) 23 SC 750 is a strong authority D for the proposition that *mala fides* is an essential element in constructive intent.

In this regard, De Villiers CJ stated in the latter case at page 762 as follows:

"No question of *bona fides* can arise where there is an act of wilful disobedience of an actual order of the court or where there is a direct insult to a Judge while acting in his judicial capacity, but where it is E attempted to construe an act which, on the face of it. shows no disrespect for the court, into a contempt of court, it appears to me that the *mala fides* of the alleged offender is an essential ingredient of the offence.

This case should be read in conjunction with an earlier South African case of *Yamomoto v Athersuch & Anor* 1919 WLD 105 whose headnote states:

"*Dolus malus* is essential to the crime of contempt of court. F

Where an act is done with the intention of defeating the ends of justice or obstructing the court in its functions there is *dolus* and the act is punishable as contempt of court, whether as not an order of court is in existence which is being disobeyed or defied.

If an act is done in defiance of an existing order of court of which the respondent in contempt proceedings was at the time of the act aware, F there is *dolus,* but where there was no order in existence at the time of the act, there is an *onus* on the part of the applicant to establish *dolus* on the part of the respondent.

Where a person deliberately interferes with another's right of free access to the courts, he is guilty of contempt of court, whether or not he *bona fide* thinks he has a right to do so. *Fien and Cohen v Colonial Government* H

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A (23 SC 750) followed: *Li Kui Yu v Superintendent of Labour* (1906 TS 181) queried"

As per De Villier J P on page 109:

"Now as Mason J points out at page 194, a most important public interest is that everybody should have free access to the courts of justice. Where a person therefore deliberately interferes with this right of another he is B guilty of contempt of court, even if he *bona fide* thinks he had a right to do so. Where the learned judge goes further that this, with respect 1 have difficulty in following him and I do not think in view of the above finding I am bound by the very wide principle enunciated by him."

In my view, whether or not contempt has been committed where no order of court has yet been made, must depend on whether or not the conduct C complained of was performed in bad faith in order to prevent the court from properly trying the main issues between the parties. I agree with what Bizos JA stated in *Botswana Football Association* case *supra* at p 50C. In this case it is beyond dispute that the first and second respondents knew about the anti- dissipation application launched by the applicant. They knew that the remedy sought was to prevent them from, *inter alia,* making withdrawals from their Kingdom bank account number 24057420. The question is whether they D made the two withdrawals with *dolus malus.* Where there is no order of court in existence, as is the case with the present matter, there is an *onus* on the part of the applicant to establish *dolus* on the part of the respondents. The applicant has to establish that the first and second respondents were deliberately interfering with his right of free access to the courts. This matter was scheduled for hearing on Friday 6 September 2002. The matter was postponed E at the behest of the first and second respondents to Monday 9 September 2002. At this stage the first and second respondents were familiar with the relief sought by the applicant. They, however, approached the third respondent * to make a withdrawal from the disputed account. The third respondent declined the withdrawal. Police had to be called as the first respondent and members of the second respondent were refusing to leave the bank unless the third respondent honoured their withdrawal. This debate (for F want of a better word) went on until 3.00 p.m i.e well after closing time for the bank on a Saturday. The bank eventually gave in. When the bank opened on Monday morning the respondents

were there to make a further withdrawal. On Saturday they withdrew $500 000 and on Monday $900 000. The question is, why the rush to make these withdrawals? They produced two requisitions from Inyathi District Hospital to explain their sudden rush in making these withdrawals. These requisitions were issued well before this application was G launched. In any event, the Monday withdrawal alone would cover both requisitions. It is clear that the conduct of the first and second respondents was aimed at frustrating any interdict that the applicant may obtain from the court. Their aim was to dissipate their assets. The facts placed before me by

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Ndou J

the applicant, which are not disputed by the respondents, lead to one A conclusion, i.e. first and second respondents did not act *bona fide.* These rushed withdrawals were made in bad faith. The question, however, still remains as to whether such act prevented any of the main issues being properly tried. The main issue between the applicant and the first and second respondents is whether the latter are indebted to the applicant to the tune of $6 434 500,00 plus interest at the prescribed rate. In this regard I am of the B view that the acts complained of are not such that they can prevent any of the main issues being properly tried. All that has been established is that the first and second respondents acted *mala fide.* In my view, as long as the main issues remain triable these respondents cannot be held to be in constructive contempt of the court. I, however, find the conduct of the first and second respondents reprehensible. C

SUBSTANTIVE ISSUE

It is trite that this court has inherent jurisdiction to grant an interdict. The jurisdiction of this court should be kept flexible so that the courts can continue to do what is just and convenient. The jurisdiction of the court should not be hedged with rules. This does not mean that the rules of procedure laid down over the years should be disregarded in order to D accommodate litigants who do not follow them. Flexibility of the jurisdiction can only be done within set procedure: see *Noormohamed v Patel 1*987 (2) ZLR 324 (S) at 333B-C and *SCF Finance Co Ltd v Masri & Anor* [1985] 2 All ER 747 (CA) at 750D.

In casu, the applicant seeks an interdict. It is trite that the criteria on which an interdict may be granted is that the matter should be one of urgency or E where irreparable harm will be done to *applicant-see Bluebell Inc v Lennard Clothing Mfrs (Pvt) Ltd* 1984 (1) ZLR 49 (H) and *Mobil Oil Zimbabwe (Pvt) Ltd v Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H). The possible harm to be suffered by the applicant relates to the dissipation of money in the bank. The following extracts from his founding affidavit capture the objective of this application: F

"3. I have since learnt that the defendants are dissipating their resources apparently with the aim of frustrating me when I eventually obtain judgment.

11 ... I pray also that the respondents be interdicted from alienating or encumbering any of the assets they may own until final determination of my action against them. G

12 I pray that this matter be heard as a matter of urgency as any delay will irreparably prejudice me. This is the only remedy I have as the respondents appear to be of impecunious circumstance and of a fraudulent bent."

To counter these averments, the respondents deny that they are impecunious. They produced documents indicating that second respondent H had won tenders with Inyathi District Hospital. The managing director of the

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Ndou J

A second respondent, one Mr Sweet Sweet, also filed an affidavit denying that the second respondent had cash flow problems. He points out that they had, in fact, made deposits into their account even after the summons was issued by the applicant. He produced a bank statement showing deposits and withdrawals well after the summons was issued. This is obviously not consistent with a conduct of a litigant dissipating assets to frustrate a possible judgment in favour of the applicant. Mr Sweet also avers that he owns a fleet B of vehicles operating under the name of Sweet Transport with five trucks and trailers each valued in the region of $15 million. He also avers that he has other properties in Bulawayo and Masvingo and is therefore in a position to satisfy a judgment in the tune of $7 million in the event that the applicant succeeds with his claim. There are serious disputes of fact in this matter which cannot be resolved even by the adoption of a robust approach. It seems C to me that the respondents have established the existence of a genuine dispute of fact - see *First Rand Bank of SA Ltd v Pretorius & Anor* 2002 (3) SA 489 (C).

I am satisfied that the applicant has failed to establish that he will suffer irreparable harm if the interdict is not granted. In such an application for an interim order the applicant has to establish *a prima facie* case on a balance of D *probability - see Kuvarega v Registrar-General*

Anor 1998 (1) ZLR 188 (H); *Roper Trust v District Administrator, Hurungwe & Ors* 2001 (2) ZLR 345 (H) at 350C and *McLeod v Rolindo supra.*
The applicant has failed to establish a *prima facie* case and the interim protection he seeks is not merited. According to Chatikobo J in *Bozimo Trade & Development Co (Pvt) Ltd v First Merchant Bank of Zimbabwe Ltd & Ors* E 2000 (1) ZLR 1 (H) an anti-dissipation prohibitory interdict is a form of interlocutory interdict. It is not necessary for the applicant to show that the respondent has no *bona fide* defence; the applicant must establish a *prima facie* case, even if it is open to some doubt. He must also establish an infringement, or a reasonable apprehension of an infringement, of the right, the absence of any other satisfactory remedy and a balance of convenience in favour of granting the interdict. See also *Knox D'Arcy Ltd and Others v* F *Jamieson and Others* 1995 (2) SA 579 (W). I agree with this statement of the law. In this matter it seems that the applicant failed to establish that the respondents are impecunious. In the circumstances he has another satisfactory remedy against the respondent in the event of success in the main application. In the circumstances I accordingly, dismiss the application with costs.
G *Majoko and Majoko,* applicant's legal practitioners
Moyo-Hara & Partners, first and second respondents' legal practitioners

* The third respondent was Kingdom Bank Ltd —*Editor*

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Source:
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[zRPz]MARIJENI v MUFUDZE & ORS 2002 (2) ZLR 498 (H)
2002 (2) ZLR p498

Citation	2002 (2) ZLR 498 (H)
Case No	Judgment No. HH-195-02
Court	High Court, Harare
Judge	Makarau J
Heard	17 October 2002
Judgment	17 October 2002
Counsel	Miss *N Moyo,* for the plaintiff
Case Type	Chamber application
Annotations	No case annotations to date

[zFNz]Flynote

Practice and procedure — pre-trial conference — purpose of — judge's function — desirability of reaching settlement D

[zHNz]Headnote

The role of the judge presiding at a pre-trial conference is to engage the parties and their lawyers meaningfully, and to assist towards a settlement. He can give directions in the matter. The judge is not a mere observer. He should be an active participant at the conference. Where opportunities E to settle the matter arise, he must point them out to the parties. It is the practice that the judge who presides at the pre-trial conference will not preside over the matter if and when it comes to trial, so he can take an active part in the proceedings without being accused of pre-judging the matter.

[zCAz]Case cited F

Doelcam (Pvt) Ltd v Pichanick & Ors 1999 (1) ZLR 390 (H)

[zCIz]Case information

Miss *N Moyo,* for the plaintiff

[zJDz]Judgment

Makarau J: On 8 January 2002, the plaintiff's legal practitioner filed a G chamber application for directions in the above matter. Her predicament is on how to proceed in the matter in which she appears in *forma paupéris* on behalf of the plaintiff who, since June 2001, has not been in touch with her to give her further instructions. H

2002 (2) ZLR p499

Makarau J

A The cause of the legal practitioner's predicament is fully revealed in the affidavit filed with the chamber application. It is as follows:

The plaintiff issued summons against the defendants claiming damages in the sum of $10 000 for pain, shock and suffering; $500 for medical costs and $3 800 being the anticipated cost of replacing one artificial eye, together with interest on the amount of $10 500 and costs of suit. The damages arise from B an alleged assault by the first and second defendants, the employees of the third defendant.

Pleadings in the matter were duly closed and the matter came before Gowora J on 19 June 2001 for a pre-trial conference. At the conference, the first defendant made an offer to settle the amount of the general damages, in the C sum of $10 000, and the proven medical costs in the sum of $430. The first defendant further indicated that, upon being furnished with proof, he would also consider settling the amount of $3 800, being the anticipated cost of replacing the artificial eye. The pre-trial conference was postponed *sine die* on the basis that the plaintiff would furnish the required proof. The presiding judge noted that once the parties reached final settlement, a minute to that D effect could be filed and, presumably, a judgment by consent issued in favour of the plaintiff.

The plaintiff undertook to furnish his legal practitioner with the outstanding proof by a date in June 2001. The date came and went without the proof being furnished. Letters written to the plaintiff on the issue since that date have also E gone without response. Feeling unsure as to how to proceed to settle the matter, the plaintiff's legal practitioner filed this chamber application for directions.

Advice to the plaintiff's legal practitioner by the Registrar that, since the matter was pending before Gowora J, she could apply for the pre-trial F conference to resume, elicited this response:

"You seem to have missed the gist of our application. The problem is that our client has disappeared, we have not heard from him at all. We therefore cannot apply for a pre-trial conference since he would not be available for it. We considered simply applying to the court for permission to renounce agency as we represent him on an *in forma pauperis* basis … G

Please return this file to the judge for a final decision. We look forward to hearing from you shortly."

In my view, a final decision in the matter is yet to come. This is so because the matter is pending at the pre-trial conference stage, and until that stage is H completed, no final decision can be made in the matter.

2002 (2) ZLR p500

Makarau J

It appears to me that the circumstances of this application bring into focus the A role and place of the pre-trial conference in this jurisdiction. This is not an issue that has been extensively dealt with in any judgments or texts, as the current practice on how to convene and dispose of pre-trial conferences is relatively new.

The pre-trial conference stage has been a feature of the procedure in this B jurisdiction. The rules of the High Court provide for when and how a pre-trial conference can be held. However, since 1995, there has been a deliberate and noticeable shift in the way judges convene, participate in and dispose of pre- trial conferences. This has resulted in pre-trial conferences assuming a more meaningful place in the entire practice of litigation. There is a deliberate attempt on the part of the

judiciary to introduce mediation at the pre-trial C conference stage as an alternative to trials. More cases are now being settled at the pre-trial conference than before, as a result of the direct and active participation of judges.

Gillespie J, in one of the few judgments on the issue, had occasion to look at the purpose of a pre-trial in *Doelcam (Pvt) Ltd v Pichanick & Ors* 1999 (1) ZLR 390 (H). D He had this to say:

"A pre-trial conference has a two-fold purpose. The primary aim is to assist towards the resolution of a dispute without recourse to trial. To this end, the parties are given the benefit of appearing before a judge and of engaging off the record in a frank exchange concerning the merits and weight of the respective cases." E

The learned judge went on to consider the duty of the judge presiding over a pre-trial conference. This is what he said, in part:

"I likewise respectfully consider it to be the duty of the judge to do all that is necessary to achieve the two-fold aim of the conference. He or she ought not meekly accept the lawyers' say-so that no settlement is possible. He should express a view on the law. He should express an F opinion on the factual probabilities."

He then went on to detail the role of the presiding judge to settle the pleadings, in the event that the matter is not settled.

I respectfully consider it the role of the judge presiding at a pre-trial conference to engage the parties and their lawyers meaningfully, and to assist G towards a settlement. He or she can give directions in the matter. Judges presiding at pre-trial conferences often do. Instances when judges request that pleadings be amended, that summaries of evidence be supplemented or that further discovery be effected are all examples of directions given at the pre-trial conference. They are aimed at facilitating a settlement or, where such is not possible, at bringing to the fore the real dispute between the H

2002 (2) ZLR p501

Makarau J

A parties. Where the facts in a matter are not in dispute, the judge could direct that a stated case be prepared so that argument could be heard or the law and the legal issue could be settled.

It appears to me that the judge presiding over a pre-trial conference is not a mere observer. He or she should be an active participant at the conference. Where opportunities to settle the matter arise, he or she must point them out B to the parties. It is the practice that the judge who presides at the pre-trial conference will not preside over the matter if and when it comes to trial. Therefore, he or she can take an active part in the proceedings without being accused of pre-judging the matter. The parties themselves should be encouraged to have their say. so that the issues are freely aired and each party C knows exactly what case it has to meet. If agreement cannot be reached at a pre-trial conference, the parties should be encouraged to think a little more on the matter before deciding to proceed to trial. Postponements for that purpose should be readily granted. The judge must ensure that the parties are well aware of the costs of litigation, which today are very high.

Due to the unique position that the judge occupies at a pre-trial conference, D I would suggest that all matters aimed at curtailing the proceedings or at settling the matter are properly before him or her and ought to be resolved by him or her. He or she is in control of the case until it is settled or referred to trial. It is in light of this role of the presiding judge at a pre-trial conference that the Registrar advised the plaintiffs legal practitioner to set the matter E down for the resumption of the pre-trial conference. The directions being sought in the chamber application before me are the very matters that the judge presiding at the pre-trial conference is seized with.

The plaintiff's legal practitioner is of the view that a pre-trial conference date cannot be sought in the absence of any one of the parties. It is in the discretion of the judge presiding at a pre-trial conference how to proceed in the event F that one of the parties is absent from the conference.

On the basis of the foregoing, the following directions are issued:

1. The plaintiff is to apply for the matter to be reset down before Mrs Justice Gowora for the resumption of the pre-trial conference.
2. The chamber application for directions as it relates to how to compromise G the claim on behalf of the plaintiff is hereby referred to Mrs Justice Gowora for determination at the resumption of the pre-trial conference.

Coghlan, Welsh & Guest, plaintiff's legal practitioners

H *H Mukonoweshuro,* defendants' legal practitioners

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Source:
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[zRPz]THOMAS MEIKLE CENTRE (PVT) LTD v TM NATIONAL WORKERS' COMMITTEE & ORS 2002 (2) ZLR 502 (S)
2002 (2) ZLR p502

Citation	2002 (2) ZLR 502 (S)
Case No	Judgment No. S-77-02
Court	Supreme Court, Harare
Judge	Cheda JA, Malaba JA & Gwaunza JA
Heard	20 June 2002; 21 October 2002
Judgment	21 October 2002
Counsel	*L T Biti,* for the appellant *W Ncube,* for the first respondent
Case Type	Civil appeal
Annotations	Link to case annotations

[zFNz]Flynote
Employment — collective bargaining agreement — employer awarding D increase higher than provided for in agreement — need for employer to negotiate with employees and agree on increase — not permissible to decide unilaterally on amount of increase
[zHNz]Headnote
The appellant company unilaterally decided to award a wage increase of E three *per centum* above the rate provided for in the collective bargaining agreement for the industry. It refused to negotiate with the employees about the increase. They appealed to a labour relations officer, alleging an unfair labour practice. The officer ordered that negotiations should be entered into.
There existed within the appellant a council called the TM National Works F Council. The council consisted of representatives of management and workers. In terms of its constitution, it was competent to discuss and make recommendations on general working conditions, excluding matters covered by the collective bargaining agreements for the industry. The appellant argued that the parties were bound by the constitution of G the council, and that the parties had contractually agreed that they would not enter into negotiations about workers' wages. There was thus no obligation to negotiate about the increase.
Held, that there was nothing in the constitution which made the council the only negotiating forum between the parties. The parties were not in any case themselves members of the council. There was no legal impediment H to the parties negotiating about wages.
2002 (2) ZLR p503
Gwaunza JA
A *Held,* further, that s 74(6) of the Labour Relations Act [*Chapter 28.01*], which allows an employer and his employees to agree to conditions more favourable than those provided for in a collective

bargaining agreement, requires an agreement rather than a situation where the employer unilaterally awards higher wages.
[zSTz]Legislation considered B
Labour Relations Act [*Chapter 28:01*], s 74(6)
[zCIz]Case information
L T Biti, for the appellant
W Ncube, for the first respondent
[zJDz]Judgment
C **Gwaunza AJA**: In the High Court the appellant made an application in which it sought a review of the decision of a labour relations officer, which was to the effect that the appellant should, within fourteen days, enter into negotiations with the first respondent. The main ground for the review sought was given as:
D "gross irregularities in (the) first respondent's decision in that she erred as a matter of law in making the ruling that s 74(6) of the (Labour Relations) Act (formerly s 79(6) of the Labour Relations Act (16/85)) obliged the applicant to enter into negotiations with its employees represented by the first respondent when a collective bargaining agreement had been concluded and existed".
E The court *a quo* dismissed the application with costs, after finding that the second respondent had not only been properly seized with the matter but had also not erred as a matter of law in making the decision in question. The appellant now appeals against this decision.
It is not in dispute that there indeed existed a collective bargaining agreement F between the parties. In terms of such agreement, negotiated through the National Employment Council for the Commercial Sector of Zimbabwe ("NECCS") of which the appellant was a member and published as Statutory Instrument 248/96, the statutory wage increase to be awarded to employees in the sector to which the first respondent's members belonged was to be 22 per cent. It is common cause that over and above this increase the appellant G arbitrarily awarded a further 3 per cent increase to the employees concerned. The appellant thereafter refused to accede to a demand by the first respondent for negotiations on the 3 per cent wage increase. The first respondent then filed a complaint with the third respondent, of an unfair labour practice. The latter assigned the second respondent to deal with the matter in terms of s 93 of the Labour Relations Act [*Chapter 28:01*] ("the Act"). The result was the H decision alluded to above.
2002 (2) ZLR p504
Gwaunza JA
Before considering the grounds of appeal, I should note that I agree with the A finding of the court *a quo* that the decision of the labour relations officer was not based on an error of law. To the extent that the refusal by the appellant to enter into negotiations with the respondent over wages constituted a dispute (defined in the Act as "a dispute relating to any matter concerning employment, which is governed by this Act"), I find that the labour relations B officer had the requisite authority to deal with the matter. Such authority, it is correctly contended for the respondent, is contained in s 93(1)(b) of the Act, which reads as follows:
"93 (1) A labour relations officer, upon reference to him by any person of a dispute ... —
(a) ... C
(b) after giving both parties an opportunity to submit representations orally or in writing, may make such determination in regard to the dispute or unfair labour practice as may be just in the circumstances.'"
The labour relations officer did just that. She or he heard both parties' oral representations and made the determination in question. The determination D related to a matter of employment governed by s 74(6). There was, therefore, no question of an error in law.
I will now turn to the main grounds of appeal, which are that the court *a quo* erred —
(i) in holding that the appellant and the first respondent were not bound by E the constitution of the TM National Workers' Committee; and
(ii) in not holding that s 74(6) of the Act does not oblige the appellant to negotiate with the first respondent the variation of the collective bargaining agreement.
It is common cause that there exists within the appellant a council called the F TM National Works Council. This council has a constitution wherein, in addition to other matters ordinarily contained in any constitution of this nature, it is provided as follows in s 4(1):
"The Council may consist of five TM employee management representatives and five TM employees elected from chairpersons of TM Branch workers committees."
Even though it is noted on behalf of the first respondent that there are two different versions of s 3(1) of this constitution, it is not in dispute that the version placed before the court *a quo* reads as follows: H

2002 (2) ZLR p505
Gwaunza JA
"(3)(b) The A Council shall be competent to discuss and make recommendations on the following matters -

(i) General working conditions of employment, excluding wages and all other matters covered by the collective bargaining agreement of (the) National Employment Council for Commercial Sectors of Zimbabwe. ..."

B The appellant contends that both it and the first respondent are bound by the provisions of this constitution. This is because, it is contended for the appellant, the council (i) was created by both the appellant and the respondent and was therefore owned and controlled by same and (ii) was the only negotiating forum between the parties. Mr *Biti* contends further that, since the parties have contractually agreed that they will not enter into negotiations on C wages which are covered by the collective bargaining agreement, then that is the end of the matter.

The court *a quo* disagreed, it being its finding that neither of the parties *in casu* was a member of the NECCS, given its composition. The learned judge observed as follows in this respect:

D "It is apparent *ex facie* the constitution of the TM National Workers' Council that it is composed of five members of the TM Management employees representatives and five TM employees elected from chairpersons of TM Workers Committees. It is the Works Council made up as above that is prohibited from discussing or negotiating wages. Both the applicant and the first respondent are not members of the TM E National Works Council (and) therefore cannot be bound by the provisions of a constitution of a body of which they are not members. On this basis the provisions of the constitution of the TM National Works Council are irrelevant and this ground of challenge must fail."

I agree with this finding. There is nothing in the constitution in question to suggest that the council is the only negotiating forum between the appellant F and the respondent. Nor, I find, is it necessary that whoever creates an entity, which then assumes an identity of its own, "shall own and control it". In any case, to own and control an entity is not to say that the entity's constitution will, by that fact, bind the operations of those who created it. There cannot be any dispute that the appellant, the first respondent and the National Works Council are three separate and distinct entities. The latter two each have a G constitution from which they derive their existence and mandate. That one may have been established at the instance, or through the agency, of the other does not, in my view, affect their autonomy. The constitution of the Works Council does not allow it to discuss or make recommendations on matters to do with employees' wages. That does not mean that the same limitation H extends to the appellant and the first respondent. I am therefore not persuaded

2002 (2) ZLR p506
Gwaunza JA

by the argument advanced on behalf of the appellant that the application of A the constitution of the TM National Works Council extends beyond the Council to cover entities that are independently constituted, as are the appellant and the first respondent.

In this respect, I find merit in Mr *Ncube's* submission that the TM National Works constitution binds only the Works Council created by it and not the B first respondent. I am also persuaded by the further submission that in any case the Works Council established by the constitution in question was not intended as a negotiating forum, since its power is limited to "discussing" and making recommendations on any issue that it considers. As a result, the TM Works Council constitution cannot be read to take away the power and/or right of the employer and employees to negotiate and agree on wages. Such C an interpretation, it is correctly submitted for the first respondent, would be inconsistent with s 24(1) of the Act which specifically gives workers committees the right and power to negotiate terms and conditions of employment at the workplace.

If, as I have found, the parties *in casu* are not bound by the provisions of the D TM National Works Council, it follows that they could not, and have not, "contractually agreed" that they would not enter into negotiations concerning employees' wages.

I am accordingly satisfied that the decision of the court *a quo* that there was no impediment to the parties' entering into negotiations on wages was correct.

I will now turn to the second ground of appeal, which is that the court *a quo* misinterpreted s 74(6) of the Act.

Section 74(6) of the Act reads as follows:

"(6) The existence of a collective bargaining agreement shall not preclude F an employer and his employees from agreeing to the introduction of higher rates of pay or other more favourable conditions of employment before the expiry of such collective bargaining agreement, so however that the rights and interests of the employees are not thereby diminished or adversely affected."

It is contended for the appellant that this section does not place an obligation G on the employer, that is, the appellant, to enter into negotiations with the employees, and that therefore the question of an employer negotiating or not is a dispute of interest, not an enforceable dispute of right.
It is contended further that, even conceding that the learned judge *a quo* was correct in finding that s 74(6) *allowed* employers and employees to negotiate H terms which are more favourable than those contained in the collective

2002 (2) ZLR p507
Gwaunza JA

A bargaining agreement, this was not to be understood to be synonymous with *obliging* the employer to negotiate.
Mr *Biti,* for the appellant, contended further that s 74(6) must be read with s 74(4), which, he submits, creates a positive right for both employer and employee to renegotiate or amend a collective bargaining agreement after 12 months. He adds that the non-imposition of a positive right on either party to B seek to renegotiate or amend a collective bargaining agreement before twelve months have elapsed, by s 74(6), is not a *casus omissus* but recognition that the section imposes no right or obligation as first respondent is not seeking to s 74(4) does.
The learned judge *a quo* was not persuaded by this argument. He observed as follows at p 4 of the cyclostyled judgment:
C "As Professor *Ncube* correctly pointed out in his submission, s 74(4) is irrelevant to this matter. That subsection merely makes it clear that a collective bargaining agreement can and may be renegotiated by the parties after twelve months so as to take account of changed circumstances. This subsection is about renegotiation of the collective bargaining agreement by the parties who make it which is not the case *in casu.* The D first respondent is not seeking to renegotiate the collective bargaining agreement but to negotiate wages and salaries in the light of that agreement. I am not persuaded by the submission that the language used in subs (4) creates a legal obligation to negotiate while the language in subs (6) does not. I am inclined to agree with Mr *Ncube's* submission that the wording in s 74(6) by necessary implication allows employers and E employees to negotiate terms which are more favourable than those contained in the commercial collective bargaining agreement. In my view, the agreement referred to in this subsection is the tail end or result of negotiations between the applicant and the first respondent."
I am in full agreement with these sentiments. To the extent that s 74(4) is irrelevant to the matter at hand, it is not necessary for the court to make a F determination on whether or not the section creates an obligation for the parties to negotiate, nor whether, by comparison, s 74(6) does or does not do the same.
In relation to s 74(6), Mr *Ncube,* in my view correctly, submits that the first respondent neither contended, nor did the High Court find, that it creates an G obligation to negotiate. I am persuaded by his submission that s 74(6) envisages a situation where employers and employees, whose wages may be or are in fact regulated by a collective bargaining agreement applicable to that industry or sector, engage in further negotiations during the currency of that collective bargaining agreement so as to create better terms and conditions H for the employees.

2002 (2) ZLR p508
Gwaunza JA

In this case the employees' wages were regulated by a collective bargaining A agreement which at that time had been in operation for less than twelve months. The appellant, as the employer, without consulting the employees concerned, awarded an increase of three per cent over and above what was contained in the collective bargaining agreement. Had the employees concerned accepted this increase, that would have been the end of the matter B and s 74(6) would have been complied with. This, however, did not happen. The employees were therefore simply asking that the appellant complies with s 74(6) by engaging in negotiations with them with a view to reaching agreement on a mutually acceptable higher rate of pay. Mr *Biti* contends that, under s 74(6), the mere fact that parties may reach an agreement does not in fact empower either of the parties to demand re-negotiation "at every turn". C I am not persuaded this is what happened *in casu.* The first respondent did not demand re-negotiation "at every turn". Its demand followed the action taken by the appellant to unilaterally award a wage increase in contravention of s 74(6), which requires that such an increase be negotiated and agreed between the parties. It is possible that they would not have made the demand had the appellant not taken that unilateral action. D
The appellant, it is evident, has taken the attitude that as long as it was prepared to award its employees a higher rate of pay than that specified in the collective bargaining agreement, the determination of such rate was in its sole discretion, with the employees free to either take it or leave it. That is clearly contrary to the spirit of s 74(6) and is also liable to cause labour unrest. E
Section 74(6) seeks to minimise the possibility of tension between the employer and the employees,

by emphasising that such matters be negotiated and agreed. For one party to unilaterally decide on a rate and impose it on the other party is to make nonsense of s 74(6). The same applies to the refusal by that party, where the other party does not accept the imposition of such a rate, to negotiate. F

There is no doubt that a higher rate of pay than that stipulated in a collective bargaining agreement, whatever its extent, does not *per se* diminish or adversely affect the interests of the employees. However, if, as was the first respondent's suspicion, the rate is not uniformly applied, the potential for an adverse effect on the interests of some of the employees cannot be discounted. G To the extent that the negotiations sought by the first respondent are permissible under s 74(6) and in addition may clarify issues between the parties, thereby preventing any adverse effect on the interests of the employees, the latter, i.e. the first respondent, were perfectly within their rights to seek such negotiations.

It should be noted that the first respondent is merely seeking to negotiate a H

Gwaunza JA

A higher rate in circumstances where the appellant is not averse to giving one. They are not seeking an order to compel the appellant to award a specific higher rate. It may be that after these negotiations, the employees will agree to the three per cent wage increases. I do not see that the appellant has anything to lose by entering into the negotiations requested. To the contrary, the appellant stands to benefit from the elimination of unrest within the B employees that is likely to be the consequence of the negotiations.

In all the circumstances, therefore, I find that the decision of the court *a quo* was correct in all respects.

The appeal is accordingly dismissed with costs.

C Cheda JA and Malaba JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

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

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Source:
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[zRPz]MUTOMBA v R & C INVESTMENTS (PVT) LTD 2002 (2) ZLR 510 (S)
2002 (2) ZLR p510

Citation	2002 (2) ZLR 510 (S)
Case No	Judgment No. S-85-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza AJA
Heard	11 July 2002; 21 October 2002
Judgment	21 October 2002
Counsel	*H Zhou,* for the appellant *G Mandizha,* for the respondent
Case Type	Civil appeal

Annotations No case annotations to date

[zFNz]Flynote
Contract — formation — tacit contract — need for parties to intend to enter D into contract — failure to return unsolicited goods — whether indication of intention to accept goods
[zHNz]Headnote
The respondent ran a supermarket from leased premises and, when the lease terminated, left some of his stock in trade there after arranging with the landlord that the new tenant would take the goods over, sell them and E remit the proceeds either to the respondent or to the landlord to pay off the respondent's rent arrears. The new tenant (the appellant) was not informed of this arrangement, however, and, believing that the landlord had a lien over the goods, separated them from his own stock and requested the landlord to take them away. Representatives of the appellant and the respondent jointly took an inventory of the goods, but F while the appellant believed the purpose of the inventory was to record the quantities in case of theft or looting, the respondent believed it was to work out an agreed value at which the appellant would take the goods over. The respondent sued the appellant in the High Court for the value of the goods, arguing that there was a tacit agreement between the G parties that the appellant would take them over at the value fixed by the inventory. The High Court gave judgment in the respondent's favour on that basis, and the appellant appealed.
Held, that the fundamental principle of tacit contract is that the parties must in fact have intended to enter into a binding contract with each other. For a valid agreement of sale to be implied from the parties' conduct in this H
2002 (2) ZLR p511
Gwaunza AJA
A case, it would be necessary to show, on a balance of probabilities, that the appellant accepted the respondent's offer to take over the goods in circumstances where the two were *ad idem* on the matter.
Held, further, that the respondent's failure to return the goods to the appellant was not evidence of his having accepted the respondent's offer to buy them, since he had not solicited the goods and had not traded B in them.
[zCAz]Cases cited
Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner for Inland Revenue 1987 (3) SA 345 (A)
Landmark Real Estate (Pty) Ltd v Brand 1992 (3) SA 983 (W)
C *Salisbury Bottling Co (Pvt) Ltd v Lomagundi Distributors (Pvt) Ltd* 1965 RLR 268 (G)
[zCIz]Case information
H Zhou, for the appellant
G Mandizha, for the respondent
[zJDz]Judgment
D **Gwaunza AJA**: This is an appeal against the judgment of the High Court, in which the appellant was ordered to pay to the respondent the sum of $105 594,39, together with interest at the prescribed rate from 22 January 1998 to the date of payment.
The background to the matter is common cause. The respondent leased E certain business premises in Chitungwiza from one Chigovanyika. The lease terminated at the end of November 1997, following the respondent's failure to generate enough business to make the enterprise viable. At the time of termination of the lease agreement, the respondent, in fact, owed the landlord certain rent arrears.
F Upon the termination of the lease the appellant concluded an agreement with Chigovanyika, in terms of which it was agreed that he would take over the premises from the respondent as the new lessee. When the respondent vacated the premises in question, certain of its merchandise was left behind. A stock-take of this merchandise was conducted by representatives of the parties to determine the quantity and value of the stock. An agreed retail value G of $105 594,39 was put on the merchandise. The merchandise was not removed from the premises. The appellant started trading in similar business, i.e. a supermarket, a day or so later. On 22 January 1998, the director of the respondent, Mr Rushambwa, ("Rushambwa") addressed a letter to the appellant, demanding the value of the stock that had been left on the premises, H on the ground that the appellant had "taken over" such stock. Having received
2002 (2) ZLR p512

Gwaunza AJA

no response to this letter, nor payment of the amount demanded, the A respondent issued summons against the appellant for that amount.

In the particulars of claim, it is asserted as follows in para 6:

"By virtue of agreeing to conduct the taking of stock of plaintiff's merchandise defendant by implication agreed to take over the goods and reimburse plaintiff their value in the sum of $105 594,39." B

The respondent maintained this argument throughout the proceedings in the court *a quo* and in this court. Rushambwa asserted, in addition, that the appellant had neither returned the merchandise to him, nor challenged his letter of demand for the amount in question. This, Rushambwa contended, was further evidence of the implied agreement of sale between the parties.

The appellant denied he ever intended to buy the merchandise in question. C His response to the question why he had participated, through his representative, in the stocktaking and evaluation of the merchandise in question, is given as follows at page 26 of the record:

"... we wanted to count the goods so that we know when they come in and they say we want four pots, we know there were four pots, we want so D many items, we know those were the items and it was the time when there was looting and all. If those things had been looted we would know what quantities were there for the previous tenant. So our stock-take was for inventory purposes only as far as we were concerned."

He denied that the representatives had in effect evaluated the goods, saying all they had done was note down the retail prices as marked on the goods, and E add them up.

The appellant went on to say that after the exercise of stocktaking, the merchandise that could be so packed, was packed in boxes while those items that could not be so packed were left as they were. He added, however, that all the merchandise had been stored in the mezzanine floor of the building. F He asserted the merchandise had stayed there during the entire period of his tenancy (some thirteen or so months) and had thereafter been removed by the landlord, i.e. Chigovanyika, and taken to his home. He did not feel he had any obligation to "return" the goods to the respondent since he had told the landlord that he did not want them.

It is not in dispute that about two months after the appellant commenced G business a meeting at which the fate of the goods was to be discussed had been called between the appellant, Rushambwa and the landlord, but had failed to take place due to the appellant's late arrival at the venue. The appellant denied personally seeing the letter of demand from the respondent's director, Rushambwa, but asserted it had been received by his manager and taken to the landlord. The reason for the manager having taken that action was H

A because, the appellant asserted, he himself had hitherto dealt only with the landlord over the respondent's goods.

It is significant that the landlord, Chigovanyika, was not called by either party to give evidence. It is, however, not in dispute that the appellant and Rushambwa had never met nor spoken directly with each other before the day of the pre-trial conference. It was on that day that they saw each other for the B first time. Each had dealt separately with the landlord over issues concerning the other. Therefore, neither could challenge the other's evidence as to what had been said or agreed between the other party and the landlord concerning the merchandise in question.

That being the case, and in the absence of other evidence to contradict it, the court must accept that the respondent, having fallen into arrears in his rentals, C did, through Rushambwa, agree with the landlord that upon its vacation of the premises, whoever took over the premises would take the remaining stock, i.e. buy it, sell it and then remit the proceeds to either the respondent or the landlord. By the same token, the court must accept the evidence of the appellant that he told the landlord, whom he believed (not unreasonably, given the arrears owed to him by the respondent) had a landlord's lien over D the merchandise, to take away the stock because he did not need it for himself. Once the court has accepted this uncontroverted evidence, it must accept the appellant's evidence that the goods in question were never displayed by him on the shelves, had therefore been stored on the mezzanine floor of the building and had ultimately been removed by the landlord.

What this evidence establishes is that Rushambwa, having assumed his offer E that the new tenant should buy the left-over goods had been conveyed to the appellant by the landlord, sent his representatives to undertake stocktaking of the goods. He assumed the participation of the appellant's representative in this exercise constituted an acceptance of his offer. The appellant who, however, was not, even by Rushambwa's admission, privy to the agreement between Rushambwa and the landlord, nevertheless sent his representative F to do a stocktaking of the merchandise together with the respondent's representatives.

According to their evidence, each party believed there was a different purpose to the stocktaking. As already indicated, the two had never, before this exercise, met to discuss this possible relationship between them. In the absence of information to the contrary, the respondent's assumption that the G stocktaking, done together with the appellant's representatives, was an indication of the appellant's willingness to buy stock, is clearly understandable. He was not to know that his agreement with the landlord had not been conveyed to, nor accepted, by the appellant. At the same time, I find reasonable the appellant's explanation for what he thought was the purpose of the stocktaking. There is nothing in the evidence before the court to suggest H that before the stocktaking, he had been informed, much less agreed, that he

2002 (2) ZLR p514

Gwaunza AJA

was to "take over" the merchandise left over by the respondent for a fee. As A long as it was his understanding that the goods were not to be removed the same day the respondent vacated the premises and that his rejection of the offer to buy the stock had been conveyed to the respondent the appellant's explanation for why he sent his representative to participate in the stocktaking is, in my view, both credible and reasonable. It should be noted that the learned judge *a quo* made no adverse comment concerning the credibility of B both Rushambwa and the appellant as witnesses.

The learned judge in the court *a quo* found, in essence, that the appellant had accepted the offer to buy the respondent's stock leading to the establishment of a tacit contract between the parties. In reaching this conclusion, the learned judge drew guidance from the following passage from Christie's *The Law of Contract in South Africa* 2 ed p 98: C

"In order to establish a tacit contract, it is necessary to prove, by the preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied beyond reasonable doubt that they were in agreement. If the court is satisfied on the preponderance of probabilities that the parties reached agreement in that manner it may find the tacit contract established." D

See also *Landmark Real Estate (Pty) Ltd v Brand* 1992 (3) SA 983 (W).

Citing the same authority the learned trial judge noted that the inquiry involves three stages. The first is to decide, on a balance of probabilities, what facts have been established. The second stage is to decide how the proved facts, that is the conduct of each party and surrounding circumstances, must have been interpreted by the other. The third and final stage is to decide, also E on the preponderance of probabilities, what conclusion consistent with those facts is most likely to be correct. Applying this test, the learned trial judge considered the facts as presented to the court, and was satisfied that the facts pointed "unmistakably" to the fact that there must have been an arrangement that the appellant would purchase the stock. The main factor considered by the learned judge was the appellant's participation in the stocktaking in F question.

I have already explained why I do not find to be unreasonable the appellant's understanding of the purpose of the stock-take. It appears to me that the learned trial judge did not attach sufficient weight to the role the landlord played in that whole matter. An appreciation of the consequences of that role is central to a proper determination of whether or not an implied agreement G of sale was concluded between the parties.

As correctly contended for the appellant by his counsel, Mr *Zhou,* the fundamental principle is that the parties must have, in fact, intended to enter into a binding contract with each other. [1] This principle is also implicit in the

2002 (2) ZLR p515

Gwaunza AJA

A words of Christie, cited above. In this case the landlord is the one with whom Rushambwa of the respondent discussed the possibility that the latter's left- over stock would be taken over by the appellant. It was to and through the landlord that the appellant conveyed the information that he (appellant) did not require the respondent's merchandise. According to the appellant, this was communicated to the landlord during the same month, i.e. December B 1998, that he started trading. It is evident that the landlord must have communicated something of this rejection to the respondent's director, hence his (landlord's) attempt to broker a meeting between the appellant and Rushambwa two months after the appellant had started trading. Apart from the total lack of direct contact between the appellant and Rushambwa there is also uncertainty in the evidence before the court, regarding who between the landlord and those of the parties' representatives who did the stocktaking, C would have been their agent on the matter of the alleged agreement of sale. There is no evidence that the representatives who participated in the stocktaking had a mandate to do more than that. Nor is there any conclusive evidence that the landlord conveyed the appellant's rejection of the offer to buy the merchandise to the respondent.

In the circumstances of this case, for a valid agreement of sale to be implied D from the parties' conduct, it would be necessary to show, on a balance of probabilities, that the appellant accepted the offer in circumstances where the two were *ad idem* on the matter. In the absence of testimony from Chigovanyika as to what information he conveyed to the parties from each other, I find there is no evidence to suggest, even on a balance of probabilities, that the parties' conduct in jointly participating in the stocktaking in question, evinced a E mutual intention to enter into a binding agreement of sale in relation to the goods in question.

Because the appellant's conduct in participating in the stocktaking was open to more than one credible interpretation, including the one given by the appellant, it was necessary to look to other conduct by him, in order to determine whether or not he had accepted the offer to buy the respondent's F merchandise.

The court *a quo,* therefore, quite correctly considered other factors, one of which was the failure by the appellant to "return" to the respondent the merchandise in question.

The court regarded the appellant's failure to return the merchandise in G question to the respondent as further evidence of his having accepted the offer to buy the merchandise in question. However, a conclusion based on such a fact is not supported by the authorities. In *Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner for Inland Revenue* 1987 (3) SA 345 (A)2 Nestadt JA had this to say in this respect at 3571 - 358C:

2002 (2) ZLR p516

Gwaunza AJA

"Where the acceptance of an offer by conduct is relied on, it must be A shown that the offeree acted with the intention (actual or apparent) of accepting the offer (Chitty on *Contracts : General Principles* 25th ed (1983) para 55 at 34). In the case of contracts of sale such conduct may be the retention by the 'purchaser' of goods sent to him (Christie - *The Law of Contract in South Africa* at 62) ... The factor underlying these cases is a prior or existing business relationship or course of dealings B between the parties. Where, however, this is absent the position will ordinarily be otherwise. In this situation, ie, where *unsolicited* goods are sent to a person, the failure per *se* to return them would not normally found a sufficient inference that they had been accepted. As Corbin on *Contracts* : Vol 1 s 72 at 306 puts it:

'It may indicate that he preferred to give no thought to the offer and to C waste no time and effort in making a reply, whether orally or by a writing. In such cases, the offeror is not reasonable in giving to the offeree's mere silence an interpretation that he accepted. So, if a party sends a book or paper or other goods to another, with a letter saying he is offering it for sale at a specified price, the party to whom it is sent is not bound by a contract to pay for it if he does nothing and says D nothing.'" (my emphasis)

The above can aptly be applied to the circumstances *in casu.* The merchandise in question was certainly unsolicited. The appellant told the landlord that he did not wish to buy it and left it at that. Based on the reasoning outlined above, it can therefore not be said that by not returning the goods, he had impliedly accepted them. The position would, of course, be different had the appellant E traded in the goods. In this respect at 358F the learned Judge of Appeal went on to say:

"On the other hand, were the offeree to make beneficial use of the goods or otherwise exercise ownership over them, an acceptance may and probably would be inferred (see Williston on *Contracts* 3 ed vol 1 s 91 (D) at 333-4)." F

The appellant *in casu,* quite apart from not making any beneficial use of the merchandise in question, had it packed and stored away from the shelves where the goods he traded in were displayed.

The learned trial judge found there were other factors pointing to the existence of a tacit agreement of sale between the parties. He noted as follows at page 7 of the judgment: G

"The stock was valued at $105 000 odd. There must have been considerable quantities, presumably stacked on shelves. No stock-take was done on 2 December and the defendant started trading the following day. If the defendant did not purchase the plaintiff's stock then I cannot but wonder when it is on 3 December that the defendant had the time to remove the plaintiff's stock, stow it away and bring in its stock and commence H

2002 (2) ZLR p517

Gwaunza AJA

A business. It is not far fetched to infer that the defendant commenced to trade in plaintiffs stock on 3 December. If that be so, it reinforces the inference that the defendant purchased the plaintiff's stock."

My reading of the record of the proceedings in the court *a quo* suggests that the learned trial judge misrepresented the evidence of the appellant, which was that after the stock-take was completed,

the merchandise in question was B taken "upstairs" to the mezzanine floor. The specific evidence of the appellant is on page 35 of the record and it was given under cross- examination:

"Q. Where were the goods stored?
A. They were stored upstairs on the mezzanine floor.
Q. On the floor? C
A. They were stored in cardboard boxes, yes, on the floor.
Q. In cardboard boxes, you say.
A. Uhu.
Q. All these goods were stored in cardboard boxes? D
A. Those that fitted (sic) but you had hardware, hardware was in the open. Like cloth material ..."

Rushambwa, in his evidence asserted he never established where the goods had been stored after he vacated the premises. He, therefore, could not dispute that they were stored in the manner stated by the appellant.

That being the case, one sees no basis for the learned trial judge's presumption E that the goods in question were stacked on shelves. If they were never stacked on the shelves, it follows that the appellant would not have required a lot of time to stow the goods away and bring in his own stock. To state, as the learned trial judge did, that the appellant must have commenced to trade in the respondent's stock is to suggest that the former did not have, at hand, his own stock. That this was not the case is made clear by the evidence of the F appellant, which was to the effect that he had brought in his own stock and did not need the respondent's. This evidence was not challenged by the respondent.

The learned trial judge's assessment of these material facts, as outlined above was therefore premised on a misinterpretation of the evidence placed before the court. Such assessment is, therefore, in my view, patently defective.

G Given all of the above, there can be no doubt that the respondent failed to prove conduct on the part of the appellant that could have been construed as an acceptance of its offer to him to buy the stock in question.

It follows that the respondent failed to prove the existence of a tacit agreement of sale between it and the appellant.

Two other issues call for comment. The first is that much reliance was placed H by both the respondent and the learned trial judge, on the appellant's failure

to respond to the letter of demand written to him by Rushambwa, dated 22nd A January 1998. The learned trial judge dismissed as highly unlikely the appellant's evidence that the letter had been received by his subordinate who had, without showing it to him, passed the letter on to the landlord. Whatever the fate of the letter may have been, the fact that the appellant did not respond to the letter does not, in my view, carry the respondent's case any further. Rushambwa believed the landlord had conveyed his offer to sell the B merchandise to the appellant and that the latter had accepted such offer. The evidence before the court is to the effect that while such offer may have been conveyed to the appellant, it had not been accepted by him. As long as the appellant as a result did not believe himself bound to any contract of sale, he could not be said to have been under any obligation to respond to the letter of demand. That he did not respond to it cannot, under these circumstances, C be taken as an admission that he was bound by the implied contract of sale alleged by the respondent.

The second issue is the exchange between the respondent's director, Rushambwa, and the landlord, Chigovanyika, of two letters. The first letter, written by Rushambwa and dated 19 May 1998, acknowledged receipt of a letter received by him from Chigovanyika two or so weeks earlier. The other D letter apparently demanded the arrears that were due to Chigovanyika by the respondent. Rushambwa, in response to this demand, and without revealing the subject of such sale, requested "the agreement of sale entered between you and Mr C Mutomba" so that he could reconcile some "figures". Chigovanyika, in his response dated 20 May 1998 informed Rushambwa:

"I write to advise that no sale has been entered into between C Mutomba E and myself save for a lease agreement."

It was contended for the appellant that this correspondence not only confirmed Rushambwa's evidence that he and the landlord had agreed the merchandise would be "sold" to the appellant but also suggested that Rushambwa had been informed by Chigovanyika that the appellant was not willing to buy the stock in question. Rushambwa, in his evidence in the court *a quo,* was so F evasive when he was asked about the subject matter of the agreement of sale referred to, that no sense could be made out of his answer to the question.

When the probabilities are considered, however, I find there may be merit in the appellant's contention, firstly, that the lease agreement and the merchandise in question were the only factors linking the three of them together, ie, the appellant, Rushambwa and Chigovanyika, and secondly, therefore, that G since the lease agreement is directly mentioned in the correspondence "the sale agreement" could only have related to the left over merchandise. The implication of this would be that the respondent insisted on an implied agreement of sale when its director knew very well that the appellant had not accepted its offer to buy the merchandise in question. H
2002 (2) ZLR p519
Gwaunza AJA
A If that is indeed the case, that evidence would certainly lend further credence to the appellant's assertion that nothing in his conduct and the facts surrounding this case could have justified a finding that the parties intended to enter into a binding contract of sale. However, even without this evidence, as already shown, the appellant would still have sufficiently disproved conduct consistent with an acceptance of the offer, and therefore, an implied agreement of sale between him and the respondent.
B In all circumstances the appeal must, therefore, succeed. It is accordingly ordered as follows:
1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and is substituted with the following:
C "The Plaintiff's claim is dismissed with costs."
Sandura JA and Cheda JA concurred
D *Muvingi & Mugadza,* appellant's legal practitioners
Mapfumo, Debwe and Partners, respondent's legal practitioners

1 See *Salisbury Bottling Co (Pvt) Ltd v Lomagundi Distributors (Pvt) Ltd 1*965 RLR 268 (G) at 280.
2 See Ellison Kahn *General Principles of Contract; Agency and Representation, 2* ed Vol 1 at page 122

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v MAREMBA 2002 (2) ZLR 520 (H)

[zRPz]S v MAREMBA 2002 (2) ZLR 520 (H)
2002 (2) ZLR p520

Citation	2002 (2) ZLR 520 (H)
Case No	Judgment No. HB-124-02
Court	High Court, Bulawayo
Judge	Ndou J
Heard	24 October 2002
Judgment	24 October 2002
Counsel	Details not supplied

Case Type Criminal review

Annotations No case annotations to date

[zFNz]Flynote
Criminal procedure (sentence) — suspended sentence — bringing into effect D — suspension on condition that accused does not commit offence of which dishonesty is an element — meaning E — whether includes setting snares
Words and phrases — "offence of which dishonesty is an element" — meaning
[zHNz]Headnote
Following a conviction for theft the accused was sentenced to imprisonment, two months of which were suspended on condition that he did not commit any offence of which dishonesty is an element. Within the period of suspension he was convicted of setting snares in contravention of s 5 of the Trapping of Animals (Control) Act [*Chapter 20:21*] and the F suspended sentence was brought into effect. On review:
Held, that the magistrate who imposed the sentence had in mind offences of a kindred nature to theft, and the word "dishonesty" in the condition of suspension referred to the category of offences such as theft, fraud, forgery and uttering, robbery and so on. Even in its wider meaning (a disposition to deceive, defraud or steal) the word "dishonesty" does not G encompass the setting of snares. The suspended sentence should not therefore have been brought into effect.
[zCAz]Cases cited
R v Brown 1908 TS 211
R v Burke 1967 RLR 105 (G)
R v Cloete 1950 (4) SA 191 (E) H
2002 (2) ZLR p521
Ndou J
A *S v Damane & 'n Ander* 1969 (4) SA 47 (O)
S v Ndhlovu & Ors 1979 RLR 236 (G)
S v Valashia 1973 (3) SA 934 (0)
S v Van Beek & Anor 1971 (1) RLR 75 (G), 1972 (1) SA 452 (R)
R v White 1968 (2) RLR 7 (A), 1968 (3) SA 556 (R, AD)
[zJDz]Judgment
B **Ndou J:** The accused is aged 26. He was charged with and convicted of setting ten wire snares at Barberton Ranch. Mberengwa, in contravention of s 5 (as read with s 30(1)(a)) of the Trapping of Animals (Control) Act [*Chapter 20:21*]. He caught a male kudu. Nothing turns on the conviction.
The prosecutor produced accused's previous conviction dated 19 February C 2002, where he was convicted of theft. Part of this conviction reads:
"The remaining 2 months imprisonment with labour are suspended for 3 years on condition accused does not within that period commit any offence of which dishonesty is an element and upon conviction accused is sentenced to imprisonment without the option of a fine."
The public prosecutor thereafter addressed the court in the following terms:
D "PP: Accused has a previous conviction. He also defaulted community service work... State applies that the 2 months suspended on 19 February 2002 be brought into effect."
The accused thereafter stated that he had no objection to the prosecutor's application. The above-mentioned suspended sentence of two months was brought into effect in addition to the sentence of five months imposed. When E the matter was placed before the scrutinising regional magistrate, he queried:
"If accused was convicted in this instant case for breaching the statutory provisions of section 5 of the Trapping of Animals Act [*Chapter 20:21*] did he breach the conditions of the suspended sentence on CRB ZVI 223/02 which caused the magistrate to bring into effect 2 months imprisonment with labour? Is the trial magistrate of the view that F the element of dishonesty suffices in this case or the trial magistrate adopted the general view that any commission of a criminal offence amounts to dishonesty irrespective of the type of the offence?"
The trial magistrate did not concede her error. She responded:
"... I am of the view that there is an element of dishonesty on the part od *(sic)* the accused. He set up ten wire snares. In the communal areas, he G could easily catch wild animals or he could catch

domestic animals resulting in someone losing a donkey, cow or a goat. Accused knew that setting up of a wire snare is prohibited. He continued to do so."

It is trite that conditions of suspension must be appropriate to the crime and formulated with such precision that the accused clearly understands the H ambit of the condition. If there is any doubt as to how a condition should be

2002 (2) ZLR p522

Ndou J

interpreted, the doubt must be resolved in favour of the accused: see Reid A Rowland *Criminal Procedure in Zimbabwe* at 25-46.

A condition that the accused does not commit any offence involving dishonesty would not apply to any offence committed, i.e. interpreting dishonesty in a generic sense. Dishonesty in the suspended sentence refers to the category of offences such as theft, fraud, forgery and uttering, robbery etc. but certainly not setting of wire snares. The weight of judicial opinion is B overwhelmingly in support of this position as articulated by the scrutinising regional magistrate - see S v *Ndhlovu & Ors* 1979 RLR 236 (G) and *S v Damane & 'n Ander* 1969 (4) SA 47 (O). The argument by the trial magistrate is not characterised by legal rationality. It borders on nothing else but mere arrogance or unwillingness to accept constructive criticism. As alluded to above, our courts have dealt with this issue in a number of cases. C

Generally, it does seem that two principles at least should be observed in the imposition of the condition. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of the suspended sentence. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition: *see R v Cloete* 1950 (4) SA 191 (E) at D page 192 and *S v Valashia* 1973 (3) SA 934 (0).

In suspending the first sentence on 19 February 2002 the magistrate had in mind offences of a kindred nature to theft. Setting of wire snares is not. In this regard in the case of *R v Burke* 1967 RLR 105 (G), Davies J, said at 106E-F:

"I think it is clear that, where a person is convicted of theft or some such E similar offence, and a sentence is suspended on condition the accused does not commit another offence involving dishonesty, the court has in mind offences of a kindred nature to theft."

According to Beadle CJ in the case of *S v Van Beek & Anor* 1971 (1) RLR 75 (G) at 76E,
1972 (1) SA 452 (R) at 453C:

"The test, therefore, as recognised in the case of *R v Burke (supra),* is F whether, in suspending the sentence, the magistrate had in mind the type of offence for which the accused was subsequently convicted."

In dealing with this question Jarvis AJA in the case of *R v White* 1968 (2) RLR 7(A) at 9G - H,
1968 (3) SA 556 (RAD) at 558G stated:

"It was open to the magistrate to be more specific, had he so wished, and G if there is any doubt in the matter, as I think there may well be, the narrower construction should be given to the meaning of the expression 'any offence involving dishonesty.'"

It is clear that setting of wire snares in contravention of s 5 of the Trapping of Animals (Control) Act [*Chapter 20:21*] is not *eiusdem generis* the crime H

2002 (2) ZLR p523

Ndou J

A of theft. In *R v Brown* 1908 TS 211 at 212, Solomon J, in considering whether an accused had earned his livelihood by dishonest means, remarked that the word "dishonest" should be construed in its ordinary sense, that is to say, there must be an element of fraud, to say the least, in the manner in which the accused obtained his livelihood. The word "dishonesty", however, in some other context may have a wider meaning. In the Shorter Oxford Dictionary B one of the meanings given is: "disposition to deceive, defraud, or steal." Even this wider meaning does not support the trial magistrate's argument in this case.

The suspended sentence of two months' imprisonment imposed on 19 February 2002 should not have been brought into effect. Instead, the trial magistrate should have dealt with the question of suspended sentence of three C months which was suspended on condition the accused performed community service. It can be gleaned from the prosecutor's submissions in the court *a quo* that the accused somewhat defaulted on this one. The record does not show what action, if any, was taken in this regard. The value of the male kudu has to be altered to the statutory value applicable at the time.

In the circumstances I make the following orders:

1. The D conviction of the accused is hereby confirmed.
2. The sentence of 5 months imprisonment is hereby confirmed.

3. The part of sentence which reads "In addition to that 2 months imprisonment with labour suspended by the magistrates' court at Zvishavane on 19 February 2002 have been brought into effect" is E set aside.
4. The value of compensation to be paid to Barberton Farm is altered from $26 000,00 to read $8 000,00.
5. It is directed that the trial magistrate attend to the question of the alleged default by the accused on performance of community service.
F Cheda J concurred

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v NCUBE & ANOR (2) 2002 (2) ZLR 524 (H)

[zRPz]S v NCUBE & ANOR (2) 2002 (2) ZLR 524 (H)
2002 (2) ZLR p524

Citation	2002 (2) ZLR 524 (H)
Case No	Judgment No. HB-126-02
Court	High Court, Bulawayo
Judge	Ndou J
Heard	9 October 2002, 15 October 2002; 24 October 2002
Judgment	24 October 2002
Counsel	*J James,* for the applicants *Mrs M Cheda,* for the State
Case Type	Bail Application
Annotations	No case annotations to date

[zFNz]Flynote
Criminal law — specific common law offences — robbery — whether a D continuing offence
Criminal procedure — bail pending extradition — principles governing grant or refusal of bail pending extradition — flexibility of procedure to be adopted in bail applications E
[zHNz]Headnote
Robbery, unlike theft, is not a continuing offence, so a person cannot be prosecuted in Zimbabwe for a robbery committed outside the country even if the proceeds of the crime have been brought into Zimbabwe.
There is no material difference between the principles governing the grant of bail pending trial and those governing bail pending extradition. F
The applicants were suspected of being involved in an armed robbery committed in South Africa, and were being held in custody in Zimbabwe pending their extradition to South Africa or their trial in

Zimbabwe in the event that the Zimbabwean Attorney-General decided to prosecute them for the robbery. They applied for bail.
Held, that the applicants could not be prosecuted for robbery in Zimbabwe. G At most the State could charge them with theft on the basis that they brought some of the proceeds of the robbery into this country.
Held, further, that although it is undesirable for the State to adduce its evidence piecemeal in bail applications, such applications are *sui generis* with no prescribed format or procedure, and it is the duty of the H
2002 (2) ZLR p525
Ndou J
A presiding officer, allowing for the circumstances of each case, to determine the way in which each party should submit its evidence.
Held, further, that in this case the applicants should be refused bail because of the seriousness of the offence, which gave rise to a real inducement to abscond, and the fact that they had allegedly tried to interfere with the evidence against them by offering bribes to members of the South B Africa police.
[zCAz]Cases cited
Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S)
De Jager v Attorney-General, Natal, & Anor 1967 (4) SA 143 (D)
C *Hale* (1978) 68 Cr App R 415
S v A 1979 RLR 69 (G); 1979 (4) SA 51 (R)
S v Chiadzwa 1988 (2) ZLR 19 (S)
S v Ho 1979 (3) SA 734 (W)
S v Hudson 1980 (4) SA 145 (D)
S v Hussey 1991 (2) ZLR 187 (S)
D *S v Maharaj & Anor* 1976 (3) SA 205 (D)
S v Makhutla & 'n Ander 1968 (2) SA 768 (O)
S v Mambo 1992 (1) ZLR 245 (H)
S v Maratera S-93-91
S v Ndhlovu 2001 (2) ZLR 261 (H)
E *S v Nichas & Anor* 1977 (1) SA 257 (C)
S v Pienaar 1992 (1) SACR 178 (W)
R v Von Elling 1945 AD 234
[zCIz]Case information
J James, for the applicants
Mrs M Cheda, for the State
[zJDz]Judgment
F **Ndou J:** This is an application for bail pending extradition to South Africa (or trial, in the event the Zimbabwe Attorney-General decides to prosecute the accused persons in this jurisdiction).
The salient facts of the matter are the following. On 27 December 2001, a case G of armed robbery took place in South Africa at the Johannesburg International Airport. A number of male assailants, armed with AK 47 assault rifles and pistols carried out the robbery. The property stolen in this robbery comprised US$9,5 million and jewellery. The total value stolen is estimated at ZAR 113 million. A female security guard was shot and seriously wounded in the H course of the robbery. A total of seven (excluding the applicants) alleged
2002 (2) ZLR p526
Ndou J
robbers were arrested, some of them in Zimbabwe. A picture of a well A planned and well executed robbery emerges. The applicants were allegedly implicated by those arrested and already standing trial in South Africa.
They are on the wanted list of the South African police. The South African police sought the assistance of the Zimbabwe Republic Police to locate, arrest and extradite these two. The Zimbabwe Republic Police traced the two B and arrested them on 23 September 2002. The Zimbabwean police were armed with a warrant of arrest issued in South Africa in the name of Khulekani Nxobu and Sosha Ndaba Mafu. The two unsuccessfully challenged their being placed in remand. The latter issue is not before me in this application. Various issues were raised by counsel. I propose to firstly deal with the issue of whether the Attorney-General can charge the applicants in C this jurisdiction from the facts of this case.

1. Can the State charge the applicant for the armed robbery in this jurisdiction?

As alluded to earlier on, the offences occurred outside the jurisdiction of this court. For the State to have jurisdiction the armed robbery must have D "continued" to our jurisdiction. In any event, is

armed robbery a continuing offence? Robbery is not a continuing offence, theft is. See S v *Makhutla* 1969 (2) SA 490 (O) at 493A-B. Whatever might have been the position in Roman and Roman-Dutch, it has been decided by our courts that theft is a continuing crime: see S v *A* 1979 RLR 69 (G), 1979 (4) SA 51 (R). On page 74 A-D (52F-H of the SA report) Gubbay J stated as follows: E "The general principle adopted hitherto by Rhodesian and South African courts is that the laws of a country extend only to acts committed within its geographical boundaries. See Dugard *South African Criminal Law and Procedure* Vol 4 at pp 58-59; Gardiner and Lansdown *South African Criminal Law and Procedure* 6 ed Vol 1 at 26 and 35. The offence of theft provides an exception in that, being a continuing offence, if stolen F property is imported into the country by the thief, jurisdiction over him will be assumed. See *R v Philander Jacobs* (1876) 6 Buch 171 at 175; *R v Herbst* (1880) Kotze 187; *R v Van Rensburg* 1921 SR 1 at 2-3; *R v Saal & Anor* 1933 CPD 13 at 16; *Cloete v R* 1954 (1) PH H95; *R v Masupe & Anor* 1967 RLR 109 (GD) at 110 D, 1967 (3) SA 530 (R) at 531C; S v *Makhutla en 'n under* 1968 (2) SA 768 (O) at G 772F-G and *1969 (2) SA 490 (O) at 493C; S v Mathabula & Anor* 1969 (3) SA 265 (N) at 266C-D; *S v Muleya* 1977 (2) RLR 149 (GD) at 150E-G. None of these decisions suggests that an alternative basis for assuming jurisdiction would be where the consequence of depriving the owner of his property outside the jurisdiction was harm felt by him within the jurisdiction. The assumption of jurisdiction is based fairly and H squarely on the premise that theft is a continuing offence."

2002 (2) ZLR p527

Ndou J

A It would seem to me that it is appropriation in the theft that is a continuing act. Robbery, as charged *in casu,* is not a continuing offence - see *S v Makhutla & 'n Ander* 1968 (2) SA 798 (O); *R v Von Elling* 1945 AD 234 at 245; Burchell and Milton *Principles of Criminal Law* 1 ed p 497; *Hale* (1978) 68 Cr App R 415; Pitman*'s Criminal Law* 1 ed at p 150 and Smith and Hogan, *Criminal Law* - 9 ed pp 500-1. In the circumstances, at most, the State can B only charge the applicants with theft of US$400 on the basis that they brought it into the jurisdiction of this court. The factual basis for bail pending trial in this jurisdiction would be the theft as opposed to the armed robbery.

2. Bail Pending Extradition

Extradition is governed by the Extradition Act [*Chapter 9:08*]. The Act C provides for two main forms of extradition. The first concerns extradition under agreements between Zimbabwe and foreign states - see s 5(1) of the Act and Linington *Constitutional Law of Zimbabwe* at p 501. The second form of extradition is that to and from designated countries - s 5(2) the Act. The underlying principle in extradition is the return of a fugitive criminal from the country where he is found to the country where he D is accused of, or has been convicted of, an offence. The objective of extradition is to prevent criminals from escaping justice by placing themselves beyond the jurisdiction. The background has to be highlighted in order for one to appreciate the issues involved in this application. Coming to bail pending extradition I agree with the observations made by the late J K E Muganhu in his article entitled "The Law of extradition in Zimbabwe" published in the *Legal Forum,* 1993 Vol 5 No. 3. At p 22 the learned writer stated:

"Bail and legal representation

The concept of State Sovereignty includes the ideal that all persons who are lawfully within the geographically territory of a given state are F subject to its law. There are, of course, exceptions such as diplomats and visiting heads of state who are largely not subject to the laws of the host state. In the context of extradition the objective is that all persons, regardless of their nationality or residence status within a country are entitled to the protection of its law and to be treated as equals in the eyes of the law... It is in recognition of the above ideals that the Act in s 26(1) G provides that a person who has been arrested for the purposes of extradition shall have the same "right" to bail as a person arrested in connection with a criminal offence committed within Zimbabwe."

It, therefore, follows that there is no material difference between the principles governing bail pending trial and bail pending extradition. The State opposes this application and I propose to deal with each reason for such H opposition.

2002 (2) ZLR p528

Ndou J

(a) That the applicants have dual citizenship A

I have already indicated above that according to the Act, nationality of the fugitive is immaterial as it allows the Minister to enter into agreements which permit the extradition of "any persons whomsoever, whether or not they are nationals of both Zimbabwe and the foreign country concerned" - s 3(2)(b). The fears of the State would be understandable if the matter did not involve B South Africa. *In casu,* the arrest of the applicants is at the behest of the South African police. The question of them absconding to the country of the other nationality does not arise. Although the

question of dual citizenship may be a factor in bail applications, in this case it does not count against the applicants.

(b) Applicants facing a **serious offence** C

The offence for which extradition is sought is very serious both in Zimbabwe and South Africa. The court can take judicial notice of this notorious fact from a reading of reported judgments of the South African courts. In this case if the applicants are convicted of armed robbery as outlined in the facts there is a real likelihood of lengthy prison terms being imposed and thus the D applicants will be tempted to abscond. The inducement to abscond is real: see *S v Hudson* 1980 (4) SA 145 (D); *S v Ho* 1979 (3) SA 734 (W) and *S v Ndhlovu* 2001 (2) ZLR 261 (H) at 264 -5. This is a relevant factor in a bail application but on its own not a ground for refusing bail: see *S v Hussey* 1991 (2) ZLR 187 (S) at 190 A-B; S *v Mambo* 1992 (1) ZLR 245 (H) at 248 *and Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S). The seriousness E of the offence should be considered in relation to the inducement of abscondment. If there is no likelihood that this factor will induce abscondment then the court should lean in favour of and not against the liberty of the applicant.

(c) Interference with evidence F

The allegation in this regard is that the applicants attempted to bribe members of the South African police with US$80 000. If these allegations are proven, then this is a clear and strong case of interference. The South African police gave details of this allegation. The applicants, it is alleged, know the police witnesses and informants. In such a case, the possibility is real that they will interfere or tamper with evidence: see *S v Chiadzwa* 1988 (2) ZLR 19 (S); G *S v Maharaj & Anor* 1976 (3) SA 205 (D); *S v Maratera* SC-93-91; *Aitken & Anor v Attorney-General supra.* The other factors listed by respondent are covered by what I have outlined above.

Mr *James,* for the applicants, criticised the piecemeal fashion in which the respondent produced its opposing documents. I agree that this is a less than H

A ideal way of presenting evidence in court and should be discouraged. I, however, cannot refuse the respondent an opportunity to use such evidence received after the commencement of the bail application. Bail applications are *sui generis.* There is no prescribed format or procedure. It is the duty of the presiding officer, with due allowance for the circumstances of each case, to determine the way in which each party must submit its evidence. In this B regard, in S v *Nichas & Anor* 1977 (1) SA 257 (C) Diemont J remarked as follows at 260 F-G:

"It is a notorious fact that in a majority of cases *ex parte* statements are made both by the defence and by the public prosecutor who intimates what the police objections are. There are no formalities; no evidence is led, no affidavits are placed before the court and the record is so meagre C that there may be little or nothing to place before the superior court if the matter is taken on appeal. This easy-going procedure has both advantages and drawbacks."

This procedure is informed by, *inter alia,* the fact that bail applications are usually urgent applications: see also S *v Pienaar* 1992 (1) SACR 178 (W) and D S *v Ndhlovu supra* at 268.

Mr *James* also pointed out what the Assistant Commissioner S D Schutte, Head of Serious and Violent Crime of the South African police stated in his correspondence to Senior Assistant Commissioner Mandizha. The relevant portion reads,

E "After the arrest of the two above mentioned suspects in Zimbabwe the investigating officer Captain Olivier discussed their arrests with the state advocate, who came to the conclusion that the two suspects currently arrested in Zimbabwe cannot be charged with the accused already standing trial on the Johannesburg CAS 338/12/2001 and that at this stage there is insufficient evidence against the arrested suspects to ensure a conviction. It will however be of immense value if the fingerprints of F the mentioned suspects would be made available to this office in order to test their prints against these *(sic)* retrieved at the relevant crime scene."

From documents before me the prints of the applicants were sent to the South African police. This resulted in the latter requesting the extradition of the applicants. Whatever their views were when they wrote the initial letter it G seems that they have since changed. They now believe they have a case against the applicants. This is the context in which the above statement should be understood.

Looking at the totality of the facts before me I am satisfied the applicants have not discharged the onus, on a balance of probability, that the court should exercise its discretion in favour of granting H them bail. In discharging this burden the applicants, *in casu,* must show that

the interests of justice will not be prejudiced, namely, that it is unlikely that A they will not be available for extradition or otherwise interfere with the administration of justice - see *De Jager v Attorney-General, Natal & Anor* 1967 (4) SA 143 (D).

An attempt to bribe the South African police details indicates a real possibility of interference with evidence. Further, the seriousness of the offence point B out there is a real possibility of inducement for the applicants to abscond. If convicted they are likely to face lengthy imprisonment as firearms were used and a female security guard was seriously wounded in the course of the robbery. Applicants moved from South Africa to Zimbabwe after the offence.
On these facts, the applicants have failed to establish, on a balance of C probability, that they are suitable candidates for bail and I, therefore, dismiss their applications.
James, Moyo-Majwabu & Nyoni, applicants' legal practitioners
Office of the Attorney-General, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/KONA & ORS v MUDZINGWA & ORS 2002 (2) ZLR 531 (S)

[zRPz]KONA & ORS v MUDZINGWA & ORS 2002 (2) ZLR 531 (S)
2002 (2) ZLR p531

Citation	2002 (2) ZLR 531 (S)
Case No	Judgment No. S-71-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	2 July 2002; 30 October 2002
Judgment	30 October 2002
Counsel	*F Girach,* for the appellants *E T Matinenga,* for the first respondent No appearance for the other respondents
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Practice and procedure — execution — sale — setting aside of — good D grounds for doing so — facts subsequently arising —relevance
[zHNz]Headnote
The appellant's home was sold to the first respondent in execution, after the second respondent had obtained judgment against the appellant's late husband, he and the appellant having bound themselves as sureties for a loan advanced by the second respondent to a company of which the E third respondent was a director. She averred that the house was her matrimonial home, in which she had lived for 20 years; that she was duped into signing the suretyship agreement; that the house was her only asset and that she would be left homeless. She sought to lead evidence on

appeal to show that the value of the property had been substantially increased by the fact that the city council had, after the F hearing in the lower court, approved the building of "cluster" homes on the property. She also argued that the equities favoured her application. The second respondent did not appear at the appeal but filed a notice of withdrawal, in which it stated that it had received full payment of its debts.

Held, that the evidence should be admitted. It was not available at the time G of the hearing in the lower court and was materially relevant. It was straightforward and uncontested. There was no need to remit the matter to the lower court.

Held, further, that in terms of r 359 of the High Court Rules, a sale in execution may be set aside on "any... good ground". In considering what is meant by this phrase, the court can and should properly have H regard to equitable considerations. Although generally the courts will

not readily interfere with a sale in execution, the equities in this case A favoured the appellant and the sale would be set aside.

[zCAz]Cases cited

Bhura v Lalla 1974 (1) RLR 31 (A)
Farmers' Co-op Ltd v Borden Syndicate (Pvt) Ltd 1961 R & N 28 (FS)
Morfopoulos v Zimbank & Ors 1996 (1) ZLR 626 (H)
Lalla v Bhura 1973 (2) RLR 280 (G)
S v Kuiper 2000 (1) ZLR 113 (S)
Warren-Codrington v Forsyth Trust (Pvt) Ltd 2000 (2) ZLR 377 (S)

[zSTz]Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 359 C

[zCIz]Case information

F Girach, for the appellants
E T Matinenga, for the first respondent
No appearance for the other respondents D

[zJDz]Judgment

Ziyambi JA: The first appellant and the late William Kona are the registered owners of the property known as Lot 118 of Greendale ("the property"). The second respondent entered into an agreement with Saffron Services (Pvt) Ltd ("Saffron"), a company of which the third appellant is a director, in terms of which Saffron became indebted to the second respondent E in the sum of $711 176.37. The first appellant and her late husband, William Kona, bound themselves as sureties and co-principal debtors for the payment of the loan to Saffron and registered a bond over the property as security for the loan. When Saffron failed to meet its repayment obligations, the second respondent issued summons and obtained judgment against the appellants. Thereafter the property was sold in execution and purchased by the first F respondent at a public auction in September 1999 for the sum of $1 350 000. The sale was confirmed by the third respondent ("the Sheriff") on 19 November 1999.

On 26 July 2000, the appellants filed a court application for the setting aside of the sale in execution in terms of r 359 of the Rules of the High Court, 1971. G

Rule 359 states:

"Any person having an interest in the sale may make a court application to have it set aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low sum, *or any other good ground.* Any such person shall give due notice to the sheriff of the application stating the grounds of his objection to confirmation of the H

A sale. On the hearing of the application the court may make *such order as it deems just."* (my emphasis).

The first appellant, in her founding affidavit, alleged that William Kona was now deceased; that she had resided on the property, which was the matrimonial home, for 20 years; that she was duped into signing the suretyship agreement by her late husband; and that the house the subject of the sale in execution was B her only asset and that the transfer of the property to the second respondent would leave her homeless. She averred further that the property is worth far more than it was sold for because there was in existence a plan for the building thereon of cluster houses, which plan was before the City of Harare for approval. Once this plan was approved, the appellant would be able to raise sufficient money to pay the second respondent in full.

C The learned judge in the court *a quo* dismissed the application, having found there was no substance in any of the submissions made on behalf of the appellants. With regard to the "proposal

for repayment", he found it vague and lacking in certainty and finality. He found that the equities favoured the second respondent who "has waited a great deal for its money and there is no D prospect of its being paid in the immediate future".

At the hearing before us, it was common cause that the plan for the erection of cluster houses on the property had been approved. The appellants sought to lead further evidence on appeal in the form of the permit granted by the City of Harare, as well as two offers for the purchase of the property, one of which was for $10 000 000

E FURTHER EVIDENCE

The principles by which this court will be guided in deciding an application of this sort were restated in *Warren-Codrington v Forsyth Trust (Pvt) Ltd* 2000 (2) ZLR 377 (S) at 380G-381B where it was held that:

"When a request is made to lead further evidence on appeal, this court will F normally, unless the evidence is simple, straightforward and uncontested, remit the matter to the High Court so that the witness can be tested by cross-examination. But we will only do so where certain criteria are satisfied

... The criteria are, briefly G

1. Could the evidence not, with reasonable diligence, have been obtained in time for the trial?
2. Is the evidence apparently credible?
3. Would it probably have an important influence on the result of the case, although it need not be decisive?
4. Have conditions changed since the trial so that the fresh evidence H will prejudice the opposite party?"

See also S *v Kuiper* 2000 (1) ZLR 113 (S) at 116 A-C; *Farmers' Co-op* A *Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28 (FS); Herbstein & Van Winsen, *Civil Practice of the Supreme Court of South Africa* 4 ed at pp 909-912.

Although the second respondent filed heads of argument, it did not appear before us to argue the appeal but filed a notice of withdrawal, the relevant part of which reads: B

"BE PLEASED TO TAKE NOTICE THAT the second respondent hereby withdraws its opposition to [the] appellants to appeal *(sic)* after receiving full payment of its debt by the appellants ...".

Mr *Matinenga,* who appeared for the first respondent, submitted that the application to lead further evidence did not satisfy any of the requirements recognised at law. C

I disagree. There is no doubt that the evidence sought to be led of the approval by the City of Harare of the subdivision is true. That much was common cause at the hearing. Further, it seems to me that this evidence is materially relevant to the outcome of the application and it is quite clear that the evidence could not have been led at the hearing before the High Court as the application was D still being considered by the City of Harare at that time.

The only question which now remains to be resolved is whether the matter must be remitted to the court *a quo* for a rehearing in the light of this evidence which has now become available. The evidence is "simple, straightforward and uncontested". It can be considered by this court without the necessity for E a remittal to the court *a quo* because it is common cause and there is therefore no dispute of fact which requires determination by a trial court after the hearing of oral evidence. The admitted evidence shows that permission has been granted for the subdivision of the property and the erection of cluster houses thereon. It requires no expert evidence to satisfy this court that the value of the property will be significantly enhanced by that fact alone and F more so, of course, once the buildings have been erected thereon.

The position is different with regard to the offers to purchase the property. These are intended to prove the value of the property. The amounts contained therein are not admitted by the first respondent as being an indication of the true value of the property and oral evidence would be necessary if the application in respect of these documents were to be upheld. In any event, I G do not consider them to be material to the determination of the matter. I would therefore disallow the application insofar as they are concerned.

THE MERITS OF THE APPEAL

In Lalla v Bhura 1973 (2) RLR 280 (G) at 283E-F, when referring to r 359, Davies J (as he then was) observed: H

A "The wording of the rule itself is all-important. The concluding portion of the rule provides that 'on the hearing of the application the court may make such order as it deems just' and it seems to me these words clearly indicate that in considering what is meant by the rule, and particularly what is

meant by the phrase 'any other good ground' the court can and should properly have regard to equitable considerations."

B He then proceeded further by adopting, as an appropriate approach, the following remarks of Solomon J in *Cairns' Executors v Gaarn* 1912 AD 181 at 189-90:

"The discretion of the court is a very wide one, and, in my opinion, it is impossible, and even if it were possible it would be undesirable, to lay down any hard and fast line as to the principles upon which its discretion C should be exercised. Every case must be judged on its own facts, and these may vary indefinitely. But though we ought not, in my opinion, to lay down any principles as to the special circumstances which will justify the Court in granting relief, we are on the other hand bound by the rule itself, and we can only assist a party 'upon sufficient cause shown'."

This approach was endorsed by this court in *Bhura v Lalla* 1974 (1) RLR 31 (A); D see also *Morfopoulos v Zimbabwe Banking Corporation & Ors* 1996 (1) ZLR 626 (H).

The discretion of the court is therefore a wide one and in the exercise thereof the court can and should properly have regard to equitable considerations. In arriving at a just decision in the present case, the fact that the debt has been E paid in full is a material consideration. I must weigh the disadvantages of setting aside a properly conducted sale in execution (as set out in *Lalla v Bhura supra),* namely, that:

"... if the courts were over ready to set aside sales in execution under r 359, this might have a profound effect upon the efficacy of this type of sale. Would-be purchasers might well be deterred from attending and F bidding if they considered their efforts might easily be frustrated by an application under r 359, and as a general principle I think it should be accepted that a court will not readily interfere in these matters";

against the apparent injustice of, in effect, depriving the first appellant of a home in circumstances where the debt has been fully paid, the first appellant has offered to reimburse the first respondent in respect of costs incurred in G the purchase of the property and the first respondent is mainly concerned with the interest that he has lost by not investing the money spent on purchasing the property.

The first appellant averred in her founding affidavit that the sum of $1 350 000, for which the property was sold, was insufficient to satisfy the judgment debt which, with interest, was, at the time of the application, in excess of H $2 000 000. She averred, although this was not accepted by the learned judge

2002 (2) ZLR p536

Ziyambi JA

in the court *a quo,* that the property, which is situate in the "prime area of A Greendale" and measures over two acres, was sold for an unreasonably low sum. Indeed, there was no evidence, on the papers, to support this averment. She averred further that various attempts had been made by her late husband to settle the indebtedness, including an approach to Beverley Building Society who were willing to provide funds with which to liquidate the indebtedness to the second respondent on the strength of the then proposed B subdivision of the property and the erection of ten cluster houses thereon. In the court below, the second respondent confirmed these "attempts" to settle the debt but averred that none of them materialised. Indeed, when the application came before the court *a quo* for hearing, the application for subdivision of the property was still before the City of Harare awaiting C consideration and the proposals for payment based thereon were rejected by the second respondent and dismissed by the court as lacking in certainty. The evidence now before us establishes that a permit to erect six cluster houses on the property was granted on 17 December 2001, some six months after judgment was handed down by the court *a quo.*

Although the courts are indeed reluctant to set aside properly conducted sales D in execution for the reasons stated above, the peculiar circumstances of this case are such as to satisfy me that the equities favour the first appellant and that sufficient cause has been shown for the setting aside of the sale in execution.

As regards the costs of this appeal, the success of the first appellant would E normally carry with it an entitlement to costs. However, the first respondent ought not to be penalised for opposing the appeal as the matter turned on the admission in evidence of the permit by the City of Harare. I would therefore make no order as to costs.

Accordingly the appeal is allowed. The order of the court *a quo* is set aside and the following substituted: F

"The sale in execution of stand 118 of Greendale situate in the district of Salisbury be and is hereby set aside".

There shall be no order as to costs.

Chidyausiku CJ and Malaba JA concurred. G

IEG Musimbe & Partners, appellants' legal practitioners

Nduna & Partners, first respondent's legal practitioners
Wickwar & Chitiyo, second respondent's legal practitioners H

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Source:
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[zRPz]S v CHININGA 2002 (2) ZLR 537 (S)
2002 (2) ZLR p537

Citation	2002 (2) ZLR 537 (S)
Case No	Judgment No. S-79-02
Court	Supreme Court, Bulawayo
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	26 March 2002; 30 October 2002
Judgment	30 October 2002
Counsel	S *Siziba,* for the appellant T *Mujaji,* for the respondent
Case Type	Criminal Appeal
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure (sentence) — common-law crimes — murder — extenuating circumstances — cumulative effect of circumstances of D extenuation —need for court to consider
[zHNz]Headnote
A trial court should consider the cumulative effect of possible extenuating circumstances. Where an accused person relies on a number of factors for extenuation, a trial court misdirects itself if it considers and dismisses each factor in isolation.
E The appellant, who was 21 years old, had been drinking at a bottle-store for most of a day when the deceased, who was very tall, came in for a drink. The appellant joined other patrons in taunting the deceased about his height, and when the deceased left the bottle-store the appellant followed him and stabbed him three times, killing him. The appellant was convicted of murder with actual intent to kill and, in regard to sentence, F advanced drunkenness and youthfulness as grounds for extenuation. The court considered these grounds separately, rejected each of them, and sentenced the appellant to death. On appeal:
Held, that the trial court misdirected itself in not considering the cumulative effect of the two extenuating factors. In view of this the appeal court was at large to determine the issue of extenuation.

G *Held,* further, that the appellant's conduct evinced a very high degree of thoughtlessness and immaturity which could be explained only by his youthfulness and the fact that he had consumed alcohol. The cumulative effect of his youth and the influence of the alcohol he had consumed justified the imposition of a sentence other than death.

[zCAz]Cases cited

H *S v Babada* 1964 (1) SA 26 (A)
2002 (2) ZLR p538
S v Bowers 1971 (4) SA 646 (A) A
S v Felix & Anor 1980 (4) SA 604 (A)
S v Lehnberg & 'n Ander 1975 (4) SA 553 (A)
S v Manyathi 1967 (1) SA 435 (A)
S v Sigwahla 1967 (4) SA 566 (A)

[zCIz]Case information

S *Siziba,* for the appellant B
T *Mujaji,* for the respondent

[zJDz]Judgment

Chidyausiku CJ: The appellant in this case was charged with the crime of murder. He pleaded not guilty but was found guilty of murder with actual intent. The court found no extenuating circumstances and imposed the death C sentence. The appellant now appeals to this court against both the conviction and sentence.

In convicting the appellant the trial court found the following facts to have been proved. On the day the appellant killed the deceased he and other patrons were having a drink at Pumula East Bottle Store. The deceased, Fortunate Ncube, also called at this bottle store for a drink. When the D deceased arrived at the bottle store, his height caused a stir among the patrons and several comments were made about his height. It was observed that when he walked into the bottle store he had to bend even where other people do not bend. The deceased, who was very tall, pointed out to the people in the bottle store that he felt harassed by those people who were making comments about his height.

The trial court accepted the evidence of Mr Jele, the manager of the bottle E store, to the effect that he had observed the deceased enter and leave the bottle store. He also saw the appellant, through the big windows, approaching the deceased and stabbing him. He further saw people gather around the deceased. After the stabbing he observed the appellant take to his heels and run away, outpacing all the people who were there. It was also the bottle store manager's evidence that there was no quarrel between the deceased and the F appellant. The court *a quo* was impressed by this witness and accepted his evidence. The acceptance of Jele's evidence by the court *a quo* cannot be faulted.

The court also accepted the evidence of Mr Duvai, who appears to be a friend of the deceased and was with him at the bottle store. His evidence corroborated G that of Jele in many respects. He stated that, of all the people who were mocking the deceased, the appellant was the most vocal. He advised the deceased to ignore the provocation, which advice was followed by the deceased except for the occasion when he wished to go for the appellant but was dissuaded from doing so. The appellant was heard to say that although the deceased was tall, he, the appellant, could bring the deceased down. The deceased responded by querying how would such a short person fell him. H

A The appellant was thereafter observed approaching the deceased, pointing a finger at him and pulling a knife from his pocket with the other hand. Having pulled out the knife, the appellant stabbed the deceased three times before running away.

The injuries sustained by the deceased as a result of this attack are contained in the post-mortem report.

B The appellant raised the defences of provocation and drunkenness. Both defences were rejected by the court *a quo.* Indeed, although there was no formal abandonment of the appeal against conviction, Mr *Siziba,* for the appellant, conceded that he had no useful submissions to make in respect of conviction. He made submissions only in respect of the finding that no extenuating circumstances exist in this case. This attitude by the appellant's C counsel is perfectly understandable given the facts of this case and, in particular, given the nature of the injuries inflicted on the deceased and the weapon used — an Okapi knife which was relatively long and sharp. The deceased died instantly. The post-mortem report reveals the following injuries on the deceased:

"EXTERNAL EXAMINATION D

Nutrition - Good

Marks of violence

a) Three stab wounds are present: one on the left chest and two on the left shoulder. The chest stab wound is 4 cm long, 1.5cm wide and 7cm deep. It is located 4cm from the midline and 4cm below the left clavicle. The shoulder stab wounds are measuring 6cm long, 2cm wide and 10cm deep for the wound on the lateral aspect and 3cm E long, 1,5cm wide and 7cm deep for the wound on the posterior aspect of the shoulder." According to the report, death was due to haemorrhagic shock following multiple stab wounds. On these facts a conviction of murder with actual intent is the correct verdict. Accordingly the appeal against conviction cannot succeed.

F I now turn to deal with the issue of the sentence. The court *a quo* found no extenuating circumstances to exist and imposed the death sentence. In the court *a quo* the appellant advanced two grounds of extenuation, namely, drunkenness and youthfulness. A reading of the judgment of the court *a quo* clearly reveals that the court considered these grounds separately and concluded that there were no extenuating circumstances. The court did not G consider the cumulative effect of the two extenuating factors. This is where the court erred. A trial court should consider the cumulative effect of possible extenuating circumstances. Where an accused person relies on a number of factors for extenuation a trial court misdirects itself if it considers and dismisses each factor in isolation. The trial court must consider the cumulative effect of the extenuating circumstances pleaded. This proposition is well supported by a line of cases starting with the case of H *S v Manyathi* 1967 (1) SA 435 (A). In that case Williamson JA had this to say at p 439D-F:

2002 (2) ZLR p540

Chidyausiku CJ

"To decide properly whether an accused's mental state at the time he A committed a crime was such that his conduct was less blameworthy than it might normally be obviously requires a consideration of the cumulative effect of all the relevant circumstances. A failure by a Court to address its mind to the possible cumulative effect of all the relevant factors which might constitute extenuating circumstances in a case such as the present would amount to the Court misdirecting itself on the question in issue." B

Manyathi's case *supra* was considered and followed in the case of S v *Sigwahla* 1967 (4) SA 566 (A). I am therefore satisfied that the court *a quo* misdirected itself in its approach to the issue of the existence or otherwise of extenuating circumstances. Because of the trial court's misdirection this court is at large to determine that issue. See *S v Babada* 1964 (1) SA 26 (A); *S v Bowers* 1971 (4) SA 646 (A); C S v *Felix & Anor* 1980 (4) SA 604 (A).

I will now proceed to determine the issue of extenuating circumstances. It is common cause that the appellant had taken alcohol before stabbing the deceased. What is at issue is how much he had taken and what effect, if any, it had on him at the time he stabbed the deceased. The evidence of the appellant was that he had started drinking at ten o'clock in the morning, and D more or less continued doing so until the fight with the deceased during which he stabbed him to death. According to his evidence he had consumed about nine scuds from about 10 o'clock in the morning to 2 pm. It would appear that a scud contains about two litres of opaque beer. On this basis the appellant, in effect, was contending that he had consumed 18 litres of opaque beer prior to this incident. It is also common cause that after the appellant stabbed the E deceased he took to his heels and outpaced everyone and could not be arrested there and then. It was put to the appellant that if he was that drunk he could not have run that fast. The following exchange between the appellant and State counsel is instructive:

"Q. After you had stabbed the deceased you were able to run away from the people who wanted to apprehend you. F

A. Yes, because I got frightened, in panic I ran away when I realised what I had done.

Q. So regardless of the fact that you had been taking alcohol, you were able to outrun all the people who were at the bottle store?

A. Yes, once I realized what I had done I sobered up.

Q. I put it to you that you had not taken as much alcohol as you would G want this court to believe and that is why you were able to outrun everyone who was there and to sober up in a short space of time as you are saying you had then sobered up.

A. No, I had taken a lot of beer."

The court *a quo* also rejected the appellant's evidence on the amount of alcohol he had taken. In this regard the learned judge remarked as follows:

"We are unable to believe this kind of evidence. If you had consumed so H

2002 (2) ZLR p541

Chidyausiku CJ

A much beer in fact, you would be in a deep sleep or in a coma and what happened in this case would not have happened at all. It would just not be possible for you to be moving around, standing there with your friends and threatening the deceased as you did.

Even if you had taken some alcohol, it is clear you knew what you were doing. Once you saw what happened you were able to run away, B outpacing all the people there including possibly some people who were sober and not drunk at all.

We do not believe that you would be able to pull yourself at such a high speed with almost twenty litres in your stomach to outpace other people who were not drunk."

The above remarks were made when the learned judge was considering the C verdict and the defence of drunkenness.

The following is what the learned judge said when he considered alcohol as an extenuating factor:

"We have considered the submission regarding the consumption of alcohol by yourself. We nevertheless find that we are not moved from the finding that you had not consumed as much alcohol as you allege. Even D if you may have consumed alcohol, there is nothing to suggest that you had consumed so much to the extent that your conduct was influenced by it because the evidence is to the effect that you just arrived at the bottle store and purchased what you were drinking at the time."

From the above excerpts it would appear that both the State and the court *a* E *quo* were satisfied that the appellant had consumed some alcohol prior to the fatal stabbing of the deceased. The court *a quo,* having determined that the appellant knew what he was doing, left open the issue of how much alcohol the appellant had taken and what effect, if any, it had on him. Given the above evidence I have no doubt that alcohol had some influence on the appellant's unlawful conduct. The reason for the fight between the deceased and the appellant was trivial. The appellant persistently jeered at the deceased F because of his height. This incident occurred at a bottle store where both parties were drinking in the company of friends. The most probable inference to be drawn from the above facts, in my view, is that the appellant, perhaps not as drunk as he would want the court to believe, was under the influence of alcohol to some extent. It is not possible to determine on the evidence before the Court the degree of such intoxication.

G On this basis, I am satisfied that the appellant, at the time he stabbed the deceased, was under the influence of alcohol although it is not possible, on the evidence, to determine the precise degree of influence. The probabilities are that the influence was considerable.

The appellant was aged 21 years at the time he committed the offence. It is trite that youthfulness is an extenuating feature or factor. In terms of s 338(c) H of the Criminal Procedure and Evidence Act [*Chapter 9:07*] it is not

2002 (2) ZLR p542

Chidyausiku CJ

competent for a court to impose a death sentence on an accused aged 18 years A and under. Thus, in the case of an accused person aged 18 years and under the issue of extenuation does not even arise as the death sentence is incompetent because of youthfulness. It is trite that youthfulness on its own or together with other factors can constitute an extenuating circumstance: S v *Lehnberg & 'n Ander* 1975 (4) SA 553 (A). Youthfulness connotes immaturity, lack of experience of life, thoughtlessness and a mental condition B of susceptibility to external influences, especially those emanating from adult persons: *Lehnberg supra* at 561A-C.

In dealing with the appellant's youth the learned judge had this to say:

"On youthfulness, again we are advised that you were twenty-one at the time you committed this crime. We do not accept that because of youthfulness at twenty-one you can be excused from the serious crime C that you committed just because you are still a young person. Young persons cannot and should never be allowed to go about committing serious crimes and hiding behind youthfulness. The law of the land is very clear on situations like this. Where you kill and there are no extenuating circumstances, the legal consequences have to follow.

We have examined the situation in this case and we come to the D conclusion that there are no extenuating circumstances."

When a court concludes that extenuating circumstances exist in a case it is not in any way condoning or justifying the commission of the most heinous of offences, namely, murder. It merely means that the court is being perceptive of human frailties and balancing them against the evil deed. See *S v Sigwahla supra* at 571. E

The conduct of the appellant in this case, in my view, evinces a very high degree of thoughtlessness and immaturity that can only be explained by his youthfulness and the fact that he had consumed some alcohol.
I am satisfied that in this case the cumulative effect of the appellant's youth and the influence of the alcohol he had consumed justifies the imposition of F a sentence other than a death sentence. I wish, however, to emphasise the point that if it had not been for the misdirection it would not have been possible for this court to interfere with the discretion of the court *a quo.*
As the court *a quo* correctly observed, this was a very bad case of murder. An innocent life was lost for no reason. The most severe sentence other than the death sentence would be the most appropriate sentence, taking into account G all the factors in this case.
In the result the appeal against conviction is dismissed. The appeal against sentence succeeds to the extent that the death sentence is set aside and substituted with imprisonment for life.
Ziyambi JA and Malaba JA concurred. H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/EASTVIEW GARDENS RESIDENTS ASSOCIATION v ZIMBABWE REINSURANCE CORP LTD & ORS 2002 (2) ZLR 543 (S)

[zRPz]EASTVIEW GARDENS RESIDENTS ASSOCIATION v ZIMBABWE REINSURANCE CORP LTD & ORS 2002 (2) ZLR 543 (S)
2002 (2) ZLR p543

Citation	2002 (2) ZLR 543 (S)
Case No	Judgment No. S-90-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	1 July 2002; 30 October 2002
Judgment	30 October 2002
Counsel	*H Zhou,* for the appellant *F Girach,* for the first respondent
Case Type	Civil Appeal
Annotations	Link to case annotations

[zFNz]Flynote
D **Contract** — right of first refusal or pre-emption — what is — need for acceptance of offer of right of first refusal
Words and phrases — right of first refusal or pre-emption — what is
[zHNz]Headnote

E A right of first refusal or pre-emption is created when in an agreement one party (the grantor) undertakes that when he decides to sell his property he will give the other party (the grantee) the opportunity of refusing or buying the property at a price equal to that offered by another person. The grantor is then under an obligation to do, at the time he sells the F property, what he voluntarily bound himself to do, that is, offer the property to the grantee first at a price equal to that offered by a third party or which he is prepared to accept from any other would-be buyer. The grantee acquires the correlative right to have the property offered to him first so that he can match the price offered by the third party or refuse the offer. A right of pre-emption can be created only by contract G or agreement between the grantor and the grantee.

The first respondent caused letters to be sent to the tenants of some flats which it owned, offering each tenant an option to purchase his or her flat at a specified price and on specified terms and conditions. The tenants were given twenty days within which to indicate if they accepted the offer, but before that period expired the respondent withdrew the offer H and replaced it with another, less favourable, one and required the

tenants, if they wished to take it up, to indicate their intention to do so A within the same twenty-day period. In the result, none of the tenants had accepted the first offer by the end of the twenty-day period, and only some had accepted the second offer. Those who had not accepted either offer sought to interdict the first respondent from selling their flats, arguing that the first letter had given them a right of pre-emption.

Held, that the onus was on the appellant to show that there was an agreement B under which the first respondent undertook to offer the tenants their flats at a price equal to that offered to another; and to discharge that onus the appellant had to show that the first respondent's letter contained an offer, the terms of which constituted a right of pre-emption, and that there was acceptance of the offer. C

Held, further, that the first respondent's letter was not an offer of a right of pre-emption; it was an ordinary offer of sale and there was no promise not to revoke the offer during the period fixed for notification of its acceptance.

Held, further, that an ordinary offer may generally be withdrawn on notice to the offeree at any time before it is accepted, and none of the tenants D had accepted the offer in the first respondent's letter by the time it was withdrawn — or even by the end of the twenty-day period after which it would in any event have lapsed.

[zCAz]Cases cited

Bellairs v Hodnett & Anor 1978 (1) SA 1109 (A)
Bird v Sumerville & Anor 1960 (4) SA 395 (N)
Cohen v Behr 1946 CPD 942
Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, & Anor 1973 (3) SA 685 (A)
Hirschowitz v Moolman & Ors 1983 (4) SA 1 (T) F
Madan v Macedo Heirs & Anor 1991 (1) ZLR 295 (S)
Manchester Ship Canal Co v Manchester Race Course Co [1901] 2 Ch 37
Sher v Allan 1929 OPD 137
Soteriou v Retco Poyntons (Pty) Ltd 1985 (2) SA 922 (A)
Stewart v Zagreb Properties (Pvt) Ltd 1971 (1) RLR 180 (A); 1971 (2) SA 346 (R, AD) G
Yates v Dalton 1938 EDL 177

[zCIz]Case information

H Zhou, for the appellant
F Girach, for the first respondent H

[zJDz]Judgment

A **Malaba JA:** This is an appeal from a judgment of the High Court delivered on 18 July 2001, discharging a provisional order and dismissing with costs the application made by the appellant for an interim interdict against the respondents in case HC 6127/01.

The first respondent is the owner of 384 two-bedroom flats in Harare, collectively known as "Eastview Gardens". The appellant's members rented B the flats from the first respondent. It is common cause that the first respondent took a decision to sell the flats and instructed the second respondent and other estate agents to do so on its behalf.

On 9 February 2001, a letter was written on behalf of the first respondent to the sitting tenants of Eastview Gardens by National Real Estate (Private) C Limited in the following terms:

"RE: PROPOSED SALE OF EASTVIEW GARDENS

Reference is made to the above matter. The owners of Eastview Gardens, the Zimbabwe Reinsurance Company Limited, have advised that they shall be selling the premises you are leasing from them. The sale shall be on sectional title basis and each flat shall have title deeds on transfer. D As a sitting tenant, we are hereby giving you notice of the owner's intention to sell the flat and advise that we are offering you (an option) to purchase if you are interested in doing so. The purchase price for the flat is $950 000.00. The terms of payment are as follows:

* 25% cash deposit and the balance payable by mortgage loan; or
* 30% cash deposit and the balance payable over six equal E monthly instalments; or
* cash deposit and/or full mortgage bond/loan from employer.

May you please advise us in writing whether or not you shall be taking up the offer as soon as possible and in any event by 28 February 2001. In addition, if you are taking up the offer, may you please call at our offices in person to complete the necessary formalities by the same date."

F The first respondent later decided to offer the flats for sale block by block. On 15 February 2001, a letter was written to the tenants advising them of the new decision and withdrawing the offer made on 9 February 2001 to sell the flats to them as sitting tenants. It read as follows:

"RE: PROPOSED SALE OF EASTVIEW GARDENS

G Reference is made to our letter of 9 February 2001 in respect of the above matter.

Please be advised that the offer made to purchase the unit you occupy has been withdrawn. This follows the decision by the seller to sell the flats block by block. However, should you wish to purchase a unit into Eastview Gardens now, you may choose from the block that shall be H selling at any one point in time.

In any event, you still need to confirm your interest in purchasing a unit A by close of business on 28 February 2001."

By close of business on 28 February 2001, some of the tenants had taken up the offer. They had indicated the units they wanted to purchase. Others had not done so. The flats were then offered to members of the public at the same price they were offered to the tenants. B

Some of the tenants who had not, by close of business on 28 February 2001, accepted the offer to purchase units in Eastview Gardens, turned to court in a bid to force the first respondent to sell them the flats they occupied. They made an urgent application to the High Court on 13 March 2001 for an interim interdict restraining National Real Estate (Private) Limited from selling and transferring "all the flats constituting Eastview Gardens to any other party C pending the outcome of proceedings to be instituted at the High Court, Harare, for a determination of (the) applicant's rights of pre-emption in terms of the lease agreements". The applicant was, however, the appellant, which claimed rights as if it was a tenant.

The averments made in the founding affidavit deposed to by the appellant's D chairman in case HC 2665/01 were that the first respondent had, in the letter of 9 February 2001, given the appellant a right of first refusal to buy the flats. It was alleged that the first respondent had wrongfully revoked the right of pre-emption in the letter of 15 February 2001.

In opposing the application, National Real Estate (Private) Limited made E three observations. It indicated that it was the wrong party to be sued. As an estate agent, it was carrying out instructions from the owner of the flats. As such, it could not decide whether or not they should be sold. The second observation made was that the letter of 9 February 2001 did not grant a right of pre-emption to the sitting tenants. It was said the letter contained a simple offer to sell the flats to the tenants. They, in turn, had to accept the offer by F the close of business on 28 February 2001. The last contention was that the appellant, as an association, could not claim a right of pre-emption over the flats. The letter of 9 February 2001, on which the alleged cause of action was based, had not been addressed to it. The appellant had no lease agreement with the first respondent. G

The application was dismissed on 26 March 2001.

On the same day that the urgent chamber application in case HC 2665/01 was dismissed, a court application was made in the name of the appellant in case HC 3277/01. This time the respondents were the Zimbabwe Reinsurance Corporation Limited, National Real Estate (Private) Limited and Gainsborough Estate Agents. The relief sought was an order that: H

"1. The A applicant's members, totalling three hundred and nine, be and are hereby granted the right to purchase their respective flats, which right they should exercise within twelve months from the date of this order.

2. Any sales of the respective flats which the respondents had approved prior to the date of this order be and are hereby cancelled." B The founding affidavit, deposed to by the secretary of the

appellant, contained the same allegations of fact as had been made in the founding affidavit in case HC 2665/01. The respondents filed opposing affidavits.

Before the matter was heard, the appellant made yet another urgent chamber application on 23 June 2001, in case HC 6127/01. In that case, the appellant sued the three respondents now before this court. The application seems to C have been prompted by an advertisement placed in a daily newspaper by the second respondent on 21 June 2001, to the effect that the flats in Eastview Gardens were on sale. The first and second respondents were called upon to show cause why a final order should not be made against them, prohibiting the disposal of the flats occupied by the 309 tenants pending the finalisation of the proceedings in case HC 3277/01. The third respondent (the Registrar of Deeds) was called upon to show cause why he should not be prohibited from registering the transfer of any of the flats specified therein pending the finalisation D of the proceedings in case HC 3277/01. The appellant sought and was granted as interim relief, an interdict restraining the respondents from committing any of the prohibited acts pending the discharge or confirmation E of the provisional order.

The allegations made in the founding affidavit in support of the application were again that the letter of 9 February 2001 granted to the appellant a right of pre-emption. In opposing the application, the first respondent contended that the letter did not contain the right claimed by the appellant. It said the letter was a simple offer to sell to the sitting tenants the flats at the specified F price. The submissions made on behalf of the appellant did not find favour with the learned judge who heard the application. He discharged the provisional order and dismissed the application with costs. He said:

"... an interdict prohibiting the first respondent from selling the vast majority of the flats in the complex cannot, in my mind, be justified. G There is no evidence that all of the tenants in those flats are interested (in) and able to buy the flat each occupies. The applicant itself has no right of first refusal as claimed in the founding affidavit. Such a right was offered to the tenant of each flat. It is only those tenants who have accepted the offer that can seek to enforce them."

The grounds of appeal were that the learned judge in the court *a quo* erred in H discharging the temporary interdict and paved the way for the first respondent

to dispose of the flats to the detriment of the rights of the appellant's members A in case HC 3277/01.

The question to be answered is whether or not the appellant placed before the court *a quo* facts from which the learned judge ought to have found that the requirements for the granting of a temporary interdict had been met.

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

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

(a) a right which, 'though *prima facie* established, is open to some doubt';
(b) a well grounded apprehension of irreparable injury;
(c) the absence of ordinary remedy.

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

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the E more the element of 'some doubt', the greater the need for the other factors to favour him. ... Viewed in that light, the reference to a right which, 'though *prima facie* established, is open to some doubt', is apt, flexible and practical, and needs no further elaboration."

There was, in my view, no question of the right of pre-emption having been *prima facie* established on the facts of this case. The right was just not F available to the appellant or the tenants themselves because the letter of 9 February 2001 did not create it.

A right of first refusal or pre-emption is created when, in an agreement, one party (the grantor) undertakes that when he decides to sell his property he will first give the other party (the grantee) the opportunity of refusing or buying G the property at a price equal to that offered by another person. The grantor is then said to be under an obligation to do, at the time he sells the property, what he voluntarily bound himself to do, that is, offer the property to the grantee first at a price equal to that offered by a third party or which he is prepared to accept from any other would-be

buyer. The grantee is said to have acquired the correlative right to have the property offered to him first so that he can H
2002 (2) ZLR p549
Malaba JA
A match the price offered by the third party or refuse the offer. The grant does not entail an existing offer because it conditions it. See *Manchester Ship Canal Co v Manchester Racecourse Co* [1901] 2 Ch 37 at 46-47; *Sher v Allan* 1929 OPD 137 at 140-142; *Cohen v Behr* 1946 CPD 942 at 946-947; *Bellairs v Hodnett & Anor* 1978 (1) SA 1109 (A) at 1138F-1139H; *Hirschowitz v Moolman & Ors* 1983 (4) SA 1 (T) at 6 A-H; *Soteriou v Retco Poyntons* B *(Pty) Ltd* 1985 (2) SA 922 (A) at 932 B-G; *Madan v Macedo Heirs & Anor* 1991 (1) ZLR 295 (S) at 302A-303D.
It is clear from all these decided cases that a right of pre-emption can only be created by contract or agreement between the grantor and the grantee. Where breach of the right is alleged as a cause of action and its existence is denied, the onus is on the plaintiff to show that there was an agreement between the C parties in terms of which the defendant undertook to offer to him the property at a price equal to that offered by another.
To establish *a prima facie* existence of the right of pre-emption in its favour or in favour of the tenants, the appellant had to show that the letter of 9 February 2001 contained an offer, the terms of which constituted a right of D pre-emption, and that there was acceptance of the offer.
Leaving for a moment the question whether the letter contained an offer of a right of first refusal as defined above, the appellant admitted that the tenants interested in the relief sought in case HC 3277/01 did not accept the offer contained in the letter. The reason given for the non-acceptance of the offer was that it was withdrawn by the first respondent on 15 February 2001. On E its own admission, it is clear that there was no contract reached by the parties in terms of which the right of pre-emption was created. Without a contract there cannot be a right of pre-emption.
Further, there is no question of the letter of 9 February 2001 being an offer of a right of first refusal. It does not mention the right at all. I agree with Mr F *Girach* that the letter contains a simple offer by the first respondent to sell the flats to the sitting tenants at the specified price. There is an invitation to them to indicate in writing acceptance of the offer by close of business on 28 February 2001. It is an ordinary offer unaccompanied by an undertaking by the first respondent to keep it open until close of business on 28 February 2001. There was no promise not to revoke the offer during the period fixed G for the notification of its acceptance.
The general rule is that an ordinary offer may be withdrawn on notice to the offeree at any time before it is accepted. See *Yates v Dalton* 1938 EDL 177; *Bird v Sumerville & Anor* 1960 (4) SA 395 (N) at 400F; *Stewart v Zagreb Properties (Pvt) Ltd* 1971 (1) RLR 180 (A) at 187; 1971 (2) SA 346 (R, AD) at 352. At the time the offer contained in the letter of 9 February 2001 was H withdrawn none of the 309 tenants involved in case HC 3277/01 had
2002 (2) ZLR p550
Malaba JA
indicated in writing acceptance of the offer. In fact, none of them accepted A the offer before the close of business on 28 February 2001.
The offer lapsed on the expiry of the period within which its acceptance had to be communicated to the first respondent. Mr *Zhou,* who appeared on behalf of the appellant, could not argue that the withdrawal of the offer contained in the letter of 9 February 2001 had the effect of extending the time within which the parties ought to have entered into contracts of sale on the terms of B the offer of 9 or 15 February 2001.
By not communicating to the first respondent their mental states on the offer before the close of business on 28 February 2001, the tenants were presumed to have rejected the offer made on 9 February 2001. They did not accept the new offer made on 15 February 2001 either.
The appellant sought the interim interdict to protect a right it knew had not C accrued to it or its members at the time it made the application. The relief' sought in case HC 3277/01 was a court order granting the tenants a right to purchase the flats they occupied. To successfully interdict the first respondent from selling its property to whomsoever it chose to contract with, the appellant or the tenants had to found the cause of action on a breach of contract with it. D
The appellant and its members knew they could not found a cause of action against the first respondent on the lease agreements. The appellant was not a party to the lease agreements and the agreements did not contain any term, the breach of which could entitle the tenants to an interdict restraining the first respondent from exercising the right of alienation of the flats. Realising the futility of an attempt to found a cause of action against the first respondent E on an alleged breach of a right of pre-emption as they clearly could not prove the existence of a contract in which the right was given, the appellant and its members sought to found a cause of action in a court order.

Courts have no power to create legal rights. Their duty is to interpret the law and declare existing rights which they enforce. If, as was the case here, there was no agreement between the first respondent and the tenants in terms of F which the right to purchase the flats they occupied was given to the tenants, the court had no basis on which to grant them a right to purchase the same. Courts cannot make contracts for parties.
The appeal is without merit. It is dismissed with costs. G
Chidyausiku CJ and Ziyambi JA concurred.
Kantor & Immerman, appellant's legal practitioners
Zamchiya Costa, first respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/MUZENDA v PUBLIC SERVICE COMMISSION & ANOR 2002 (2) ZLR 551 (H)

[zRPz]MUZENDA v PUBLIC SERVICE COMMISSION & ANOR 2002 (2) ZLR 551 (H)
2002 (2) ZLR p551

Citation	2002 (2) ZLR 551 (H)
Case No	Judgment No. HH-189-02
Court	High Court, Harare
Judge	Paradza J
Heard	16 October 2003; 30 October 2002
Judgment	30 October 2002
Counsel	*D T Mwonzora,* for the first applicant Miss *M Mwerewangepo,* for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

[zFNz]Flynote
D **Employment** — contract — termination — resignation — circular issued stating that public servant would be deemed to have resigned in certain circumstances —no regulation to that effect — circular invalid
Public service —public servant —employment —termination —resignation —circular issued stating that public servant would be deemed to have E resigned in certain circumstances — no regulation to that effect — circular invalid
[zHNz]Headnote
The applicant, a public servant, submitted his nomination as an independent candidate for a parliamentary election. Before the election, he became aware of circulars which had been issued by the Public Service F Commission shortly before he submitted his nomination. The circulars were

purported to have been issued in terms of regulations which came into effect more than six months before the election. The regulations provided that it was an act of misconduct for a public servant to be an officer in or address a meeting of any political party, movement or G organisation.
The first circular stated that a public servant who wished to stand for parliament had to seek his Minister's authority to do so, but would also be required to resign from the Public Service. If he was accepted as a candidate without authority, he was deemed to have resigned. The second circular stated that a public servant was forbidden from becoming H a member of a political party or organisation. The applicant, on
2002 (2) ZLR p552
Paradza J
becoming aware of the circular, immediately withdrew his candidacy. A Nevertheless, he was told by the Commission that he was deemed to have resigned.
Held, that the applicant was not shown to have contravened any provision of the Public Service Regulations by submitting his papers for nomination as a parliamentary candidate.
Held, further, that a circular cannot have the force of law, and in particular B could not substitute legal instruments. If a circular was to have any effect, it must give effect to the purpose for which a particular legal instrument was enacted. A circular could not state that a public servant was deemed to have resigned upon the happening of any event. The Regulations provided for the procedure to be followed if misconduct C was alleged. Any member of the public service alleged to have committed such an act had a right to be heard and to have the rules of natural justice applied.
Held, therefore, that as the applicant did not commit any act of misconduct defined in the Regulations, he would be reinstated without loss of pay or benefits. D
[zCAz]Cases referred to
Mandizvidza v Chaduka NO & Ors 1999 (2) ZLR 375 (H)
The Music Room (Pvt) Ltd v ANZ Grindlays Bank (Zimbabwe) Ltd 1995 (2) ZLR 167 (H)
[zSTz]Legislation considered E
Public Service Regulations 2000 (SI 1/2000), First Schedule, para 20
[zCIz]Case information
D T Mwonzora, for the first applicant
Miss M Mwerewangepo, for the respondents F
[zJDz]Judgment
Paradza J: This matter came before me as an opposed application. The facts of this matter are as follows. The applicant was employed in the Ministry of Education and Culture as an auditor. Sometime in the year 2000 he developed an interest in politics. Nothing on paper shows that he was affiliated to or had obtained membership of any political party. He then G decided to contest the Masvingo Central parliamentary seat. In his supporting affidavit, he states that he was contesting as an independent parliamentary candidate. This is not in dispute.
He submitted his papers to the nomination court when it sat for that purpose. He was duly accepted as a worthy candidate on 3 June 2000. H
2002 (2) ZLR p553
Paradza J
A Before elections were held, he became aware of the existence of two circulars that had been issued by the first respondent on 20 May 2000. Circular Number 14/2000 outlined procedures to be followed by members of the Public Service who wanted to participate in parliamentary elections. Briefly, such a person was required to seek the authority of his Minister, then that of the Public Service Commission, which in turn would require the person B concerned to resign from the public service with effect from a date to be specified by the Public Service Commission. If, as in the applicant's situation, a member is accepted as a candidate without seeking the necessary authority, he or she would be deemed to have resigned or retired from the Public Service with immediate effect.
C Circular 15/2000, which was also issued on the same date, forbade members of the Public Service from generally getting involved in politics, in the sense of being elected to an office of a political party, or organisation. If he was so appointed or elected, he was expected to resign from the public service immediately. The circular also prohibited such persons from addressing meetings of any political party or organisation.
D That circular also cancelled and replaced an earlier circular number 6/2000.
It is important to note that the circulars referred to above are purported to have been issued in terms of para 20 of the First Schedule to the Public Service Regulations. These are contained in SI 1/2000. These regulations were subsequently amended by the Public Service (Amendment) Regulations, E 2001 (No 1), SI 58A /2001. For our purposes, that amendment is irrelevant as it came into effect long after the June 2000 Parliamentary elections.

Section 20, as it then was before the amendment referred to above, provided that it was an act of misconduct in terms of those regulations for -

"Being an officer in or addressing a meeting of any political party, F organization or movement".

For the sake of clarity these regulations came into effect on, or at least more precisely were published, in the Zimbabwe *Government Gazette Extraordinary* of 3 January 2000, more than six months before the elections. In my view, the applicant is deemed to have known that as an officer in the Public Service he could not hold office in or address a meeting of a political party, organisation G or movement.

It is important to emphasise that the wording of the regulations, as they were at the relevant time, did not make it an offence for someone in the Public Service to submit his papers for nomination as a parliamentary candidate. Strictly interpreted, clause 20 of the First Schedule did not stop anyone who H was not a member of a political party, organisation or movement from

2002 (2) ZLR p554

Paradza J

addressing a gathering of members of the electorate as long as they were not A meeting as a political party, organisation or movement. What it means is simple. The applicant was not a member of any such movement, political party or organisation. If he was, there is nothing before me suggesting that he was. The letter written by the first respondent to the applicant, dated 22 June 2000. does not make any reference to the applicant having committed B anything that is prohibited by clause 20 of the First Schedule to the regulations. Instead, he was deemed to have resigned his office by virtue of having failed to follow the procedures laid down by Circular 14 of 2000.

The question that I have to decide is whether Circulars 14 and 15 were binding upon the applicant at the time of the alleged breach.

A circular is nothing more than a letter or means of communication addressed C to a circle or group of persons, one not necessarily addressed to one person. It is defined in *The Concise Oxford Dictionary* as a "letter, notice, advertisement etc. of which many copies are made for distribution". It is clear, therefore, that a circular cannot have and has never been intended to have the force of law, especially to the extent of substituting any existing D legal instruments. If it must be respected and be of force and effect, the circular must give effect to the purpose for which a particular legal instrument has been enacted. Failure to comply with that basic requirement would make that circular of no force or effect. It can be challenged successfully without any problem.

I have not been able to find case authority in our jurisdiction. The nearest I E found was the judgment of Gwaunza J (as she then was) in the case of *Mandizvidza v Chaduka NO & Ors* 1999 (2) ZLR 375 (H). In her judgment, it became clear, when dealing with a circular that had been issued by the relevant Ministry affecting pregnant student teachers, that the effect of such a circular is to give effect to the shift in government policy towards treating F pregnant student teachers with respect, instead of refusing them to continue with their training as was happening before.

In the case of *The Music Room (Pvt) Ltd v ANZ Grindlays Bank (Zimbabwe) Ltd* 1995 (2) ZLR 167 (H), Malaba J (as he then was) also had to deal with circulars that had been sent to various branches of a bank after a fraud had been committed through the use of a rubber stamp. The effect of the judgment G was that such circulars help to prevent the commission of crime or other misdemeanours as defined in existing legislation or law. They do not create new offences or new acts of misconduct, as happened in this case. In any case, when the applicant became aware of the circular in question he immediately withdrew his candidature. He also advised the Ministry that he did not belong to any political organisation, did not hold office therein and as such he has H

2002 (2) ZLR p555

Paradza J

A not contravened the law. He was correct in his interpretation of the law. The first respondent was completely wrong in a number of respects.

Firstly, it sent circulars that were completely inconsistent with the provisions of the regulations that created the act of misconduct. There was no justification in putting those restrictions on persons in the position of the applicant. It would make some sense if the applicant was holding office in a political party B or organisation or had addressed a meeting of a political party or organisation. None of this had happened and therefore there was no justification in the first respondent in making the decision it made.

Secondly, it is of concern to note that it is improper in a circular to lay down a position or rule to the effect that a person is deemed to have resigned his or C her office upon the happening of any event. The Public Service has regulations that must be followed in the event of a charge of misconduct being proffered against any of its members. Any such member has a right to be heard

and to have the rules of natural justice applied to him. This has been repeated over and over again in our law and in all civilised societies.
D In the circumstances, I find that the applicant did not commit an act of misconduct as defined in clause 20 of the First Schedule to the Public Service Regulations. Under the circumstances I make the following order:
1. The contents of the letter of the first respondent dated 22 June 2000 terminating the employment of the applicant is hereby set aside;
2. The applicant is hereby reinstated to the position he was in at the time of E the purported termination of his employment with full benefits;
3. That the respondents be ordered to pay the costs of suit.
Mwonzora & Associates, legal practitioners for the applicant
F *Civil Division of the Attorney-General's Office,* for the respondents

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v MUCHURO 2002 (2) ZLR 556 (H)

[zRPz]S v MUCHURO 2002 (2) ZLR 556 (H)
2002 (2) ZLR p556

Citation	2002 (2) ZLR 556 (H)
Case No	Judgment No. HH-182-02
Court	High Court, Harare
Judge	Smith J
Heard	6 November 2002
Judgment	6 November 2002
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure (sentence) —statutory offences —Public Order and D Security Act [*Chapter 11:17*] —s 17(1)(b) —riotous assembly etc — destruction and theft of property to force complainant to change political affiliation - appropriate sentence
[zHNz]Headnote
The accused was charged with contravening s 17(1)(b) of the Public Order and Security Act [*Chapter 11:17*]. The charge was that she unlawfully E and riotously assembled with others with a common intent forcibly to disturb the public peace or security or to invade the rights of others. She and other members of the ZANU (PF) Youth League went to the complainant's homestead for the purpose of

making him renounce his membership of the Movement for Democratic Change and affiliate with F ZANU (PF). The complainant would not comply with their wishes so they destroyed his kitchen utensils and wardrobe and removed property from his kitchen and granary. The total amount of damage caused was $15 560. The accused was sentenced to a modest fine with a short alternative period of imprisonment.
Held, that the sentence was manifestly too lenient. In any democratic G country citizens must be free to support the political party of their choice. Political violence must be deterred and this sentence was unlikely to be an effective deterrent
[zJDz]Judgment
Smith J: The accused was charged with contravening s 17(1)(b) of the Public Order and Security Act [*Chapter 11:17*]. The charge was that she H
2002 (2) ZLR p557
Smith J
A unlawfully and riotously assembled with others with a common intent forcibly to disturb the public peace or security or to invade the rights of others. According to the outline of the State case, on 19 March 2002 the accused and other members of the ZANU (PF) Youth League proceeded to the complainant's homestead at Chizemo Village in the Chimanimani area for the purpose of making him renounce his membership of the Movement B for Democratic Change and affiliate with ZANU (PF). The complainant would not comply with their wishes so they destroyed his kitchen utensils and wardrobe. They removed property from his kitchen and granary. The total amount of damage caused was $15 560.
The accused, a 22 year old female, pleaded guilty and was duly convicted. C She was sentenced to a fine of $6 000 or, in default of payment, two weeks' imprisonment. In my view, the sentence is manifestly lenient. In any democratic country where the constitutional rights of its citizens are upheld, citizens must be free to support the political party of their choice. Political violence must be deterred. A mere fine, with an alternative of two weeks' imprisonment, is not likely to be an effective deterrent. It is unfortunate that D the other people who assembled with the accused to attack the complainant were not apprehended and brought to book. In this case, a fine was not an appropriate sentence. Moreover, the alternative to the fine of $6 000 should be a term of at least two months' imprisonment. Even if the magistrate considered that a fine was appropriate, he should have imposed a custodial sentence of at least nine months' imprisonment suspended for five years on E condition she did not commit a similar offence within that period.
In the circumstances I am unable to confirm the proceedings as being in F accordance with real and substantial justice.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v MUTSENGIWA & ORS 2002 (2) ZLR 558 (H)

[zRPz]S v MUTSENGIWA & ORS 2002 (2) ZLR 558 (H)
2002 (2) ZLR p558

Citation	2002 (2) ZLR 558 (H)
Case No	Judgment No. HH-183-02
Court	High Court, Harare
Judge	Smith J
Heard	6 November 2002

Judgment 6 November 2002

Counsel Details not supplied

Case Type Criminal review

Annotations No case annotations to date

[zFNz]Flynote
Criminal procedure (sentence) — statutory offences — Public Order and Security Act [*Chapter 11:17*] — s 17(1)(b) —riotous assembly etc — D destruction and theft of property and serious assault to make complainant change political affiliation — appropriate sentence
[zHNz]Headnote
The five accused were charged with contravening s 17(1)(b) of the Public Order and Security Act [*Chapter 11:17*]. The charge was that they unlawfully and riotously assembled with others with a common intent E forcibly to disturb the public peace or security or to invade the rights of others. They were all members of the ZANU (PF) Youth League. They had gone to the complainant's homestead for the purpose of making him renounce his membership of the Movement for Democratic Change and affiliate with ZANU (PF). The complainant would not comply with their wishes, so they destroyed a large amount of his property and F severely assaulted him, breaking one leg. They were all sentenced to terms of imprisonment, of which all or part was suspended.
Held, that political violence is unacceptable in any democratic country and deterrent sentences must be imposed. The accused in this case were all young, two being still at school. They must have been encouraged or egged on by older members of society to commit the violent acts they G did. The moral blameworthiness of those who planned the violence was much greater, and they should be identified and brought to court.
[zJDz]Judgment
Smith J: The five accused and one other were charged with contravening s 17(1)(b) of the Public Order and Security Act [*Chapter 11:17*], in that they "unlawfully and riotously assaulted with common intent forcibly to disturb the public peace or security or to invade the rights of others". The allegations H
2002 (2) ZLR p559
Smith J
A against the accused, as set out in the outline of the State case, are as follows. On 19 March 2002, at Chizemo village in the Chimanimani area, the accused, who are members of the ZANU (PF) Youth League, proceeded to the complainant's homestead in order to get him to renounce his membership of the Movement for Democratic Change and to affiliate to ZANU (PF). He refused to do so. The accused then started to destroy his property, including B a display cabinet, radio, kitchen utensils and wheelbarrow. They removed the thatching from his kitchen and his granary and then took all the maize out of his granary and threw it all over the premises. The complainant ran away but they chased him and caught him. They hit him with sticks and stones and caused a fracture of his left leg. The total value of the property damaged amounted to $240 000. The first accused, who is 28 years old, pleaded not guilty, whereas the other five accused pleaded guilty, and so the magistrate C ordered a separation of trials. He convicted the five who had pleaded guilty, after he had put the essentials of the offence to them and satisfied himself that they were in fact pleading guilty to the offence with which they were charged.
The accused all live in the area, as does the complainant. Two of the accused are girl: Mercy, who is 15 years old and Miriam, who is 16. They were both sentenced to two years' imprisonment, of which one year was suspended for D five years on condition of good behaviour and the other was suspended on condition they did 420 hours of community service. The other three accused are males, aged 18,22 and 21 years. They were each sentenced to three years' imprisonment, of which one year was suspended for five years on condition of good behaviour.
E In his reasons for sentence the magistrate said:
"Political violence has destroyed our beloved country and must be weeded out".
I agree that political violence is unacceptable in any democratic country. Deterrent sentences must be imposed on those who are apprehended and brought before the courts on charges of political

violence. In the case of the F accused in this case, the eldest is only 22 years of age and two of them are girls still at school. Clearly they were all encouraged or egged on by older members of society to commit the violent acts that they did. It is unthinkable that girls of 15 and 16 would get so worked up about a person "belonging to a political party which is not the one to which they belong, that they would feel compelled to go and assault him, break his leg and destroy his home and property. They must have been instigated by others. The moral G blameworthiness of those others who planned the violence is much greater. Not only are they guilty of harming the complainant, they are also guilty of having the accused sentenced to imprisonment and either doing community service or serving a prison sentence. They are the ones that the police must identity and bring to court so that they can reap their just desserts.
H The convictions and sentences are confirmed.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v PEDZISA 2002 (2) ZLR 560 (H)

[zRPz]S v PEDZISA 2002 (2) ZLR 560 (H)
2002 (2) ZLR p560

Citation	2002 (2) ZLR 560 (H)
Case No	Judgment No. HH-184-02
Court	High Court, Harare
Judge	Smith J
Heard	6 November 2002
Judgment	6 November 2002
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure (sentence) — common law offences — assault — D politically motivated assault —custodial sentence appropriate
[zHNz]Headnote
The accused, a member of the ZANU (PF) Youth League, was convicted of common assault after questioning and beating the complainant because he did not have his ZANU (PF) party card. The accused was sentenced E to 14 months' imprisonment, of which seven months were suspended on condition of his good behaviour.
Held, that ordinarily, in cases of assault, the appropriate sentence depends on the severity of the assault. However, in cases where the assault is carried out for political motives and clearly with the

intention to intimidate members of an opposing political party, different F considerations apply. A custodial sentence was richly deserved.

Smith J: The accused pleaded not guilty to a charge of common assault. According to the outline of the State case, on 3 March 2002 the complainant, who works at a mine just outside Karoi, arrived at about 1600 hours at G Sengwe Business Centre. He was called by a member of the ZANU (PF) Youth League to go to the base camp because he did not have a ZANU (PF) card. Whilst at the base camp he was questioned by some members of the Youth League. The accused, who is a member of the Youth League, grabbed a stick and beat the complainant with it. The complainant testified that when H

2002 (2) ZLR p561

Smith J

A he was asked to produce his ZANU (PF) card he said that he had left it at home. It was the accused who was the first to assault him and then the rest of the youths joined in. The accused admitted that he was present at the time but denied that he had assaulted the complainant. However, the complainant said that he remembered the accused because the accused was, at the time, wearing a ribbon round his head on which were the letters ZANU (PF). The B accused admitted that he sometimes wore such a ribbon but said that he had not been wearing it at the time the complainant was brought to the ZANU (PF) base camp.

The accused was convicted and sentenced to 14 months' imprisonment, of which seven months were suspended for five years on condition of good C behaviour. In his reasons for sentence the magistrate said "this type of harassment of members of the public has been painfully rampant in this area, replete with political thugs and hooligans". I agree with his sentiments that those who commit offences such as the one for which the accused was convicted for political reasons richly deserve a custodial sentence. Ordinarily, in cases of assault, the appropriate sentence depends on the severity of the D assault. In cases such as this, however, where the assault is carried out for political motives and clearly with the intention to intimidate members of an opposing political party, different considerations apply.

E The conviction and sentence are confirmed

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/CHIURA v PUBLIC SERVICE COMMISSION & ANOR 2002 (2) ZLR 562 (H)

[zRPz]CHIURA v PUBLIC SERVICE COMMISSION & ANOR 2002 (2) ZLR 562 (H)
2002 (2) ZLR p562

Citation	2002 (2) ZLR 562 (H)
Case No	Judgment No. HH-190-02
Court	High Court, Harare
Judge	Paradza J
Heard	29 May 2001; 6 November 2002
Judgment	6 November 2002
Counsel	*T Biti,* for the applicant *N Mutsonziwa,* for the respondents

Case Type Criminal application

Annotations No case annotations to date

[zFNz]Flynote
Review — record — need for — duty of tribunal whose decision is subject of D review to supply proper record of proceedings — consequences of failure to file record
Administrative law — bias — test to be applied
[zHNz]Headnote
A review of any judicial or quasi-judicial proceedings depends a proper E record reflecting exactly what transpired during those proceedings, and the High Court Rules, 1971, require the officer responsible for the proceedings to prepare such a record and lodge it with the Registrar of the High Court. If the responsible officer is for any reason unable to supply such a record, it is pointless even to think of a review. That is not to say, however, that an aggrieved party cannot be heard on review F simply because the responsible officer has failed to put together a record. The aggrieved party can still apply to the court and point out the irregularity, i.e. the failure to put together a record of the proceedings. On that basis alone the court can make its decision.
The applicant, a senior officer in the Public Service, appeared before a disciplinary committee charged with misconduct. After a hearing she G was told the committee would have to call other witnesses whose evidence was necessary for a judicious determination of her case. Her legal practitioners then objected to the committee's composition on the ground that one of its members had presided over previous disciplinary proceedings in which the applicant was found guilty of misconduct, and H
2002 (2) ZLR p563
Paradza J
A another had taken up a post that fell directly under the applicant's authority and was likely to take over the applicant's position. The committee thereupon found the applicant guilty of misconduct without affording her a further hearing and without calling the witnesses whose evidence it had said was necessary. When she applied to the High Court for a review of the committee's decision, the purported record of the B proceedings that was filed on behalf of the first respondent consisted entirely of irrelevant papers.
Held, that the first respondent's failure to supply the record of the disciplinary committee's proceedings, in its original form, amounted to an irregularity.
Held, further, that the test for bias is an objective one based on impressions C of reasonable right-thinking people. It is objective because although the person concerned may very well believe he is impartial, he may be unconsciously biased.
Held, further, that the applicant's failure to object at an earlier stage of the proceedings to the composition of the disciplinary committee did not remove the possibility of bias.
D *Held,* further, that bias on the part of the committee could not be ruled out. In the case of the member who had presided over the previous proceedings involving the applicant, one could not rule out the probability, not just possibility, of bias; and reasonable right-thinking people were likely to perceive the other member as a person with an interest in the matter.
E *Held,* further, that costs should be awarded against the first respondent.
[zCAz]Cases cited
Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 255 (S)
Matida v Chairman, PSC & Anor 1998 (1) ZLR 507 (H)
F *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1968] 3 All ER 304
Moyo v Forestry Commission 1996 (1) ZLR 173 (H)
S v Ndebele 1988 (2) ZLR 249 (H)
Secretary for the Interior v Scholtz 1971 (1) SA 633 (C)
[zSTz]Legislation considered G
High Court Rules, 1971 (SI 1047/71), O 33 R 260
[zCIz]Case information
T Biti, for the applicant
H *N Mutsonziwa,* for the respondents
2002 (2) ZLR p564
Paradza J

[zJDz]Judgment

Paradza J: This matter came before me as an opposed application for A review of certain proceedings of the first respondent that had resulted in the termination of the applicant's employment by the respondents

The background of this matter is as follows. Sometime in June 1988 the applicant was employed by the respondents as Deputy Secretary for Women and Youth in the second respondent's ministry, (hereinafter referred to as B "the Ministry"). By letter of the first respondent dated 25 August, 2000 the applicant was suspended from her employment for a period of three months commencing on 28 August 2000, ending on the 28 November 2000,. In yet another letter to the applicant of the same date, 25 August 2000, she was charged in terms of s 44(2)(a) as read with paras. 4, 6 and 7 of the First Schedule to the Public Service Regulations 2000 SI 1 of 2000 (hereinafter C referred to as "the regulations"). For the sake of clarity, s 44(2)(a) of the regulations does not create an offence. It lays down the procedure to be followed before and after suspension of an employee. The charges are listed in the First Schedule to the regulations. I believe the correct charge that would adequately describe the offence allegedly committed by the applicant would be found in para 4 of the First Schedule to the Regulations. It reads as follows: D

"Improper, threatening, insubordinate or discourteous behaviour, including sexual harassment, during the course of duty towards any member of the Public Service or any member of the public."

The allegations were that on 28 July 2000 the applicant was attending a meeting which was being chaired by one Matumbike. He was the Secretary E of the Ministry. A certain consultant with the Ministry was also in attendance, one Mrs Tapela. During the course of their deliberations the applicant is alleged to have shouted at Mrs Tapela, words described as derogatory and obscene. No details are provided of the "derogatory and obscene" content of the remarks. What is however further mentioned is that the applicant accused Mrs Tapela of being incompetent and jealous of her colleague, one Mrs F Chakaredza. When advised by the chairman of the meeting not to shout and use "abusive" language, she did not take heed. The meeting was prematurely terminated.

Her behaviour was described as "unbecoming and indecorous and tarnished the image of the Public Service". She was said to have hindered or obstructed G the head of the Ministry in the execution of his duties.

In her defence she completely denies the allegations. She admits there was an exchange of words between her and Mrs Tapela and further says that the Secretary, Matumbike, had shown a lot of partiality and bias in his dealings with her and Mrs Tapela. The Secretary had systematically eroded her power and area of responsibility in the Ministry, stopped a meeting she was chairing H

A on one occasion, and had clearly shown to her that he did not respect her role in the Ministry. Time elapsed. On 7 November 2000 she was advised by letter that her matter would be referred to a disciplinary committee for hearing. It would seem that she did appear before such a committee. On 9 January 2001 she was again invited to appear before a disciplinary committee so that evidence could be B heard from the Secretary of the Ministry, Mr Matumbike, and from Mrs Tapela, the consultant. The Commission could not make any meaningful decision without their evidence. It is not clear why that was so if there were other disinterested parties who witnessed what had happened.

Just before the second hearing Messrs Honey & Blanckenberg assumed C agency and wrote a letter addressed to the chairman of the disciplinary committee of the Public Service Commission, the first respondent. They raised some pertinent issues which, they said, if not corrected would result in a miscarriage of justice. Those issues related to the composition of the disciplinary committee. One member, a Mrs Rachael Simbabure, had since assumed the office of Director of Gender in the Ministry. That post was D effectively a post that fell under the ambit of the applicant. Another member was Mr Mazula who had previously sat in another disciplinary hearing and with whom the applicant had quarrelled previously. The point raised in the legal practitioners' letter was that with that composition of a disciplinary committee, bias could not be ruled out. In other words, the two members were people who were already seized with prior conceptions, ideas and biases E about this matter by virtue of their previous association with the applicant. They would not be impartial.

The next thing that happened after the assumption of agency by Messrs Honey and Blanckenberg was that a decision was made which was contained in a letter to the applicant dated 30 April 2001. The effect of that decision was to advise the applicant that she had been found guilty and that in consequence F she was being demoted to the level of Under Secretary with a reduction in her salary. At the same time she was being transferred to another Ministry still to be advised.

She sought to have the decision reviewed on the following grounds:

(a) Bias: I have already referred to this aspect above in so far as Mr Mazula G and Mrs Simbabure sat on the panel of the committee that was to hear the matter.
(b) Gross irregularity in procedures: This related to a failure to observe the rules of natural justice. The applicant argues that she was not given the opportunity to cross-examine Mrs Tapela and Mr Matumbike who she had been told were coming to testify and whom she would be afforded H the chance to cross-examine.
2002 (2) ZLR p566
Paradza J
(c) Denial of legal representation: She stated that her lawyers had A communicated their interest in the matter to the respondents. They sought a postponement of the matter so that they could adequately represent their client. No response was received in respect of their letter. Instead a decision was made in haste without hearing further evidence and without affording the applicant a chance to challenge those witnesses B in cross-examination. Further, despite lawyers having assumed agency on behalf of the applicant, a decision was made without hearing submissions from the legal representative of the applicant.
(d) Lastly, the applicant sought a review of these proceedings on the basis that the decision made was so irrational that no reasonable body properly applying its mind to the evidence and facts of the matter would arrive at C such a verdict.
A review of any proceedings of judicial or quasi-judicial bodies and tribunals proceeds on the basis of a proper record of proceedings in a good state reflecting exactly what transpired during those proceedings. It proceeds on the basis of strict compliance with the rules of court that require certain D important aspects to be satisfied before the matter can be set down for hearing. Order 33 r 260 of the High Court Rules, 1971, requires that a record of proceedings must be prepared by the officer responsible for those proceedings and must be lodged with the registrar, in its original form, and not otherwise, with any additional copies of that record being certified. It is important to note that what is required for purposes of review is a record of E the proceedings that are the subject for review. It follows that if the responsible clerk of court, tribunal, or person responsible for the *quasi- judicial* body is unable for whatever reason to supply the record of proceedings, it is pointless even to think of a review. The question is what exactly would be there to be review.
That is, however, not to say the aggrieved party cannot be heard on review F simply because the responsible authority or body has failed to put together a record of proceedings. In a court application the hearing party can still seek audience with this court and point out that irregularity, that is, the failure to put together a record of the proceedings. On that basis alone the court can still make its decision. G
What has been referred to as the record of proceedings in this matter contains the following:
Pages 1-3 are certain papers which the index to the record refers to as "inelligible papers". In reality they are certain letters written and signed by the Senior Secretary for Finance and the Secretary for National Affairs, Employment Creation and Co-operatives. They seem to have been both H
2002 (2) ZLR p567
Paradza J
A communicating with the World Bank.
Page 4 is a warning to the applicant in respect of a completely different issue, the issue of flouting tender procedures. This has nothing to do with the matter under review.
Pages 5 - 7 comprise a document that records the tender procedures which B should be followed. It is of no relevance to this matter.
Pages 8 - 51 deal with a misconduct charge preferred against the applicant, which charge at some stage was aborted for one reason or another. Again, that is not a matter of our concern and is irrelevant.
Pages 52 - 93 deal with various issues ranging from other matters of misconduct C and matters that relate to the applicant's personal file, suspension, leave etc. Again that has nothing to do with this matter and is irrelevant to this case.
Pages 94 - 172 are what would have been relevant to this matter. Unfortunately that part of the record deals with correspondence, memoranda, reports, determinations, etc. None of that part of the record relates to the record of proceedings of the disciplinary inquiry.
D At the end of the day, I have no record before me that contains a record of the proceedings when the matter was heard by the disciplinary committee. That places me in a very difficult situation in that I do not have before me a record of proceedings that I have been asked to review.
The law relating to such a situation has been repeatedly stated in these courts. E In the matter of *Matida v Chairman PSC and Anor* 1998 (1) ZLR 507 (H) Adam J emphasized the need to lodge with the Registrar of the High Court, the original record of proceedings in compliance with the rules of

this court. He singled out previous failures on the part of the Public Service Commission to lodge records of proceedings in compliance with the rules of this court. He warned that in future, should the Public Service Commission fail in this F regard and a matter could not be reviewed properly because of the unavailability of the record of proceedings, punitive costs would have to be awarded against the members of the committee that sat to hear the case

In addition, the learned judge pointed out that legal practitioners acting for their clients have a duty to ensure that the record of proceedings complies G with the rules of court. If, before the matter comes up on review, the record is not there or is not in order, the court should seriously consider making an order to the effect that the responsible legal practitioner should not charge his client for his appearance in court.

In the case of S v *Ndebele* 1988 (2) ZLR 249 (H) Muchechetere J (as he then H was) remarked at p 254 E-F as follows:

2002 (2) ZLR p568

Paradza J

"The need [to keep a record of proceedings] is quite obvious. In the A absence of such a record how is a review or appellate tribunal to assess the correctness and validity of any proceedings placed before it for adjudication?"

In the case of *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H) Malaba J (as he then was), citing the South African case of *Secretary for the Interior v Scholtz* 1971 (1) SA 633 (C). echoed the same sentiments as stated B above. In so doing he found support in the South African rules of court, rule 53. At page 187 this is what he had to say:

"It is important to note, however, that in the South African review procedure under r 53, the applicant is obliged, in the same application for review directed at the administrative tribunal, to call upon it to dispatch C to the registrar the record of the proceedings sought to be corrected or set aside."

Our rule 260(1) of the High Court Rules, 1971, is clear in its requirements. Within twelve days of the date of service of an application for review, the officer responsible for preparation of the record of proceedings must lodge with the Registrar the original record together with two other typed copies D which copies must be duly certified as true and correct copies.

What has been tendered before me and described as the record of proceedings is nowhere near what could be described as a record of proceedings. One extra copy I have in the court record is not certified. The result is clear. Failure by, the first respondent to supply the record of proceedings, in its original E form, amounts to an irregularity. It is not possible by looking at the papers presented to me and described as the record of proceedings to know whether the applicant was afforded a fair hearing.

The aspect of bias cannot be ruled out. I have noted that even the so-called record of proceedings that was placed before me consists of other charges that had previously been preferred against the applicant. I am bound to F conclude that if the first respondent heard this matter with that information in front of it, information relating to previous alleged acts of misconduct, one cannot rule out the probability, not just possibility, of bias. Failure by the applicant to object at the early stages of the inquiry does not remove the possibility of bias. In any case, at that stage she was not legally represented and could not enjoy the benefit of expert legal advice. I am in full agreement G with *Mr Biti,* who appeared for the applicant, as far as this point is concerned. He referred me to Lord Denning's remarks in the case of *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1968] 3 All ER 304 at 310A. He says:

"It brings home this point: in considering whether there was a real H

2002 (2) ZLR p569

Paradza J

A likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity... The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he B should not sit. And if he does sit, his decision cannot stand."

The test therefore is not a subjective one. It is an objective test based on impressions of reasonable right-thinking people. This is what Korshah JA had to deal with in the case of *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S). It is an objective test because invariably, although the officer or justice concerned may very well C believe that he is impartial, he may be quite unconscious of the existence of that bias in him. Having looked at the authorities in our law and elsewhere, Korshah JA concluded at page 297A as follows:

"A common theme which runs through the authorities is, therefore, that the test to be applied is an objective one. One does not enquire into the mind of the person challenged to determine whether or

not he was or D would be actually biased. Thus the character, professionalism, experience or ability as to make it unlikely, despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration."
In the case before me the panel that heard the matter consisted of a man who E had earlier found the applicant guilty of an act of misconduct. He was aware of the various allegations that had previously faced the applicant. Mrs Simbabure had worked directly under the supervision of the applicant. She had been tipped to take over the applicant's position. Reasonable right- thinking people were likely to perceive her as a person with an interest in the matter, very unlikely to be impartial.
F I am also concerned about the conduct of the disciplinary committee. The matter went through a first hearing. After that a decision to call the Secretary of the Ministry, Mr Matumbike, and Mrs Tapela was made. It was communicated to the applicant by letter of 7 December 2000. Part of that letter reads as follows:
G "The reason for the extension of the suspension order is that the Commission noted that the Disciplinary Committee did not summons all the key witnesses to this case to give evidence at the hearing i.e. the former Head of the Ministry, Mr Matumbike, the Consultant, Mrs Tapela and the minutes recorded by Mrs Shakede. *It was therefore felt that such an omission would not result in a judicious determination of your case".* H (my emphasis).
2002 (2) ZLR p570
Paradza J
On 16 January, 2001 a letter was dispatched by Messrs Honey & Blanckenberg, A legal practitioners who had assumed agency for the applicant. That letter, *inter alia,* expressed concern about the composition of the disciplinary committee. The letter highlighted the fact that the applicant had quarrelled with one of the members of that committee, a Mr Mazula.
Further, Mrs Simbabure had at that stage effectively taken over a position in B the Ministry which the applicant was responsible for.
What happened after the letter was delivered to the first respondent is disturbing. Without hearing any of the witnesses it intended to call and without any explanation to the applicant and her legal practitioners, a determination of this matter was made. Previously the committee was of the view that without calling those witnesses to testify a "judicious determination" C of the case could not be made. In a letter to the Secretary of the Public Service Commission, the chairman of the disciplinary committee, while acknowledging receipt of the letter from the applicant's legal practitioners, stated that by insisting on a second hearing of the matter, they "may have opened up a can of worms". At that stage the disciplinary committee was D unable to proceed. Yet despite that dead-end situation, on 7 February 2001, the committee made a determination to demote the applicant to a lower grade. It also found her guilty of the charges levelled against her. She was informed of this decision in April 2001, two months after the determination was made. As stated above, the situation at hand cannot be described as a fair hearing. The rules of natural justice were not followed. The committee made a E decision out of panic when the applicant through her legal practitioners raised very important issues. The decision made by the committee according to their own words could not be "judicious" without hearing more evidence from Mrs Tapela and Mr Matumbike. They were the key witnesses. Yet they both refused to testify for one reason or another. It is difficult therefore to understand on what evidence the committee made its determination. I am F satisfied this is a decision which cannot be allowed to stand. I therefore make the following order:
1) The first respondent's decision contained in its letter of the 20th April, 2001 addressed to the applicant is hereby set aside.
2) Applicant is hereby reinstated to her previous position of Deputy G Secretary without loss of benefits forthwith.
3) First respondent be ordered to pay costs of **suit.**
Honey & Blanckenberg, legal practitioners for the applicant
Civil Division of the Attorney-General's Office, for the respondent H

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Source:

[zRPz]MASEKO v JONGWE PRINTING & PUBLISHING CO (PVT) LTD 2002 (2) ZLR 571 (H)
2002 (2) ZLR p571

Citation	2002 (2) ZLR 571 (H)
Case No	Judgment No. HH-191-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	3 October 2002; 6 November 2002
Judgment	6 November 2002
Counsel	*H Zhou,* for the plaintiff *J S Mandizha,* for the defendant
Case Type	Stated case
Annotations	No case annotations to date

[zFNz]Flynote
D **Employment** — contract — termination —fixed term contract — contract not yet time expired — termination must be in accordance with labour legislation or code of conduct
Employment — contract — termination — wrongful dismissal — damages for — assessment — requirement for dismissed person to mitigate loss E by taking any reasonable alternative employment — what is reasonable time by which such employment should have been taken up
[zHNz]Headnote
The plaintiff was employed by the defendant as its managing director in terms of a written contract. The contract was for a fixed three-year period. It provided that the contract could be terminated by either party F on one month's notice. The defendant, after some fifteen months, summarily terminated the plaintiff's employment. The questions to be decided in a stated case were (a) whether the plaintiff was entitled to damages for one month only or for the balance of the three-year term; and (b) whether the plaintiff had failed to mitigate his loss. The parties G agreed on the quantum to be paid, depending on what the decision was on the first question.
Held, that employment may not be terminated by an employer other than in terms of the labour legislation or a registered code of conduct. A fixed term contract of employment is like any other, except that is terminable in terms of an agreement between the parties upon the expiration of the H fixed period. If a fixed term contract has not expired, employment can
2002 (2) ZLR p572
Chinhengo J
only be terminated in terms of the labour regulations, except where the A employee is in probation. The fact that in this case the contract purported to allow one month's notice to be given was irrelevant. The termination was unlawful.
Held, further, that if the defendant needed to terminate the plaintiff's employment because it was in financial difficulties, it should have complied with the regulations governing retrenchment. B
Held, further, that the principles regarding mitigation of loss that applied to an indeterminate contract also applied to a fixed term contract. The plaintiff was entitled to be placed in the same position as he would have been had the contract not been terminated. The employer had an onus to show that the employee could have mitigated his loss. It was C reasonable in this case to assume

that the plaintiff could have mitigated his loss, and the damages would be based on the date when he lost his employment and the date when he could reasonably have been expected to find alternative employment. A year would, in the circumstances, be a reasonable period. D

[zCAz]Cases referred to

Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S)
BHP Minerals Zimbabwe (Pvt) Ltd v Takawira 1999 (2) ZLR 77 (S)
Gauntlet Security Svcs (Pvt) Ltd v Leonard 1997 (1) ZLR 583 (S)
Madawo v Interfresh Ltd 2000 (1) ZLR 660 (H)
Min of Labour & Ors v PEN Transport (Pvt) Ltd 1989 (1) ZLR 293 (S) E
Myers v Abrahamson 1952 (3) SA 121 (C)

[zSTz]Legislation considered

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), ss 2(1), 3 F

[zCIz]Case information

H Zhou, for the plaintiff
J S Mandizha, for the defendant

[zJDz]Judgment

Chinhengo J: The facts of this case are not in dispute. Nor are the issues for the court's decision. The parties agreed to present this matter as a stated G case. The facts of the case and the issues are these.

On 10 March 2000, the plaintiff was employed by the defendant as its managing director in terms of a written contract of employment. The contract provided in clause 10 that —

"Under normal circumstances, the contract may be terminated by either H party at the end of the month, provided a month's notice is given to this

A effect. Should you (the employee) leave the employer without giving due notice in terms of this contract you shall be liable to pay the employer for the amount equivalent to a salary that would have been payable to you if you had worked during the notice period required by this contract".

On 28 June 2001 the defendant forthwith terminated the plaintiff's contract of employment. The letter of termination reads:

B "We hereby terminate immediately your services with Jongwe Printing and Publishing Company. As you are aware, the company has no money at present. But we will pay you accordingly when we are able to do so. Please leave your keys and all the property of the Party with Mrs Ngurira".

This letter was written by the Secretary for Information and Publicity of C ZANU PF because the defendant company is owned by that party. At the time that the contract of employment was terminated, the plaintiff's monthly salary was $53 179. The defendant was contributing to the plaintiff's medical aid scheme, CIMAS, the sum of $4 670 per month and $3 051 towards the plaintiff's pension scheme. The plaintiff was entitled to a further contribution D by the defendant towards his children's school fees in the sum of $30 000 annually.

The contract of employment was a fixed duration contract of three years from 10 March 2000 to 10 February 2003. At the time that his contract of employment was terminated the plaintiff had been paid the amount due to him for the first two years of the contract in respect of his children's school E fees. He had not been paid the sum of $30 000 in respect of the third year. He had not been paid the motor vehicle allowance of $37 000 to which he was entitled under the contract.

The issues as agreed between the parties for my decision are (a) whether the plaintiff is entitled to damages for a period of one month only or for a period F of nineteen months and ten days and (b) whether the plaintiff has failed to mitigate his loss. The parties also agreed that in the event that I hold that the plaintiff is entitled to damages for one month only then the amount of damages to be paid to him is the sum of $128 000 but if I hold that he is entitled to damages for a period up to the end of the fixed term contract the amount of damages to be paid to him is the sum of $1242 026. The parties also agreed G that the costs should follow the cause. The legal practitioners filed their written submissions on 3 October 2002.

In order to determine the main issue in this matter the starting point is to recognise that in this country the common law of master and servant has been altered by statute law. The Labour Relations Act [*Chapter 28:01*] and the H Regulations made thereunder are relevant to any consideration of an

employment contract. In terms of s 2(1) of the Labour Relations (General A Conditions of Employment)(Termination of Employment) Regulations 1985 (SI 371 of 1985) hereinafter referred to

as "the Regulations"):

"No employer shall, summarily or otherwise, terminate a contract of employment with an employee unless —

(a) he has obtained the prior written approval of the Minister to do so; B or

(b) he and the employee mutually agree, in writing, to the termination of the contract; or

(c) the employee was engaged for a period of fixed duration or for the performance of a specific task, and the contract of employment is terminated on the expiry of such period or on the performance of C such task; or

(d) the contract of employment is terminated in terms of section 3."

Section 3 of the Regulations provides for termination of a contract in terms of a registered code of conduct. The provisions of the Regulations have been the subject of judicial interpretation over the many years of their existence. The result is that it is now settled law, consistent with the provisions of the D Regulations, that an employment contract may not be terminated by the employer other than in terms of the Regulations or in terms of a registered code of conduct. The situation with regard to a contract of fixed duration was dealt with in *Minister of Labour & Ors v PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S). At 298D-E Gubbay JA (as he then was) said:

"In order to utilize the right to terminate under s 2(1)(c) of the Regulations E the employer was obliged to ensure that the fixed duration period had effectively expired. It would have been proper to have informed the employee in advance that on 28 February 1987 his services were to be terminated and either have required him to work until that day or, if not, have paid his salary in full for the month. But notwithstanding any contractually agreed period of notice it was not permissible to terminate, F in reliance thereon, before the end of the fixed period.

If during the currency of the fixed period the employer had good cause to believe that the employee was guilty of misconduct, its remedy lay in s 3(1) of the Regulations, to suspend him without pay and apply forthwith to a labour relations officer for an order terminating the contract of employment. This remedy the employer did not avail himself G of."

It is clear from the above statement by Gubbay JA that it is not open to an employer to terminate a fixed term contract without complying with the provisions of the Regulations. In so far as the application of the Regulations is concerned, there is nothing magical about a fixed term contract. It is a H contract of employment like any other, except that it is terminable in terms

2002 (2) ZLR p575

Chinhengo J

A of an agreement entered into between the employer and the employee upon the expiration of the fixed period. During its subsistence, therefore, the same law applies to it as to any other contract of employment, except where the employee is on probation. See *Madawo v Interfresh Ltd* 2000 (1) ZLR 660 (H).

The defendant's legal practitioner sought to rely on the provisions of the B contract to support the contention that the contract could be terminated by giving the period of notice stipulated in the contract. He relied in particular on clause 10, which I have already cited. Such reliance was misplaced. First, the "normal circumstances" referred to in that paragraph are normal to the extent that they may be contrasted with the "special circumstances" referred C to in clause 9 of the contract. Clause 9 of the contract provides that —

"Your employment will commence with a probation of 3 months during which each of the contracting parties shall have the right to terminate the contract with a one month notice. The notice to terminate the contract however, can be reduced to 48 hours in special circumstances through a waiver by the employer."

D Clauses 9 and 10 of the contract have to be read together in order to obtain an appreciation of what is meant by "normal circumstances" in Clause 10. Second, the common law of employment was superseded by the provisions of the Regulations which specify, as in s 2(1) above cited, the circumstances in which the employer can terminate a contract of employment, whether it be for a fixed term or otherwise. This is the position at law which it seems E Mr *Mandizha* failed to appreciate when he made the submission that, if in terms of Clause 10 the applicant had the right to terminate the contract at any time by giving one month's notice, the respondent could do the same also. He specifically stated in para 4(1) of his written submissions that —

"It is submitted that the reverse of the afore going obtains *in casu.* The F parties to the contract intended that should the employer summarily dismiss the employee, then it 'shall be liable to pay (the employee) the amount equivalent to a salary.'"

The Regulations were intended to and did indeed deprive an employer of this right, even where it is a term of a contract: *vide* s 2 of the Regulations and *PEN Transport* case *supra.* If the plaintiff drafted the contract which it is alleged G he did, it seems to me that he was quite knowledgeable about the legal position, because in Clause 10 he only concerned himself with the situation where

the employee failed to give one month's notice. He must have known that the employer had no right to terminate the contract without complying with the Regulations, and he was correct.
H In the letter of termination of employment, the suggestion is apparent that the
2002 (2) ZLR p576
Chinhengo J
defendant terminated the contract of employment because it was in financial A difficulties. It had no money. If this was the defendant's reason for terminating the contract, the proper procedure would have been to comply with the provisions of the Labour Relations (Retrenchment) Regulations 1990 (SI 404 of 1990). The defendant did not take advantage of those regulations. The defendant's position in this case must be analysed closely. It is not in B dispute that the defendant terminated the contract of employment unlawfully. The defendant admits this in its plea and the same admission is made in the written submissions filed on its behalf. It was willing to pay damages of $128 100 in respect of a period of one month which it thought was the appropriate notice period which it was required to give in order to lawfully bring to an end the contract. In adopting this position, it in fact was admitting C that it had acted unlawfully. The only issue which remained to be determined by the court became, not the issue of liability, but rather the extent of the liability in so far as the quantum of the damages was concerned. I was therefore required to determine whether, in view of the unlawful termination of the contract, the damages payable would be in respect of the one month period of notice or in respect of the whole of the unexpired period of the D contract. In this connection *Mr Zhou* made an ingenious submission. He said that the failure by the defendant to give any notice of termination meant that the purported termination was void *ab initio* and so, whether or not the contract was overridden by the Regulations, the plaintiff was entitled to his salary and benefits until the expiry of the fixed period. In other words, the contract remained in existence and the plaintiff was entitled to continue to be E employed (reinstated) or to be paid damages calculated to the end of the contract period. He made his submission with lucidity as follows:

"10. Alternatively, in the unlikely event that this Honourable Court accepted the argument that Clause 10 of the written contract overrides or excludes the application of the provisions of Statutory Instrument 371 of F 1985 and therefore the defendant was obliged to give one month's notice, it is respectfully submitted that the defendant did not give that notice. There was no notice which was given. The result would be that the purported termination is void *ab initio,* so the plaintiff remains an employee of the defendant.

11. Put differently, if the notice period stipulated in the contract overrides G the provisions of the Regulations, then the defendant would have to give such notice, if it so minds, and until the notice is given the contract remains in existence.

14. Accordingly, it is submitted that, whichever approach one takes the plaintiff would still be entitled to damages in the sum of $1 242 026." H
2002 (2) ZLR p577
Chinhengo J
A Accordingly, the only issue that remains to be determined is the quantum of damages, having regard to the requirement, if it applies in this case, that the plaintiff must mitigate his damages. As it is said:
"The onus of proving that the plaintiff unreasonably failed to exercise his duty to mitigate loss rests upon the defendant. Consequently he has to prove that the plaintiff should have restricted his damage or that the B plaintiff should have used a better or alternative method": P J Visser & J M Potgieter *Law of Damages* at p 234.
The question of the onus in this case arises for consideration because the defendant in its plea stated in para 3 as follows:
"Additionally and/or alternatively:
C Defendant avers that even if the parties' contract is held to be of fixed duration, plaintiff is, in law expected to mitigate his losses rather than claim full damages for the unexpired duration of the contract.
Defendant avers that plaintiff has not done so, nor has he pleaded as such".
This plea indicates that the defendant was not aware that the onus in this case D lies on it not only to prove but also to allege, initially, that the plaintiff unreasonably failed in his duty to mitigate his loss. It was therefore not necessary for the defendant to plead mitigation of loss when there was no allegation that he unreasonably failed in his duty to mitigate his loss. If the defendant discharges the onus on it, then the plaintiff must show that he did E all that was in his power to mitigate his loss. In other words, the onus is then shifted to the plaintiff to prove what his loss would have been had he taken the reasonable steps. In the present case the defendant has not, to my mind, discharged the onus on it.

Most of the cases which have come before our courts and in which the question of mitigation of damages in employment contracts arose were not, F as in the present case, concerned with fixed term contracts but with contracts for personal service of a continuing nature. *Gauntlet Security Services (Pvt) Ltd v Leonard* 1997 (1) ZLR 583 (S), *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S) and *BHP Minerals Zimbabwe (Pvt) Ltd v Takawira* 1999 (2) ZLR 77 (S) were all concerned with contracts of a continuing nature. It was G in *Gauntlet Security Services (supra)* that Gubbay CJ at 546C-D said:

"Thus the general rule governing the measure of damages is applicable. The employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in H consequence of the breach. See *Willenburg v Pickstone & Brother Ltd*

2002 (2) ZLR p578

Chinhengo J

1922 CPD 13 at 14. But the employee must mitigate his loss. He must A look for and accept any reasonable offer of alternative employment. He cannot just do nothing. See *Faberlan v McKay & Fraser* 1920 WLD 23 at 32; *Bulmer v Woollens Ltd (In liquidation)* 1926 CPD 459 at 467-468; *Beeton v Peninsula Transport Co (Pty) Ltd* 1934 CPD 53 at 59. If he fails to take other employment when it would have been reasonable for him to do so, a deduction will be made in respect of the remuneration he B would have earned from the substituted employment."

This case, as I have shown, was followed by the decisions in *Ambali* and *BHP Minerals Zimbabwe (Pvt) Ltd (supra).* I have not been referred to any case in this country where the issue of mitigation of damages arose in a fixed term contract. Do the same principles apply to a fixed term contract as they do to an indeterminate contract of employment? It seems to me that they do. C Support for this view may be found in the persuasive decision in *Myers v Abrahamson* 1952 (3) SA 121 (C) which was quoted with approval in *Gauntlet Security Services (supra),* where Gubbay CJ said at 586 D:

"Since the respondent's contract of employment was not one of a fixed duration or terminable by the appellant upon notice given, I consider it D was incumbent upon the Tribunal to call for evidence as to the reasonable period it would take a person in the position of the respondent (disregarding the injury) to obtain similar employment. And having made the necessary finding, then to deduct from the monthly wages paid by the appellant, the amount the respondent actually earned or could reasonably have earned during such period." E

It is implicit from this statement that Gubbay CJ accepted that the principle of mitigation of damages applied to a fixed duration contract of employment. It seems to me that this proposition is correct. A claim of damages arising from a breach of contract, as is the case with a wrongful termination of an employment contract, requires that the plaintiff be placed in the position he would have been had his contract not been terminated. The plaintiff's claim F is for damages and not for surrogated damages. This was made clear in *Myers'* case *supra* at 124C-E. To so place a person on a fixed duration contract means that he has to be paid the amount outstanding for the unexpired duration of the fixed contract. But to arrive at the correct amount of the damages, account must be taken of any income which he made or could G reasonably have made during the period when his contract should have subsisted. This means that the plaintiff is required to mitigate his damages, as is the general requirement on those who seek to claim damages for unlawful termination of employment contracts. McNally JA in *Ambali supra* was quite categoric as to the need to mitigate damages: see his remarks at 418G - 419D. I therefore come to the conclusion that even where a fixed term H

2002 (2) ZLR p579

Chinhengo J

A contract of employment is involved the principle that the plaintiff must mitigate his damages applies.

In the present case, the applicant mitigated his loss by taking up a consultancy job for a while until it was terminated by the company to which he was rendering the consultancy services. It will be necessary therefore to reduce the amount of damages payable to him by the amount of $18 000 which he B earned as a consultant. Mr *Mandizha* urged me to find that there is scope for the plaintiff to mitigate his loss more substantially. He submitted that the plaintiff holds a university degree and, although he may find it difficult to obtain formal employment because of the current harsh economic conditions, he may still be able to engage in informal or self employment and reduce his C damages. *Mr Mandizha* also highlighted the fact that the plaintiff's contract would have subsisted until February 2003 and that if I awarded him damages in respect of the unexpired period of the contract then the result may be that I will have over-compensated him should he obtain formal

employment or engage in other income generating activities during that period. I am aware that the defendant has not, on the pleadings, discharged the onus on it to prove D that the plaintiff has unreasonably failed to exercise his duty to mitigate his loss. The need to discharge that onus has, to a very great extent, been neutralised by the plaintiff's own admission on the pleadings (see plaintiff's further particulars filed on 7 February 2002) that he has taken reasonable steps to mitigate his loss and has in fact mitigated the loss in the sum of $18 000. I am satisfied that in this case it is reasonable to assume that the E plaintiff can further mitigate his losses. I will therefore compensate him for the period between his wrongful dismissal and the date when he could reasonably be expected to find alternative employment: *Ambali's* case, *supra* at 419A-B. That period, in my view, is a period of twelve months from the date of his unlawful dismissal. I will therefore deny him the amount of gross F salary for the remaining period of the contract. Judgment will therefore be in the sum of $663 069 less $18 000. It is so entered, with costs to be paid by the defendant.
Mhiribidi Ngarava & Moyo, plaintiff's legal practitioners
G *Mandizha & Co,* defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/NIRI v COLEMAN & ORS 2002 (2) ZLR 580 (H)

[zRPz]NIRI v COLEMAN & ORS 2002 (2) ZLR 580 (H)
2002 (2) ZLR p580

Citation	2002 (2) ZLR 580 (H)
Case No	Judgment No. HH-192-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	25 October 2002; 6 November 2002
Judgment	6 November 2002
Counsel	*N B Nagar* for the applicant *C Silemani* for the respondents
Case Type	Civil Application
Annotations	Link to case annotations

[zFNz]Flynote
Interest — rate of — stipulated rate of interest in excess of rate laid down in D Moneylending and Rates of Interest Act [*Chapter 14:14*] —does not render acknowledgment of debt void for illegality and unenforceable — lender not disentitled from recovering his money at rate of interest permitted by the Act

Interest — rate o f — rate laid down in Moneylending and Rates of Interest Act [*Chapter 14:14*] — not same as rate under Prescribed Rate of Interest E Act [*Chapter 8:10*] — how rate to be ascertained
Loan —acknowledgment of debt — rate of interest stipulated contravening Moneylending and Rates of Interest Act [*Chapter 14:14*] — whether loan recoverable
Practice and procedure —judgment — summary judgment — defence to — F onus on defendant to show good bona fide defence — what is — need to establish legal defence, not a moral one — not sufficient to show that, for reasons beyond defendant's control, he was unable to pay the debt
[zHNz]Headnote
The first defendant was indebted to the plaintiff, having borrowed a sum of G money from him. He defaulted on the loan repayments, at least in part because his farm was invaded by persons describing themselves as "war veterans", who prevented him from farming and who stole the crop with which he had hoped to pay the debt. The second and third defendants had in writing stood surety and bound themselves as co-principal debtors. H
2002 (2) ZLR p581
Chinhengo J
A In an application for summary judgment based on the acknowledgment of debt by the first defendant, the defendants pleaded several defences, *inter alia,* that, as the rate of interest exceeded the maximum permitted, they had a defence to the claim; and that there was a verbal agreement varying the contract. The court applied the test whether a good *bona fide* defence had been shown.
B *Held,* that some of the defences were spurious and that contradictory averments did damage to the *bona fides* of the defence.
Held, further, that the defence based on an oral variation of the contract failed because of the existence of a non-variation clause.
Held, further, that the excessive rate of interest claimed, though it rendered C the lender liable to prosecution, did not disentitle the lender from recovering the debt together with lawful interest.
Held, further, that the rate of interest under the Money lending and Rates of Interest Act is not the same as the rate under the Prescribed Rate of Interest Act [*Chapter 8:10*]*;* the latter is set out in a statutory instrument and equates to the Reserve Bank's re-discount rate as fixed from time D to time.
Summary judgment granted accordingly.
[zCAz]Cases cited
Jena v Nechipote 1986 (1) ZLR 29 (S)
E *Mtandwa v Zimbank* 1999 (1) ZLR 445 (H)
Muleya v Bulle 1994 (2) ZLR 202 (H)
[zSTz]Legislation considered
Interpretation Act [*Chapter 1:01*], s12(1)
Moneylending and Rates of Interest Act [*Chapter 14:14*], s 8
F Prescribed Rate of Interest Act [*Chapter 8:10*]
[zCIz]Case information
N B Nagar for the applicant
C Silemani for the respondents
[zJDz]Judgment
G **Chinhengo J:** This is an application for summary judgment. The applicant (to whom I shall refer as "the plaintiff) sued the respondents (to whom I shall refer as "the defendants") for the payment of $3 889 732,97 plus interest thereon at the rate of 40 per cent per annum calculated monthly in arrears with effect from 25 January 2002 and collection commission and H legal costs on a legal practitioner and client scale. He also sought an order
2002 (2) ZLR p582
Chinhengo J
that the property known as Lot 3 of Stand 549 A Marlborough Township A Extension 3 ("the property") be declared to be specially executable. The suit in which the plaintiff made these claims is Case No HC 885/2002. In that suit the defendants entered an appearance to defend and filed their plea.
The essential facts of this case are these. On 26 June 2001, the first defendant signed an acknowledgement of debt in terms of which he declared that he was B lawfully indebted to the plaintiff in the sum of $3 000 000 plus interest on the capital sum or any sum outstanding from time to time at the rate of 40 per cent per annum with effect from 25 June 2001. He agreed and undertook to pay the capital sum and interest on certain terms and further, in the event of default, to pay collection commission and legal costs on a legal practitioner and client scale which the

plaintiff would incur in the event that he instituted C legal proceedings for the recovery of the debt. The plaintiff averred in his declaration that on 28 August 2001 he advanced a further sum of $500 000 to the first defendant on the same terms as those contained in the acknowledgment of debt. It is not in dispute that although he has paid some money to reduce the debt the first defendant defaulted in making payments to the plaintiff. In terms of the acknowledgement of debt, the capital amount D of $3 000 000 was to be repaid in two instalments of $1 500 000 each on 28 December 2001 and 28 June 2002. The interest was to accrue with effect from 25 June 2001 and to be paid on or before the last day of each month commencing on 25 July 2001. The first defendant's default resulted in the plaintiff suing him and the other defendants in Case No HC 885/02. The E second and third defendants, in writing, had stood surety and had bound themselves as co-principal debtors for the due performance by the first defendant of all his obligations imposed in terms of the acknowledgement of debt. The second and third defendants had also tendered as security the title deed in respect of the property.

In the plea filed of record the defendants admitted that the plaintiff advanced F the sums of money but denied that the sum of $500 000 was advanced on the same terms and conditions as contained in the acknowledgement of debt. They admitted defaulting on monthly interest payments which were payable with effect from 25 July 2001 but averred that the first defendant paid the sum of $138 205 on 31 January 2002. Though they admitted breaching the terms G of the acknowledgment of debt they averred in their plea that those terms were novated on or about 20 December 2001 when it was agreed between the plaintiff and the first defendant that the first defendant would pay to the plaintiff the first instalment in the sum of $1500 000 after the sale by the first defendant of his crops by mid March 2002 and that the balance would be paid by the end of June 2002. They thus pleaded that the debt was not due at the H

A time that the plaintiff instituted the action in Case No HC 885/02. The plea went on to deny that the second and third defendants "gave over as security" the property. They averred that they only tendered the title deed as security. In regard to the sum claimed by the plaintiff the defendants denied that it was $3 889 732,97 as alleged because the first defendant had made other payments. The defendants averred that they had no knowledge of how the B sum of $3 889 732,97 was made up. They also disputed the validity of the claim that the property be declared specially executable.

In the application for summary judgment the plaintiff stated that subsequent to the issuance of the summons, the first defendant had made four payments totalling $375 767. He averred that the defendants' plea consisted largely of C bare denials with some of the denials flying in the face of the clear terms of the acknowledgment of debt. In regard to the latter averment he cited the defendant's denial that in terms of the acknowledgement of debt they were liable for collection commission when the acknowledgement of debt clearly provided for such liability. The plaintiff described the defendants' defence or defences as spurious. He averred that some payments were made after the D summons was issued and that the allegation about the novation of the terms of the acknowledgement of debt were false because the acknowledgement of debt provides that no variation of its terms shall be of any force or effect unless such variation is reduced to writing and signed by both parties.

The plaintiff averred further that the second and third defendants did not deny E that they bound themselves as sureties and co-principal debtors and that their denial of anything alleged in the plaintiff's declaration would be designed only to cloud the issues. In particular the plaintiff referred to the clear provisions of the deed of surety by which they bound themselves and in terms of which they also tendered the title deed of the property as security for the due performance by themselves of the obligation they had assumed.

F In para 10 of the founding affidavit the plaintiff gave a breakdown of the amount owing as being the sum of $3 933 415,97 as at 9 May 2002 taking into account the interest accrued and the payments made. The plaintiff averred that the defendants had no *bona fide* defence to his claim and that they had entered an appearance to defend and filed a plea solely for the purpose of G causing a delay to the finalisation of this matter.

In their opposition to the application for summary judgment, the defendants state that the first defendant paid a further amount of $50 000 on 24 January 2002. They admitted, contrary to their position in the plea, that they were liable to pay collection commission. They averred that the acknowledgement of debt was novated when, after discussions between the plaintiff and the first H defendant, it was acknowledged that, due to the "invasion" of the first

defendant's farm by the war veterans, farming activities were disrupted. A They averred that the first repayment of $1500 000 was to be paid exclusively from the proceeds of the potato crop which was to be reaped in March 2002. They averred that it was a "material term and tacit term" of the acknowledgement of debt and the deed of surety that the loan would be repaid from profits derived from the first defendant's farming operations from B which the second and third defendants also derived their income and on the basis of which they signed the deed of surety. They averred that since March 2002 it had not been possible for the first defendant to carry on farming operations because of the disruptions caused by the war veterans, who had not only slaughtered livestock, but they had also commandeered and removed the first defendant's entire potato crop valued at $2 000 000. C

The defendants averred that because of the farm "invasions" the performance of the terms of the acknowledgement of debt became impossible due to no fault of theirs. The defendants filed a notice of amendment on 14 June 2002 and thereby amended their plea by inserting a new para 11 to deal with the disruption of farming activities and to incorporate the averment on the existence of a material and tacit term as I have already mentioned. They thus D pleaded that the performance of their obligations became impossible and for that reason the agreement to pay became impossible and was accordingly terminated. It is significant that the notice of amendment was filed on 14 June 2002 almost a month after the plaintiff had instituted the summary judgment proceedings on 16 May 2002. E

In summary judgment proceedings the respondents (in this case the defendants) have to show that they have a good *bona fide* defence to the plaintiff's action. *In Jena v Nechipote* 1986 (1) ZLR 29 (S) Gubbay JA (as he then was) said of the onus on the defendants in summary judgment applications that:

"All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that 'there is a mere F possibility of his success', 'he has a plausible case'; 'there is a triable issue'; or 'there is a reasonable possibility that an injustice may be done if summary judgment is granted.'"

He then referred to several cases in which this test was laid down. Although he stated that, in the case before him, the defendants' affidavits were G somewhat bald, he was satisfied that they disclosed *a prima facie* defence. He accordingly upheld the appeal against the grant of summary judgment.

The question I must answer *in casu* is whether the defendants have raised a *prima facie* defence i.e. whether there is a mere possibility of their success or a plausible case or a triable issue. These phrases merely mean that the defendant has to depose to a defence which, if proved at a trial would H

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A constitute a good defence to the plaintiff's claim. The defence must itself be *bona fide.* Even though the rule is not concerned with the defendant's *bona fides,* if he is not *bona fide* then his defence too cannot be *bona fide* — see Erasmus: *Superior Court Practice* at p B1-224. A defence raised against the grant of a summary judgment application must also be valid at law. A defendant cannot raise an unenforceable moral right or an inability to pay as B a defence.

I have therefore to examine the defences raised by the defendants to determine whether they are *bona fide* and valid at law.

I have no problem in accepting that the defendants' ability to carry on farming operations may have been interfered with by the farm "invasions". But it C does not mean that if a defendant is himself *bona fide* in that respect, then he necessarily raises a *bona fide* defence for the purpose of defeating an application for summary judgment on the facts of the matter before the court. The defendants raised a number of defences *in casu.* First, they averred that they had no knowledge of how the amount claimed was made up. This is a spurious defence. In the declaration and in the founding affidavit, the D plaintiff showed quite clearly how that amount was made up. He provided a kind of schedule detailing the amount of the capital and the interest charges based on an annual rate of interest of 40 per cent. The defendants did not at all challenge the calculations therein detailed. I am satisfied that they raised this issue as a defence without a sufficient basis therefor. Second, they E averred that it was a material and tacit term of the acknowledgement of debt that the amount of $1 500 000 would be paid out of the proceeds of the sale of crops. It is significant that they limited the amount payable from cropping profits only to the $ 1500 000. They did not say so in respect of the other part of the loan. This defence is different from the third which is the alleged verbal variation of the terms of the acknowledgement of debt. The plaintiff denied F that the terms were varied in any way. He drew attention to clause (e) of the acknowledgement of debt which specifically provides that:

"No variation of the terms and/or conditions of this Acknowledgement shall be of any force or effect unless reduced to writing and signed by the Debtor and the Creditor".

This clause was inserted into the acknowledgement of debt, as it usually is G in many similar agreements, to remove the possibility of one of the parties relying or attempting to rely on, or alleging, a subsequent verbal variation of the terms agreed. Although the defendants gave the circumstances in which the alleged variation took place, i.e. the alleged mutual recognition of the disruptive effects of "farm invasions", that alone cannot be sufficient to H defeat the clear written provisions of the acknowledgement of debt. If such

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variation had been agreed upon, there is no reason given by the defendants A why it was not reduced to writing. This suggests that no such variation was ever agreed upon.

The defendants must have realised that by alleging a verbal variation of the terms of the acknowledgement of debt, they were not, on the facts of the case, setting up *a prima facie* defence which would defeat the application. They B then amended their plea by the notice of amendment filed on 14 June 2002 in order to allege a tacit term that the loan would be paid exclusively from cropping profits. How they sought to imply such a term is not clear. They did not allege any facts on which such an implication could be based. Unless they linked this defence to the alleged verbal variation, I do not see how it can stand on its own. Alleging a verbal variation of the acknowledgement of debt C is inconsistent with alleging the existence of an implied term that the repayments would be made from the profits on the crops. These contradictory averments do damage to the defendants' *bona fides* and to the *bona fides* of their defence. It follows that if no such variation was agreed upon, the defendants' allegations as to the disruptive nature of the war veterans' "invasion" of their farm, even if true, are immaterial. So whether the D disruption occurred or not, the defendants are not absolved from liability on that basis. At most the disruptive effects of the "invasions" would only provide a moral basis for the plaintiff to indulge the defendants, if he so wished, in regard to the time of payment. Alternatively the disruptive effects only provide an explanation for the defendants' inability to pay. In either E case, they would not provide, at law, a valid defence to the plaintiff's claim. I reject the defendant's defence as not being *bona fide.* This also means that the debt was due when the summons were issued and further that the performance of the contract did not become impossible for any reason.

It is only in respect of the repayment of the loan of $500 000 that the defendants appeared to have raised a triable issue in their plea. They stated F in para 5 of the plea that this amount was not advanced on the same terms as those contained in the acknowledgement of debt. They surprisingly did not persist with this ground of opposition in their affidavits. Had they done so and had they gone further to indicate on what terms this amount was advanced, I would have been reluctant to grant summary judgment. That G they did not pursue this seemingly valid ground for resisting the application suggests that it was not a *bona fide* defence.

The defendants raised another defence which requires closer analysis. They submitted in the heads of argument filed on their behalf that the acknowledgement of debt was an instrument of debt in terms of the Moneylending and Rates of Interest Act [*Chapter 14:14*] ("the Act") and that H

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A because the acknowledgement of debt contravened s 8 of the Act in regard to the rate of interest applicable it cannot be enforced because it is void for illegality. It was also submitted that as the plaintiff had lent money and charged an exorbitant rate of interest he was approaching this court with dirty hands and was seeking to enforce an illegal contract.

In terms of the definition section of the Act, "lender" includes a moneylender B but not *vice-versa* "Lender" is defined as meaning:

"any person making a loan of money, the cessionary of any right arising under any contract of loan of money and the holder of any instrument of - debt, and includes a money-lender".

The term "instrument of debt" is also defined as including:

C "A negotiable instrument, bond, written contract or agreement or other document containing the terms of any contract or agreement in respect of any loan of money, but does not include any *bona fide* covering bond in so far as it purports to convey security for future advances".

An acknowledgement of debt is clearly an "agreement" or "other document" containing the terms in respect of a loan of money. A deed of surety may not D be such an "agreement" or "other document": see *Mtandwa v Zimbabwe Banking Corporation* 1999 (1) ZLR 445 (H), but that is immaterial in this case. The applicant is a lender. In terms of s 8 of the Act no lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest and if he does so he will be guilty of an E offence and liable to the punishment stipulated

therein. The Act, whilst creating an offence in respect of stipulating or demanding or receiving from a borrower interest at a rate greater than the prescribed rate, does not disentitle the lender from recovering the debt because of such contravention of the law. Yes, the lender may be prosecuted but he can still recover his money at the rate of interest permitted by the Act. It seems to me therefore that the mere F fact of charging a prohibited rate of interest is not a bar to a lender's claim of money lent or advanced. The contract does not become an illegal contract in respect of which the maxim *ex turpi causa non oritur actio* operates since the borrower may recover any excess interest paid in terms of s 11 of the Act. The mere fact of charging a prohibited rate of interest would-also not be a bar to the granting of summary judgment where the defendant or borrower has no G defence to the claim. *See Muleya v Bulle* 1994 (2) ZLR 202 (H). In this case I do not think that the defence raised by the defendants in respect to the rate of interest is such a defence as would defeat an application for summary judgment. The defendants contended that the rate of interest permissible in terms of the Act was 30 percent per annum as prescribed in the Prescribed H Rate of Interest Act [*Chapter 8:10*] and not 40 percent per annum as

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stipulated in the acknowledgement of debt. It is true that the plaintiff had A calculated the amount outstanding, inclusive of interest, using a rate of interest of 40 percent per annum. In the oral submissions made on his behalf it was conceded that having regard to the provisions of the Act, the rate of interest at 40 percent per annum was impermissible. This concession was made in the erroneous belief that the rate prescribed in [*Chapter 8:10*] was B the applicable rate. It was a concession nonetheless. The situation that remained for me to resolve was what to do in view of the plaintiff's concession which was consistent with the only valid basis on which the defendants could have successfully resisted the granting of the application. It would seem wrong to grant summary judgment where the defendants had raised a *prima* facie defence to the plaintiff's claim which was rendered C ineffectual because of the plaintiff's concession at the hearing of the application. It would equally seem wrong to deny the plaintiff the relief that he seeks merely because the defendants had raised a *prima facie* defence which, as it happened, was rendered ineffectual by the plaintiff's concession.

The purpose of the summary judgment procedure is to prevent a plaintiff's claim from being delayed by what amounts to an abuse of the process of the D court. It is for this reason that the law allows the plaintiff to apply for judgment to be entered summarily against the defendant, thereby disposing of the matter without putting the plaintiff to the expense of a trial. It has been made quite clear in several decisions of our courts that the procedure is not intended to shut out a defendant who can show that there is a triable issue E applicable to the claim as a whole from laying his defence before the court. It is a stringent remedy and an extraordinary one in that it allows a judgment to be entered without a trial. Applying the purpose of the summary judgment procedure to this case, it seems to me that there would be no infringement of the basic purpose of the procedure if I were to grant summary judgment. The defendants, as I have found, have no defence to the plaintiff's claim on the F capital sum. They had some defence based on the rate of interest charged. That defence has been rendered ineffectual because of the concession made by the plaintiff as to the correct rate of interest to apply. On a debt of $3 500 000 in capital plus interest the defendants have to the date of hearing, only paid a paltry sum of $375 767 which, as stated by the plaintiff, was appropriated to interest. Whether the plaintiff applied the rate of interest of G 40 percent or of 30 percent per annum, the defendants would still be indebted to the plaintiff in a sum in excess of the capital amount, in respect of which the defendants have, in any case, no defence. In addition the prohibition by statute against the charging of usurious interest is not open to doubt. If I refused to grant summary judgment then the result will be that the matter H

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A would proceed to trial on an issue on which the plaintiff had conceded. There would obviously be no triable issue. On these rather unusual facts I would incline towards granting the application.

Both counsel were not correct as to the prescribed rate of interest in terms of the Act. There is no definition of the words "prescribed rate of interest" in the Act. Counsel were of the view that the prescribed rate of interest referred B to in the Act is the prescribed rate of interest in terms of the Prescribed Rate of Interest Act [*Chapter 8:10*]. In my view they were both wrong. For this reason I invited them to make further written submissions on this point. Miss *Nagar* filed supplementary heads on 31 October, 2002. Mr *Silemani* had not done so by the time of writing this judgment. *Miss Nagar* conceded that she C had been wrong in thinking that the rate of interest applicable in terms of the Act was the rate prescribed in the Prescribed Rate of Interest Act. She also submitted that the prescribed rate of interest in terms of the Act could not now be ascertained. She said that the

Reserve Bank has not, since 1999, issued a rediscount rate and that the rate fixed in respect of bankers acceptances can not be ascertained because that rate is now agreed on a case by case basis. She D urged me to apply the rate of interest prescribed by the Prescribed Rate of Interest Act.

The position at law as I see it is that in the absence of a definition of the words "prescribed rate of interest" in the Act regard must be had to s 12(1) of the Interpretation Act [*Chapter 1:01*] which provides that:

E "Definitions or rules of interpretation contained in an enactment shall apply to the construction of the provisions of the enactment which contain those definitions or rules of interpretation as well as to the other provisions of the enactment".

The Prescribed Rate of Interest Act contains a definition of "prescribed rate" as meaning "the rate of interest prescribed in terms of section *seven"* of that F Act. And currently the prescribed rate of interest in terms of that Act is 30 per cent per annum. That definition applies only to the provisions of that Act and not to the provisions of the Moneylending and Rates of Interest Act. The Minister prescribes the rate of interest in regulations made in terms of s 22 of the Act. By virtue of the Moneylending and Rates of Interest Regulations 1985 (SI 53 of 1985) as amended by the Moneylending and Rates of Interest G (Amendment) Regulations, 1993 (No 3) (SI 126 of 1993), the Minister prescribed the rate in s 4(1) as follows —

"No lender shall, in respect of any loan of money, stipulate for, demand or receive from a borrower interest at a rate greater than —

(d) a H rate which is equivalent to —

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(i) the rediscount rate as fixed by the Reserve Bank from time to time; A or

(ii) the rate fixed by commercial and merchant banks in respect of bankers acceptances;

whichever is the higher, plus a maximum of three per cent for administrative costs where the total amount lent exceeds in the aggregate one hundred thousand dollars". B

That is the rate which the plaintiff was permitted to charge. No information was placed before me as to what the rediscount rate or the rate fixed for bankers acceptances were, except as submitted by Miss *Nagar,* that these rates cannot be ascertained now. I am therefore unable to make a specific order in respect of that rate of interest. It will, in my view, suffice merely to C order that the rate of interest shall be that prescribed by SI 53 of 1985 as amended. I am comfortable to make such an order because the rate of interest is not subject to debate. It must be ascertainable because it is stipulated by statute. It cannot be a basis for denying summary judgment in a case in which the defendants have otherwise no *bona fide* defence to the plaintiff's claim and the plaintiff has, though grudgingly, conceded that the rate of interest D should be a rate other than the rate he had stipulated for.

In view of the plaintiff's substantial success I would order the defendants to pay the costs as agreed in the acknowledgement of debt.

The plaintiff also sought an order that the property be declared specially executable. In terms of the deed of surety the second and third defendants E agreed to register a mortgage bond in order to provide the plaintiff with real security for the obligations assumed by them. No such mortgage bond was registered against the property. Whilst this part of the order sought by the plaintiff cannot be granted for the reason that a mortgage bond was never registered as contemplated by the parties, that the plaintiff sought such an order cannot disentitle him from being granted the relief he sought on the F cause of action disclosed on the papers. In any event, the prayer to declare the property specially executable goes to the enforcement of the judgment and not to the merits of the case.

It will appear as if, in this case, I have somewhat disregarded the law in regard to summary judgment applications. If I have done so, which I think I have G not, it is simply because on the facts there is no *prima facie* defence to the plaintiff's claim on the capital sum and because defence raised in respect of the rate of interest applicable only calls for the recalculation of the total sum owing as a purely arithmetical exercise. Additionally both parties were at a loss as to what the correct rate of interest should be and because that rate is specified by statute it does not create a triable issue between the parties. As H

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A I have already stated there would be no point in allowing this matter to proceed to trial on an issue on which the answer is provided by statute and which answer both parties will have to accept as binding. If indeed the rate of interest can no longer be ascertained as stated by Mss *Nagar,* which position I cannot verify independently, then either of the parties is hereby granted leave to apply, by way of a chamber application to me, to determine B the interest rate applicable.

I will accordingly enter judgment with costs on the legal practitioner and client scale in favour of the plaintiff against the defendants jointly and severally the one paying the others to be absolved for the capital sum plus interest thereon calculated from 9 May 2002 (as prayed for in the draft order) C at the rate prescribed in terms of s 4(1)(d) of the Money lending and Rates of Interest Regulations 1985 (S I 53 of 1985) as amended to the date of payment in full. The defendants shall on the same basis pay collection commission in accordance with by-law 70 of the Law Society of Zimbabwe By-Laws 1982.
D *Stumbles & Rowe,* legal practitioners for applicant
Byron Venturas & Partners, legal practitioners for respondents

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/LEIGHTON v EAGLE INSURANCE CO LTD & ORS 2002 (2) ZLR 592 (H)

[zRPz]LEIGHTON v EAGLE INSURANCE CO LTD & ORS 2002 (2) ZLR 592 (H)
2002 (2) ZLR p592

Citation	2002 (2) ZLR 592 (H)
Case No	Judgment No. HH-193-02
Court	High Court, Harare
Judge	Smith J
Heard	6 November 2002
Judgment	6 November 2002
Counsel	*F Girach,* for the plaintiff *R Harvey,* for the defendants
Case Type	Civil action
Annotations	No case annotations to date

[zFNz]Flynote
Damages — assessment of — patrimonial loss — cost of repairs — inflation causing massive rise in cost of repairs — effect on assessment of D damages
[zHNz]Headnote
The plaintiff was injured in a motor cycle accident which occurred in 1996. He was the driver of the motor cycle; the other vehicle was driven by the second defendant, who was. at the time driving in the course of his E employment. The first defendant was the insurer of the motor vehicle. The plaintiff claimed for, among other things, the cost of repairs. The defendant agreed to pay for repairs to restore the motor cycle to the satisfaction of the plaintiff. The sum of $50 000 was spent on the repairs, but the plaintiff was not satisfied with them. He returned the motor cycle and claimed the sum of over $850 000, being the current F cost of the spares. The 1996 value of the

motor cycle was less than $95 000. The summons was issued in 1997 but the defendant, the insurer of the driver's employer, only pleaded in 2002. It offered $150 000 for the replacement value of the motor cycle. During the intervening period, there had been rampant inflation in Zimbabwe, G around 160 per cent, and by 2002 the spares would cost over 10 times the 1996 value of the motor-cycle.
Held, that delictual damage is ordinarily calculated as at the date of the delict. The normal approach would be that if the repairs to the motor- cycle cost more than the market value of the motor-cycle, then the motor-cycle would be beyond economic repair and all the plaintiff H
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A would be entitled to as compensation would be the 1996 market value of the motor-cycle. However, the cost of repairs cannot be used as a yardstick in circumstances in which it would not be an appropriate method of assessing damages. Had the defendant pleaded in a reasonable time, its offer would also have been reasonable; but in view of the high levels of inflation that had occurred in the interim, the offer was not a B reasonable one. A departure from the usual yardstick of the salvage value of the motor cycle was required. The plaintiff would be awarded a sum based on the current cost of spares.
[zCAz]Cases cited
C *Enslin v Meyer* 1960 (4) SA 520 (T)
Erasmus v Davis 1969 (2) SA 1 (A)
Parish v King 1992 (1) ZLR 216 (S)
Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd 1975 (2) SA 420 (A)
[zCIz]Case information
D *F Girach,* for the plaintiff
R Harvey, for the defendants
[zJDz]Judgment
Smith J: The second defendant, whilst driving a vehicle belonging to the third defendant and in the course of his employment, collided with a motor- E cycle belonging to, and being ridden by, the plaintiff. The accident occurred on 27 July 1996. The second defendant was at fault and liability is not disputed. The plaintiff issued summons on 31 January 1997, claiming damages for personal injuries and for repairs to his motor-cycle. The claim for personal injuries has been settled but the parties cannot agree on the quantum for the repairs to the plaintiff's motor-cycle. At the pre-trial F conference, it was agreed that the parties would prepare heads of argument.
Initially, the plaintiff claimed $149 223 for the cost of repairs. Thereafter, negotiations ensued which resulted in an agreement that the motor-cycle would be repaired by a particular firm, using second-hand parts. It was agreed that the first defendant, as insurer of the third defendant, would pay for the repairs in an attempt to restore the motor-cycle to its original condition to the G plaintiff's satisfaction, failing which the first defendant would pay the market value of the motor-cycle and keep the salvage. The motor-cycle was repaired at a cost of $50 000 but the plaintiff was not satisfied as to the condition of the motor-cycle. He has returned the motor-cycle and has amended his summons to claim $864 429 as being the cost of new parts for H repairs.
2002 (2) ZLR p594
Smith J
In its plea, which was filed on 14 March 2002, the first defendant averred that A the pre-accident value of the motor-cycle was less than $95 000.
Mr *Girach* accepted that delictual damage is ordinarily calculated as at the date of the delict, as is laid down in *Parish v King* 1992 (1) ZLR 216 (S), but submitted that the objective of the court should be to assess an amount which is fair to the plaintiff and to the defendant. He argued that the underlying B principle behind damages in delict is to place the plaintiff in the position he would have been in had the delict not occurred. It would be grossly inequitable to fix blindly, in every case, that the date for assessing damages is the date of the delict. The court can take judicial notice of the rampant inflation in the country. It is officially said to be in excess of 110 per cent, but economists put the figure closer to 160 per cent. The prescribed rate of C interest is 30 per cent, which is nowhere near the rate of inflation. It would be most unfair to the plaintiff to award him damages assessed at the costs prevailing in 1996 with interest at the prescribed rate from that date. It would be much fairer, and more realistic, to fix damages at today's costs.
Mr *Harvey* submitted that the pre-accident value of the motor-cycle is the D yardstick. If the repairs to the motor-cycle cost more than the market value of the motor-cycle, then the motor-cycle is beyond economic repair and all the plaintiff would be entitled to as compensation is the 1996 market value of the motor-cycle — see Visser and Potgieter Law *of Damages* p 333; *Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 428F-G and *Parish's* case *supra.* The reasonable cost of repairs is usually E used as a means of estimating damages, provided they do

not exceed the pre-accident market value of the property or the diminution in value which is due to the delict. See *Erasmus v Davis* 1969 (2) SA 1 (A) at 18.

In Visser and Potgieter *op cit* the learned authors deal with the question of quantum of damages for patrimonial loss caused by certain forms of delict at p 329 *et seq.* They say that the basic principle is that the general measure of F damage caused by injury to property is usually the diminution in its market value. The criterion of market value is employed to estimate loss, and this is measured by a comparison of the market value before and after the damage- causing event. The plaintiff should prove both these values but, in practice, that method is not often used because it is simpler and more realistic to rely G on the reasonable cost of necessary repairs as a measure of damages. However, the learned authors go on to say at p 330-331:

"There are, however, three instances where the cost of repairs cannot serve as a measure of damage and damages:

(a) Where the cost of repairs exceeds the pre-accident (market) value of the property. Here the cost of repairs is more than what the plaintiff H

A should reasonably obtain (because it is non-economical) and the basic method of comparison of values should be used.

(b) Where the cost of repairs exceeds the diminution in value of the property. Here, too, the cost of repairs is more than what the plaintiff is entitled to.

(c) Where the repairs, though restoring the property to its pre-accident B condition, do not also restore its pre-accident market value. In this situation the cost of repairs is too low to serve as a yardstick for full compensation.

In *Erasmus v Davis* the majority of the court held that evidence of the reasonable costs of repairs constitutes *prima facie* proof of the diminution in value of property and that it is for the defendant to cast doubt on the C validity of this measure of loss."

In *Enslin v Meyer* 1960 (4) SA 520 (T), in dealing with the quantum of damages, Galgut J said at 522H-523D:

"McKerron in his *Law of Delict* 5 ed at p 108, says:

'So if a thing has been wrongfully damaged, the ordinary measure of damages will be the difference between the market value of the thing D immediately before the wrong was committed and the market value of the thing after the commission of the wrong. But it is to be observed that there is no objection to taking as the measure the cost of restoring the thing to its original condition, provided such cost does not exceed the diminution in value of the thing'.

This statement of the law by the learned author is supported by authority— E see *Trotman and Anor v Edwick* 1951 (1) SA 443 (A) at p 449, where van den Heever JA says:

' The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.'

F In *G & M Builders Supplies (Pty) Ltd v South African Railways & Harbours* 1942 TPD 120, Greenberg JP at p 121 says:

' I think it is clear from the authorities, some of which are referred to in *Scrooby v Engelbrecht* 1940 TPD, too, that in cases of this kind it is not necessary for a plaintiff to have any repairs effected at all: he is entitled G to claim from the party who has negligently injured his property the difference in value between that property before and after the injury. But a very common method of arriving at this difference is to prove the amount that it would cost to reinstate the article, and it has been held in the case to which I have referred that what the plaintiff is entitled to is a reasonable amount for the repairs. He need not have the repairs effected at all, and his damages are assessed as at the time when the tort H was committed'.

There is no need to quote further authority. In delict the true measure of A damage is as stated by McKerron. In many cases in practice a convenient way of assessing this damage is to accept the necessary and reasonable costs of repairs. A very old car worth say £50 may well cost, because of its age, £200 to repair. It could never be suggested that a court could award the owner of the car more than £50 — a moment's reflection will show that if the cost of repairs was regarded as the basis on which damage B should be assessed in all cases, the results could often be ruinous to the defendant."

Muller AJA in *Erasmus v Davis* 1969 (2) SA 1 (A) at 21D said:

"It is, of course, correct to say, as I have already stated, that cost of repairs is often used as a yardstick to measure damages but, as I have also shown, it cannot be used as a yardstick in

circumstances in which it would not C be an appropriate method of assessing damages. It cannot be a proper yardstick in a case where it is not economical to repair the vehicle and the plaintiff claims the estimated cost of repairs without bringing into account the salvage value of the vehicle. Thus, in the circumstances of the present case, an award of damages in a sum of R771.01 as being the cost of repairs would be excessive if the salvage value of the vehicle was D in excess of R429; because the total of the two amounts would then exceed the pre-collision value of the car, which would mean in effect that plaintiff would then receive more than her loss."

Clearly, a delay in instituting proceedings may affect the amount of damages awarded. In *Parish's* case *supra* at 227CD McNally JA said:

"The English cases have made the point that it is not equitable for a E plaintiff to delay the institution of proceedings and then seek to benefit from the fact that the value of the disputed property has been considerably enhanced by the passage of time. In this case it seems that Mrs Parish first learnt of Mr Harding's claim to ownership in May 1986. Yet her claim for damages in the sum of $80 000 was filed only in February 1988, and as based on a valuation as at 15 February 1988. Following the principle F in *Sachs* case *supra,* I would consider that there has been an inordinate delay in instituting proceedings, resulting in the excessive inflation of the claim to the disadvantage of Mr King".

The date of the accident in which the plaintiff's motor-cycle was damaged was 27 July 1996. He issued summons on 31 January 1997. The first G defendant's plea was filed on 14 March 2002, more than five years after the summons was served on it. In its plea, it averred that the pre-accident value of the motor-cycle was less than $95 000. However, it tendered $150 000 for the replacement value of the motor-cycle. Having regard to the erosion in the value of the Zimbabwe dollar since July 1996, and in particular the very steep erosion in the last two years, I consider that it would be inequitable to fix the H

2002 (2) ZLR p597

Smith J

A diminution in value of the motor-cycle at $150 000. If one accepted that the value of the motor-cycle in July 1996 was $75 000, that would mean that the first defendant is now offering double that amount. Had this matter come to court reasonably soon after summons was issued, the court would have fixed the damages due to the plaintiff as being $75 000 or thereabouts. Had the first defendant made the offer of $150 000 within a year or two after summons was B issued, the court would have accepted that as reasonable. However, in the light of the high levels of inflation in this country over the last two years, such an offer could not be accepted as reasonable. Since the first defendant only filed its plea on 14 March 2002, more than five years after the summons was issued, I consider that a departure from the normal yardstick is required. The C present day values of goods such as motor-cycles have escalated tremendously since 1996. I consider that in all the circumstances, the claim by the plaintiff is reasonable, having regard to the value of things today.

It is ordered that the defendants jointly and severally, the one paying the other to be absolved, pay the plaintiff:

1. $864 429 with interest thereon at 30 per cent *per annum* from the date D of this order to the date of payment;
2. costs of suit.

E Gill, Godlonton & Gerrans, *legal practitioners for plaintiff*

Granger & Harvey, *legal practitioners for defendants*

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[zRPz]S v BINGA 2002 (2) ZLR 598 (H)

2002 (2) ZLR p598

Citation 2002 (2) ZLR 598 (H)

Case No	Judgment No. HH-196-02
Court	High Court, Harare
Judge	Makarau J
Heard	6 November 2002
Judgment	6 November 2002
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure — review — alteration of sentence on review — community service — increase in number of hours to level set out in D guidelines —not permitted
Criminal procedure (sentence) — general principles — community service — number of hours of community service to order —guidelines set by National Committee on Community Service — adherence to — when courts may depart from guidelines E
[zHNz]Headnote
Where a magistrates court has erroneously set a lower period of community service than set out in the guidelines, a court on review may not increase the period to what it ought to have been, as that would amount to an increase in sentence
When imposing a period of community service as an alternative to a period F of imprisonment, magistrates courts should generally adhere to the guidelines set by the National Committee on Community Service, but may depart from them for a good reason, which must be stated. A failure to do so may amount to a misdirection, as it gives rise to the inference that the court has acted arbitrarily. G
[zCAz]Cases cited
S v Chikamba 2000 (2) ZLR 311 (H)
S v Mugebe 2000 (1) ZLR 376 (H)
S v Sabawo HH-189-94
S v Tachiona 1994 (2) ZLR 402 (H) H
2002 (2) ZLR p599
Makarau J
[zSTz]Legislation considered A
Magistrates Court Act [*Chapter 7:10*], ss 57(1) & 58(1)
High Court Act [*Chapter 7:06*], s 29(2)(b)
[zJDz]Judgment
Makarau J: On 20 April 2002, the accused went to a house in Glen View, B Harare, and stole a 50kg bag of sweet potatoes, and a 20kg bag of ground nuts, all valued at $3 950. As chance would have it, the complainant, a trader in potatoes and groundnuts, woke up around 3.20 am to go to Mbare Musika to purchase more stock. He came upon the accused carrying a heavy load. He got suspicious and checked upon his stocks of potatoes and groundnuts which he found missing. He woke up the neighbours and together they gave chase. C The accused eluded them but was subsequently arrested and some of the sweet potatoes valued at $300 were recovered.
When arraigned before the magistrates court, the accused pleaded guilty to one count of theft. He was duly convicted and sentenced to six months' imprisonment with labour, wholly suspended on three different conditions. Three months were suspended on condition the accused performed ninety D hours of community service, two months on condition the accused paid compensation to the

complainant in the sum of $3 650 by 30 July 2002 and one month was suspended for five years on condition the accused did not within that period commit an offence for which he would be sentenced to a term of imprisonment.

E The record of the proceedings was sent to a scrutinising magistrate in accordance with the provisions of s 58 of the Magistrates Court Act [*Chapter 7:10*] ("the Act"). The scrutinising magistrate then addressed a minute to the registrar of this court as follows:

"Kindly place the attached record of proceedings before a reviewing Judge together with the following comments:

F The trial magistrate imposed 90 hours of community service as being equivalent to three months imprisonment. He has conceded the mistake he made.

The record is referred to his Lordships *(sic)* for correction".

I note that the scrutinising magistrate did not query why the record of proceedings G was referred for scrutiny outside the time frame stipulated in the Act. The accused was sentenced on 9 May 2002 and the scrutinising magistrate only received the record of proceedings on 7 August 2002, almost three months later. Section 58 of the Act stipulates that the record must be submitted for scrutiny not later than one week after the determination of the case.

It appears to me that the legislature did not stipulate a time frame for scrutiny H and review for the sake of it. The time frame stipulated is part of the protection

that is afforded the accused person by the review and scrutiny procedure, A which, in my view, is a commendable feature of our criminal law system. The procedure will be rendered meaningless if records are submitted for scrutiny outside the stipulated time limit. In some cases, the sentence would have been served before it is certified as being in accordance with real and substantial justice. It is therefore imperative that clerks of court and the scrutinising B magistrates strictly adhere to the time limit provided for in ss 57(1) and 58(1) of the Act in the interests of safeguarding the rights of an accused person. Failing to do so is failing in delivering justice.

The scrutinising magistrate and the trial magistrate are both of the view that the failure to compute the number of hours equivalent to a term of imprisonment in terms of the grid of hours supplied by the Zimbabwe National Committee C on Community Service is such an error as needs rectification by a judge of the High Court.

The grid of hours is a guideline only. It does not supplant the discretion of the sentencing court to mete out a punishment that suits both the offence and the offender. D

In the case *S v Tachiona* 1994 (2) ZLR 402 (H) Chatikobo J had to deal with a situation where the sentencing court had imposed 180 hours of community service instead of 120 hours as laid down in the grid. The sentencing court was of the view that what it did was proper. At 409B Chatikobo J stated that:

"The magistrate is undoubtedly correct in this regard. I never meant to suggest that a court must slavishly adhere to the guidelines, as indeed E guidelines are not intended to supplant the discretion of a sentencing court."

He then proceeded to refer to an earlier decision of his where he had made similar remarks: see S v *Sabawo* HH-189-94. In that case he noted that there is no hard and fast rule about the guidelines as a court is free to depart from F them in appropriate cases, but that does not mean that such a court is free to set community service hours arbitrarily. There must be a basis for doing so.

In my view, the point made by Chatikobo J in these two cases and made in the cases that have followed them is that the guidelines by the National Committee on Community Service must be adhered to, but a sentencing court may depart from the guidelines for a good reason. Thus where the sentencing G court has cause for departing from the guidelines, it must give reasons for such departure. A failure to do so may amount to a misdirection as it gives rise to the inference that the court has acted arbitrarily. On this reasoning, I would venture to suggest that where, in error, a sentencing court departs from the guidelines, it cannot be said to have acted arbitrarily. It has acted in error. In the matter before me, the sentencing court did not deliberately set out to H

A depart from the guidelines. Thus no reasons were due from it. The departure was due to an error in calculation. The sentencing court, without realising it, used the hours set in the guidelines before the guidelines were revised. Thus the calculation was not arbitrary but was based on a grid since revised. I also note that the departure from the grid of hours was not substantial. Instead of using thirty-five hours for each month of imprisonment, the sentencing court B used thirty hours.

The issue that arises is whether the error in the matter before me is such that the resultant sentence must be held not to be in accordance with real and substantial justice. I say so because a

scrutinising magistrate and a reviewing judge can only decline to certify a sentence if such is not in accordance with C real and substantial justice. In my view, this cannot be. To hold that this error vitiates the sentence is to elevate the guidelines to an immutable rule of law. I have already indicated that I do not regard the departure from the grid of hours in the matter before me to be so substantial as to constitute a misdirection. The sentence imposed upon the accused was in my view properly assessed even though it appears to me to be on the stiff side. The term D of imprisonment was suspended on proper conditions: S v *Mugebe* 2000 (1) ZLR 376 (H). In the premises, I would not hold that equating three months imprisonment to 90 hours of community service is such an error as renders the sentence not to be in accordance with real and substantial justice.

Although I am confirming the proceedings and sentence in this matter, I E intend to briefly raise the issue of whether or not correcting an error such as the one in the matter before me amounts to increasing the punishment imposed upon the accused person.

The accused person was sentenced to a term of imprisonment. Part of that term of imprisonment was suspended on condition the accused performed community service. Thus the sentence imposed on the accused is primarily F a term of imprisonment and not a direct community service order which is also permissible under the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The term of imprisonment has since been incorrectly converted to hours of community service. The correction of the number of hours would not affect the primary sentence imposed upon the accused, which remains at three months' imprisonment. However, the accused person G was actually ordered to perform 90 hours of community service in lieu of the prison term. The effective sentence on the accused is the performance of community service. It is the performance of community service that is his penance for the wrong he has done society.

H The accused should have been ordered to perform 105 hours. Were I to

correct the judgment, I would have to order that the accused performs an A additional 25 hours of community service.

Our law regards any alteration to the sentence that is more burdensome than the sentence imposed as an increase in the sentence: see the comments of Gillespie J in *S v Chikamba* 2000 (2) ZLR 311 (H) at p 314G. Once it is accepted that the performance of community service is the effective sentence B in this matter, then, in my view, any alteration to the community service hours is an increase in the sentence imposed upon the accused. It appears to me that an increase in the number of hours is clearly more burdensome even if it is to correct a patent error. An increase in punishment is prohibited by statute: see s 29 (2)(b) of the High Court Act [*Chapter 7:06*]. On the basis of the foregoing, I would have declined the invitation by the C scrutinising magistrate to correct the error by the sentencing court, had I found that the error was one that rendered the sentence not to be in accordance with real and substantial justice.

In the result, the proceedings before the trial magistrate are hereby confirmed. D

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/UPPER CLASS ENTERPRISES (PVT) LTD v OCEANER (PVT) LTD & ORS 2002 (2) ZLR 603 (S)

[zRPz]UPPER CLASS ENTERPRISES (PVT) LTD v OCEANER (PVT) LTD & ORS 2002 (2) ZLR 603 (S)
2002 (2) ZLR p603

Citation 2002 (2) ZLR 603 (S)

Case No Judgment No. S-88-02

Court Supreme Court, Harare

Judge	Chidyausiku CJ, Cheda JA & Gwaunza AJA
Heard	18 June 2002; 7 November 2002
Judgment	7 November 2002
Counsel	*I E G Musimbe,* for the appellant *W J Mutezo,* for the first and second respondents
Case Type	Civil appeal
Annotations	Link to case annotations

[zFNz]Flynote
D **Contract** —*pactum commissorium* — what is — invalidity
[zHNz]Headnote
A *pactum commissorium* is *not enforceable in our law. While South Africa may have moved towards allowing exceptions to the rule that a pactum commissorium is invalid and unenforceable, there are no authorities to suggest that such exceptions have become part of our law in Zimbabwe.*
[zCAz]Cases cited E
Baines Motors v Piek 1955 (1) SA 534 (A)
Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor 1994 (1) ZLR 310 (H)
Mapenduka v Ashington 1919 AD 343
Sun Life Assurance Co of Canada v Kuranda 1924 AD 20
F *Van Rensburg v Weiblen* 1916 OPD 247
[zCIz]Case information
I E G Musimbe, for the appellant
W J Mutezo, for the first and second respondents
[zJDz]Judgment
G **Cheda JA:** The appellant is a company duly registered with limited liability according to the laws of Zimbabwe. The first respondent is a company duly registered with limited liability according to the laws of Zimbabwe. The second respondent is the managing director of the first respondent and owner of immovable property known as No 4 of Lot 2 of Lot 54A, Block A, H Avondale.
2002 (2) ZLR p604
Cheda JA
I will refer to the parties as Upper Class, Oceaner, Mbalekwa and the A Registrar.
In June 1998 Mbalekwa entered into an agreement with Upper Class in which Upper Class was to purchase for Oceaner air tickets for the sum of $321600. In addition Upper Class was to pay $45 000 to the National Arts Council of Zimbabwe on behalf of Oceaner. This brought Oceaner's total indebtedness B to Upper Class to $366 600.
The above arrangement was reduced to a written agreement wherein Mbalekwa's property at Block A Avondale ("the property"), was mortgaged to the appellant as security for due payment of the above amount. Part of the written agreement dated 24 June read as follows:
"2:1. The Purchaser shall pay the amounts due to the Seller as set out in C Paragraph 1 of the agreement by way of two instalments.
The first instalment in the sum of $321 600 shall be paid on or before Saturday 27th June 1998. The second instalment in the sum of $45 000 shall be paid on or before Monday 29th June 1998."
The agreement also provided that in the event of default in payment the D amounts would attract interest of 36 per cent *per annum* until date of payment. On signing the agreement Mbalekwa had to hand over the title deeds to the said immovable property. Upper Class was entitled, in this agreement, to have the mortgaged property transferred to it at an agreed price of $350 000 and Mbalekwa and Oceaner would still be liable to pay in cash the difference of $16 000. Mbalekwa and Oceaner failed to pay within the E agreed period.
In the meantime, Mbalekwa and Oceaner had issued summons against Upper Class claiming that the agreement referred to above be set aside and an order be issued declaring that the correct amount

chargeable by Upper Class is $197 400 and that a sum of $98 700 be set off against the claim. An interdict F was also obtained against Upper Class to stop it from taking transfer of the property, as the respondents said that it was against public policy for Upper Class to resort to what they called "self help" which removed the case from the jurisdiction of the court.

When pleadings were closed, Mbalekwa and Oceaner failed to attend a pre- trial conference and were held to be in default. Their claim was dismissed G with costs. In addition, the court ordered that Upper Class be given leave to enrol its counter-claim on the unopposed roll and file heads of argument in support of its claim that the agreement was valid and enforceable.

At the hearing of the application the court *a quo* found that the agreement was a *pactum commissorium* and was invalid and not enforceable and ordered H

2002 (2) ZLR p605

Cheda JA

A judgment for the amount owed instead. The appeal is against this order of the court *a quo.*

A *pactum commissorium* has been defined as "a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full B property in the thing will irrevocably pass to the creditor in payment of the debt." See *Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor* 1994 (1) ZLR 310 (H) at 314B-C, quoting *Van Rensberg v Wieblen* 1916 OPD 247 at 252. The reasons why a *pactum commissorium* should not be enforced in our law are discussed in *Mapenduka v Ashington* 1919 AD 343 at 351. In short, the authorities say that a *pactum commissorium* is not enforceable in our law. C See also *Sun Life Assurance Co of Canada v Kuranda* 1924 AD 20 at 24; *Baines Motors v Piek* 1955 (1) SA 534 (A).

The appellant submitted that despite the general policy that a *pactum commissorium* is invalid, there should be exceptions to the policy where the creditor gives the debtor a fair price for the pledged goods. He cited Silberberg & Schoeman *The Law of Property* (3rd ed by Kleyn & Boraine) D in support of his argument. The appellant agreed that it was only South African authorities that now seem to accept exceptions to the rule that a *pactum commissorium* is invalid but can be held to be valid where the creditor gives the debtor a fair value for the mortgaged or pledged property. It asked this court to make the same exception as the value was agreed in this case and E it argued that it was a fair value. I do not agree. The value in this case was given by an evaluator as being between $340 000 and $370 000. This was just an estimate. There is nothing to show that the value was compared with values of other similar flats of the same size and in the same locality. It is an unsatisfactory evaluation.

Chiweshe J, who presided over the trial, had this to say: *

F "To say that the debtor entered into the agreement willingly and voluntarily or that a fair evaluation of the property was agreed to is to miss the point altogether. The point, that the fairness and volition of the agreement is itself in doubt, considering the dire position in which the debtor often finds himself in cases of this nature.

Accordingly, I am reluctant to hold the agreement valid and enforceable. G In any event, the alternative remedy sought, that of a monetary judgment, will meet the justice of the case."

I see no fault with this reasoning in view of the authorities referred to earlier in this judgment.

2002 (2) ZLR p606

Cheda JA

While South Africa may have moved towards accepting exceptions to the A rule that *a pactum commissorium* is invalid and unenforceable, there are no authorities to suggest that such exceptions have become part of our law in Zimbabwe.

A further important point made in *Mapenduka's* case, *supra,* is that an exception can be made provided the arrangement meets the requirement that B the fair price is agreed at the time that the debt is due, not at the time the property or thing is pledged. The debtor should be in a position to redeem the property pledged when the time for payment arrives. In *Mapenduka's* case, *supra,* the creditor advised the debtor when the debt was due. The debtor said he had no money to pay. The creditor then advised the debtor that in that case the debtor would keep the pledged oxen as his. C In the present case, the value of the flat was agreed to at the time of the pledge and not when the debt was due. By the time the debt was due it was disputed by the debtor and there was, therefore, no agreement on the fair value which by then could have appreciated.

The debt itself was also disputed as the debtor questioned its legality. D

There is a possibility that the debtors in this case could be prejudiced by the unsatisfactory evaluation of the property. There is no reason why the creditor, Upper Class, should insist on taking transfer of the property instead of the amount owed together with interest.

Mr *Mutezo* advised that his client Mbalekwa was able to pay. However, up E to the hearing of this appeal no tender of payment was made. His clients were allowed to be before this court to argue

only on the issue of the *pactum commissorium.* They did not dispute the fact that money was owed to the appellant. Although they have succeeded in the appeal, it has not been shown that the appellant would have refused to accept payment if the admitted amount was tendered. In the circumstances, although they succeeded I am of F the view that they should not be entitled to costs as the other party would still have had to come to court to recover their money.
Accordingly, I make the following order:
1. The appeal is dismissed.
2. Each party is to pay its own costs. G
Chidyausiku CJ and Gwaunza AJA concurred
I E G Musimbe & Partners appellant's legal practitioners
Mutezo & Partners, first and second respondents' legal practitioners H

* *See Oceaner & Anor* v *Upperclass Enterprises (Pvt) Ltd & Anor* 2001 (2) ZLR 130 (H) at 132 F-G

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v NYAMIMBA 2002 (2) ZLR 607 (H)

[zRPz]S v NYAMIMBA 2002 (2) ZLR 607 (H)
2002 (2) ZLR p607

Citation	2002 (2) ZLR 607 (H)
Case No	Judgment No. HH-204-02
Court	High Court, Harare
Judge	Hlatshwayo J & Guvava J
Heard	8 November 2002
Judgment	8 November 2002
Counsel	Details not supplied
Case Type	Criminal appeal
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure (sentence) —common law offences —rape —on young D victim —appropriate sentence
[zHNz]Headnote

The 44 year old appellant was convicted of the rape of a six year old child and sentenced to nine years' imprisonment, of which two years were suspended on conditions. He appealed against both conviction and sentence.

E *Held,* that complainants in sexual cases are traumatized by the act of rape. Further trauma, having far-reaching psychological effects on rape victims, can occur when, as *in casu,* the complainant is victimised by other persons because of the rape. A rape perpetrated on a young girl should attract a sentence of at least 10 to 12 years' imprisonment.

[zCAz]Cases cited F

S v Banana 2000 (1) ZLR 607 (S)
S v Chidodo HH-78-98
S v Mhlanga 1987 (1) ZLR 70 (S)
S v Mufudza 1982 (1) ZLR 271 (S)
G *S v Phiri* HH-219-93
S v Sidat 1997 (1) ZLR 487 (S)
S v Torongo S-206-96

[zJDz]Judgment

Guvava J: At the hearing of this matter we dismissed the appeal against both conviction and sentence and indicated that our reasons would follow. These are the reasons.

2002 (2) ZLR p608
Guvava J

This is an appeal against the conviction and sentence imposed by the regional A magistrate sitting at Chitungwiza on 17 September 2001.

The appellant pleaded not guilty to one count of rape but was convicted and sentenced to nine years' imprisonment of which two years were suspended on the usual conditions of good behaviour.

The facts upon which the appellant was convicted may be summarised as B follows. On 21 March 2001 the complainant, who was about six years old at the time, was playing with her friends at Mashanda Farm in Beatrice, where she resides with her family. The appellant, who was the complainant's neighbour, called the complainant to his house and invited her inside. He thereafter closed the door and had sexual intercourse with the complainant once while she was lying on the floor. The appellant gave the complainant C some sweets and told her not to report what had happened to anyone. The complainant did not report the incident. On the following day, the complainant's father was passing near a place where the complainant was playing with her friends. He heard her friends jeering at her and saying that she was appellant's wife. He called the complainant and questioned her and D she told him that the appellant had raped her. A report was made to the police and the complainant was later taken to a doctor for examination. The medical report on the complainant's condition was produced. The doctor observed that the complainant's hymen was intact but that the upper half of the vestibule was inflamed (red and oedematous). He also observed bruises on the vestibular roof and urethral mound of the complainant. With regards to E whether penetration was effected he stated as follows: "most likely rear intracrural insertion with friction outer vestibule — sexual molestation without penetration". The doctor also reported that the young girl was not sexually active. The complainant's birth certificate was also produced and shows that she was aged about nine years at time of the offence.

The appellant has challenged the conviction on the grounds that he should not F have been convicted of rape as the medical report does not show that penetration was effected, as the hymn was intact. He also stated that he never raped the complainant and that all the witnesses were lying against him. In respect of the sentence, he stated that the sentence was so excessive that it induced a sense of shock. G

The trial magistrate accepted the evidence of the State witnesses and rejected that of the appellant. In her judgment the magistrate said in regard to the complainant's evidence:

"The complainant gave evidence using the victim friendly court facility. Considering her age - that is the age of 6 - her evidence was remarkable. She vividly recalled what transpired. She used the victim friendly court H

2002 (2) ZLR p609
Guvava J

A dolls to demonstrate an act of sexual intercourse. Accused person was given an opportunity to cross-examine the complainant after the complainant testified. Accused person indicated that he had no questions to put to the complainant after purposes of cross-examination were explained to him. Accused person did not dispute complainant's story. This was a clear indication what the complainant testified was the truth".

B The trial court went further and found that the complainant's evidence was credible and believable in all material respects. The trial court also found that the evidence of the complainant was

corroborated by the other evidence which was before the court. It was submitted on behalf of the respondent that- the approach by the trial court was in accordance with the well established rule which requires judicial officers to warn themselves of the dangers of C convicting on the uncorroborated evidence of certain categories of witnesses, such as complainant's, in sexual offences. This approach was adopted in our courts in the landmark decision of *S v Mupfudze* 1982 (1) ZLR 271 (S) where the two stage test was applied and approved. This approach was premised on the basis that there was an inherent danger in relying on the uncorroborated testimony of such complaints. However, this approach is no longer part of our D law. In the case of S v *Banana* 2000 (1) ZLR 607 (S) the Supreme Court, after examining sexual cases in various jurisdictions, including South Africa and Namibia, said at 614:

"It is my opinion that the time has now come for our courts to move away from the application of the two-pronged test in sexual cases and proceed E in conformity with the approach advocated in South Africa. ... I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. Yet I would emphasize that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully."

Thus, once a trial court finds, as it did in this case, that the evidence of F complainant was clear and satisfactory in every material respect and that the witness was credible, there was no requirement that her evidence be corroborated by other evidence.

According to the decision in *Banana*'s case *(supra),* a court making such a finding must carefully examine all the evidence in relation to the alleged G sexual offence and, if satisfied, may convict the accused just as it would in any other case.

In this case there was ample evidence to indicate that the complainant's story was not concocted. The complainant's father had heard children teasing the complainant and calling her the appellant's wife. On questioning her she disclosed what had transpired. This story was confirmed by Farai who was H part of the group of children who were teasing the complainant. The medical

report, too, shows that the complainant was interfered with. The complainant A identified her assailant as "Amuveti," the appellant's nick-name, as did Farai who told the court that complainant was said to have been raped by the appellant. The appellant did not cross-examine the complainant nor Farai, thus accepting their evidence. The appellant's evidence that there was hatred between him and the complainant's family was completely without any B foundation. The evidence by the complainant's father that there was no bad blood with the accused was not challenged by the accused. In my view, the trial court's finding that the complainant was interfered with by the appellant is unassailable.

The appellant, in his grounds of appeal, raises the question of whether or not there was penetration of the complainant in view of the fact that the doctor C stated that her hymen had not been ruptured. In order to constitute the crime of rape, penetration by the male organ of the complainant's vagina must be effected. Various cases in our courts have stated that the complainant's hymen need not be ruptured, as the slightest degree of penetration is sufficient to constitute rape. In S v *Mhlanga* 1987 (1) ZLR 70 (S) at 72 Dumbutshena CJ cited Smith and Hogan *Criminal Law* 5 ed at p 407. When D dealing with this very issue they stated this: "The slightest penetration will suffice and it is not necessary to prove that the hymen was ruptured". See also *S v Torongo* S-206-96.

It was not disputed in this case that the complainant described in her evidence the act of sexual intercourse using the dolls in the victim friendly court. The E complainant in her evidence explained that the appellant inserted his penis into her vagina using the dolls in the victim friendly court. The evidence from the medical report by Dr Choto shows that the complainant sustained injuries on her genitalia. Her vestibule was inflamed and bruised. Such injuries could only have been effected in circumstances where the appellant had effected some degree of penetration. The remarks by the doctor were obviously from F a medical and not a legal point of view. Clearly the court *a quo* convicted the appellant after carefully consideration of the evidence before it. I can find no basis for interfering with the findings of the trial magistrate that the appellant raped the complainant.

In respect to sentence, it is trite that appellate courts will only interfere with G the discretion of a trial court where the sentence is disturbingly inappropriate or where the discretion of a trial court in respect to sentence has been exercised capriciously or upon wrong principles. See S v *Sidat* 1997 (1) ZLR 487 (S) at 490. There can be no suggestion in this case that the sentence imposed was so excessive as to induce a sense of shock or that the magistrate did not exercise her discretion judiciously. In my view on the facts of this case H the trial court actually erred on the side of leniency.

Guvava J
A The complainant was barely six years old at the time of the commission of the offence and the appellant was 44 years old. It is now accepted from studies of psychologists that complainants in sexual cases are traumatised by the act of rape. From the evidence before the court, the complainant not only suffered the physical trauma of the rape itself but she also suffered at the hands of her friends who teased her for something which occurred through B no fault of her own. Studies have shown that this trauma has far reaching psychological effects on rape victims. See J R Spencer and Rhoni Flin *The Evidence of Children: The Law and Psychology* 2 ed p 317 - 318. Because of these studies, this court has on numerous occasions emphasised the seriousness with which it viewed cases of rape, particularly when they are committed against young children. In *S v Chidodo* HH-78-98 Blackie J said C at p 2 of the judgment:
"Firstly and primarily, rape is a very serious offence. It is a gross violation of the rights, body and dignity of the complainant. The offence is aggravated when it is committed on a child. A severe penalty must be seen to have been given."
D The same position had been taken by Mubako J in the case of S v *Phiri*
HH-219-93 where he stated as follows:
"It is important that the courts protect victims of sexual aggression who are usually women. Sexual assaults are a most reprehensible invasion of one's body, one's personality and dignity, the more so when it is perpetrated on young people."
E These sentiments are now even more valid in view of the high incidence of sexually transmitted diseases and the rampant spread of AIDS in Zimbabwe. Given the high incidence of rape of innocent young children and their possible exposure to these diseases, the courts must impose severe penalties in order to deter offenders from committing such offences. That this view is widely held in Zimbabwe is evidenced by the recent promulgation of the F Sexual Offences Act [*Chapter 9:21*] and the severe penalties which are provided therein.
In my view, given the above dangers to which a rape victim is exposed, a rape perpetrated on a young girl should attract a sentence of at least 10 to 12 years' imprisonment.
G It was for these reasons that the appeal against conviction and sentence were dismissed.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/APOTEX INCORPORATED v SURGIMED (PVT) LTD 2002 (2) ZLR 612 (S)

[zRPz]APOTEX INCORPORATED v SURGIMED (PVT) LTD 2002 (2) ZLR 612 (S)
2002 (2) ZLR p612

Citation	2002 (2) ZLR 612 (S)
Case No	Judgment No. S-100-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Gwaunza AJA
Heard	20 June 2002; 11 November 2002
Judgment	11 November 2002
Counsel	*R M Fitches,* for the appellant *F Girach,* for the respondent

Case Type Civil Appeal

Annotations No case annotations to date

[zFNz]Flynote
Company — winding up — application — purpose — not to be used for enforcement of payment of debt — application by a single creditor — D liquidation should not lightly be granted on application of single creditor
Costs — legal practitioner and client scale — rounds of appeal not proper — abuse of court process
Prescription — extinctive —interruption of—application for winding up of E debtor company — does not interrupt prescription
Prescription — extinctive — defence of — whether defence may be raised *meru motu* by court
[zHNz]Headnote
The appellant had entered into an agreement with the respondent company, in terms of which the respondent was granted exclusive agency to import and sell the appellant's products in Zimbabwe. The respondent was able to pay for the products initially, but after a few years was in arrears. The amount was disputed. The appellant sought an order in the High Court for the provisional winding-up of the respondent. It failed, and appealed. G
Held, that the application had been properly dismissed on the grounds of prescription. While it would have been a misdirection for the court to take notice of prescription *mero motu,* in this case it was raised and argued during the proceedings.
Held, further, that an application for a winding-up order is not a legal H proceeding for the enforcement of a right relating to the applicant's debt
2002 (2) ZLR p613
Cheda JA
A and it is not a process whereby the applicant claims that debt. The service of such an application does not have the effect of interrupting the running of the prescription of the debt.
Held, further, that winding-up proceedings should not be resorted to in order to enforce payment of a debt, the existence of which is *bona fide* disputed on reasonable and substantial grounds. The procedure is not B designed for the resolution of disputes as to the existence or non- existence of a debt.
Held, further, that an order for the liquidation of a company should not be lightly granted on the application of a single creditor
Held, further, that the appeal had been an abuse of the court process and costs C should be paid on a legal practitioner and client scale
[zCAz]Cases cited
Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T)
Clarke v Protein Foods (Pvt) Ltd 1970 (2) RLR 278 (A)
Collett v Priest 1931 AD 290
D *McLeod v Gesade Hldgs (Pty) Ltd* 1958 (3) SA 672 (W)
Misnun's Heilbron Roller Mills Hldgs (Pty) Ltd v Nobel Street Central Invstms (Pty) Ltd 1979 (2) SA 1127 (W)
Prudential Shippers SA Ltd v Tempest Clothing Co (Pty)Ltd& Ors 1976 (2) SA 856 (W)
E *Stambolie & Anor v Nyamutamba Tpt (Pvt) Ltd* 1985 (2) ZLR 320 (H)
[zSTz]Legislation considered
Prescription Act [*Chapter 8:11*], ss 19 and 20
[zCIz]Case information
R M Fitches, for the appellant F *F Girach,* for the respondent
[zJDz]Judgment
Cheda JA: The appellant (hereinafter referred to as "Apotex") made an application to the High Court for an order for the provisional winding up of the respondent (hereinafter referred to as "Surgimed").
G The High Court dismissed the application with costs. Apotex appealed against the decision. After hearing both counsel, we dismissed the appeal with costs, reserved our decision on the level of costs and said our reasons would follow. These are H the reasons.
2002 (2) ZLR p614
Cheda JA

Apotex, a Canadian company, entered into an agreement with Surgimed in A 1992, whereby Surgimed was granted exclusive agency to import and sell Apotex's products in Zimbabwe. Surgimed was able to pay for the products initially, but by 1995 Apotex said Surgimed was in arrears in the sum of US$280 000. Surgimed disputed the B figure.

When Surgimed could not pay, Apotex applied for a provisional winding-up order against Surgimed. At the hearing of the application Apotex argued that it had shown that Surgimed was unable to pay its debt and the provisional winding-up order should be granted.

While conceding that to be so the court still refused to grant the order and gave C other reasons for doing so.

I now proceed to deal with those reasons. The main grounds of appeal by Apotex were that having found that Surgimed was unable to pay its debts the court should have issued the order, and the court erred in taking into account *mero motu* the issue of prescription. D

As clearly stated above the main ground was conceded by the court and there is no basis for raising the same ground on appeal.

On the issue of prescription Apotex Applied for and was granted leave to file an amendment to its grounds of appeal, raising the issue. In his judgment, the judge who heard the application stated that the issue of prescription was raised by Mr *Girach* in his argument. The record also shows that Mr *Fitches* appeared for the appellant. In that case he would have been aware that the issue was raised in court at the hearing of the application. Section 20 of the Prescription Act, [*Chapter 8:11*] provides as follows:

"20. Prescription to be raised in pleadings. F

(1) No court shall of its own motion take notice of prescription.

(2) ...

Provided that a court may allow prescription to be raised at any stage of the proceedings."

While it would have been a misdirection for the court to take notice of G prescription *mero motu,* in this case it was raised and argued during the proceedings. It is, therefore, not correct to state that the court took notice of it *mero motu.* The point was raised as it was said that Surgimed had admitted owing a certain amount in a letter written three years before the application.

The judge went into detail to discuss whether the running of prescription was interrupted by the service of the application. He decided that this was not so. His H

Cheda JA

A decision is supported by the authority of *Misnun's Heilbron Roller Mills Holdings v Nobel Street Central Investments (Pty) Ltd* 1979 (2) SA 1127 (W).

This case made it very clear that an application for a winding-up order is not a legal proceeding for the enforcement of a right relating to the applicant's debt and it is not a process whereby the applicant claims that debt. The service of such an application does not. therefore, have the effect of interrupting the B running of the prescription of a debt in terms of s 6(1) of Act 18 of 1943 or s 15 (1) of Act 68 of 1969.

The above Act had the same provisions as s 19 of our Prescription Act Section 19 of our Act reads as follows:

C **"19. Judicial interruption of prescription**

(1) In this section —

'process' includes —

(a) a petition;
(b) a notice of motion;
(c) a *rule nisi;*
(d) ... D
(e) ...
(f) any document whereby legal proceedings are commenced.

(2) The running of prescription shall, subject to subsection (3), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

It was also pointed out that an application for the winding-up of a company E is not process for the purposes of enforcing payment. See also *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd & Ors* 1976 (2) SA 856 (W) and *Collett v Priest,* 1931 AD 290.

The court *a quo* also dealt with the point of a disputed liability although in this case liability was not disputed completely but the quantum. The court F found support for its decision in *Stambolie & Anor v Nyamutamba Transport (Pvt) Ltd* 1985 (2) ZLR 320 (H) wherein Sandura JP, as he then was, pointed out that winding-up proceedings should not be resorted to in order to enforce payment of a debt, the existence of which is *bona fide* disputed on reasonable and substantial grounds; the

procedure is not designed for the resolution of disputes as to the existence or non-existence of a debt. See also *McLeod* v G *Gesade Holdings (Pty) Ltd* 1958 (3) SA 672 (W).
These cases clearly support another ground for not granting the order sought.
There was a further ground that the court found to be also a good basis for not issuing the order.
It was pointed out in *Badenhorst v Northern Construction Enterprises (Pty)* H
Ltd 1956 (2) SA 346 (T) that the liquidation of a company affects the interest
2002 (2) ZLR p616
Cheda JA
of all creditors and shareholders and an order for its liquidation should not be A lightly granted on the application of a single creditor.
The court also took into account that there had been a long delay in making the application and it was possible that Surgimed's financial situation could have changed.
Authority for this was found in *Clarke v Protein Foods (Pvt) Ltd* 1970 (2) RLR 278 (A). B
The above authorities show that the court *a quo* did not determine the application on the basis of Surgimed's inability to pay or the issue of prescription only but on all the various reasons given.
When we dismissed the appeal with costs we reserved the issue of the level C of costs. *Mr Fitches* conceded that the application was for winding-up and not for enforcement of payment of the debt. He said it was left open to the court whether it could grant an order for winding-up on a claim that had prescribed.
Mr *Girach* pointed out that there was no service of a claim for the debt. He submitted that the court should show its displeasure by ordering costs on a legal practitioner and client scale as there were no merits at all for the appeal D and it was an abuse of the court process. Mr *Fitches* conceded that if there were no merits the court should exercise its discretion.
I agree with Mr *Girach's* submission. The appeal was based partly on what the court had conceded on the proof of failure by the respondent to pay its debts. The court pointed out that the evidence led was sufficient to prove that, E but based its decision on other grounds.
On the issue of prescription, the court did not take the point *mero motu* as stated by the appellant. The point had been raised in argument as stated in the judgment.
The above points were, therefore, not proper points to base an appeal on. The F court made clear several other reasons for dismissing the application.
In view of the above I agree that this was an abuse of the court process and I therefore order as follows:
The appellant is ordered to pay costs on a legal practitioner and client scale.
Chidyausiku CJ and Gwaunza AJA concurred G
Wickwar Chitiyo, appellant's legal practitioners
Stumbles & Rowe, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/NATIONAL SOCIAL SECURITY AUTHORITY v DOBROPOULOS & SONS (PVT) LTD 2002 (2) ZLR 617 (S)

[zRPz]NATIONAL SOCIAL SECURITY AUTHORITY v DOBROPOULOS & SONS (PVT) LTD 2002 (2) ZLR 617 (S)
2002 (2) ZLR p617

Citation	2002 (2) ZLR 617 (S)
Case No	Judgment No. S-86-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA

Heard	4 July 2002; 14 November 2002
Judgment	14 November 2002
Counsel	G S *Wernberg,* for the appellant *R M Fitches,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
D **Delict** — liability — vicarious liability — rationale for holding employer vicariously liable — deviation from duties for which employed— tests to be applied to determine whether servant is "on a frolic of his own "
[zHNz]Headnote
The rationale behind holding employers vicariously liable for the acts of E their employees, even where the latter have deviated from the strict course of their duty, is that it is right and proper, where one of two innocent parties has suffered a loss arising from the misconduct of a third party, that the loss should fall on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. This approach does not depend upon a "creation of risk" F theory, but uses the customary test for determining the existence of vicarious liability which serves the interests of society by maintaining a balance between imputing liability without fault, which runs counter to general legal principle, and the need to make amends to an injured person who might otherwise not be recompensed. Where there has been a deviation from duty, the employer's liability depends on the nature G and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been H reached is essentially a question of degree.
2002 (2) ZLR p618
Chidyausiku CJ
[zCAz]Cases cited A
Biti v Minister of State Security 1999 (1) ZLR 165 (S)
Ess Kay Electronics (Pty) Ltd & Anor v First National Bank of Southern Africa Ltd 2001 (1) SA 214 (SCA)
Feldman (Pty) Ltd v Mall 1945 AD 733
Min of Law & Order v Ngobo 1992 (4) SA 822 (A)
Min of Safety & Security v Jordaan t/a Andre Jordaan Tpt 2000 (4) SA 21 (SCA) B
Mkhatswa v Min of Defence 2000 (1) SA 1104 (SCA)
Van der Byl's Est v Swanepoel 1927 AD 141
[zCIz]Case information
G S *Wernberg,* for the appellant C
R M Fitches, for the respondent
[zJDz]Judgment
Chidyausiku CJ: The sole issue in this case, as Mr *Wernberg* correctly submitted, is whether at the time of the admitted collision which occurred on 25 July 1997 between a vehicle driven by the respondent's employee, Mr Boniface Mukudu ("Mukudu"), and a vehicle driven by the second plaintiff D in the court *a quo,* Mr Chimonyo ("Chimonyo"), Mukudu was acting in the scope and course of his employment with the respondent, or whether he had deviated therefrom to such an extent as to have justified the trial court's finding that the respondent was not vicariously liable for Mukudu's actions.
The facts of this case are that the respondent employed Mukudu as a driver. E On the day of the accident Mukudu was instructed to take a load of lime from Odzi and deliver it to Claire Estate in

Nyazura. From Odzi to Nyazura is a distance of about twenty-five kilometres. Mukudu left at about 9.00 am and this was his task for the day.

The evidence establishes that Mukudu arrived at Claire Estate between 11.00 am and 11.15 am. After his arrival, Mukudu unhitched from the horse the F articulated trailer bearing the lime, leaving the latter behind whilst he went off to some unknown destination. The task of off-loading the lime from the trailer was completed at about 2.30 pm. Had Mukudu been present on the completion of the off-loading, he could have left the farm and arrived back at the depot at between 3.15 and 3.30 pm, given the distance between Claire Estate and the depot. G

Mukudu, for reasons known to him alone, did not return to Claire Estate until some time after 6.00 pm. He was next seen with the vehicle at about 7.30 in the evening. The vehicle was parked outside the Star Bar, very close to the scene of the accident. The accident occurred about one-and-a-half hours later, at about 9.00 pm. H

2002 (2) ZLR p619

Chidyausiku CJ

A While at the Star Bar, Mukudu met up with Mr Pawaringira ("Pawaringira"), a mechanic in the employ of the respondent. He reported to Pawaringira that the vehicle was overheating. However, when the latter looked at the gauge it reflected otherwise. Mukudu alleged that the fan belt had broken. It was not possible to ascertain that. Mukudu thereafter drove the vehicle, going to the depot. He gave a lift to a number of employees of the respondent who were B going to the respondent's depot. Among the respondent's employees given a lift was Mr Mudyiwa ("Mudyiwa"), who was employed as a driver by the respondent. Mukudu asked Mudyiwa to take over driving the vehicle from Mukudu's house to the respondent's depot. Apparently Mukudu's house was some short distance before getting to the respondent's depot. Mukudu also asked Mudyiwa to sit next to him so that he could observe the flow of gears. Mudyiwa was a licensed and authorised driver of the respondent. Pawaringira C was also seated in the cab next to the passenger door. Mukudu drove out of the durawall surrounding the Star Bar onto the junction entering the main road to the respondent's depot. He failed to give way at the junction and collided with another vehicle.

It is common cause that in order to have returned to the depot Mukudu's journey would have taken him past the scene of the accident, the Star Bar D being some fifty metres off the main road along which he would have travelled in each direction. The accident occurred as Mukudu drove back onto the main road at that point.

On these facts, the learned judge in the court *a quo* concluded that Mukudu had deviated from the course of his employment to the extent that he was on E a frolic of his own at the time of the accident and his employer was not vicariously liable. The reasoning of the learned judge is to be found on pp 9-10 of the cyclostyled judgment:

"Therefore, according to the evidence, as far as time is concerned, the vehicle, when it was involved in the accident, was more than six hours overdue in terms of what the second defendant was supposed to do.

F It is true that he was on the route on the Harare-Mutare (highway) as far as where the truck was found after the accident. But he also had deviated in the sense that he was not going to be returning the vehicle himself to the depot. In fact, the second defendant had already made up his mind that the vehicle was going to be returned by another junior employee and that when the collision occurred he was in the process of instructing him G how to change the gears of that vehicle. Therefore, that was a further deviation or digression from what his duty was towards his employer. I am not persuaded, and although the vehicle was only fifty metres away from the main road, that as far as space is concerned that was not such a major deviation to constitute one that still made the first defendant employer liable for the conduct of the second defendant driver, Boniface.

H It is clear that he deviated from what was his employer's affair(s) or

2002 (2) ZLR p620

Chidyausiku CJ

business in that he went to the bar and had consumed liquor and, in fact, A deviated from his employer's affairs or business by asking that an unauthorised junior employee drive that vehicle back to the depot. I am satisfied from the evidence that such deviation was sufficient to convert it into an act of the second defendant (on) a 'frolic of his own'."

With the greatest respect, I am unable to agree with the learned judge's conclusion that at the time the accident occurred Mukudu was not acting B within the scope of his employment and that he was on a frolic of his own. A close examination of the above remarks of the learned judge reveals that the learned judge seriously misdirected himself in his assessment of evidence given by the respondent's witnesses in certain material respects.

In this regard, the evidence of Pawaringira, a witness for, and a mechanic in the employ of, the respondent, is instructive as to why Mukudu stopped at the C Star Bar and how the accident

occurred. His evidence was as follows:

"BY THE COURT: Q. The last witness said you came out of a truck which was involved in an accident that evening. Do you remember the accident? A. Yes, my lord.

Q. How did you get into that truck?
A. I had come to Riverside to buy D some cigarettes.
Q. Who had come?
A. I.
Q. You had gone to Riverside to buy some cigarettes?
A. Yes. When I got there I saw this driver seated with the other guys drinking.
Q. Where?
A. At Riverside Star Bar.

Mr Fitches:

Q. Where were they drinking beer?
A. Riverside Star Bar. E

Adam J:

Q. What time was this?
A. It was about 9.00 in the evening.

MR Fitches:

Q. Did you see the truck?
A. I saw the truck, yes.
Q. Where was it?
A. It was parked inside the durawall of the beerhall.
Q. And then, did you speak to Boniface at all?
A. I spoke to him. He told me about the problem on the truck, saying it was over-heating. F
Q. What was he drinking when you saw him?
A. He was drinking opaque beer.
Q. Did you sit with him and drink some?
A. No, I did not. I told him I did not want beer that day. I had only come to buy cigarettes.
Q. What was your job at the company at the time?
A. I am a motor G mechanic.
Q. So, and he told you something, what?
A. So I told him the truck ...
Q. He told you there was a problem with the truck. Tell us about that?
A. He told me there was (a) problem on the truck. It was over-heating.
Q. So what did you do?
A. I checked on the gauge and the gauge was low, showing that this truck has cooled down. H

2002 (2) ZLR p621

Chidyausiku CJ

Q. What, A precisely, when he said over-heating, did he say exactly whether something had broken or what did he say to you?
A. He said the fan belt was broken.
Q. The fan belt that drives which?
A. Which drives the water pump.
Q. Did you check that yourself?
A. I could not see it because it was night. I had no light to see it.
Q. Did B you believe what he said to you about the heating?
A. I just believed for the moment, because I could not have time to check it. It was at night, there was no light to illuminate, so that ...
Q. But you found the gauge (was) alright?
A. The gauge was down, yes.
Q. So what did you say then, after what happened, what you witnessed?
A. I C went inside the beer hall to buy my cigarettes. After buying my cigarettes, I started talking to the other guys who were there, farm work- mates. Then from there, he said he was going. They had finished their beer which they were drinking."

It is quite clear from the above that Mukudu stopped at the Star Bar for possibly two reasons — either to have a drink of beer (which he was seen D drinking), or to allow the vehicle, which was over-heating, to cool down before proceeding to the respondent's depot. The learned judge concluded that Mukudu had stopped to drink beer and simply dismissed the other possible reason without explanation.

As to how the accident occurred, the same witness had this to say in his evidence-in-chief:

"Q. Do E you know one Mudyiwa?

A. Yes, I know him.
Q. Tell us about Mudyiwa?
A. Mudyiwa is another driver who was also working for Suncrest.
Q. What happened that night involving Mudyiwa?
A. Mudyiwa stays right close to the depot and Boniface was staying just about one-and-a- half kilometres from Riverside to where he was staying. So he stayed F behind, unlike Mudyiwa who was staying at the depot. So Boniface told Mudyiwa to take the truck to the depot so that he could be left behind at his house, because it was during the night.
Q. So he told Mudyiwa to take the truck to the depot?
A. Yes.
Q. Was Mudyiwa licensed to — authorised to — drive a truck to your G knowledge?
A. Mudyiwa is a licensed and an authorised driver.
Q. But that truck was in the care of who that night, Mudyiwa or Boniface?
A. It was in Boniface's.
Q. Did he show Mudyiwa everything about the truck?
A. The time we got out of the beer hall durawall, he told Mudyiwa to sit very close to him, so H that he could see how he was shifting the gears and the positions.

2002 (2) ZLR p622
Chidyausiku CJ

Q. Were you in the cab at the time as well?
A. Yes. I was seated by the A door, the passenger door.
Q. So, he told Mudyiwa to sit near him?
A. Yes.
Q. So that he can see the gears?
A. Gears, yes. At that time we were driving out of the durawall, the time he was changing the gears. And when we got to the junction, he did not even give way. He just went straight into the highway and turned right. B

Adam J:

Q. He did not give way and did what, turned right at the junction?
A. Yes, into the highway.
Q. Carry on.
A. He had only managed to drive past the middle white line, with the horse only. The trailer was still tracking behind and it was almost across the road, the highway. Then I just saw some lights coming from C Mutare going up at Riverside. I just saw some light(s) and suddenly, in a blink of an eye, I just heard a sound coming from the back. It was a truck which had smashed (into) the trailer."

The learned judge in the court *a quo* concluded that Mukudu was instructing the other driver when the accident occurred and that this giving of instructions to another driver was outside the scope of Mukudu's terms of employment D and that that conduct somehow contributed to the accident.

This is not borne out by the above evidence. The above evidence establishes that Mukudu simply asked Mudyiwa, an authorised driver, to sit next to him so that he could observe how the gears were changed. There is no suggestion in the evidence that Mudyiwa's sitting next to Mukudu in any way contributed to the accident. The accident occurred, according to the respondent's own E witness, because Mukudu failed to give way to traffic that had the right of way.

It is also clear from the evidence of the respondent's own witness that Mukudu intended to give Mudyiwa the vehicle later and farther down the road when they got to where Mukudu lived. He had not done so at the time of the accident. F

To suggest that Mukudu was on his own frolic at the time of the accident because he had planned to hand over the vehicle at a later stage is untenable.

It is common cause that, at the time of the accident, Mukudu was driving towards his employer's depot, with the intention of returning to the depot his employer's vehicle. Mukudu's mandate was to deliver the lime to Claire Estate and return the vehicle to the depot after such delivery. Mukudu, when G the accident occurred, was doing precisely that though late, about six hours late. In my view, the fact that Mukudu was returning the vehicle late does not convert his master's business of returning the vehicle into his own. In my view, the deviation in terms of time taken, together with the other circumstances of this case, does not constitute a departure from the employer's mandate sufficiently to exonerate the employer from vicarious liability. H

2002 (2) ZLR p623
Chidyausiku CJ

A It is also common cause that the Star Bar is some fifty metres or so from the road Mukudu had to travel on to his employer's depot. He deviated to this place. The deviation is minimal in terms of

space and the reasons for the deviation are not entirely clear. Mukudu stopped at Star Bar either to drink beer or to allow the vehicle he was driving to cool down. He himself did not give evidence, and therefore the reason for his stopping at the Star Bar B remains, to some extent, a matter for conjecture.

Mr *Wernberg* referred the court to two cases whose facts, he argued, were strikingly similar to the facts of this case. He referred us to *Biti v Minister of State for Security* 1999 (1) ZLR 165 (S) and *Feldman (Pty) Ltd v Mall* 1945 AD 733. In both cases the employer was held vicariously liable for the delict of an employee in circumstances very similar to the present case. He drew C certain comparisons in support of his submissions.

The facts in *Biti's* case *supra* are that the driver of a government vehicle was instructed to take three government officers home after work and then keep the vehicle safely overnight. In the morning he was to pick up the same officers and drive them to their workplace. He was on call while not actively on duty. About two-and-a-half hours after he should have finished dropping D the three officers, he rammed into a stationary taxi owned by the plaintiff, badly damaging the taxi and severely injuring the plaintiff. The accident occurred at a place which was about a five kilometre deviation from the route he would have taken to drop off the government officers. There was some evidence that the driver was heavily intoxicated and that he had his girlfriend in the car. The trial court had held that the Ministry which employed the driver was not vicariously liable. On appeal, that decision was reversed and E it was held that the standard test for vicarious liability required the court to decide whether the wrongdoer was engaged in the affairs or business of the employer when he committed the delict. The Supreme Court held that the business of the government driver included not only the transporting of passengers to their homes, but also keeping the vehicle in safe overnight custody, and although the driver had deviated from his authorised route, the F deviation, in terms of time and space, from it was not such as to convert it into "a frolic of his own". The improper mode of exercising his duty of keeping the vehicle safely overnight was still done within the course of his employment and the Ministry which employed him was vicariously liable.

Mr *Wernberg* submitted that by comparison:

G "... the deviations in terms of time and space were, *in casu,* far less significant. Firstly, the question of keeping the vehicle overnight does not arise in the instant case. The vehicle, as previously submitted, was in the process of being returned, albeit late. In each case it was clearly the obligation of the respective driver *not* to have consumed alcohol; and, in each, they did. In *Biti's* case, the driver was intoxicated. In the instant H case, the respondent's own witnesses differed widely on the point. One

said that he was intoxicated; the other said that he was not. In *Biti* the A driver was carrying an unauthorised passenger. In this case, whilst there were several of the respondent's employees aboard, it was never suggested that this was irregular. It is respectfully submitted that the fact that there may have been two deviations in the instant case; *viz* the earlier one when the trailer was unhitched and left at Claire Estate and the deviation to the Star Bar, are more than 'made up for' - for comparison purposes - by the B fact that there was a five kilometre deviation from the authorised route in the *Biti* case."

The facts in *Feldman 's* case *supra* were as follows. A servant of the defendant had been given custody of a motor van and a number of parcels, with instructions to drive the van and deliver the parcels to various customers in a town. Having delivered the parcels, he was to return the van to a certain C garage. It appeared that, after delivering the parcels, he had driven the van to a place some miles away on his own business, and while there drank enough liquor to make him incapable of driving the van with safety. Shortly after his departure from such place on his way back to the garage, he negligently collided with and killed the father of two children. On these facts the court concluded that the employer was vicariously liable. D

Mr *Wernberg* submitted that the facts in *Feldman's* case *supra* were very close to the facts of this case and drew some comparisons. He made the following submissions. Both drivers were employed to effect deliveries. Both were in the process of returning their respective vehicles to their employer's premises when they were involved in collisions. Both deviated from their authorised routes in order to consume alcohol. In the instant case, E Mukudu should have been back at the Depot by 3.00 or 3.30 pm. He was involved in the accident at about 9.00 pm, some five-and-a-half or six hours later. In the *Feldman* case *supra,* the driver of the van, one Baloyi, should have returned it to its garage immediately after reporting off duty at 1.00 pm on the Saturday in question. Baloyi in fact deviated by many miles from the route which he ought to have taken and only resumed his journey back to the F garage at 6.30 pm. He, too, was involved in his collision five-and-a-half hours after the vehicle ought to have been returned. He submitted that, factually,

the two cases were startlingly similar and that it could not be said that, merely because Mukudu had told another driver to observe the manner in which the gears were changed in order to facilitate the *intended* later assumption of control of the vehicle for the last short distance back to its G depot by the latter, this constituted a material distinction from the facts of the *Feldman* case *supra.* He argued that the deviation in terms of distance in the latter was obviously of a much greater extent.

I am persuaded by Mr *Wernberg's* submissions that both *Biti supra* and *Feldman supra* bear a striking resemblance to the facts of this case. In both those cases the court held the employer vicariously liable. H

2002 (2) ZLR p625

Chidyausiku CJ

A The rationale behind holding employers vicariously liable for the acts of their employees, even where the latter have deviated from the strict course of their duty, is clearly set out in the *Feldman* case *supra* at 740, where Watermeyer CJ quoted with approval a passage from an earlier decision of the same court in *Estate van der Byl v Swanepoel* 1927 AD 141 at 150:

"... it is right and proper that the employer should be liable 'where one of B two innocent parties has to suffer a loss arising from the misconduct of a third party it is for the public advantage that the loss should fall ... on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. *(Coupé Co v Maddick, per* Cave J (1891) LR 2 QBD 417). It is within the master's power to select trustworthy servants who will exercise due care towards the public and C carry out his instructions. The third party has no choice in the matter and if the injury done to the third party by the servant is a natural or likely result from the employment of the servant then it is the master who must suffer rather than the third party."

This formulation has been consistently followed. See, for example, *Ess Kay Electronics (Pty) Ltd & Anor v First National Bank of Southern Africa Ltd* D 2001 (1) SA 1214 (SCA); *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A).

This approach does not depend upon a "creation of risk" theory, which this court declared to be of no application in the *Biti* case at p 169 *in fine* - 171*,* following the decision in *Minister of Law and Order v Ngobo supra,* but uses the customary test for determining the existence of vicarious liability which E "serve(s) the interests of society by maintaining a balance between imputing liability without fault, which ran counter to general legal principle, and the need to make amends to an injured person who might otherwise not be recompensed".

In *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA), Scott JA held at 24-25A that:

F "The standard test for vicarious liability is, of course, whether the delict in question was committed by an employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the time the employee was about the affairs or business or doing the work of the employer (see, for example, *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 827B*; Minister of Police v Rabie* 1986 (1) SA 117 G (A) at 132G). This is no doubt true, but it should not be overlooked that the affairs or business or work of the employer in question must relate to what the employee was generally employed or specifically instructed to do. Provided the employee was engaged in activity reasonably necessary to achieve either objective, the employer will be liable (see *Estate van der Byl v Swanepoel* 1927 AD 141 at 145-6, 151-2). The difficulty, of H course, is that while the general approach to be adopted may be easy

2002 (2) ZLR p626

Chidyausiku CJ

enough to formulate, its lack of exactitude is such that problems A inevitably arise in its application. This is particularly so in the so-called 'deviation' cases. What is clear is that not every act of an employee committed during the time of his employment which is in the advancement of his personal interest or for the achievement of his own goals necessarily falls outside the course and scope of his employment *(Viljoen v Smith* 1997 (1) SA 309 (A) at 315 F-G). In each case, whether the employer is B to be held liable or not must depend on the nature and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed, or still carrying out some instruction of his employer, the latter will cease to be liable. Whether that stage has been reached is essentially a question of degree. *(See Feldman (Pty) Ltd v Mall* 1945 AD C 733 at 756-7; *Union Government v Hawkins* 1944 AD 556 at 563; *Viljoen v Smith supra* at 316E-317A). The answer in each case will depend upon a close consideration of the facts. The same is true of the inquiry as to whether the deviation has ceased and the employee has resumed the business of his employer."

In the *Feldman* case *supra* at p 742 Watermeyer CJ made the following D observation:

"... a variety of situations may arise having different legal consequences.

(a) If (an employee) abandons his master's work entirely in order to devote his time to his own affairs then his master may or may not, according to the circumstances, be liable for harm which he causes to third parties. If the servant's abandonment of his master's work E amounts to mismanagement of it or negligence in its performance and is, in itself, the cause of harm to third parties, then the master will naturally be legally responsible for that harm. ... If, on the other hand, the harm to a third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master will F not be responsible.

(b) If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's G work, and not entirely to an improper management by the servant of his own affairs."

The learned Chief Justice then went on to hold that the employee's conduct fitted into the latter category and that the employee had not abandoned his master's work entirely.

This formulation from *Feldman supra* has been referred to with approval on H

2002 (2) ZLR p627

Chidyausiku CJ

A a number of occasions and was adopted by the South African Supreme Court of Appeal recently in *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA).

The conduct of Mukudu *in casu* is no different to that of the driver in *Feldman supra.* To distinguish it on the basis of holding that there was not one, but three deviations from Mukudu's duty is, with respect, artificial. The test of B time and space must not be elevated to an artificial level. The test is simply a tool by which a court will be guided in determining whether an employee has abandoned his employer's work altogether. If, for example, Mukudu had, instead of returning the vehicle (as was his intention) to the depot, driven to Mutare on a mission of his own, it could not be said that he was acting in the course of his employment. In that instance, the distance factor would constitute strong evidence of an intention to abandon his master's work. *In* C *casu,* however, the spatial deviation, apart from being minute, is of very limited relevance because Mukudu's intention is known. Mukudu was in the process of returning the vehicle to its depot. He, therefore, was continuing to perform his employer's work, albeit negligently and "in an improper manner". By further analogy, if a person were employed to drive from one point to another and was specifically instructed not to stop at any places along the D way, but that in contravention of such orders, the driver stopped at one point before being involved in a collision, it cannot be said that such a deviation absolved the employer from liability. Even if the driver had stopped twice, three or even five times *before* he collided with another vehicle, that would not absolve the employer. It would be untenable to say that because the driver deviated from specific instruction on so many occasions, he was no longer acting in the course of his employment when he was actually proceeding to E the intended destination. In reality, there is no distinction between this analogy and the instant case. Whatever deviations Mukudu might have made, at the time of the collision he had clearly recommenced the assigned task of ensuring the return of the vehicle to its depot.

In the result, I would allow the appeal with costs.

The order of the court *a quo* is set aside and substituted with the following

F order:

"Judgment be and is hereby awarded in favour of the first plaintiff against the first, second and third defendants jointly and severally, the one paying the other to be absolved, in the sum of $419 169, with interest *a tempore morae* thereon at the prescribed rate from July 1997 to date of payment and costs of suit."

G Ziyambi JA and Malaba JA concurred.

Scanlen & Holderness, appellant's legal practitioners

H *Henning, Lock, Donagher & Winter,* respondent's legal practitioners

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Source:

[zRPz]ZUPCO v DAISON 2002 (2) ZLR 628 (S)
2002 (2) ZLR p628

Citation	2002 (2) ZLR 628 (S)
Case No	Judgment No. S-87-02
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Malaba JA
Heard	16 September 2002; 13 November 2002
Judgment	13 November 2002
Counsel	*H Zhou,* for the appellant Respondent in person
Case Type	Civil appeal
Annotations	Link to case annotations

[zFNz]Flynote
Appeal — Labour Relations Tribunal — appeal from — appeal on point of D law only —appeal against quantum of damages — assessment based on unreasonable grounds — issue appealable
Employment — contract — termination unlawful — order for reinstatement — reinstatement without loss of pay or benefits — retrospectivity implied — damages in lieu — duty to mitigate loss — onus on employer to show E that employee could have mitigated loss
[zHNz]Headnote
An appeal to the Supreme Court against a decision of the Labour Relations Tribunal lies on a point of law only. Where the point at issue is the quantum of damages, and the Tribunal's assessment is based on F unreasonable grounds, an appeal would be properly before the court Thus, where the Tribunal ordered the employer to pay salary and benefits to a dismissed employee for a given period, but did not say why it chose that period as opposed to another, the decision could be categorised as wholly unreasonable
Where the order of the Tribunal is that an employee be reinstated "without G loss of pay or benefits", the reinstatement is retrospective If damages are paid in lieu of reinstatement they must include back-pay and benefits. Although the employee should mitigate his loss by taking other employment the employer has the onus of showing that the employee has, or should have, earned income from some other source. H
2002 (2) ZLR p629
Sandura JA
[zCAz]Cases cited A
Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S)
Chegutu Municipality v Manyora 1996 (1) ZLR 262 (S)
Chiriseri & Anor v Plan International 2002 (2) ZLR 261 (S)
Gauntlet Security Services (Pvt) Ltd v Leonard 1997 (1) ZLR 583 (S)
Leopard Rock Hotel Co (Pvt) Ltd v van Beek 2000 (1) ZLR 251 (S)
B *Madyara v Globe & Phoenix Industries (Pvt) Ltd* 2002 (2) ZLR 269 (S)
Nyaguse v Mkwasine Ests (Pvt) Ltd 2000 (1) ZLR 571 (S)
[zCIz]Case information

H Zhou, for the appellant
Respondent in person
[zJDz]Judgment
C **Sandura JA:** This is an appeal against the quantum of damages in lieu of reinstatement awarded to the respondent ("Daison") by the Labour Relations Tribunal ("the Tribunal").
The salient facts are as follows. Daison was employed by the appellant D ("Zupco") as a motor mechanic. He was charged with an act of misconduct and was found guilty and dismissed in terms of Zupco's code of conduct on 23 April 1997.
He appealed to the Tribunal in terms of s 101(7)(a) of the Labour Relations Act [*Chapter 28:01*] ("the Act") and was successful. On 9 April 2001 the E Tribunal ordered as follows:
"1. that the appeal be and is hereby allowed with costs.
2. that the respondent (Zupco) be and is hereby ordered to reinstate the appellant (Daison) with no loss of salary or benefits.
3. (that) in the event that reinstatement is no longer an option, the respondent be and is hereby ordered to pay the appellant damages in F lieu of reinstatement, the quantum of which the parties may agree upon, failure of which either party may approach the Tribunal for quantification."
When the parties subsequently failed to agree on the quantum of the damages, Daison approached the Tribunal and, on 10 July 2001, the parties appeared before the Tribunal for the quantification of the damages. Thereafter, on 1 August 2001, the Tribunal ordered Zupco to pay to Daison, *inter alia,* his G salary and benefits for a period of forty-eight months. Aggrieved by that decision, Zupco appealed to this court.
The first issue which I must deal with is whether this appeal raises any question of law. The issue is important because in terms of s 92(2) of the Act H an appeal from the Tribunal lies to this court only on a question of **law.**
2002 (2) ZLR p630
Sandura JA
Since this is an appeal against the quantum of damages awarded by the A Tribunal, the issue is whether a ruling by the Tribunal on such a matter involves a question of law. That issue was considered by this court in *Leopard Rock Hotel Co (Pvt) Ltd v Van Beek* 2000 (1) ZLR 251 (S). At 256B-C, McNally JA said the following:
"A ruling by the Tribunal on damages is a ruling on fact and thus not B appealable unless it can be categorised as wholly unreasonable. This may (but not must) be the situation where the Tribunal has misdirected itself on the law as to the criteria to be taken into account in assessing damages."
See also *Chiriseri & Anor v Plan International* S-56-02 1 and *Madyara v Globe & Phoenix Industries (Pvt) Ltd t/a Ran Mine* S-63-2002 2 C
I must now consider whether the Tribunal's decision in this case can be categorised as wholly unreasonable. One of the grounds of appeal set out by Zupco in its notice of appeal reads as follows:
"There were no facts upon which the Tribunal's assessment of a period of 48 months could reasonably be based."
That, in my view, amounts to alleging that the Tribunal's decision is wholly D unreasonable. That allegation was based upon the fact that in its judgment the Tribunal did not say why it chose the period of forty-eight months as opposed to any other period. As stated in *Nyaguse v Mkwasine Estates (Pvt) Ltd* 2000 (1) ZLR 571 (S) at 575D, "if the Tribunal is forced to make an estimate, it must use the information to hand, and not simply pluck a figure from E nowhere."
In the circumstances, I am satisfied that the Tribunal's decision can be categorised as wholly unreasonable. The matter is, therefore, properly before this court.
I now wish to deal with the main issue in this appeal, which is whether the F Tribunal's order should stand.
When Daison appeared before the Tribunal for the quantification of the damages on 10 July 2001 he was not legally represented. He was asked what his claim was and he said the following through an interpreter:
"I pray that the court direct that the Company pays (me) from the date of dismissal up to today (i.e. 10 July 2001)." G
Upon further questioning, he stated that what he wanted paid were his salary and benefits. He then enumerated the benefits which he thought he was entitled to, most of which were correctly rejected by the Tribunal.
2002 (2) ZLR p631
Sandura JA
A After the hearing the Tribunal issued the following order:
"The employer is therefore ordered to pay damages for loss of employment as follows:

Pay the employee his salary and benefits in terms of the contract of employment for a period of 48 months. This should include his salary which was agreed to be $4 112.68 per month, his employer's pension B contribution to a pension scheme which was $189.90 per month, his leave days, 13th cheque if it was due to him in terms of his contract of employment and any other benefits he was entitled to.

The employer should also pay interest on each sum as it fell due at the prescribed rate.

C The sum of $2 500 earned at Kamunhu Service Station should be deducted. An amount of $62.50 multiplied by 365 days (12 months that he should have vended *(sic)* to mitigate his losses) should also be deducted together with his tax contributions and contributions to NASSA and any other lawful deductions in terms of his contract of employment."

With respect, the Tribunal's order was inappropriately worded, and is not in D the usual form.

As already indicated, when Daison appeared before the Tribunal, he claimed payment of his salary and benefits from the date of his dismissal, which was 23 April 1997, to 10 July 2001, the date when the Tribunal heard evidence on the quantum of damages in lieu of reinstatement, i.e. a period of fifty E months and seventeen days.

It is clear from that claim that Daison sought payment of a little more than his back-pay and benefits. The real issue, therefore, is whether he was entitled to his back-pay and benefits. I think he was.

I say so because on 9 April 2001 the Tribunal ordered Zupco to reinstate him "with no loss of salary or benefits", or pay him damages in lieu of reinstatement. F In my view, where an employee is reinstated "with no loss of salary or benefits" his reinstatement is retrospective. If he is not reinstated, but is paid damages in lieu of reinstatement, those damages must include his back-pay and benefits.

As this court stated in *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 268A-B: G

"... the word 'reinstate' or 'reinstatement' carries no automatic retrospective connotation, either in ordinary language or in our legislation. Normally it means simply that the person concerned will be placed again in his/her former job. If retrospectivity is intended, one would normally look for additional words such as 'with effect from the date of dismissal' H or 'with effect from (a particular date in the past)' or 'with back-pay and all benefits from ... (date)'".

2002 (2) ZLR p632

Sandura JA

If one applies that test to the order of reinstatement issued by the Tribunal in A this case, it is clear beyond doubt that retrospectivity was intended. A contrary interpretation of the Tribunal's order would mean that if reinstated Daison would lose the salary and benefits he had already earned, which would be contrary to the specific provisions of the order.

That being the case, it follows that the damages payable in lieu of reinstatement must include back-pay and benefits. As I stated in *Madyara v Globe* & B *Phoenix Industries (Pvt) Ltd t/a Ran Mine supra* at p 5 of the cyclostyled judgment: 3

"As far as back-pay and benefits are concerned, there is no cogent reason for distinguishing between an employee who is reinstated and one who is not, where the order of reinstatement has a retrospective effect. In my view, both of them are entitled to back-pay and benefits. The only C difference between them is that one gets his job back whilst the other is paid damages for the premature termination of his employment contract."

In the circumstances, Daison is entitled to net back-pay and benefits from the date of his dismissal, being 23 April 1997, to 9 April 2001, the date when the Tribunal ordered that he be reinstated or paid damages in lieu of reinstatement. The claim in respect of the period between 9 April 2001 and 10 July 2001, D when the Tribunal heard evidence on the quantum of damages, cannot be granted as Daison laid no basis for it. In addition, it is pertinent to note that Daison made no claim in respect of the premature termination of his employment contract.

Having said that, I would like to consider the three benefits which the Tribunal thought Daison was entitled to. The first benefit mentioned in the E Tribunal's order is Zupco's contribution to a pension scheme in the sum of $189.90. This benefit does not appear in Daison's employment contract, and there is no indication of where that figure came from. In my view, the Tribunal must have mistaken it for the sum of $189.90 which appears on the Time and Wage Register as a deduction from Daison's salary in respect of his medical aid contribution. The benefit was, therefore, not proved. F

The second benefit mentioned in the order is annual bonus. This benefit appears in Daison's employment contract but was payable at Zupco's discretion. It was not an entitlement.

The third benefit which the Tribunal found established was annual leave. This appears in the contract of employment, which indicates that Daison was G entitled to twenty-four days' leave annually. He is, therefore, entitled to cash in lieu of leave in respect of the period from 23 April 1997 to 9 April 2001.

I now wish to deal with the mitigation of damages. It is well established that an employee who considers, whether rightly or wrongly, that he has been unlawfully dismissed, is not entitled to sit around and do nothing. He must
2002 (2) ZLR p633
Sandura JA
A mitigate his damages by looking for and taking temporary employment when available. See, for example, *Gauntlet Security Services (Pvt) Ltd v Leonard* 1997 (1) ZLR 583 (S) at 586D-E; *and Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S) at 419A-B.
However, the burden of proof rests on the employer to show that the employee has, or should have, earned an income from some other source. See B *Nyaguse v Mkwasine Estates (Pvt) Ltd supra* at 575C. In my view, apart from the sum of $2 500 which Daison said he earned whilst temporarily employed by Kamunhu Bus Service, Zupco failed to prove that Daison earned or ought to have earned an income from some other source and the amount thereof. Daison's evidence was that he looked for alternative employment but was C unsuccessful. There was no evidence to the contrary. In the circumstances, Daison is entitled to his net salary and cash in lieu of leave from 23 April 1997 to 9 April 2001, minus the sum of $2 500. In addition, he is entitled to interest at the prescribed rate on the sum payable to him from 9 April 2001 to the date of payment in full. The net salary will be his gross salary minus the income tax payable by him, his contribution to the D National Social Security Fund and any government levy payable by him during the relevant period. Regrettably, this court is not in a position to calculate the sum payable by Zupco because the record does not have the necessary evidence. For example, whilst the record shows that in April 1997 Daison's gross salary E was $4 112.68, there is no evidence indicating what it was during the rest of the period in question. It is, therefore, necessary to remit the matter to the Tribunal to enable it to calculate the sum to be paid by Zupco, after any evidence relating to Daison's salary, income tax, contribution to the National Social Security Fund and any government levy payable by him during the relevant period is led.
F In the circumstances, the following order is made:
1. The appeal is allowed with no order as to costs.
2. The order issued by the Tribunal is set aside.
3. The matter is remitted to the Tribunal to enable it to calculate the sum payable to Daison in accordance with the principles set out in this G judgment after the relevant evidence is led by the parties.
Ziyambi JA and Malaba JA concurred
Wintertons, appellant's legal practitioners

1 See above, at p 261 of this volume —*Editor*
2 See above, at p 269 of this volume — *Editor*
3 See above, at p 269 of this volume — *Editor*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v MVURUME 2002 (2) ZLR 634 (H)

[zRPz]S v MVURUME 2002 (2) ZLR 634 (H)
2002 (2) ZLR p634

Citation 2002 (2) ZLR 634 (H)

Case No Judgment No. HH-198-02

Court High Court, Harare

Judge	Chinhengo J & Makoni J
Heard	17 October 2002; 13 November 2002
Judgment	13 November 2002
Counsel	*P Kwenda,* for the appellant *N J Mushangwe,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure — plea — of guilty — charge of attempted murder — D whether proper for trial court to proceed to conviction and sentence without psychiatric reports which it had agreed and directed should be produced
Criminal procedure — plea — of guilty — procedure when accused is legally represented — need to record that legal practitioner has confirmed that E he had ensured that the accused understood the facts alleged and admitted them or that the elements of the offence had been explained to him — effect of failure to record this
Criminal procedure — trial — conduct of — charge of attempted murder — plea of guilty — whether proper for trial court to proceed to conviction and sentence without medical evidence on the complainant's injuries F
Criminal procedure — trial — conduct of — plea of guilty — record of proceedings — must be comprehensive and complete in every respect
[zHNz]Headnote
The appellant shot and wounded the complainant. Two days later he was charged with attempted murder and pleaded guilty. He was legally G represented. The magistrate did not put the normal questions to the appellant to satisfy himself that the plea was genuine. The appellant was convicted and submissions were made in mitigation and aggravation. The court required medical evidence as to the complainant's injuries and psychiatric evidence as to the appellant's state of mind. Over five months later neither report was available. A further submission in H
2002 (2) ZLR p635
Chinhengo J
A mitigation was made and a sentence of six years' imprisonment, of which two were suspended, was imposed. The appellant appealed against both conviction and sentence. On appeal he was represented by a different legal practitioner. As against conviction it was argued:
(a) that the magistrate failed to confirm with the appellant's legal B representative that he had admitted the facts in the outline of the State case and had understood the elements of the offence; and
(b) that the magistrate erred in proceeding without the psychiatric evidence, having requested it.
As against sentence it was urged:
(a) in t C he absence of the medical reports on the complainant's condition the conclusion that her injuries were serious was not warranted; and
(b) the psychiatric evidence might have shown less or diminished responsibility.
Held, that even where an accused person is legally represented, the provisions of the proviso to s 271(2)(b) of the Criminal Procedure and Evidence D Act [*Chapter 9:07*] require that the court should record the statement by the legal representative made in accordance with that proviso. It is only for that reason that the court may decide not to give the necessary explanation. A failure to record that the legal practitioner made the statement may cast doubt on whether that statement was made at all. In any event, a statement by a legal practitioner does not preclude the court E from making the enquiry itself. Failure to do so is a misdirection warranting the setting aside of the conviction.

Held, further, that the absence of a medical report on the complainant's injuries is not necessarily fatal to the prosecution's case where the injuries are admitted, provided that the injuries are such that they would F enable the court to reach, as the only reasonable inference, the conclusion that the accused intended to cause the complainant's death. There was no misdirection on this score.
Held, further, that the record of the proceedings was silent as to how two medical reports on the appellant, prepared in terms of the Mental Health Act [*Chapter 15:06*], came to be in the file with no reference to their G production and no reliance on them in the judgment. These reports required further consideration. Accordingly, the matter should be remitted for rehearing.
Conviction and sentence set aside. Matter remitted for rehearing before a H different magistrate.
2002 (2) ZLR p636
Chinhengo J
[zCAz]Cases cited A
R v Poteradzayi 1959 R & N 31; 1959 (2) SA 125 (FS)
S v Sibanda 1989 (2) ZLR 329 (S)
[zSTz]Legislation considered
Criminal Procedure & Evidence Act [*Chapter 9:07*], s 271 High Court Act [*Chapter 7:06*], s 41(d)
[zCIz]Case information
P Kwenda, for the appellant
N J Mushangwe, for the respondent
[zJDz]Judgment
Chinhengo J: The speedy disposal of cases may sometimes adversely C affect the proper administration of justice. In this case the appellant shot and wounded his girlfriend (hereinafter called "the complainant") on 4 April 2000. He was immediately arrested. On *6* April he was taken to court and appeared before a regional magistrate on a charge of attempted murder. He pleaded guilty and was-sentenced to six years' imprisonment of which two D years' imprisonment was suspended for five years on the usual condition of good behaviour. He appealed against conviction and sentence. The effect of a rushed trial will be apparent from what I have to say in this judgment.
The facts of this case are the following. The appellant was twenty four years old at the time that he committed this offence. He had been in an amorous E relationship with the complainant for about two years. In the afternoon of 4 April aforesaid he telephoned the complainant from Westgate Shopping Complex on the western side of Harare. The complainant was at her workplace at Newlands Shopping Centre on Enterprise Road in Harare. For reasons which were not disclosed at the trial the complainant told the appellant that she did not wish to continue with the relationship and that she F wanted it to terminate. The appellant was incensed by what the complainant had told her. He left Westgate Shopping Centre and drove three kilometres to where he resided with his elder brother in Marlborough Township. He armed himself with a pistol belonging to his older brother which he in fact stole. He then drove ten kilometres to the complainant's workplace. He talked to the complainant for a while and when the complainant did not G change her mind and allow the relationship to continue, the appellant drew the pistol and shot at the complainant hitting her on the left thigh and on the left shoulder. The appellant had no experience in handling firearms. The complainant ran to a nearby restaurant. The members of the public who witnessed the shooting made a citizens' arrest of the appellant and assaulted him, thereby administering instant justice. The appellant was handed over to H
2002 (2) ZLR p637
Chinhengo J
A the police. The complainant was immediately taken to hospital. Hardly twenty-four hours later on 6 April, the appellant was arraigned before the regional court on the charge of attempted murder. When he appeared in court he had a swollen right cheek. The prosecutor was asked to produce a medical report on the complainant's condition. He was unable to do so because the report was not available. He was however permitted to make his submissions B on sentence. He said that the offence was a serious one; that it was premeditated and pre-planned and that the appellant had not indicated that he had lost anything apart from the complainant's affection. He submitted that the appellant had not given any other more acceptable motive for committing the offence. He urged the court to impose a deterrent sentence.
C There then followed an investigation by the court to establish the appellant's motive. It emerged that the appellant had for seven months prior to the commission of the offence paid the complainant's college fees at the rate of $620 per month and that he had often driven the complainant in his motor vehicle to and from a college in the City where she attended lessons on a part- time basis. It seems that some request was made by the appellant's legal D practitioner to allow the appellant to obtain psychiatric reports in terms of the Mental Health Act [*Chapter 15:06*] on his mental condition at the time of the offence. It also seems that the court agreed that it was

necessary that such reports be prepared and that a medical report on the complainant's injuries also be made available. The matter was adjourned for this purpose. The trial resumed on 24 April. The reports were not available. It was adjourned to and E resumed on 28 April. Again the reports were not available. The prosecutor then applied for a longer adjournment to 14 June. The magistrate expressed concern at the delay which was taking place but agreed to adjourn the matter. The record of proceedings does not show that the trial was resumed on 14 June, nor does it indicate any reason why the case was not resumed on that F date.

The trial eventually resumed on 24 September. The prosecutor advised the court that the medical report was still not available and further that the complainant was not co-operating with the doctor who had attended to her injuries. The prosecutor then directly told the court that the State did not have the medical report and could not produce it. The psychiatric reports were also G still not available. The trial magistrate then allowed the appellant's legal practitioner to make a further submission in mitigation. Curiously and without pursuing it, he submitted that "as there was no medical report the court should give the accused the benefit of the doubt".

The magistrate then proceeded to pass sentence. He recorded that he had H considered the mitigatory factors placed before him: that the appellant was

first offender who had pleaded guilty; that he had been in custody for five A months awaiting sentence, that he had assisted the complainant financially; that he had put his heart into his relationship with the complainant and could not accept rejection; and that he had lost his temper and had reacted violently because he loved the complainant so much. He noted that the offence was a serious one, that the appellant had driven thirteen kilometres to go and B confront the complainant; that he had stolen his elder brother's pistol; that he had fired twice at the complainant causing her some injuries. He noted that there was no medical report to show the extent of the injuries sustained by the complainant. He said he did not doubt that the injuries must have been serious. He castigated the police officer who investigated the case for failing to obtain the medical and psychiatric reports and for failing to comply with C the court's request in that regard. He then passed sentence on the appellant.

In the appeal against conviction the grounds thereof were the following: (a) that the trial magistrate erred in failing to confirm with the appellant's legal practitioner that the appellant had admitted the facts in the outline of the State case or that he had also understood the elements of the offence; and (b) that the trial magistrate erred in that having requested reports on the appellant's D mental condition, he had nonetheless proceeded to complete the trial without these reports.

In the appeal against sentence the grounds were: (a) that no medical report on the complainant's injuries was produced and the court had to speculate on the extent of the injuries and came to the wrong conclusion that they were E serious; (b) that if the reports on the appellant's mental condition had been produced they might have shown that the appellant had less, or a diminished, responsibility for the crime. The appellant's legal practitioner, who was not the one who represented the appellant at the trial, expressed surprise that the reports prepared in terms of the Mental Health Act were now in the file without any explanation as to when, how or why they had been placed in the F record of proceedings when the trial had been completed before those reports were available.

In a lengthy response to the appellant's grounds of appeal, the trial magistrate opined that because the appellant was represented by a competent and experienced legal practitioner there was no need, in proceedings in terms of G s 271(2)(b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (hereinafter called "the Criminal Code"), for the facts and elements of the offence to have been put to the accused by the court in order to solicit his admission or understanding of them, as the case may be. He explained the purpose of the psychiatric reports as advised to him by the appellant's legal practitioner as having been simply to obtain a professional view as to what H

A the appellant must have "felt like when he was rejected and why he reacted as he did". Such reports, he said, were intended to be a part of the submissions on mitigation and not to establish whether or not the appellant suffered from a mental defect at the time that he committed the offence. He explained that in his opinion the appellant did not suffer from any mental disorder and that the reports prepared by two general medical practitioners purportedly in B terms of the Mental Health Act were not of any assistance to the court. He said that the reports had been handed over to him in court and that he had satisfied himself that they were not of any assistance to him. Of the two reports he went on to say:

"I put them on the bench where the court orderly usually collects C documents. I left the record on the bench after remanding the case. The medical reports were not produced in court and they are

not part of the record of proceedings. I suspect that the orderly placed them in the record before taking it to the Clerk of Court's Office The two medical reports were not considered on sentence since they were not of any assistance".

This explanation is confusing. Were the reports handed in to the magistrate D in court or not? The trial magistrate explained several other aspects of the trial such as the general attitude of the appellant's legal practitioner and what he was prepared to confirm as having taken place at the trial. He also explained the basis on which he convicted and sentenced the appellant in the absence of any medical reports. The response by the trial magistrate simply indicates that if what he E said happened did happen, then he had not recorded it comprehensively. His response also indicates that what he said happened may not have happened at all. This highlights the absolute necessity for a magistrate to record in detail the proceedings before him. From perusing the record of proceedings it is not indicated that the appellant's legal practitioner confirmed that he had ensured F that the appellant understood the facts alleged and admitted them or that the elements of the offence had been explained to him. The record does not indicate what the legal practitioner's purpose for requesting the psychiatric reports was nor what he said generally in respect thereto. It does not show that he confirmed any of the things that the magistrate later said he confirmed or was now willing to confirm. The record does not indicate that the two reports G now on file were produced in court and, if they were, what the court's attitude to them was. It is not helpful that a magistrate should at a later stage explain in detail what transpired during the trial when that is not recorded. It is the record, taken with scrupulous regard to detail, which should tell the story. The record in this case is scanty and lacks the necessary detail to enable an appellate court to understand what exactly transpired during the trial. If what H the magistrate said in his response to the notice of appeal indeed took place,

then that simply confirms the inadequacy of his record. I must therefore A remind judicial officers about the absolute necessity of ensuring that the record of proceedings is comprehensive and complete in every respect. The record in this case does not meet the required standard.

The main issue in this appeal was whether the appellant's conviction was proper. If it was not, then it must be set aside and the need to deal with the B appropriateness of the sentence falls away. The main issue, in my view calls for a consideration of three aspects of the proceedings in the following order:

a) whether it was necessary for the trial court to satisfy itself that the appellant had admitted the facts in the outline of the State case and had understood the elements of the offence even though he was legally represented? C

b) Whether it was proper for the trial court to proceed to convict and to sentence the appellant in the absence of a medical report or affidavit on the injuries sustained by the complainant; and

c) Whether it was proper for the trial court to proceed to convict and sentence the appellant in the absence of the psychiatric reports which it D had agreed and directed should be produced?

The heads of argument filed by both parties and their oral submissions, in particular those of Mr *Mushangwe,* dealt with the non-production of the medical report on the complainant's injuries in so far as it impacted on the sentence and not on the conviction. The grounds of appeal dealt with this E matter in the same way. But in his heads of argument and in his oral submissions Mr *Kwenda* dealt with the absence of the medical report on the complainant's injuries in so far as it impacted on the conviction.

The Court's duty in regard to an explanation of the facts alleged and the accused's understanding of the essential elements of the offence

Mr *Mushangwe* found no fault with the trial magistrate not complying with F the requirements of s 271(2)(b) of the Criminal Code in regard to a plea of guilty tendered. He submitted that the provisions of the section are only mandatory where the accused is not represented by a legal practitioner. He stated that the rationale of the provisions is to ensure that the plea of guilty is genuine, unqualified and unequivocal. He submitted that the appellant was G represented by a legal practitioner at every stage of the proceedings and that the legal practitioner would, as is commonly done, have explained the essential elements of the offence to him. The court's duty was then simply to inquire of the legal practitioner if he had explained the essential elements of the offence to the appellant and whether the plea of guilty was genuine. If the legal practitioner confirmed this then there was no basis for attacking the trial H

A magistrate's approach in that regard. Mr *Mushangwe* said that the magistrate had in fact sought the necessary confirmation from the accused's legal practitioner. Unfortunately, and contrary to

these submissions, the record does not reflect that this is what happened.
Mr *Kwenda* submitted that the mere fact of the accused being represented by a legal practitioner did not absolve the trial magistrate from the duty to B explain the essential elements of the offence and to ensure that they were understood by the accused. He said that a failure to ensure that that happened amounted to a gross irregularity which was fatal to the proceedings.
Section 271(2)(b) of the Criminal Code lays down the procedure on a plea of guilty where the offence merits a sentence of imprisonment without the C option of a fine or a fine exceeding five hundred dollars. The procedure is that if the accused is not legally represented the court shall explain the charge and the essential elements of the offence to the accused and inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge. The court is required D to follow this procedure without being prompted thereto by any person or if requested to do so by the prosecutor. The acts or omissions on which the charge is based may be explained to the accused by the prosecutor. Where the accused is legally represented the procedure is laid down in the proviso to s 271(2)(b) as follows:
E "Provided that, if the accused is legally represented, the court may, in lieu of the procedure provided in subparagraph (i) and (ii), satisfy itself that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor by relying upon a statement to that effect by the legal F practitioner of the accused".
It is clear from this proviso that the court is entitled to rely on a statement by the accused's legal practitioner to the effect that he has explained to the accused the charge and the acts or omissions on which the charge is based and that he has explained the essential elements of the charge and further that the accused admits the charge and the elements of the offence. The statement on G which the court is entitled to rely in these circumstances is no doubt an important confirmatory statement which renders it unnecessary for the court to comply with the absolutely mandatory requirements of s 271(2)(b) of the Criminal Code. That confirmatory statement by the accused's legal practitioner is in substitution of the court's duty to give the explanation and seek H confirmation itself. I have no doubt at all that the court must record that the
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Chinhengo J
statement on which it relies for a conviction was made by the legal practitioner A because it is only for that reason that the court may not itself give the necessary explanation. A failure to record that the legal practitioner made the statement may cast doubt on whether that statement was made at all. It must be noted that even where the legal practitioner makes the statement, the court may still, by giving the explanation itself and seeking the accused's admissions, B satisfy itself as to the genuineness of the accused's admission of the charge and the essential elements. The proviso is clear that even where the legal practitioner had given the statement confirmatory of the explanations he had given to the accused, the court may still itself give the explanation and follow the requirements of s 27 (2)(b). It is in no doubt at all that the intention of the Legislature in providing for the procedure in s 271(2)(b) was to ensure that C however it was done, the court should satisfy itself that the plea of guilty was genuine and well founded in all respects. That is the reason why in terms of s 272 of the Criminal Code, if the court is in doubt that the accused is in law guilty of the offence to which he has pleaded or is not satisfied that he has admitted or correctly admitted the essential elements of the offence or all the acts and omissions on which the charge is based or it is not satisfied that the D accused has no valid defence to the charge, it shall record a plea of not guilty and require the prosecution to proceed with the trial. This is so despite the fact that the accused's legal practitioner may have confirmed that the accused's plea was genuine and well founded. It must be accepted that there are competent and not so competent legal practitioners. It must be accepted that a legal practitioner may be in error as to the guilt of the accused at law or as E to the correctness of his admissions of the facts and the essential elements of the offence or as to the absence of a valid defence to the charge. And it is for this reason that the duty is placed on the court to ensure that the plea tendered is not vitiated by any such factor at all.
In my view the requirement that the trial magistrate must record the legal practitioner's confirmatory statement F is supported by subsection (3) of s 271 of the Criminal Code. It provides that where a magistrate proceeds in terms of s 271(2)(b) he shall record the explanation of the charge and the essential elements of the offence, any statement of the acts or omissions on which the charge is based, any reply given by the accused to the inquiry relative to his admissions and any statement made to the court by the accused in connection with the offence to G which he has pleaded. If the accused is legally represented a reply to the inquiry in terms of s 271(2)(b) and any statement made to the court in connection with the offence will normally be given or made, as the

case may be by the accused's legal practitioner on the accused's behalf. That reply or statement, in my view, must be recorded. I think that a failure to record it amounts to a failure to comply with s 271 (3) and, therefore, to a misdirection. H

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Chinhengo J

A See *S* v *Sibanda* 1989 (2) ZLR 329 (S) where on slightly different facts it was held that the failure to comply with s 271 (3) was fatal to the prosecution case.

I have already indicated what the magistrate recorded in respect of the plea proceedings. In addition to recording the scantiest details of the proceedings, the magistrate did not record that the appellant's legal practitioner had made the statement to the effect that he had explained the charge, the acts and B omissions on which it was based and the essential elements of the offence. I am satisfied that this was a misdirection warranting the setting aside of the conviction, more so when this misdirection is viewed together with the other shortcomings in the proceedings.

Whether it was proper for the court to convict and to sentence the appellant C *in the absence of any medical report/affidavit on the injuries sustained by the complainant?*

Mr *Kwenda* submitted that the conviction of the appellant in the absence of a medical report on the complainant's injuries was improper and that the trial magistrate's failure to secure it as evidence before the court was a misdirection. Mr *Mushangwe* submitted on this matter only in relation to sentence and said D that the trial magistrate misdirected himself by proceeding to sentence the appellant without having had sight of the medical report.

The appellant was facing a charge of attempted murder. The *mens rea* of this offence consists in the intention to commit the crime that the accused is charged to have attempted. That intention may be actual intention or it may E be legal intention. See Burchell & Hunt: *South African Criminal Law and Procedure* Vol 1, 2nd ed at p.451 and *R v Poteradzayi* 1959 (1) R & N 31, 1959 (2) SA 125 (FSC). In convicting a person of attempted murder it is necessary to establish either the express purpose to kill or the constructive purpose to kill. How then is either purpose established?

F In *Poteradzayi (supra)* the appellant had thrown some petrol at his wife, mostly at her neck and upper part of her body and had ignited her clothing with a match. He had then run away without attempting to help her or raise an alarm. He was convicted of attempted murder. The conviction and sentence were upheld on appeal. On appeal however the court was called upon to determine whether an express intention to kill had been proved. G Briggs FJ at 33H-34E (129B-G of the SA report) said:

"Certainly there was deliberation; but that of itself would be perfectly consistent with an actual intention to do grievous harm only. In order to establish an express purpose to kill, the probability of death in relation to the means adopted must, in the absence of other evidence establishing intention, be such that the only reasonable inference is that the accused H must have intended to cause death, and did so in fact intend. In this case

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the only medical evidence was a certificate and deposition by a A Government medical officer and an affidavit by a Government analyst. The latter established that the liquid in question was petrol and gave some account of the extent of burning of the clothing, which was apparently confined to one shoulder and part of the same side. The former showed that the injuries were superficial burns extending over approximately one-tenth of the skin area of the body and that in normal B circumstances one-third of the skin area must be so affected before there is appreciable danger to life. This leaves many questions unanswered. The amount of petrol thrown could never be precisely established. The bottle was an ordinary lemonade bottle and there was an inch left in the bottom. There is nothing to show that the bottle was ever full. There was no evidence to indicate how much more extensive the burning would C have been if Gabriel had not intervened. It is not impossible that the petrol had already completely, or almost, burnt itself out, though the clothes were still alight, when he used the water. A petrol fire is not in the ordinary way easily extinguished with water. Considering these facts, as one must, in the light most favourable to the accused, it seems impossible to say that the gravity of the risk involved in his act was such that the only reasonable inference is that he actually intended to cause D death. To this extent, and assuming the meaning of the judgment to be as we have suggested, we are unable, with respect, to agree with its reasoning".

The reasoning of the court *a quo* had been that the facts as noted in the above quotation established an express intention to kill. The appeal court thus did E not find this to have been a proper basis to found the conviction of attempted murder. It however upheld the conviction on the basis that a constructive intention to cause death had been established. The appeal court accepted that constructive intent is, in the circumstances, "an appreciation that there is some risk to life involved

in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death". The appellate court was F satisfied that the appellant's assault on the complainant involved: "so substantial a risk to life that he must have appreciated that some risk to life was involved . . . . We are of opinion that the Crown proved beyond reasonable doubt an assault occasioning bodily harm and committed with intent to kill, in the sense that the appellant appreciated that some risk to life was involved in his act, and was reckless as to whether or not G the risk might be fulfilled in death. We think, therefore, that the Crown proved the offence of attempted murder". (at 35; 129). In my reading of the judgment of *Poteradzayi* the existence of a medical report on the injuries sustained by the victim of the offence on a charge of attempted murder would be quite helpful, if available, for purposes of securing a conviction. The extent of the injuries may be an indication of the H

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Chinhengo J

A necessary intention. What I perceive looming large as the criterion is the means adopted by the accused to inflict the bodily harm. In *Poteradzayi (supra)* those means were not found to be such that the only inference was that the accused intended to cause death. It was stressed that in the absence of other evidence establishing intention the means adopted by the accused must provide a basis for the reasonable inference, excluding every other inference, B that the accused must have intended to cause death. The injuries of themselves do not appear to be of any real major significance. In the present case the appellant used a firearm. It was common cause that he fired twice at the complainant injuring her in the thigh and in the shoulder. It was not in dispute at the trial that the appellant was not experienced in the use of firearms. The use of a firearm in the circumstances of this case (and on a consideration of C the principle of the means adopted by the accused in relation to the probabilities of death arising from their use) provides a basis, even in the absence of other evidence establishing intention, to draw, as the only reasonable inference, that the appellant intended to cause death and that he did so in fact intend. I am of the view that even in the absence of a medical D report on the injuries, which were not in dispute as to their occurrence and in respect of which it was common cause that the complainant was admitted to hospital for treatment, the court could have inferred an intention to kill, and therefore could have properly convicted the appellant on the charge of attempted murder. I also think that even without having had sight of the medical report the court could still have arrived at the same verdict on the E basis of legal intention because the assault with a firearm which the appellant projected involved so substantial a risk to life that he must have appreciated that some risk to life was involved and he was reckless as to whether the risk might be fulfilled in death. I must add, as was done in *Poteradzayi supra,* at 34 D; 129 F, that my reasoning in this judgment applies only to cases of F attempted murder involving physical assault. Otherwise different considerations apply. I therefore come to the conclusion that in cases of attempted murder involving a physical assault the absence of a medical report as to the injuries, where the injuries are admitted to have been inflicted, is not fatal to the proceedings in regard to conviction and even to sentence. What is of decisive importance are the means adopted by the accused as they relate G to the probability of causing death. The medical report on the injuries will always be of great assistance to the court and must be made available whenever possible. Its non-availability, however, may not of itself be fatal to a conviction on a charge of attempted murder if the means adopted to cause the injuries are such that they would enable the court to reach, as the only reasonable inference, that the accused intended to cause the complainant's H death.

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I may add for completeness that the *actus reus* of the offence charged was A present. The appellant shot at the complainant intending to kill her. It seems to me that he did everything that he set out to do but failed in his purpose because he was unskilled in the use of a firearm or because of some other factor. It would appear that his was a completed attempt. The non-availability of the medical report on the complainant was not fatal to the prosecution case B nor would its non-availability have impacted negatively on the magistrate's assessment of sentence. There was no misdirection on this score.

Whether it was proper for the court a quo to proceed to convict and sentence the appellant in absence of psychiatric reports which it had requested

The record of proceedings in this case does not, as I have already commented upon, provide full details of what transpired at the trial. It seems to be C accepted by the appellant and the respondent that the trial magistrate directed that reports in terms of s 29 of the Mental Health Act be prepared by two medical practitioners. The purpose of those reports could only have been to establish whether at the time of committing the offence the appellant was mentally disordered or

intellectually handicapped or not. The appellant was D examined by two medical practitioners and two reports were compiled in respect of him. The record of proceedings does not indicate what the trial magistrate did with those reports. It is only in his comments in response to the notice and grounds of appeal that the magistrate attempted to explain what he did or did not do with the reports. A court of law may disregard an expert report only for very good reasons and usually on the basis of another E expert report to the contrary. The reports whose inclusion in the record is lamely explained by the trial magistrate indicate that the general medical practitioners who examined the appellant were of the opinion that the appellant may have had a mental problem. In the report prepared by Dr Masenda it was recommended that the appellant be examined by a psychiatrist. In the other report it is recorded that the appellant was of "impulsive F behaviour" and had "night-mares and insomnia". In my view the magistrate was not entitled to dismiss these reports out of hand as he did or to simply ignore them and make no comment on their contents. It may well be that these reports were not very useful to the court. It may also be that the appellant was not mentally disordered at the time that he committed the offence. These G however are all the issues which the trial court must investigate. It may be that after a proper consideration of the reports by Dr Masenda and Dr Madhombiro and after hearing other evidence, the court may consider it necessary to call for psychiatric reports on the appellant's mental condition. I think that in order for a proper trial to be conducted in this case it is necessary for the court to remit it for a rehearing. See *S v Sibanda, supra,* at 332H where Dumbutshena H
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Chinhengo J
A CJ said:
"Where a judge of the Supreme Court is seized with deciding an appeal brought before him in terms of s 9A of the Supreme Court of Zimbabwe Act, he has a discretion to remit the case to the magistrate's court for rehearing or to allow the appeal and set aside the conviction".
See also s 41(d) of the High Court Act [*Chapter 7:06*].
B I am empowered to take the course of action I have decided upon. In this case it is, in my view proper to remit the case because the offence charged is of a serious nature and the appellant pleaded guilty to the charge. Despite my criticism of the procedure adopted by the court *a quo,* his plea of guilty cannot be ignored. The trial court misdirected itself on procedure by failing to record C the proceeding comprehensively and by failing to consider certain medical reports presented to the court. There is no need, in view of the decision I have reached, for me to consider any issues relating to the propriety or otherwise of the sentence.
Accordingly the conviction and sentence are set aside. The matter is remitted to the court of the regional magistrate for a fresh hearing before a different D magistrate.
P Kwenda & Partners, appellant's legal practitioners
E *Office of the Attorney-General,* respondent's legal practitioners

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[zRPz]MOYO & ANOR v ATHLETICS ZIMBABWE 2002 (2) ZLR 648 (H)
2002 (2) ZLR p648

Citation 2002 (2) ZLR 648 (H)

Case No Judgment No. HH-205-02

Court High Court, Harare

Judge Smith J

Heard	8 November 2002; 13 November 2002
Judgment	13 November 2002
Counsel	*T Magwaliba,* for the applicants *R M Fitches,* for the respondent
Case Type	Urgent application
Annotations	No case annotations to date

[zFNz]Flynote
Sport — regulation of — Sport and Recreation Commission — interim D committee appointed to administer a sport after de-registration of sporting association — status of such committee — new association formed — no right to claim levies payable to former association before new association was formed
[zHNz]Headnote
The applicants, who were professional athletes, were members of sports E clubs indirectly affiliated to the respondent. The respondent was registered in June 2002 in terms of s 29 of the Sports and Recreation Commission Act [*Chapter 25:15*]. Until December 2001 the sport of athletics had been controlled by another association, which had been de-registered at that time. An interim committee was appointed by the F Sports and Recreation Commission under s 30 of the Act to administer athletics until a new body was formed. The interim committee demanded that the applicants pay to it 10 per cent of the prize moneys won at a competition in Angola. The applicants' participation had been sanctioned and organised by the previous association before it was de-registered. When they refused, they were suspended from participation in official G athletics meetings.
Held, that a committee appointed in terms of s 30 of the Act is not a separate *persona* with its own corporate status. It merely replaces the governing body of the association concerned. Any payment was due to the former association, not to the interim committee. The respondent did not exist at the time of the competition in Angola and could not demand any levy. H
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A It therefore could not suspend the applicants from participation in other competitions.
[zSTz]Legislation considered
Sports and Recreation Commission Act [*Chapter 25:15*], s 30
[zCIz]Case information
B *T Magwaliba,* for the applicants
R M Fitches, for the respondent
[zJDz]Judgment
Smith J: The facts in this case are mostly common cause. The applicants are professional athletes. They are members of sports clubs that are indirectly C affiliated to the respondent, which is the association that is registered in terms of s 29 of the Sports and Recreation Commission Act [*Chapter 25:15*] (hereinafter referred to as "the Act") in respect of the sport of athletics. The respondent (hereinafter referred to as "AZ") was registered in June 2002. Initially, the association that controlled athletics in this country was the D Amateur Athletics Association of Zimbabwe (hereinafter referred to as "AAAZ"). That body was deregistered in December 2001 by the Sports and Recreation Commission (hereinafter referred to as "the SRC"). Soon after its deregistration the applicants participated in the New Years Eve marathon in Angola. On their return from Angola AAAZ demanded payment of 10 per cent of their prize money. However, after the deregistration of AAAZ, the E SRC appointed a body, known as the Interim Committee, to administer athletics, pending the establishment of a body to replace AAAZ. The Interim Committee drew up a constitution for a new association, elections were held and eventually AZ came into existence and was registered.
The Interim Committee demanded that the applicants pay it 10 per cent of the prize money that they had won in Angola. When the applicants failed to F comply with the demand, the Interim

Committee resolved that unless the applicants paid the levy they were suspended from participating in national and international meets sanctioned by the Interim Committee until February 28, 2002. If they did not pay by that date, they would be barred from taking part in national and international meets organised and sanctioned by the G Interim Committee until their case was reviewed by AZ.
On 17 October 2002 the applicants filed an application seeking an order setting aside their continued suspension by AZ from participating in athletic contests (case No HC 9316/02). The applicants then filed this urgent application on 6 November seeking an order that they be permitted to H participate in athletic contests pending the determination of case No HC

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9316/02. They contend that the Interim Committee was not lawfully in office A as it had not been appointed by the Minister responsible for the administration of the Act, and therefore their suspension is a nullity. Furthermore, as the suspension is a penalty, they should have been afforded an opportunity to be heard. Finally they averred that, following the intervention of the International Association of Athletics Federations through its area representative for Southern Africa, Mr Cheune, the suspensions were lifted. B

The applicants wished to participate in the Gutu Half-Marathon on 5 October 2002. AZ refused to allow them to do so. The first applicant withdrew but the second applicant entered and she came second. However, when the results were announced it was announced that she had been disqualified. No reasons were given. The applicants consider the matter to be one of urgency because C there are contests coming up on 9 November and in December which they would like to take part in. AZ submits that the matter should not be treated as an urgent application because the applicants were suspended on 9 February 2002 and have not been allowed to take part in contests since then. They have had eight months in which to institute legal proceedings but have D not done so until now. The need to act arose on 9 February. The response by the applicants is that initially they did not want to act confrontationally by way of legal proceedings. They wanted to proceed by way of dialogue. That is why the International Association of Athletics Federations was approached. That body sent its representative for Southern Africa, Mr Cheune, to Zimbabwe to try to resolve the dispute. They were informed that Mr Cheune, E in a letter dated 5 September 2002, had advised that the suspension of the applicants was lifted with immediate effect and that they should not pay the 10 per cent levy. However, AZ insisted that the suspensions would only be lifted when the 10 per cent levy was paid. Because of the attitude adopted by AZ, they had no option but to resort to litigation.

I agree that the matter should be treated as one of urgency. In my opinion, the F position changed after Mr Cheune wrote the letter saying that the suspensions of the applicants were lifted unconditionally. The applicants have already missed the contest that was to be held on 9 November. Clearly they are very keen to take part in the contests which are to take place in December.

As regards the legality of AZ, there is an application pending before Hungwe G J in which AAAZ, under its new name Zimbabwe Athletics Federation, is challenging the legality of AZ — case No HC 5497/02. It would be wrong for me to make any finding at this stage was to the lawfulness of AZ and its registration by the SRC. I do not consider it to be necessary for me to do so in order to resolve the dispute with which I am seized.

According to the applicants, when arrangements were made for them to take H

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A part in the race in Angola last year, it was AAAZ which made all the arrangements for them to do so. It was AAAZ that secured their tickets to go to Angola, and paid for their visas, vaccinations and travel expenses to Harare. However, AZ claims that it, as the Interim Committee, had sent them to Angola. In a letter dated 27 December 2001 to the Director-General of the SRC, purporting to be from the Interim Secretary-General of the Amateur B Athletics Association of Zimbabwe, the writer submitted the names of the athletes who were to compete in the New Years Eve race in Angola and said "the Association has cleared them on the understanding that they will remit ten per cent of their winnings to the mother body on their return". The applicants say that both AAAZ and the Interim Committee wanted to be paid C the levy and they did not know which one should be paid.

Section 30 (2) of the Act provides that where the Board of the SRC has directed the Director-General to strike an association from the register, the Minister may appoint a committee to administer the affairs of the association concerned. Presumably the Interim Committee was appointed in terms of this provision. Subsection (3) of s 30 of the Act provides that a committee D appointed in terms of that section shall have all the rights, duties and responsibilities of the governing body it has displaced, but it is answerable to the Board of the SRC and not to the members of the national association concerned. Subsection (4) of s 30 of the Act then provides that

where a committee has been appointed, the name of the national association concerned shall, if it has been struck off the register, be restored to the register. E Paragraph (b) of that subsection requires that the committee shall, as soon as practicable, take steps for the appointment of a new governing body of the association concerned in accordance with the constitution and rules of the association. It would appear, therefore, that a committee appointed in terms of s 30 of the Act is not a separate *persona* with its own corporate status. It F merely replaces the governing body of the association concerned. Therefore, when the Interim Committee demanded payment of the 10 per cent levy from the applicants, that payment was due to AAAZ and not to the Interim Committee. Once the Interim Committee was appointed, since its function was to take over the reins of AAAZ, the SRC should have restored AAAZ to the register in terms of s 30(4) of the Act. The fact that AAAZ was G deregistered does not mean that it ceased to exist. It still continued in being as a corporate body by virtue of its constitution. It is its constitution that gives it corporate status, not the fact of registration.

I accept that, in terms of clause 11(h) of the Constitution of AZ, the association has power "to set percentage fees due to it from athletes' H winnings from competitions organized on an Association to Association

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invitation basis". However that can only apply in relation to competitions A where AZ is a party thereto or has been invited to send participants. For the New Years Eve marathon in Angola last year, the invitation must have been sent to AAAZ. It could not have been sent to AZ because AZ was not in existence at that time. AZ cannot demand the levy in respect of competitions held before it came into existence. Even if AZ is the successor to the Interim B Committee, there is nothing in the papers which indicates that it has the authority to collect monies owed to the Interim Committee. Since the Interim Committee did not have corporate status, no levy would be payable to it. That being the case, AZ has no right to suspend any athlete on the grounds that the athlete has not paid any levy due to the Interim Committee.

It is ordered that: C

1. Pending the determination of the application in case No HC 9316/02, the respondent shall treat the applicants as though their suspensions have been lifted and shall permit them to take part in any athletics competition arranged by or under the auspices of AZ or of any other national association in respect of which AZ has received an invitation to participate, subject to their compliance with any conditions fixed by AZ for athletes D in general.
2. The respondent pay the applicant's costs.

Magwaliba, Matutu & Kuririra legal practitioners for applicants E

Gill, Godlonton & Gerrans, legal practitioners for respondent F

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/TSVANGIRAI & ORS v REGISTRAR-GENERAL 2002 (2) ZLR 653 (S)

[zRPz]TSVANGIRAI & ORS v REGISTRAR-GENERAL 2002 (2) ZLR 653 (S)
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Citation	2002 (2) ZLR 653 (S)
Case No	Judgment No. S-93-02
Court	Supreme Court, Harare
Judge	Ziyambi JA, Malaba JA & Gwaunza JA

Heard	1 October 2002; 14 November 2002
Judgment	14 November 2002
Counsel	*J J Gauntlet SC,* with him *P Nherere,* for the first appellant No appearance for the other appellants Mrs *L Matanda-Moyo,* with her *C Mudenda,* for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

[zFNz]Flynote
D **Appeal** — submissions by parties to appeal — submissions made after hearing but before judgment delivered — propriety of
Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s20(1) — right to receive information — does not include right to demand voters' roll from Registrar-General
E **Election** — voter —voters' roll — copies of — supply by Registrar-General — limitations on requirement to supply voters' — roll — no requirement to supply copy of common voters'— roll to candidate in Presidential election
Practice and procedure — *res judicata* — requirements for — same subject F matter — meaning — whether can be raised by plaintiff against a defence raised by defendant
[zHNz]Headnote
The first appellant was the unsuccessful candidate in the Presidential election held in March 2002. In order to challenge the outcome of the election, he sought from the High Court an order compelling the G respondent to furnish him with an electronic copy of the common voters' roll. The order was granted by consent, and the respondent supplied the data on compact disks furnished by the appellant. The appellants then sought similar copies of the revised voters' roll and two supplementary voters' rolls but the respondent refused to supply them. H He agreed to supply printed copies of the rolls, on payment of the
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prescribed fees. The appellants applied for an order compelling the A respondent to supply the data required. The application was dismissed, the judge (Makarau J) holding that the legislation under which copies of the voters' roll could be obtained clearly referred to printed copies or extracts there from. The law was behind the times, she said, and remained in the pre-computer age, but was clear. She also ruled that the B fact that the respondent had previously consented to the granting of a similar order did not mean that he could not now be heard to oppose such an order. Subsequently, the respondent reneged on his undertaking to supply printed copies of the voters' rolls, citing logistical and cost problems. The appellants appealed, on the grounds that the court *a quo* had erred: C

(a) in holding that the application had been in terms of s 18(3) of the Electoral Act [*Chapter 2:01*], whereas it was grounded on s 18(2);

(b) in not finding that *res judicata* or estoppel did not operate against the respondent, as he had previously consented to the relief sought;

(c) in finding that the Electoral Act only required printed copies to be supplied, not electronic ones; D

(d) in not finding that the refusal by the respondent to supply the rolls constituted an infringement of the appellants' right to protection of the law and to receive information, a right now reinforced by the Access to Information and Protection of Privacy Act [*Chapter 10:27*].

Following the hearing of the appeal, the first appellant's counsel, without applying for leave and without being invited to do so, submitted a E document entitled appellant's further submissions.

Held, the submission of the document was an attempt to improperly influence the outcome of the matter. The document and its contents would be disregarded.
Held, further, that under s 18(1) of the Act, the voters' roll for every F constituency is open for inspection, free of charge, at the office of the constituency registrar. Under subs (2), a person inspecting the roll may, without payment, make copies of or extracts from the roll. A person inspecting a constituency voters' roll is entitled to make copies of it. The option to make copies or extracts is only open to a person inspecting the roll. A person who has not inspected or will not inspect the roll has no G right to make or request copies of the roll.
Held, further, that the subsections deal with constituency rolls being inspected at the offices of the 120 constituency registrars. They do not deal with the combined rolls being inspected and copies sought from the Registrar-General. There thus is no provision in the Act whereby the Registrar-General can be required to provide copies of the common H
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A voters' roll to a candidate in a Presidential election. The previous issuance by the respondent of copies of the original common voters' roll could not have been done in terms of s 18(2) of the Act.
Held, further, that the doctrine of estoppel could not be used to make legal what would otherwise be illegal.
Held, further, that the defence of *res judicata* has three requirements, all of B which must be present. 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. *In casu,* while the two actions may have been between the same parties and founded on the same cause of action, it was not clear that they concerned the same C subject matter. What the first appellant sought in the later application was not the same as he sought and obtained in the earlier one.
Quaere, whether *res judicata* can be raised by a plaintiff in answer to a defence raised by a defendant.
Held, further, that the constitutional right to receive information without interference does not extend to a right to demand a copy of the voters' D roll from the Registrar-General. Section 20 of the Constitution is concerned, broadly, with the right to freedom of expression; and the spirit and essence of the section is that every person is entitled, among other things, to receive information without interference. The first appellant was seeking the voters' rolls, not for the purpose of exercising that right, but for the purpose of challenging the outcome of the E Presidential election.
Held, further, that the first appellant could not rely on s 5 of the Access to Information and Protection of Privacy Act. He should have made a request to the respondent in the manner prescribed by s 6 of the Act; and if that had been refused, he should have taken the refusal on review to the High Court. It was improper to rely, on appeal, on arguments and F information not placed before, and therefore not considered by, the court *a quo.*
[zCAz]Cases cited
African Wanderers Football Club (Pty) Ltd v Wanderers Football Club G 1977 (2) SA 38 (A)
Evins v Shield Ins Co Ltd 1980 (2) SA 814 (A)
Horowitz v Brock and Others 1988 (2) SA 160 (A)
Levy v Zalrut Invstms (Pty) Ltd 1986 (4) SA 479 (W)
Registrar-General v Chirwa 1993 (1) ZLR 291 (S); 1993 (4) SA 272 H (ZS)
2002 (2) ZLR p656
Gwaunza JA
Smyth v Ushewokunze & Anor 1997 (2) ZLR 544 (S); 1998 (2) BCLR A 170 (ZS)
[zSTz]Legislation considered
Access to Information and Protection of Privacy Act [*Chapter 10:27*], ss5&6 B
Constitution of Zimbabwe 1980, s 20(1) Electoral Act [*Chapter 2:01*], s 18
[zCIz]Case information
J J Gauntlet SC, with him *P Nherere,* for the first appellant
No appearance for the other appellants
Mrs *L Matanda-Moyo,* with her *C Mudenda,* for the respondent C
[zJDz]Judgment
Gwaunza AJA: This is an appeal against the judgment of the High Court, in which the appellants' application was dismissed, with no order as to costs.
In the court *a quo* the appellants sought the relief that is aptly summarised in the judgment of that court, and which is repeated here for convenience: D
"... an order compelling the respondent, on payment of one million two hundred thousand dollars, to make available to the applicants, the complete voters' roll together with the two supplementary voters' rolls used during the presidential election of 9 - 11 March 2002, on compact discs to be

supplied by the applicants in a comma delimitated ASCII format. The applicants proceeded further in the draft order to specify and E clarify the particulars of the voters' rolls whose copies they seek, when the respondent should be ordered to comply with the order of the court, and an order safeguarding the effectiveness of such an order in the event of an appeal and costs."

Before considering the merits of this appeal, it is pertinent that I deal with a few preliminary issues arising from the proceedings now before the court. F

The first relates to the implications of the ruling made by this court at the beginning of the hearing, to the effect that senior South African counsel, Advocate *J J Gauntlet,* had the authority to appear and argue this appeal before this court. The ruling followed the objection, raised *in limine* by the respondent's counsel, Mrs *L Matanda-Moyo,* to *Mr Gauntlet* so appearing. G The court was satisfied that the order giving Mr *Gauntlet* the authority to represent the first appellant in his challenge of the March 2002 Presidential Elections, and "in any proceedings related thereto" was sufficiently wide to cover the present appeal (Case No H-3616-02).

The High court order in question (Case No H-8493-02), however, was specific in terms of who Mr *Gauntlet* could represent. The relevant part of H

A that order reads as follows:

"1. The applicant be and is hereby admitted as a Legal Practitioner of this Honourable Court, in order to represent Morgan Tsvangirai in challenging the legality and validity of the Presidential Elections held in Zimbabwe on 9 to 11 March 2002. in case no HC 3616/2002, and in any proceedings related thereto."

B In this appeal, two other appellants are cited. The order of the court *a quo,* cited above, does not give Mr *Gauntlet* the authority to represent these appellants. Accordingly, since no other counsel appeared to represent them, this court considers that only one of the three appellants cited, that is, Morgan Tsvangirai. is properly before it.

C The second matter relates to the applications, each made by either side, for leave to adduce fresh evidence on appeal. Even though each side had filed papers opposing the other's application, Mrs *Matanda-Moyo,* for the respondent, withdrew both the respondent's application and his opposition to the appellant's application. The effect of such withdrawal was that the application of the appellant to adduce fresh evidence on appeal, was granted D without opposition.

That notwithstanding, it was contended for the appellant that, since a fair amount of work had gone into the preparation of his opposing papers and heads of argument concerning the application by the respondent for leave to adduce new evidence on appeal, the costs attendant on that application E should be awarded to the appellant. I will revert to that matter later.

The third issue relates to something that happened after the hearing of the appeal had been concluded and the court had reserved its judgment. The appellant, without first applying to do so and, therefore, without the invitation of the court, sought to introduce after the fact, a document entitled "The Appellant's Further Submissions". No authority was cited as a basis for the F submission of this document. The two learned judges who heard this appeal together with me each received a copy of the document in question. We conferred over this unusual development and concluded that the submission of the document was an attempt by the appellant to improperly influence the outcome of this matter. We record our extreme displeasure at this attempt to influence our determination of this appeal and hope that such behaviour on G the part of a senior legal counsel will not be repeated.

Consequently, I shall, in my determination of this matter, disregard both the document and its contents.

I will now consider the appeal.

H The appellant is the President of the political party called the Movement for

Democratic Change ("MDC"). He voted and stood as a candidate on behalf A of his party in the Presidential Elections which took place on 9 - 11 March, 2002.

The respondent is the Registrar-General of Elections, and is empowered to exercise the functions which are provided or conferred upon him in terms of the Electoral Act [*Chapter 2:01*]. B

The pertinent background to the dispute is as follows. The appellant brought an urgent chamber application before the High court on 24 December 2001 (Case No H-12092-2001) seeking an order compelling the respondent to furnish him with an electronic copy of the common voters' roll in respect of all registered voters in Zimbabwe up to 2 January 2002.

The appellant was successful in his application and the following order was C granted by consent:

"3. That the respondent make available on or before 7 January 2002, to the applicant, an electronic copy on compact disc supplied by the Applicant and in a comma delimitated ASCII format, of the common voters' roll in respect of all registered voters in Zimbabwe up to January 2002." D

This order was implemented on 7 January 2002, with the respondent handing over to the appellant's representative, four compact discs previously supplied by him in blank. A letter confirming this handover, written by the respondent and signed at the bottom by the appellant's representatives read in part as follows (Annexure 'C'):

"The Registrar-General is hereby providing on electronic media, ie CDs, E data concerning all the 120 constituencies. *This is in compliance with Sec 18(2) of the Electoral Act Cap 2:01.*

It should be noted that the data on the four compact discs does not include the majority of registrations which were effected during the voter registration exercise ..." (my emphasis) F

Subsequent to these developments, considerable correspondence was exchanged between the representatives of the appellant, the respondent and the Civil Division of the Attorney-General's office, over the appellant's request for similar copies of the revised voters' roll and two supplementary voters' rolls that had subsequently been prepared. The appellant charges that the respondent was "repeatedly evasive" about supplying copies of these voters' rolls. The respondent having declined to avail to the appellant the copies of the voters' roll in the manner requested, the appellant, in an urgent High Court application, sought the order referred to.

The respondent, who had filed no opposing papers to the application, nevertheless sent a legal representative to represent him at the hearing. The H

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A learned trial judge, after voicing her concern at the unprocedural appearance of counsel for the respondent, reluctantly allowed such counsel to make her submissions. This was after counsel for the appellant had, because of the national importance of the matter, consented to such appearance.

It is noted in the judgment of the court *a quo* that the submissions made for the respondent were simply to the effect that he abided by the contents of his B letter, dated 10 April 2002, and submitted in an earlier hearing concerning whether or not the matter could be heard on an urgent basis.

The relevant part of that letter read as follows:

"We are pleased to advise that the respondent is willing to supply Applicants with copies of the voters' rolls upon payment of the prescribed C fees. The rolls are available. Respondent cannot supply the rolls on compact discs as there is no such requirement in law. Applicants can capture the data from the printed rolls onto compact discs of their own."

The learned trial judge conceded the "common sense" implicit in the argument advanced for the appellant that the respondent was estopped from opposing the relief sought by the appellant by virtue of his having consented D to the granting of a similar order in H-12092/01. She, however, noted that she had "searched in vain" for a legal principle that compelled common sense in a situation where the law was clear. The learned judge was, in this respect, referring to s 18(3) of Electoral Act, as read together with s 14 of the Electoral Regulations, 1992, as amended. On the same principle, the learned trial judge rejected the argument put forward for the appellant that it would be far more E convenient, in the present computer age, for the appellant to have the voters' roll on compact disc rather than in printed form. She noted in this respect that the law currently in force had remained in the "pre-computer" age. The learned judge also rejected the argument that the word "copy" in the Electoral Act should be read to include a copy held in electronic form. In her view there F was no ambiguity in the law, which expressly provided for a "printed" copy.

Having in the final analysis found no legal basis for the appellant's application, the learned trial judge dismissed the application, and made no order as to costs.

Consequent upon this judgment, the parties once again engaged in G correspondence, this time over the issue of the respondent furnishing the appellant with printed copies of the voters' roll, as promised. This correspondence is now admitted for consideration in this appeal, following the appellant's successful application to adduce fresh evidence. The upshot of the matter, as appears from this correspondence, is that the respondent H backtracked on his undertaking to supply the appellant with printed copies

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of the voters' roll. The letter conveying this development is dated 19 August A 2002 and reads as follows:

Dear Sir,

RE: PRESIDENTIAL ELECTION: PRINTED VOTERS' ROLL D

We refer to your letter dated 14 August 2002 on the above mentioned matter.

Although we know that you can get the voters' rolls at a legally prescribed fee, these rolls have to be printed. They need finance, printing, logistics, stationery and manpower.
We note from your letter that you are asking for the rolls covering all C constituencies in the country. We are unable to provide you with the said rolls."
The appellant now appeals against the whole of the judgment of the court *a quo,* and has enjoined this court to take into account the refusal by the respondent to supply even the printed copy of the voters' roll in question. D
The grounds of appeal can be summarised as follows:
1. That the court *a quo* erred in holding that the application before it had been made in terms of s 18(3) of the Electoral Act, as read with the regulations made in terms of such Act, when in fact the claim of the appellants was "grounded fundamentally" E in section 18(2); 1
2. That the court *a quo* erred in not finding that *res judicata* or the doctrine of issue estoppel operated against the respondent's opposition to the application because he had, in an earlier case, consented to substantially the same relief;
3. That the court *a quo* erred in finding that the Electoral Act had remained in the pre-computer age and that therefore the only copies envisaged F therein were printed copies; and
4. That the court *a quo* erred in not finding that the refusal by the respondent to furnish copies of the rolls in computer format constituted an infringement of the appellant's constitutional right to protection of the law and the right to receive information, a right now reinforced by the G provisions of the Access to Information and Protection of Privacy Act [*Chapter 10:27*].
I will consider these grounds separately and in relation to the evidence placed before the court.
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Gwaunza JA
A SECTION 18 OF THE ELECTORAL ACT [*CHAPTER 10:27*]
I find merit in the contention made for the appellant that the court *a quo* fell into error when it determined the matter, in part, on the basis that the application had been made in terms of s 18(3) of the Electoral Act.
A consideration of the whole of s 18 is apposite. It reads as follows:
"(1) The B voters roll for every constituency shall be open for inspection by the public, free of charge, at the office of the constituency registrar during office hours.
(2) A person inspecting the voters roll for a constituency may, without payment, make copies thereof or extracts therefrom during office hours.
(3) A C constituency registrar may, whenever he considers it to be desirable, have the voters roll for his constituency printed, and any person may obtain from the Controller of Printing and Stationery, on payment of such charges and subject to such conditions as may be prescribed, copies of any voters roll so printed.
(4) Where the voters roll for any constituency has been printed in terms D of subsection (3) immediately before a general election or by- election or election to the office of the President, and it contains the names of the voters entitled to vote at that election, the Registrar- General may publish a notice in the *Gazette* declaring that the printed voters roll shall be used for the purposes of the identification of voters at that election."
E It will be seen from the above that subs (3) envisages a situation where:
(i) a constituency registrar, after considering it to be desirable, causes the voters' roll for his constituency to be printed, and
(ii) thereafter such copies are available, through the Controller of Printing and Stationery, and on payment of the relevant charges and subject to given conditions, to any person requiring them.
This situation bears no resemblance to the one *in casu.* The appellant seeks F from the Registrar-General copies of the common and supplementary voters' rolls. He does not seek copies of a voters' roll printed at the instance of a constituency registrar and reposed with the Controller of Printing and Stationery. The fact that the appellant is offering to pay for the copies requested and in the format suggested, does not, as contended for the G respondent, "remove" the application from s 18(2) to s 18(3). All that can be said of the tender of payment is that, on a reading of s 18(2) of the Act, it is not a requirement.
In all respects, therefore, the appellant is correct in his contention that the learned trial judge erred in determining the matter on the basis that the H application had been made in terms of s 18(3). In view of this finding, I do
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Gwaunza JA
not consider it necessary to consider the merits of the argument that the A learned trial judge further fell into "basic" error in seeking to interpret primary legislation (s18(3)) by recourse to secondary legislation.

The appellant has reiterated that the application at hand was made in terms of s 18(2) of the Electoral Act. It is asserted for him in paras 37 and 38 of his heads of argument:

"37. As already stated, the application was based on Sec 18(2) of the Act, B following concession (in annexure "c") at page 25, that the furnishing previously of the roll in computer format was in compliance with that provision.

38. What the court below, with respect, overlooked was the dominant provision in Sec 18 namely that (significantly, in peremptory language) C the voters' roll for every constituency *shall* be accessible to the public (by being available for free inspection). This is admitted by the respondent in his own letter, annexure "A" (page 22). It is on this primary provision in section 18(1), that subsection (2) builds. The latter permits a person inspecting the roll simply to 'make copies thereof or extracts therefrom'. It does so without specifying further the nature or form of the copies." D

I find to be eminently sound, the assertion by the appellant that subsection 18(2) builds on the primary provisions in s 18(1). It therefore came as somewhat of a surprise that counsel for the appellant, Mr *Gauntlet,* in an obvious departure from this stance, entreated the court to interpret subs (2) of s 18 in isolation and not within the context of s 18 as a whole. His contention was in effect that since the respondent had not in its papers taken E up this point (i.e. that the two subsections should be read together), the court could not, on its own, do so.

This reasoning is flawed for a number of reasons. Firstly, while the respondent may not have advanced the argument in question, the appellant himself did so in his heads of argument. After contending that the court *a quo* had F overlooked the matter (by implication therefore, that this court should not fall into the same error) it was somewhat contrary for Mr *Gauntlet* to now contend that the court should not do so. Secondly, once the issue of how the subsection in question should be interpreted had been raised by the appellant himself, it became untrue, as contended by Mr *Gauntlet,* that the court had sought of itself to raise it. Thirdly, it is a fundamental principle of legislative G interpretation that a provision in an enactment must be interpreted within the context of, firstly, the section or part of the enactment that it appears in and, secondly, the context of the entire statute. Therefore, even if the appellant himself had not raised the matter, the court whose task it is to interpret the law would have been perfectly within its rights to do so. H

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Gwaunza JA

A Be that as it may, the appellant is correct in his assertion that s 18(2) must be read together with s 18(1). Subsection (1), which the appellant correctly refers to as the dominant provision, places an obligation on the respondent to make available, for inspection by the public and at no charge, the voters' roll for every constituency. My understanding of this subsection is that the voters' roll *in whatever form* for every constituency shall be opened for B inspection by the public. Following from that, subs (2) provides that a person who inspects such roll, in whatever form it is presented, may make copies or extracts of it during office hours.

If the two subsections are read together it becomes evident that subs (2) gives the option to a person *inspecting* a voters roll pursuant to subs (1), to then C make copies or extracts of what he/she is inspecting. In other words, the option to make copies or extracts of the voters' roll is open only to a person inspecting it. It follows from this that a person who has not inspected or will not inspect the voters' roll in question does not have the right to make, or request, copies of such roll.

The reference in subss (1) and (2) of s 18 to constituencies is, in my view, D significant. The country is divided into 120 constituencies. Every constituency will have its own voters' roll, reflecting the names of people who have registered to vote in that particular consistency. As such a voter one would, logically, be interested in inspecting the voters' roll, of the constituency in which one is registered to vote. One does so, primarily, to ensure that one's E name appears on the roll. It is this type of voter, with that special interest, who is envisaged by subsection (1) and (2) as firstly inspecting, and secondly, making copies of or extracts from such roll. Logically, therefore, and as correctly contended for the respondent, such inspection and such copying should be done before the elections, not after.

This brings me to the contention made for the respondent, which I do not find F to be without foundation, that appellant lacked *locus standi* to make the application in question. The appellant seeks copies of the voters' roll, i.e. the complete roll for all 120 constituencies. He has based his application on subs (2) of s 18 of the Act, yet has not made the essential averment that would give him the right to demand such copies. That averment is that he inspected the voters' roll in question. Without such inspection having taken place, the G bottom is, as it were, removed from under his application, which is based on subs (2) of s 18.

The appellant, even if it was assumed he made the application as a voter, would, in any case, have found it difficult to convince the court that he had personally inspected each and every

constituency's voters' roll. As already H shown, failure to prove such inspection is fatal to the application.

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Gwaunza JA

Mr *Gauntlet* contends that s 18(2) must be interpreted broadly so as to A accommodate copies of the voters' roll in a format different from the one such roll was presented in for inspection. This argument carries the appellant's case no further, as long as the averment has not been made, or proved, that the person requesting such copies inspected the voters' roll in question.

One crucial fact seems to have been overlooked, and that is that ss 18(1) and B 18(2) clearly envisage a situation where only constituency voters' rolls are inspected at the office of the relevant constituency registrars, from where, therefore, copies can be made during office hours. The two subsections do not deal with the combined voters' roll being inspected and copies thereof being sought from the respondent, who is the Registrar-General. Mrs *Matanda-Moyo,* for the respondent, argues in this respect that our law does C not provide, like the South African law, for the provision of common voters' rolls to political parties. Therefore, Mrs *Matanda-Moyo* contends, the appellant should properly seek to have an amendment to the law in order to bridge this gap, instead of asking the court to stretch the meaning of existing provisions so as to find a legal basis for the relief sought.

I am persuaded by this contention. The simple reality is that neither subss 18 D (1) and (2) nor other provisions of the Electoral Act provide a basis for what the appellant seeks in this application, which is the acquisition of a copy of the common voters' roll by a candidate in the same Presidential elections to which the voters' roll in question relates.

According to my interpretation of subss (1) and (2) of s 18 of the Electoral E Act, the previous issuance by the respondent of copies of the original common voters' roll, in computer or any other format to the appellant, could not properly have been done pursuant to those two provisions. This finding, in my view, holds true despite the respondent's written notification that he was furnishing the computer discs in question in terms of s 18(2) of the Electoral Act. As already mentioned, that action by the respondent, in reality, finds no basis in any provision of the Electoral Act. Accordingly, no weight can be attached to the letter in which the respondent asserted he was furnishing the appellant with the copies in question, pursuant to subs (2) of s 18 of the Electoral Act.

To succeed in his claim, the appellant would have to look to another basis, G not s 18(2) of the Electoral Act, for the desired relief. In the light of these findings, nothing really turns on the letters from the respondent's office, to the effect that his office, firstly, was prepared to provide the printed copies of the voters' roll in question and, secondly, in a reversal of the earlier stance taken, that he was not prepared to provide even those. H

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Gwaunza JA

A To the extent, therefore, that the present claim is premised on s 18(2) of the Electoral Act, I would dismiss it.

ESTOPPEL

It is correctly contended for the appellant that the issue of estoppel is part of the law of Zimbabwe, as the court has previously held: see *Registrar-* B *Generals Chirwa* 1993 (1) ZLR 291 (S) at 293; 1993 (4) SA 272 (ZS) at 274. By estoppel is meant that a person is precluded or estopped from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his detriment.

In para 37 of the appellant's heads of argument (cited above), it seems to be C suggested that the application was based on s 18(2) of the Electoral Act partly because the respondent had, in an earlier matter, conceded that the furnishing of the voters' roll in computer format was in compliance with that provision.

I have already determined that s 18(2) does not give the respondent the authority to do what he did. He, in effect, misinterpreted the subsection, D thereby justifying an action that has in effect no legal basis. The law is clear that estoppel cannot be used to make legal what otherwise would be illegal: *see Levy v Zalrut Invstms (Pty) Ltd* 1986 (4) SA 479 (W). I have no hesitation in extending this principle to the case at hand. The appellant cannot use the doctrine of issue estoppel to vest with legality the furnishing, by the respondent, of the voters' roll in question, in electronic form, where such E action is not supported by the law quoted. This ground of appeal must, accordingly, also fail.

RES JUDICATA

This leaves only one other ground upon which the principle of *res judicata* could appropriately be applied, i.e. the order by consent. As correctly F asserted by the appellant, the learned trial judge did not deal with this issue in the judgment. It is significant that the appellant does not make the

averment that the court *a quo,* in case H-12092-2001, made a finding that the appellant was entitled to the electronic copies of the voters' roll, by virtue of s 18(2) of the Electoral Act. Indeed, para 3 of the consent order, which the appellant now relies on to raise the plea of *res judicata* against the respondent, makes G no reference to s 18(2) of the Electoral Act. As the actual application of the appellant, in case HC-12092-2001, is not part of the record, I have not been able to ascertain the basis upon which the application in that matter was made. If the court *a quo* did not grant the consent order in question on the basis that the entitlement of the appellant was based on s 18(2) of the Electoral Act, it H cannot, in my view, be said to have effectively disposed of the matter.

What, however, falls to be determined is whether the order by consent A operates as an effective bar to the refusal by the respondent to act in the same manner he did when he provided the electronic copy of the original voters' roll.

It is contended for the appellant that the consent by the respondent to the previous final High Court order (i.e. to supply the copies in electronic format) should have been treated by the court *a quo* as having disposed of the matter. B A number of authorities are cited on behalf of the appellant concerning the frequent recognition and application of the principle of *res judicata* by our courts: *see African Wanderers Football Club (Pty)Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45 E-G; *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 835 F-H, 836 F-G. It is pertinent to repeat the contention as it appears in paras 21 and 22 of the appellant's heads of argument: C

"21. ... As the principle has been stated:

'If a cause of action has been finally litigated between the parties, then a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by an *exceptio reijudicatae vel litis finitae.'*

Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) *at* D 472 A-B. ...

22. The *exceptio* can, of course, be raised (as here) to a defence as well as a cause of action."

I understand, by para 22, the appellant to contend that in this case, where a cause of action (and the defence proffered by the respondent) has been finally E determined between the parties, then a subsequent attempt by the respondent to raise the same defence on the same cause for the same relief can be met by the *exceptio reijudicatae vel litis finitae.* The immediate question raised by this, of course, is whether the same cause for the same relief would have been pursued by the applicant, if the matter had been finally determined? More on this point later. F

As to the nature of the order, it is contended for the appellant that it is not required that the order in question be given in contested proceedings, since a judgment granted by consent, or by default, can sustain a plea or replication of *res judicata.* Again, a number of authorities are cited to support this contention.

Disregarding for a moment the question of which of the parties raised the G principle of *res judicata* against the other, there can be no doubt that for all cases in which it is raised, all the requisites, as correctly cited for the appellant (above), must exist for the plea to be successful. This is reinforced in the following words by Muller J in *African Wanderers Football Club v Wanderers Football Club supra* at 45E, an authority cited by the appellant's counsel in his heads of argument: H

A "There is nevertheless no room for this exception (of *res judicata)* 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 emphasis)

In casu, while the two actions may have been between the same parties (or B their "privies") 2, and founded on the same cause of action, I am not satisfied that the two actions concerned the same subject matter.

The earlier order of the court *a quo* was specific in terms of what copies the appellant was to be provided with, i.e. copies of the voters' roll up to January 2002. What the appellant now seeks is the total voters' roll, including the supplementary voters' rolls compiled after the earlier copies had been C provided. Even the originals of the copies already supplied by the respondent have, it is not in dispute, been updated. In essence, therefore, what the appellant now seeks is substantially different from what he was before provided with. Certainly the first copy cannot be put to the same use as is now intended for the copies *in casu.*

It is on this basis that the question of whether or not the relief sought is the D same as before, is to be considered. The following definition of "subject matter" or relief, in relation to a plea of *res judicata,* is particularly helpful (see *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 178):

"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* E *must have been demanded."* (my emphasis)

As indicated above, the appellant, in the court *a quo,* did not demand copies of the same voters' and supplementary voters' rolls that he is demanding *in casu.* When the principles enunciated above are applied to the circumstances of this case, it is evident that, whether the plea of *res judicata* is raised in relation to a cause of action or defence, it must fail on the basis that all the F requisites for such plea have not been met.

It follows that, even were it possible to apply the principle in reverse, as the appellant now seeks to do, his invocation of it against the respondent must fail.

The point must be made, however, that a diligent search on my part has failed to yield any authorities or legal basis for the invocation of the principle of *res* G *judicata* against a defence that a respondent or defendant raises. It can be assumed that the appellant's counsel came up against the same problem as evidenced by the fact that, while a variety of authorities were cited to explain the principle where it is raised in relation to a cause of action, by the defendant, not a single authority has been cited to support the proposition that

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the principle can, equally, be raised against a respondent/defendant by an A applicant/plaintiff.

There is, instead, much in the language used in the authorities in reference to *res judicata* that suggests that the principle should only properly be invoked by a respondent/defendant against an applicant/plaintiff. The learned authors of Amler's *Principles of Pleadings* 4 ed at p 273 even refer to it as a defence, as the following excerpt illustrates: B

"**Procedure:** In spite of the fact that the *defence* (of *res judicata)* was known at common law as an *exceptio,* it cannot be raised by way of exception but must be raised in a special plea ..." 3 (my emphasis)

Thankfully, I am saved the task of delving more deeply than I have done into the application (if any) of the plea of *res judicata* in reverse, by the finding that in any case all the requisites of such a plea have not been met. C This ground must also fail.

VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS

This brings me to the final ground of appeal, which is that the refusal by the respondent to furnish the copies of the voters' rolls in computer format constituted an infringement of the appellant's constitutional right to protection D of the law and the right to receive information. Again, the appellant is correct in his assertion that the court *a quo* did not address this ground despite the issue having been raised in the founding affidavit.

This right, it is contended for the appellant, is now "reinforced" by the provisions of the Access to Information and Protection of Privacy Act **[*Chapter 10:27*]**. E

Section 18 of the Constitution of Zimbabwe guarantees every citizen of Zimbabwe equal right to protection of the law. In support of the appellant's claim that his rights in this respect have been infringed, it is contended as follows in para 52 of his founding affidavit:

"... the applicants are not being afforded the protection of the law in terms F of the Electoral Act in that the respondent is breaching s 18 of that Act."

I have already dealt at length with the meaning of subss (1) and (2) of s 18 of the Electoral Act, and the question of whether or not, by refusing to furnish the appellant with the requested copies of the voters' roll in electronic format, the respondent has offended against these subsections. I have in fact found that the respondent had misinterpreted the subsections in question and G handed over compact disks containing the original common voters' roll, under the mistaken belief that s 18(2) gave him the authority to do so. To the extent, therefore, that the appellant's claim that his constitutional right to protection of the law has been infringed is based on the respondent's refusal to hand over the required copies *in terms of subs 18(2)* of the Electoral Act,

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Gwaunza JA

A such claim is misconceived and has no merit.

The appellant charges in respect of s 20(1) of the Constitution that his right to receive information has been violated by the respondent's refusal to give him the required voters' roll in the format indicated. My reading of this subsection suggests a different context for the receipt of information, from B the one obtaining *in casu.* It is pertinent to set out what the subsection provides:

"20 Protection of freedom of expression

(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 C and information without interference, and freedom from interference with his correspondence."

This subsection is clearly concerned, basically, with the right to freedom of expression. The "spirit and letter": see Gubbay CJ in *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S) at 553; 1998 (2) BCLR 170 at 177 (ZS) of the provision is that, in the exercise of his right to freedom of expression, every D person is entitled to, among other things, receive information without interference.

In my view, to regard, as the appellant does, the entitlement to receive information as the dominant concern of subs 20(1) of the Constitution is to clearly misinterpret and distort its otherwise clear meaning. It is not in dispute E that the appellant requires the copies of the voters' roll in question, not for purposes of exercising his right to freedom of expression, but for purposes of exercising his "right to challenge" the outcome of the March 2002 Presidential election. 4 Section 20(1) of the Constitution is quite evidently, in my view, not intended to cover such a situation.

The appellant contends that the right to receive information that is safeguarded F by subs 20(1) is further reinforced by s 5 of the Access to Information and Protection of Privacy Act, which reads as follows:

"Subject to section *ten,* every person shall have a right of access to any record, including a record containing personal information, that is in the custody or under the control of a public body."

G He contends further that the Registrar-General's Office is a "public body" in terms of the Second Schedule to the Access to Information and Protection of Privacy Act.

It is pertinent to note that this contention is contained in the appellant's notice of appeal and heads of argument, and was therefore raised for the first time

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at the appeal stage. The averment now being made, that the appellant's A application for copies of the voters' roll in question was, in the alternative, made in terms of the Access to Information and Protection of Privacy Act, was not made in the founding affidavit accompanying the application in the court *a quo.*

Paragraph 51 of the founding affidavit (at p 18 of the record), which the appellant avers spelt out this "explicit basis" 5 for the application, makes B reference only to the infringement of the appellant's constitutional rights.

To set out this "explicit basis", the appellant would, of necessity, have had to show that he had made the request to the respondent under the Access to Information and Protection of Privacy Act in the manner prescribed in s 6 of that Act, and that such request had been refused by the respondent, again in the manner set out in that Act (see s 9). Had all that been averred and proved, C one would have ordinarily expected the appellant to then approach the High Court for a review of such refusal, again in the prescribed manner. An appeal to this court on the same matter would have depended on the decision of the court *a quo* thereon. All this did not happen.

The argument made for the appellant, that the rights under the Access to Information and Protection of Privacy Act arise from the rights constitutionally D guaranteed in s 20(1) of the Constitution, while ingenious, does not, in my view, cure the defect, which is his failure to place before the High Court a proper application for relief under the Access to Information and Protection of Privacy Act. The result of this failure is that the court *a quo* did not consider that submission, whatever its merits or demerits.

While it is conceded that the court *a quo* should have addressed the merits of E the submissions relating to the doctrines of issue estoppel and *res judicata* and that relating to the infringement of the appellant's constitutional rights, the court cannot be criticised, as the appellant does in his grounds of appeal and heads of argument, for not addressing its mind to an issue that was not raised before it. Since that argument was not placed before the court *a quo,* and therefore not dealt with, the ground of appeal that charges that the learned F judge *a quo* erred "in failing to appreciate that the appellants are in any event entitled to copies of the voters' roll in an electronic format in terms of s 5, as read with s 8, of the Access to Information and Protection of Privacy Act [*Chapter 10:27*]*"* has neither foundation nor merit.

It hardly needs mentioning that the matter in the court *a quo* did not fall to be determined on unstated entitlements. The observation must also be made that G the Access to Information and Protection of Privacy Act came into effect on 15 March 2002. The appellant's founding affidavit is dated 9 April 2002. There was, therefore, no reason for the appellant not to mention in such affidavit that the application was in part based on the Access to Information H

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A and Protection of Privacy Act. To now call upon this court, as the appellant does, to consider this appeal on the basis of information and arguments not placed before, and therefore not considered

by, the court *a quo* is both unprocedural and improper.
That ground of appeal must, therefore, fail.
B One last ground of appeal merits comment.
Cogent arguments, well supported by relevant authorities, were advanced by the appellant against the finding, based on her interpretation of s 18 of the Electoral Act, by the learned trial judge that the Electoral Act had remained in the "pre-computer" age and therefore that the copies of the voters' roll referred to were printed and not electronic.
C In the light of my finding that s 18 does not provide a basis for the type of application now before the court, I do not consider it necessary to consider the merits of these submissions. Suffice it to say that I would have found the arguments to be very persuasive had they been advanced within the appropriate context.
D I will now turn, finally, to the question of costs.
The costs of this appeal will follow the cause, thereby determining the outcome of the application by the appellant for costs to cover two counsel.
The appellant has applied for costs against the respondent, in relation to the latter's application, now withdrawn, to adduce fresh evidence on appeal. The E evidence in question was an affidavit deposed to by the respondent himself, and another deposed to by an official in his office. The appellant filed, not only an opposing affidavit to this application, but also fairly lengthy heads of argument. I have no doubt that much work went into the preparation of these documents, only for all of it to turn into a wasted effort. The application is, in my view, and given these circumstances, with merit. It shall be granted.
F It is in the premises ordered as follows:
1. The appeal is dismissed with costs.
2. The respondent shall pay the wasted costs of the application, by him, to adduce fresh evidence on appeal.
G Malaba JA and Ziyambi JA concurred.
Gill, Godlonton & Gerrans, appellant's legal practitioners
Civil Division of the Attorney-General's Office, respondent's legal H practitioners

1 Paragraph 15 of the appellant's heads of argument
2 See Amler's *Precedents of Pleading* 4 ed at p 273.
3 See also the *dicta* cited above, from *Horowitz v Brock and Others supra*
4 See para 53 of the appellant's founding affidavit.
5 See the appellant's heads of argument, para 53 at p 26.

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Source:
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[zRPz]MAZARURA v DIRECTOR OF CUSTOMS & EXCISE 2002 (2) ZLR 672 (S)
2002 (2) ZLR p672

Citation	2002 (2) ZLR 672 (S)
Case No	Judgment No. S-98-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA

Heard	9 September 2002; 14 November 2002
Judgment	14 November 2002
Counsel	*R M Fitches,* for the appellant *A B Chinake,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Customs and excise — customs duty — rebate granted to immigrant —goods purchased and fully paid for before immigrant entered Zimbabwe — all D of purchase price paid before but part of price received by seller after immigrant arrived — whether goods "fully paid for by immigrant" before his return
[zHNz]Headnote
The appellant went overseas to study for four years. Before he returned he decided to acquire a new car. He paid part of the purchase price of the E car and a few days later, before he returned to Zimbabwe as an immigrant, he initiated payment of the balance. The seller of the car received the balance of payment only after the appellant's arrival back in Zimbabwe because of delays in the banking system. The Director refused his application for an immigrant's rebate of duty on the grounds that the goods were not fully paid for before his arrival. F
Held, that in order to qualify for an immigrant's rebate of duty, the immigrant must show that the goods were in physical existence before his return and that they were fully paid for by him before his return. The phrase in s 92(2) of the Customs and Excise (General) Regulations 1977 "fully paid for by the immigrant" did not necessarily mean "receipt of full payment by the seller". What constitutes full payment G depends on the facts of each case and on the intention of the parties. The seller had accepted the date on which the appellant initiated payment of the second installment as being the date of payment. The appellant had done everything that could be expected of him but for reasons beyond his control the money did not reach the seller until after the appellant arrived back in Zimbabwe. H
2002 (2) ZLR p673
Chidyausiku CJ
[zCAz]Cases cited A
Lardner-Burke v Dir of C & E S-54-02
Mahomed v Dir of C & E 1998 (1) ZLR 60 (H)
S v Kachipare 1998 (2) ZLR 271 (S)
S v Nottingham Ests (Pvt) Ltd 1995 (1) ZLR 253 (S)
[zSTz]Legislation considered B
Customs & Excise (General) Regulations 1977 (RGN 106 of 1977), s 92(2)
[zCIz]Case information
R M Fitches, for the appellant
C *A B Chinake,* for the respondent
[zJDz]Judgment
Chidyausiku CJ: The facts of this case are by and large common cause. They are set out in some detail by the learned judge in the court *a quo.* There is no need to relate them again in this judgment. I will only briefly summarise D them as follows.
The appellant went to the United States to study. He remained there for four years before he returned to Zimbabwe. He returned to Zimbabwe on 21 September 1999. In terms of s 92 of the Customs and Excise (General) Regulations, SI 106 of 1977 (hereinafter referred to as "the Regulations"), he was entitled to a rebate of duty on certain goods he might wish to import on E his return. To this end, he decided to purchase a motor vehicle, a Mercedes Benz ML 430-190, which he intended to import into Zimbabwe duty free in terms of the Regulations.

He placed an order for the motor vehicle with Mercedes Benz (United Kingdom) Limited, of 78 Picadilly, London. The latter confirmed the F availability of the motor vehicle. On 10 September 1999 the appellant paid £16 000.00, leaving a balance of the purchase price of about US$30 000.00. It is the date of the payment of the balance of the purchase price which has given rise to this dispute.

It is common cause that on 13 September 1999 the appellant initiated the G transmission of the balance of the purchase price to the bank of the seller. It is also common cause that, through some confusion not satisfactorily explained by the various banks that handled this money, the balance of the purchase price was not received by the seller until 7 October 1999, some twenty-four or so days after the initial instruction to transmit the money to the seller. In the meantime, the appellant returned to Zimbabwe on 21 September H 1999.

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Annexure 'C' attempts to set out the sequence of events from the time of the A initial instruction to the date of receipt of the purchase price by the seller. Annexure 'C' provides as follows:

"Thank you for your fax dated 14 July 2000 addressed to my colleague, Mr D Holden, in which you asked for a résumé of the events surrounding our payment IP4BM99091300162.

I was sorry to learn of the difficulties you have encountered in connection B to this payment. Please find below a breakdown of NatWest's involvement in this particular SWIFT transfer.

13 September 1999:

NatWest Bank London received a SWIFT payment order from Bank of America New York, instructing us to issue the following payment:- C

Payment amount:	USD 31.500.00 LESS OUR CHARGES
Value date:	13 SEPTEMBER 1999
By order:	CHARLES MAZARURA
Instructing bank:	/000300201183 D
	CENTRAL CAROLINA BANK AND TRUST
	ADJUSTMENT OC 25
	PO BOX 931
•	DURHAM NC USA 27702 E
Beneficiary:	/0485527427
	CHRIS JOHN MAZARURA
Details:	/RFB/SE990913005747
Bank to bank instructions:	/INS/NATIONSBANK NACHARLOTTE
	//NORTH CAROLINA F
	//ACC/TLX ADVSORT CODE 720000

In response to this payment order, due to the bank to bank instructions ' SORT CODE 720000' NatWest issued a similar US 31,480.43 payment on 13 September 1999 to Citibank London. (Sort Code 720000 belongs G to Girobank Bootle, who, I believe at the time this payment was processed, maintained their US Dollar settlement through Citibank London).
15 September 1999:
Citibank London returned the payment that we had made on 13 September 1999, as they advised us that the beneficiary institution were unable to H apply the payment.
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A 16 September 1999:
Our Investigations Team opened a file upon the payment, and started to research the matter.
21 September 1999:
B NatWest received a response from Bank of America New York, requesting cancellation of the payment on behalf of Nationsbank NA. The reason for cancellation was stated to be 'funds sent in error'. A cancellation of the payment was initiated via our agent Chase Manhattan Bank New York.
C 23 September 1999:
NatWest received a further message from Bank of America New York, revoking their cancellation request and requesting an amendment to their original payment instructions:-

Beneficiary:	MERCEDES BENZ - REF:
	D PICADILLY
Beneficiary bankers:	BRANCH MILTON KEYNES
	SORT CODE 601455.

Specifically they requested that we now re-effect payment per these amended instructions avoiding any duplication. As we had already sent the funds back through Chase Manhattan Bank, we contacted them to E recall the funds.
6 October 1999:
After numerous messages had been exchanged between all the banks involved in this payment, the funds were returned to NatWest. [Due to (the) time difference between (the) USA and (the) UK, NatWest was F unaware of the return until 7 October 1999.]
7 October 1999:
NatWest issued a payment in accordance with the revised payment instructions.
G Although this transaction was first instructed to NatWest for value 13 September 1999, NatWest was not in receipt of both full and correct payment instructions and covering funds until 7 October 1999. With this in mind, I do not consider the apparent delay involved in this transaction, 24 days [18 working days], to be the responsibility of NatWest."
The appellant also enquired of the seller's bank through the seller what had H transpired. The seller responded to that enquiry as follows:
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"Further to our recent telephone conversation (I) have read through the A file pertaining to your car, and have found a copy of a document, which may help you.
Our bank (was) unable to assist in respect of answering the question of 'where the money went'. But the dates shown on the document are clear that a *'value date' of 13/9/99 was given!* ..." (the emphasis is mine). B
It is apparent from the above letter that the seller's bank and indeed the seller itself gave the payment of the purchase price a value date of 13 September 1999.
On these facts the learned judge in the court *a quo* concluded that the date of full payment in terms of the Regulations was 7 October 1999, which is the C date the seller received full payment.
The appellant had returned to Zimbabwe by that date and consequently the court *a quo* concluded that the appellant was not entitled to a rebate in terms of s 92(2) of the Regulations. Section 92(2) of the Regulations provides as follows:

"For the purposes of this section, goods shall be treated as being owned D by an immigrant only if such goods were in physical existence *and fully paid for by the immigrant* before the time of his arrival" (the emphasis is mine).

The requirements of s 92 are clear. In order for one to qualify for an immigrant's rebate of duty, the immigrant ought to satisfy the following: H

(i) that the effects/goods were in physical existence prior to his/her return; and

(ii) that such effects/goods were fully paid for by the immigrant before arrival in Zimbabwe.

In *Mahomed v Director of Customs and Excise* 1998 (1) ZLR 60 (H), F Adam J expressed the view that "fully paid for" meant no payments were outstanding at the time of arrival in Zimbabwe. In that case the issue was whether the words "paid for by the immigrant" in the above section meant paid for *personally* by the immigrant, as contended for by the Director of Customs and Excise (the Director), or included a gift of a motor vehicle paid for, using the relative's funds, by a relative of the immigrant. The court G rejected the literal interpretation of the Director and accepted the more liberal interpretation contended for by the immigrant. In doing so the court relied on the intention of Parliament and the mischief intended to be dealt with, as opposed to the literal meaning of the words of the Regulations.

In concluding that payment was made after the return of the appellant to H Zimbabwe, the learned judge in the court *a quo* contended that he was giving

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A effect to the primary or literal meaning of the words of the statute, in particular the words "fully paid for by the immigrant before the time of his arrival".

I have no problem in accepting the proposition that the court should accord words of a statute their ordinary meaning, save in cases where that would lead B to an absurdity so glaring that no reasonable person, using those words, could have intended such an interpretation. See S v *Nottingham Estates (Pvt) Ltd* 1995 (1) ZLR 253 (S); and S v *Kachipare* 1998 (2) ZLR 271 (S).

I am unable, however, to agree with the learned judge in the court *a quo* that ascribing the literal meaning of the words of the Regulations in this case leads to the conclusion that full payment by the immigrant occurred on 7 October C 1999. The facts of this case clearly show that what occurred on 7 October 1999 was the *receipt* by the seller of the full payment of the purchase price which had been made by the buyer, the immigrant, several days previously. The learned judge ascribed to the words of the statute "fully paid for by the immigrant" the meaning "receipt of full payment by the seller". I do not D accept that the words "fully paid for by the immigrant" literally mean, or are synonymous with, "receipt of full payment by the seller". The latter words are not the words of the Regulations.

Mr *Chinake* has argued that we should follow *Lardner-Burke v Director of Customs and Excise* S-54-02 (not reported), which concluded on very similar facts that full payment only occurred upon receipt of the full purchase price E by the bank of the seller. I agree with *Mr Chinake* that the facts of *Lardner- Burke v Director of Customs and Excise supra* are strikingly similar to the facts of this case, but there is one very important factor that distinguishes the two cases. I shall revert to that shortly.

A careful reading of *Lardner-Burke's* case reveals that it did not seek to lay F down a general proposition that full payment occurs *only* upon receipt of the full purchase price by the seller, but that on the facts of that case full payment was effected on receipt of the purchase price by the seller.

In my view, what constitutes full payment by the immigrant depends on the facts of each case and no doubt to some extent the intention of the parties. For F example, where the parties agree that payment was to be by cash sent to the seller by registered post and any loss through *vis major* thereafter was to fall on the seller, full payment no doubt would be complete upon the posting of the registered mail. In short, I hold the view that although full payment by the immigrant could occur upon receipt of the full purchase price by the seller it does not necessarily have to be the case, and the facts of each case have to be H examined in order to make a determination as to when full payment occurred.

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In terms of Annexure 'E', the seller and its bank value-dated full payment by A the immigrant at 13 September 1999, the date when the SWIFT transfer was made. At the time the agreement was concluded, the buyer was located in the United States, while the seller was in the United Kingdom. Given this situation, it must have been within the contemplation of the parties that payment would or could be made by SWIFT transfer, which was in fact done B on 13 September 1999. The appellant contends that that is the date on which full payment was made. The seller concurred with that view

by value-dating the payment to that date. That concurrence no doubt is based on the fact that on 13 September 1999 the appellant did everything that could reasonably be expected of him, but for reasons beyond his control the money did not reach the seller **until** 7 October 1999.
This case is therefore distinguishable from *Lardner-Burke's* case *supra,* on the basis that the parties *in casu* are agreed that the date of full payment was the date on which the purchaser sent the money to the seller by SWIFT transfer and not the date when such money was received by the seller.
Mr *Chinake* also argued that the appellant did not own the motor vehicle upon D his arrival in Zimbabwe. I am not persuaded by this submission. A proper reading of s 92(2) of the Regulations reveals that once it is shown that the goods were in existence and fully paid for by the immigrant at the time of his arrival "the goods shall be treated as being owned by the immigrant".
Mr *Chinake* also argued that the payment was made by the appellant's E brother and not the appellant. *Mahomed's* case *supra* is authority for the proposition that the words "full payment by the immigrant" do not mean the goods necessarily have to be paid for by the immigrant. It is interesting to note that the court in that case applied a liberal interpretation to the words of the statute. The words "fully paid by the immigrant" were interpreted to include F goods paid for by the immigrant's relative and given to the immigrant as a wedding gift.
For the foregoing reasons, the appeal must succeed. The court *a quo* erred in rejecting 13 September 1999 as the date when full payment was made by the appellant.
In the result, the appeal succeeds. The order of the court *a quo* is set aside and G the following order is substituted:
It is ordered as follows:
(1) It is declared that the respondent's determination that the appellant had not fully paid for the motor vehicle on his arrival in Zimbabwe is H invalid.
2002 (2) ZLR p679
Chidyausiku CJ
(2) That A the respondent bears the costs of this application. Ziyambi JA and Malaba JA concurred.
Manase & Manase, appellant's legal practitioners
B *Kantor & Immerman,* respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/REGISTRAR-GENERAL OF CITIZENSHIP & ANOR v TODD 2002 (2) ZLR 680 (S)

[zRPz]REGISTRAR-GENERAL OF CITIZENSHIP & ANOR v TODD 2002 (2) ZLR 680 (S)
2002 (2) ZLR p680

Citation	2002 (2) ZLR 680 (S)
Case No	Judgment No. S-101-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba JA & Gwaunza AJA
Heard	21 October 2002; 14 November 2002
Judgment	14 November 2002
Counsel	*S Chihambakwe,* for the appellants

A P de Bourbon SC, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

[zFNz]Flynote
Appeal — postponement — when granted
Evidence — foreign law — interpretation of foreign statute — whether expert evidence needed
[zHNz]Headnote
At issue between the parties was whether the respondent was a citizen of E New Zealand or was merely entitled to New Zealand citizenship, and the issue had to be determined from the provisions of the New Zealand Citizenship Act. The appellants applied for a postponement of the appeal to enable them to place the Act before the court. The respondent opposed the application.
Held, that the Supreme Court was competent to interpret a New Zealand statute without the assistance of an expert on New Zealand law; s 25 of the Civil Evidence Act [*Chapter 8:01*] did not render the court incompetent to interpret foreign statutes.
Held, further, that this was a proper case for the court to grant a postponement: the reason for the postponement had been fully explained, the application was not a delaying tactic, and justice demanded that the court should G familiarise itself with the New Zealand Act in order to determine the matter properly.
[zCAz]Cases cited
D'Anos v Heylon Court (Pty) Ltd 1950 (2) SA 40 (C) H
2002 (2) ZLR p681
Chidyausiku CJ
A *Madnitsky v Rosenberg* 1949 (2) SA 392 (A)
Prinsloo v Saaiman 1984 (2) SA 56 (O)
Schapiro v Schapiro 1904 TS 673
[zSTz]Legislation considered
B Civil Evidence Act [*Chapter 8:01*], s 25
[zCIz]Case information
S Chihambakwe, for the appellants
A P de Bourbon SC, for the respondent
[zJDz]Judgment
Chidyausiku CJ: The first appellant refused to renew the respondent's Zimbabwean passport because, according to him, the respondent had failed to renounce her entitlement to New Zealand citizenship, which entitlement, he alleges, is derived from the New Zealand Citizenship Act.
The respondent successfully applied in the High Court for an order compelling the first appellant to issue a passport to her. The first appellant was dissatisfied with that decision and noted an appeal to this court.
D At the hearing of this matter the appellants applied for a postponement to enable them to place before the court expert evidence on the law of New Zealand on citizenship. They tendered the wasted costs. The respondent opposed the application, essentially on the ground that the appellants have had ample time to secure such evidence and there was need for finality in this E case.
It is quite apparent from the record that New Zealand does have a Citizenship Act. It is this Citizenship Act that really determines the status of the respondent *vis-à-vis* New Zealand. If the respondent, in terms of the New Zealand Citizenship Act, is a citizen of New Zealand then, in terms of s 9 of the Zimbabwe Citizenship Act [*Chapter 4:01*] (the Act), she has to renounce the citizenship of New Zealand or lose her Zimbabwean citizenship. If, in terms of the New Zealand Citizenship Act, the respondent is merely entitled to citizenship of New Zealand, as opposed to being a citizen, then the issue before this court is whether the respondent is required, in terms of s 9 of the Act, to renounce that entitlement or lose Zimbabwean citizenship. The court *a quo* resolved that issue in favour of the respondent and the appellants now appeal against that judgment.
In my view, the critical issue is the status of the respondent in terms of the New Zealand Citizenship Act and not the Registrar-General's interpretation of that Act, which could be correct or incorrect.

The court can only determine the respondent's status upon examination of the New Zealand Citizenship H Act. That Act has to be placed before the court.
2002 (2) ZLR p682
Chidyausiku CJ
It has been suggested that only expert evidence can determine the respondent's A status in terms of the New Zealand Citizenship Act.
I think it is nonsensical to suggest that this court is not competent to interpret a New Zealand statute without the assistance of an expert on New Zealand law. The enactment of s 25 of the Civil Evidence Act [*Chapter 8:01*] did not render this court incompetent to interpret foreign statutes. B Mr *Chihambakwe* is simply seeking a postponement to enable him to place before this court the New Zealand Citizenship Act. The provisions of that statute are critical to determination of the substantive issue in this matter. The respondent will not, in any way, be prejudiced by such a postponement as she has been issued with a Zimbabwean passport. The granting of an application for postponement is in the nature of an indulgence to be granted or refused C at the discretion of the court: see *Schapiro v Schapiro* 1904 TS 673; *D 'Anos v Heylon Court (Pty) Ltd* 1950 (2) SA 40 (C); *Prinsloo v Saaiman* 1984 (2) SA 56 (O). In the case of *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) it was held that a court should be slow to refuse to grant a postponement of a trial 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 D justice demands he should have further time for the purpose of presenting his case. If the above requirements are met, such postponement should be granted.
Mr *Chihambakwe* has attributed the difficulty of obtaining the evidence he requires to the fact that he has to rely on third parties to supply him with such evidence and to the long distance between Zimbabwe and New Zealand. The E application for a postponement in this case is certainly not a delaying tactic because, as I have said, the respondent does have as of now a Zimbabwean passport. Justice demands that the court should familiarise itself with the provisions of the relevant New Zealand statute in order to determine this matter properly. The appellants have tendered wasted costs.
In my view, this is a proper case for the court to grant a postponement to F enable the appellants to place before this court the relevant statute determining the respondent's New Zealand status, which has an effect on her Zimbabwean citizenship.
In the result, the matter is postponed *sine die.* The appellants will bear the wasted costs. G
Malaba JA and Gwaunza AJA concurred
Chihambakwe, Mutizwa & Partners, appellants' legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/S v JACKSON 2002 (2) ZLR 683 (H)

[zRPz]S v JACKSON 2002 (2) ZLR 683 (H)
2002 (2) ZLR p683

Citation	2002 (2) ZLR 683 (H)
Case No	Judgment No. HH-201-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	1 March 2002; 20 November 2002

Judgment	20 November 2002
Counsel	*C Marimba,* for the accused *J Mabeza,* for the State
Case Type	Criminal case transferred for sentence
Annotations	No case annotations to date

[zFNz]Flynote
Criminal procedure — plea — of guilty — alteration of after conviction — trial held in magistrates court but matter referred to the High Court for D sentence — application to change plea must be directed to trial court — what applicant must show High Court to have matter remitted
[zHNz]Headnote
The accused, together with a colleague, stole a car in Chinhoyi. While driving it away, the accused lost control. His companion was killed; the vehicle was badly damaged. At his trial in a regional magistrates court, E the accused pleaded guilty and was convicted. The matter was referred to the High Court for sentence. Before the High Court hearing, the accused's legal representative indicated that the accused wished to change his plea to one of not guilty. The reason given was threats by the police. The court considered two points: firstly, whether such an F application could be made in the High Court and secondly, assuming that the procedure was correct, whether the court could decide the application on its merits. The question was whether the High Court could remit the matter to the lower court for the accused to change his plea.
Held, that the application to change the plea should be directed to the trial G court.
Held, further, that although there is no onus on the accused — all he must do is offer a reasonable explanation for having pleaded guilty — less is required of him when he applies to the High Court for remittal to change his plea. All he must show is that he has an explanation which *prima facie* shows that he has a reasonable explanation for a change of plea to H give to the trial court.
2002 (2) ZLR p684
Chinhengo J
[zCAz]Cases cited A
A-G, Tvl v Botha 1994 (1) SA 306 (A)
S v Haruperi 1984 (1) ZLR 258 (H)
S v Maseko 1986 (2) ZLR 52 (S)
S v Matare 1993 (2) ZLR 88 (S)
S v Nyajena 1991 (1) ZLR 175 (S) B
[zSTz]Legislation considered
Criminal Procedure and Evidence Act [*Chapter 9:07*], s 227
High Court Act [*Chapter 7:05*], s 29(2)(b)(v) C
[zCIz]Case information
C *Marimba,* for the accused
J Mabeza, for the State
[zJDz]Judgment
Chinhengo J: The accused appeared before a court of the regional magistrate at Chinhoyi on a charge of theft of a motor vehicle. He pleaded guilty to the charge and was convicted. He was referred to the High Court for D sentence in terms of s 54(2) of the Magistrates Court Act [*Chapter 7:10*]. The matter was set down for sentence before me on 1 March 2002. Before the hearing Mr *C K Mkinya,* then the legal practitioner for the accused, had on 15 February, 2002 written a letter to the Registrar in which, among other things, he had advised that he had instructions to apply for a change of plea. E At the hearing Mr *Mkinya* applied for his client's plea of guilty to be changed to one of not guilty. I was not satisfied that the procedure adopted by Mr *Mkinya* was correct. I was concerned about two issues: first, whether it was correct that such an application could be made before me in the High Court; and, second, assuming that the procedure was correct, whether I could decide the application on its merits. I then directed the legal practitioners to file F heads of argument, because the oral submissions which they had made did not appear to me to have

canvassed all the points of law which had to be considered. Just after the hearing on 15 March, Mr *Mkinya* renounced agency. I directed that he had to file the heads of argument before he could renounce agency. The legal practitioner for the State filed his heads of argument on G 14 March 2002 and *Mr Mkinya* filed his heads of argument on 31 May 2002 after further insistence by me that he should do so. I intended that the matter be argued in court and it had to be some time before it could be set down for argument. On 2 September 2002 the accused's current legal practitioners, Marimba & Partners, assumed agency for the accused. I inquired from them if they intended to file heads of argument different from H

2002 (2) ZLR p685

Chinhengo J

A those filed by Mr *Mkinya.* It was not until 12 November that *Mr Marimba* finally confirmed that he was happy with the heads filed by Mr *Mkinya.* He had in the meantime obtained the record of proceedings and perused it. As of 5th November none of the legal practitioners intended to make any addition to their heads of argument. I then dispensed with hearing further argument in court.

B The allegations against the accused are the following. On 19 October 2001 at about 2.00 a.m. the accused and his colleague, one James Munodawafa Makumbiza proceeded to the complainant's house at 12 Msasa Drive, Chinhoyi. There they stole the complainant's motor vehicle, a Nissan hardbody, registration No. 603773E. They drove the motor vehicle towards C Murombedzi Growth Point. The accused was driving. At or near the 84 kilometre peg on the Chegutu-Murombedzi road the accused lost control of the motor vehicle and an accident occurred. James Munodawafa Makumbiza died in the accident. Later the accused was arrested. He led the police investigators to the scene of the crime and to the scene of the accident. It was alleged that the motor vehicle was valued at $1500 000 at the time of the theft D and that it was extensively damaged in the accident. When the complainant gave evidence at the trial, he stated that he estimated the cost of repair to be about one million dollars.

The accused pleaded guilty to the charge following upon well-conducted proceedings in terms of s 271(2)(b) of the Criminal Procedure and Evidence E Act [*Chapter 9:07*] ("the Code"). There is nothing on the record of proceedings on which any criticism can be directed at the manner in which the proceedings were conducted.

At the hearing on 1 March 2002, *Mr Mkinya* applied for the accused's plea of guilty to be changed to one of not guilty. He could not immediately satisfy me as to the propriety of that application. I stood down the matter and after F he carried out further research he then submitted that the application must be made to the trial court. He submitted that the accused had pleaded guilty because he had been threatened by the investigating police officer with physical assault if he did not plead guilty and that one of the police officers was in court during the plea proceedings. It was for these reasons that he had pleaded guilty to the charge. Mr *Mabeza,* for the State, opposed the application G and submitted that the plea of guilty had been genuine. He urged the court to proceed to pass sentence.

It is apparent that the application to change the plea was based on facts that did not appear on the record. The question arises as to whether the High Court, to which the accused was referred for sentence, could, without H satisfying itself as to the validity of the accused's averments in regard to the

2002 (2) ZLR p686

Chinhengo J

plea which he had apparently given freely and voluntarily in the lower court, A remit the matter to the lower court for the accused to formally apply to change his plea.

The Code provides in s 227 that when a matter is referred to court for sentence a judge may exercise such of the powers conferred on the High Court by s 29(1) and (2) of the High Court Act [*Chapter 7:05*] as he may find B appropriate. If the judge is satisfied that the proceedings in the court *a quo* were in accordance with real and substantial justice he shall sentence the accused without calling upon him to plead to the charge and he shall deal with him as if he had been convicted by the High Court for the offence concerned (s 228 of the Code). In terms of s 29(2)(b)(v) of the High Court Act, a judge may remit the case to the court *a quo* with such instructions relative to further C proceedings to be had in the matter as he thinks fit.

The accused in this case alleged that he pleaded guilty because of threats made to him by the investigating police officers whom he named. He alleged that he was threatened with physical assault and that a gun was pointed at him to induce him to plead guilty to the charge. When he appeared in court one D of the police officers was present in court to ensure that the accused pleaded guilty. The law with regard to a change of plea has a chequered history in this country, arising from the question whether the accused had an onus to discharge in order to succeed in an application to change his plea. The law was for a long time one thing in this respect: see S v *Haruperi* 1984 (1) ZLR 258 (H); *S v Maseko* 1986 (2) ZLR 52 (S) and *S v*

Nyajena 1991 (1) ZLR 175 (S). E See also the dissenting judgment of McNally JA and Sandura AJA (as he then was) in *S v Matare* 1993 (2) ZLR 88 (S) and the cases cited therein. The law as enunciated in these cases was altered in *S v Matare (supra)* by a majority judgment of Gubbay CJ, Korsah JA and Muchechetere JA. In *Matare supra,* at 97B-G, Gubbay CJ after reviewing the authorities on the subject and analysing the relevant provisions of the Code, said: F

"It necessarily follows that the contrary decision in *S v Haruperi supra* was wrong.

In the second place, I have no hesitation in accepting that in so far as a common law application to alter a plea of guilty is concerned, whether made before conviction or after conviction but prior to the passing of G sentence, there is no onus on the accused to show anything on the balance of probabilities. He must simply offer a reasonable explanation for having pleaded guilty. *See S v Moahlodi & Anor* 1962 (2) PH H145 (O); *van Heerden v de Kock & Anor* 1979 (3) SA 315 (E) at 316H - 318F; S v *Zwela supra* at 346D-E and 347B-D; *S v Pillay supra* at 152B; *S v Mazwi supra* at 348F - 349E; S v *Hazelhurst supra* at 910B-E; *S* v O 1990 (2) SACR 145 (C) at 152E. This is simply in conformity with the H

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Chinhengo J

A general principle to which expression was given by Lord Sankey LC, and hallowed by repetition in several cases, that:

'Throughout the web of English Criminal Law one golden thread is always to be seen —that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said to the defence of insanity and subject also to any statutory exception'.

B See *Woolmington v DPP* [1935] All ER Rep 1 (HL) at 8C.

This court therefore erred in *Maseko supra* and S v *Nyajena supra* in confining the test enunciated by Claassen J in S v *Britz* 1963 (1) SA 394 (T) to a common law application to alter a plea of guilty only where made before verdict and in holding that, thereafter, the onus shifts to the accused to prove on a balance of probabilities that his plea of guilty was C not voluntarily and understandingly made. (Similar *dicta* in S v *Mudimu supra* at 175 F and *S v De Bruin supra* at 935 I-J are also wrong). If Claassen J's misconception concerning the meaning of 'judgment' is allowed for (see at 397 B) - and certainly the English authorities cited by him used the term in the sense of all stages of the proceedings until the imposition of sentence, then the test was correctly formulated."

D The position in regard to this matter is now as succinctly stated in the head note in *Matare supra* that:

"[Section 272] of the Criminal Procedure and Evidence Act [*Chapter 9:07*] did not oust a common law application for a change of plea to not guilty. In the interests of justice the court has an inherent discretion to E permit a withdrawal of a plea of guilty. [Section 272] merely elevates the previous existing common law discretion to a duty in certain circumstances and on certain grounds; if those circumstances existed, the court was bound to order a change of plea whether the accused had asked for it or not ....

... as far as a common law application to alter a plea of guilty is F concerned, whether made before or after conviction but before passing of sentence, there was no onus on the accused to show anything on a balance of probabilities. He must simply offer a reasonable explanation for having pleaded guilty. Unless the court is convinced beyond a reasonable doubt that the explanation is not merely improbable but positively false, the accused must be allowed to change his plea."

G There would be nothing more to add. Cases that came before our courts differ one from the next. Legal principles develop from that difference and the law over time is transformed and reformed in order to deal with the different situations presented by the different cases. All the cases to which reference has been made in this judgment have dealt with the question of a change of plea of guilty on appeal against a magistrate's decision. None of the cases H which have been drawn to my attention dealt with an application to change

2002 (2) ZLR p688

Chinhengo J

a plea at a hearing in the High Court upon reference of the matter to it for A sentence terms of s 54(2) of the Magistrates Court Act. The issues which I have to decide are simply whether that application should be made to the High Court. If it may not be made to the High Court, what must the accused show in order that the High Court can decide to remit the matter to the court *a quo?*

The first issue can be disposed of quickly. The substantive application for a B change of plea must be made to the trial court, in this case to the magistrates court. It is that court before whom the accused appeared on trial and it is that court which convicted him. A change of plea, if allowed, means the conviction cannot stand. It is therefore that court which must deal with an application which would affect its verdict. The High Court may not hear or C determine such an application.

The second issue is more difficult to deal with. Our law is that in an application to change his plea an accused does not bear an onus to show anything on a balance of probabilities. This test applies to a situation where the accused person makes the application to court which has convicted him. D Nothing, as I have mentioned, has to my knowledge ever been said about the situation where the accused wishes to change his plea when he is before a different court, in this, as in all cases, the High Court for sentence. I have stated that the substantive application should be made, not to the High Court, but to the court convicting him on the charge. The question simply put is: in these circumstances, does the High Court, without any investigation of the E matter, remit the matter to the magistrates court on the mere request of the accused? If the High Court must conduct some inquiry before it accedes to the request, what would that inquiry entail? The accused in this case raised a ground for changing his plea which was similar to the ground raised in the application in *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A) in which Smalberger JA, considering similar provisions of the South African F legislation, said at 330C-E :

"Grounds for setting aside a plea of guilty such as duress, undue influence and the like arise from events anterior to the proceedings under [s 271] and do not have their origins in that section. They cannot on their own (i.e. without being coupled to a valid defence, ...) be brought within any of the situations catered for by [s 272]. The reason is that standing alone G they do not raise a reasonable doubt that the accused is in law guilty of the offence to which he has pleaded guilty or that he has a valid defence to the charge. .... nor do they relate to any allegations in the charge ....

[Section 272] therefore provides no protection or safety mechanism for an accused who pleads guilty because of duress, undue influence or the like. Yet these are valid grounds under the common law which are H

2002 (2) ZLR p689

Chinhengo J

A frequently raised for setting aside a plea of guilty. In my view, it is unthinkable that the legislature could have intended to exclude such common-law rights without any protection being afforded by [s 272]".

I have in the above quoted statement substituted the provisions of our own Act for those of the South African Act to which the learned Judge of Appeal case was referring. In *Botha's* case *supra* the decision of the court was the B same as in *Matare supra,* that there was no onus on the accused to prove his case on a balance of probabilities.

In my view, therefore, if at a hearing of an application to change his plea, the accused is only required to give a reasonable explanation as to his plea of guilty in the first instance, then something less is required of him where he C applies to the High Court to have the matter remitted so that he can apply to the appropriate court to change his plea. I think that an accused needs only show that he has an explanation which *prima facie* shows that he has a reasonable explanation for a change of plea to give to the court which convicted him. The High Court need not inquire into the matter, beyond satisfying itself that the explanation which the accused will give for changing D his plea is *prima facie* reasonable. I do not think that this approach will open the floodgates for accused persons who realise that they are on the verge of going to prison, which was the concern expressed by McNally JA in *Matare supra* at 106H-107B.

In the present case, it was submitted on the accused's behalf that he had been E threatened with physical assault and that a gun had been pointed to his head. It was also submitted that a police officer had sat in court during the plea proceedings. The accused went a step further and mentioned by name the police officers who had threatened him with assault. This, in my view, was an explanation which *prima facie* showed that the accused may succeed in the application to change his plea.

F I am of the opinion that the applicant should be permitted to apply to the magistrates court to change his plea. The matter is accordingly remitted to the magistrates court for that purpose.

G *Masimba & Partners,* legal practitioners for the accused

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Source:

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[zRPz]UNITED TRANSPORT GROUP SERVICES LTD v SCOTFIN LTD & ANOR 2002 (2) ZLR 690 (H)
2002 (2) ZLR p690

Citation	2002 (2) ZLR 690 (H)
Case No	Judgment No. HH-206-02
Court	High Court, Harare
Judge	Hungwe J
Heard	22 March 2001; 20 November 2002
Judgment	20 November 2002
Counsel	*A P de Bourbon SC,* for the first claimant *E W W Morris,* for the second claimant
Case Type	Opposed application
Annotations	No case annotations to date

[zFNz]Flynote
Contract —nature of—whether one of assignment or cession —need to D determine parties' true intention from agreement itself — agreement showing that cession rather than assignment intended
[zHNz]Headnote
The first claimant, a financial institution, had entered into an agreement with E a company (now in liquidation) to take over the collection of rentals due to the company by its clients, of whom the applicant was one. The liquidator claimed that the payments should be made to him. The first claimant argued that the right to receive payment had been ceded to it. The liquidator argued that the agreement was one of assignment.
Held, that in an assignment, the assignee steps entirely into the shoes of the F assignor; he assumes the rights as well as the obligations of the assignor. Where there is a cession, the debtor is not entitled to give or withhold his consent to the cession. He is entitled to pay the original creditor until he receives notice of the cession.
Held, that an examination of the agreement showed that the first claimant was given the right to claim payment of the rental, and thus the G agreement was one of cession. Judgment would be entered in favour of the first claimant.
[zCAz]Cases cited
Bon Accord Irrigation Bd v Braine 1923 AD 480 H
2002 (2) ZLR p691
Hungwe J
A *Goode, Durrant & Murray (SA) Ltd v Glen & Wright NNO* 1961 (4) SA 617(C)
Talas Properties of Rhodesia (Pvt) Ltd v Abdullah 1971 (1) RLR 20(G); 1971 (4) SA 369 (R)
[zCIz]Case information
B *A P de Bourbon SC,* for the first claimant
E W W Morris, for the second claimant
[zJDz]Judgment
Hungwe J: The applicant filed an interpleader notice after it was sued by the first claimant ("Scotfin") for payment of the sum of $1 898 750, being 31 instalments in respect of the rental agreement to 30 June 1999; interest at C the prescribed rate on each sum of $61 250 from the first day of the month on which it was due to the date of payment; an order directing the defendant to make timeous payment of all future rentals to the plaintiff with effect from 1 July 1999; and costs of suit. The applicant joined the second claimant, as it expected to be sued over the same payments.

The history of this claim is clearly set out in the pleadings and the second D claimant's heads of argument. It may be summarised as follows:

The first claimant is a financial institution. In the furtherance of its business objective, it conducts various types of agreements which enables it to finance business operated by its customers. The first claimant entered into an agreement with Zimasaza (Pvt) Ltd. It would take over the collection of the E rentals due under the respective rental agreements entered into by Zimasaza with its clients. Scotfin had the right to approve the clients, and once the rights under the rental agreements have been transferred, then the customer was obliged to pay the rentals directly to first claimant.

Zimasaza leased communication equipment to the applicant. The agreement F of lease set out the period of lease, the rental and the equipment that was the subject of the lease. The agreement signed on 30 August 1996 between the parties indicated that rentals were payable to the lessor at a given address. This agreement was preceded by the agreement between the applicant and Zimasaza dated 4 June 1996, wherein the applicant agreed to take assignment of the rental agreements which Zimasaza was to conclude with its customers.

G Zimasaza went into liquidation. By then, although the applicant had been advised to forward all rentals in terms of the agreement between it and Zimasaza to Scotfin, the applicant had not made any payment.

The liquidator of Zimasaza claims that he is entitled to the payments due from the applicant in respect of the rentals of the radios. The first claimant holds H that, by virtue of the "assignment" of its rights to receive the rentals as

reflected in the agreement of June 1996, the second claimant cannot be A entitled to receipt of the rentals due on the radios.

Mr *de Bourbon,* appearing for the first claimant, urged this court to find that although the first claimant and Zimasaza used the word "assignment", the true character of the transaction flowing from their agreement was cession rather than assignment. He pointed to the fact that in an assignment, the B assignee steps entirely into the shoes of the assignor: *Talas Properties of Rhodesia (Pvt) Ltd v Abdullah* 1971 (4) SA 369 (R) at 371; 1971 (1) RLR 20 (G) at 22.

The assignee assumes the rights as well as the obligations of the assignor. On the other hand, this agreement amounts to a cession which denotes a transfer of rights only. The agreement between the first claimant and Zimasaza was C a cession of the right to receive the rental. Under the law of cession the debtor is not entitled to give or withhold his consent to the cession. He is entitled to pay the original creditor until he receives notice of the cession: *Goode, Durrant & Murray (SA) Ltd v Glen & Wright* 1961 (4) SA 617 (E).

Mr *Morris,* for the second claimant, very forcefully argued against any D finding that there was a cession of the right to receive rental by Zimasaza in favour of the first claimant. He attacked the first claimant's position from three angles. Firstly, he argued that, having pleaded assignment, the first claimant could not seek to shift its position without risk to its credibility. It must be held to its pleadings. Secondly, there was no proof, on the papers, of the existence of either an assignment or a cession. Thirdly, the document E relied upon by the first claimant does not support its claim of cession, in that it refers to different radio equipment and conditions.

In *Bon Accord Irrigation Board v Braine* 1923 AD 480 at 490 Kotzé JA said:

"In agreements, we should examine what is the common intention of the contracting parties as expressed by themselves, and must construe the F words in that sense which is most agreeable to the nature of the agreement."

An examination of the agreement between the first and second claimants leaves the clear impression that the parties created, for the first claimant, the right to claim payment of the rental from Zimasaza, once it approved the rental agreement passed on to it by Zimasaza. Its only obligation was to pay G the discounted value and advise the approved customer by way of a monthly statement of account. It has been said that the conduct of the parties did not strictly comply with this agreement and strictly, therefore, no proper assignment or cession existed. On the face of it, this is a valid criticism of the manner in which the parties' affairs were conducted, but the essence of the agreement remained intact. Each party regulated, as much as possible, its H

A affairs so as to fulfil its part of the agreement. Thus, the initial radios, subject of the Zimasaza/Unifreight agreement, were replaced and the necessary paper work effected to reflect the correct equipment and the relevant documentation was amended to reflect the change in the subject matter.

On its part, the first claimant had always looked at the applicant for the due discharge of its obligations under the agreement.
B I am persuaded to interpret the documents relied on by the parties as reflecting a cession rather than an assignment. In any event, I am not persuaded by the argument that since the first claimant has failed to establish the legal basis for a claim of an assignment its claim must fail. The second claimant does not deny that Zimasaza received payment from first claimant C for the discounted value of the lease agreements between it and the applicant.
I am satisfied that the second claimant is not entitled to the proceeds of the judgment which must follow in HC 9857/99. In the premises, I must first enter judgment as prayed in HC 9857/99 and declare as follows:
That judgment is entered in favour of the first claimant as follows:
D 1. Payment of the sum of $1 898 750, being 31 instalments in respect of the rental agreements to 30 June 1999;
2. Payment of interest at the prescribed rate on each sum of $61 250 from the first day of the month in which it was due to date of payment in full;
3. The applicant is to make timeous payment of all future rentals to the first E claimant with effect from 1 July 1999;
4. The second claimant is to pay costs of suit.
Wintertons, legal practitioners for the applicant
Gill, Godlonton & Gerrans, legal practitioners for the first claimant
F *Coghlan, Welsh & Guest,* legal practitioners for the second claimant

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/UKUBAMBANA KUBATANA INVESTMENTS LTD v PRIVATISATION AGENCY OF ZIMBABWE & ANOR 2002 (2) ZLR 694 (H)

[zRPz]UKUBAMBANA KUBATANA INVESTMENTS LTD v PRIVATISATION AGENCY OF ZIMBABWE & ANOR 2002 (2) ZLR 694 (H)
2002 (2) ZLR p694

Citation	2002 (2) ZLR 694 (H)
Case No	Judgment No. HH-207-02
Court	High Court, Harare
Judge	Chinhengo J
Heard	8 November 2002; 20 November 2002
Judgment	20 November 2002
Counsel	*E Manikai,* for the applicant *R Y Phillips,* for the first respondent *C C Seddon,* for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

[zFNz]Flynote
Constitutional law — government — agency of government — when separate D persona
Practice and procedure — citation of parties — agency of government — whether may be cited as separate persona.
[zHNz]Headnote
By means of a circular letter addressed to Government Ministries and quasi- E government bodies, the Government established the Privatisation Agency of Zimbabwe as a "semi-autonomous institution", a unit in the Office of the President and Cabinet entrusted with the task of privatising parastatals and disposing of shares the Government held in commercial companies. The Agency published documents which explained its role, F invited tenders for the Government's shares in three related companies, and set out the rules under which tenders would be received, considered and accepted. The documents made it clear that tenderers would be dealing with the Agency rather than with the Government, that the Agency had authority to decide which tenders would be accepted and G which rejected, and that the Agency would engage consultants to assist it with the tender processes. The applicant submitted tenders for shares in all three companies, and in the case of two of them its offers were the highest received. The Agency, however — probably at the instigation of the Government — flouted the rules set out in its memorandum and did not accept the applicant's tenders: it first sought to reopen the H
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Chinhengo J
A tender, then purported to terminate the bidding process, and finally informed the applicant and other bidders that after evaluating their tenders the Government had refused to accept any of them. The applicant sought an order directing the Agency to announce the winning tenderers and to allot shares to them. The Agency raised the point *in limine* that it was wrongly cited since it was not a legal *persona, and tha*t B the applicant should have sued the Government.
Held, that the Agency's status was quite different from that of other government departments and agencies. Its relationship with the Government was not that of agent and principal but was *sui generis,* enabling the Agency to contract in its own right and to assume rights and C obligations for itself in respect of which it could sue and be sued in its own right.
Held, further, that even if the Agency was merely an agent of the Government, it had expressly warranted in the documents that it had authority to transact the tender process in its own right as principal, and for that reason rendered itself liable to the applicant for any breach of contract.
D *Held,* further, that the Agency's position was akin to that of an auctioneer who has assumed personal liability on a contract of sale, since the sale of the shares was completed upon completion of the bid process and the determination of the winning tenders. Once that process was complete the Agency was obliged to comply with the terms of the tender.
[zCAz]Cases cited E
Murray v McLean NO 1969 (2) RLR 541 (G)
PTC v Support Construction (Pvt) Ltd 1998 (2) ZLR 221 (S)
R v Cloete & Anor 1945 OPD 204
F *S v Mt Hampden Potato Growers (Pvt) Ltd & Anor* 1975 (2) RLR 143 (A); 1976 (1) SA 800 (RA)
Sugden & Ors v Beaconhurst Dairies (Pty) Ltd & Ors 1963 (2) SA 174 (E)
Telcon Italia SRL v PTC & Anor 2000 (2) ZLR 92 (H)
Waterfalls Town Management Board v Minister of Housing 1956 R & N 691 (SR);
1957 (1) SA 336 (SR) G
[zCIz]Case information
E Manikai, for the applicant
R Y Phillips, for the first respondent
H *C C Seddon,* for the second respondent
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[zJDz]Judgment
Chinhengo J: On 2 July 2001, the shareholders of a company known as A Astra Limited agreed, at an extraordinary general meeting, to a demerger of the company. The demerger resulted in three companies —Tractive Power Holdings Limited, Cairns Holdings Limited, and Astra Industries Limited. The second respondent (hereafter called "Fintrust"), a company wholly owned by the Reserve Bank

of Zimbabwe, owned 88 526 968 shares in all B the three companies which emerged from the demerger of Astra Limited. (I shall henceforth refer to these companies collectively as the "demerged companies"). The beneficial holder of the shares held by Fintrust in the demerged companies is the Government of Zimbabwe. In terms of the policy it has adopted, the Government decided to dispose of its entire shareholding in the demerged companies. In pursuance of that same policy Government C had, on 2 March 2000, established in terms of a confidential Circular Letter No. 1 of 2000, the first respondent (hereinafter referred to as "PAZ") as its agency for the privatisation of parastatals and the disposal of the Government's shares in the demerged companies.

PAZ embarked on the process of disposing of the Government' s shares in the demerged companies. On or about 19 July PAZ issued a document entitled D "Information Memorandum on the Open Tender for the Government of Zimbabwe's 88 526 968 Shares Held in the Demerged Companies of the Former Astra Limited" (hereinafter referred to as the Memorandum). The Memorandum was an invitation to investors to submit tenders for the purchase of the shares. E

The applicant (hereinafter referred to as "UKI"), is a joint stock company registered in Zimbabwe. It responded, together with four other bidders, to the invitation in the Memorandum and submitted its bids in respect of the dermerged companies. Its bids and those of other bidders were accepted by PAZ for adjudication purposes. From the papers placed before me, UKI's bid was the second highest bid of the three bids submitted in respect of the shares F on offer in Cairns Holdings Limited. This bid was for $438 208 293,60. Its second bid was the higher of the two bids for the shares on offer in Tractive Power Industries Limited. This bid was for $535 587 914,40. Its third bid was the higher of the two bids in respect of the shares on offer in Astra Industries Limited. It was for $632 967 535,20. UKI was therefore clearly the highest G bidder in respect of the shares on offer in Tractive Power Industries Limited and Astra Industries Limited and as such, everything else being equal, UKI was entitled to be declared the successful bidder- the winner- in respect of those shares.

The tender documents were made available to the bidders on 23 July 2001 at 8:00 a.m. The bids were to close on 3 August 2001 at 4:00 p.m. The allotment H

A of shares was to be made on 16 August 2001. The tenders were to be valid for a period of sixty days from 3 August 2001 to 3 October 2001. PAZ had the right to extend the period of validity of the bids by forty-five days. It did extend the period of validity of the bids by fourteen days to 16 October 2001, apparently with the consent of all the bidders. Come 16 October 2001 PAZ did not announce the results of the bidding process nor did it announce the B cancellation or termination of the bidding process. On 24 April 2002 PAZ sought to reopen the tender and advised the bidders to that effect. It however did not pursue this course of action. On 28 May 2002 PAZ purported to terminate the bidding process in terms of a disclaimer provision in the tender document. Following some advice from the Attorney-General, PAZ on 21 June 2002 rescinded its decision to terminate the bidding process. On 5 July C 2002 it changed its position again and advised the bidders that the bids had been evaluated and adjudicated upon, and that the Government had not accepted any of them.

UKI was riled by this turn of events and lodged this application. The amended order which it sought was an order declaring that it was the winning bidder D in respect of the bids submitted for the shares on offer in Tractive Power Holdings Limited and Astra Industries Limited and compelling Fintrust forthwith, and in any event within seven days of the order of court, to transfer the shares held by it in the two companies. That order also sought to compel PAZ to announce the winning bidder in respect of the shares on offer in Cairns Holdings Limited. UKI claimed the costs of this application from E PAZ. At the hearing of this application Mr *Manikai,* for UKI, reverted to the original draft order so that the relief sought by the applicant was an order to compel PAZ to announce the winning bidders within seven days of the order of court and allot shares to the winners as well as to pay the costs of suit. It seems to me that the issue which arises for my determination is whether F UKI's tenders were accepted by PAZ and, if they were, whether a contract was created which is binding on the parties.

The respondents' position is that the bidding process was lawfully terminated by the Government and that they have no power or authority to proceed to announce the winning bidders and allot and transfer shares to them without the Government's consent. A subsidiary issue accordingly arises for G determination. The subsidiary issue is whether PAZ is a separate legal *persona* because, if it is not, then it was wrongly cited as a respondent in this application. In so far as it is concerned, the present action could not, therefore, be maintained against it. This is one of the two cornerstones of the opposition on the part of PAZ. The other is its denial that a binding contract was created H between it and UKI.

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I will deal first with the subsidiary issue. To do so I have to have regard to the A policy and administrative framework established by the Government for the disposal of its shares in various companies and to the bidding process as contained in the Memorandum.

The Policy and Administrative Framework for the Privatisation of Parastatals and the Disposal of Government Shares in Private Companies B

In terms of Circular Letter No. 1 of 2000, which is classified "Confidential" and addressed to Government Ministries and other Government-related entities including PAZ, PAZ was established as an agency in the Office of the President and Cabinet. The functions of PAZ, as outlined in the circular, are to advise Ministries on all matters relating to privatisation and to assist them in the financial restructuring of enterprises earmarked for privatisation; to C advise on necessary legislative changes to speed up the privatisation process; to prepare, in consultation with relevant Ministries, detailed work plans and timetables for privatisation of designated enterprises for submission to Cabinet through the Inter-Ministerial Committee on Commercialisation and Privatisation of Parastatals (hereinafter referred to as "the IMCCPP"); to D assist Ministries to identify local and external consultants to be engaged to deal with the technical aspects of the privatisation programme; E to prepare and implement public information campaigns on the benefits of privatisation and empowerment of indigenous Zimbabweans; and to act as the Secretariat of the IMCCPP. The circular ends on a high and noble note by urging that:

"All stakeholders be committed to making the privatisation programme a success in order for it to contribute to the overall recovery of the economy."

In its publication entitled "Privatisation Agency of Zimbabwe: Transfer of Ownership of Assets from State to You" (hereinafter referred to as "the Publication") investors are invited to invest in companies in which the Government has a controlling shareholding or which it owns and in F Government utilities and parastatals. It is recorded therein, as being a part of PAZ's mission:

"to professionally and efficiently lead, advise and manage the privatisation programme in Zimbabwe through the disposal and disinvestiture of Government shareholding in companies and parastatals. G This will be achieved through an objective and transparent implementation of a business plan in partnership with all stakeholders."

This publication was intended to inform the potential investor about the role of PAZ and about how it would accomplish its mission. PAZ describes itself as having been formed: H

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A "out of a realisation by Government of the need to create a single semi- autonomous institution that would be responsible on a day-to-day basis, for the privatisation of State-owned enterprises and other companies in which the Government has some shareholding."

The Publication defines and explains the role of the IMCCPP and Cabinet as follows. The IMCCPP convenes a Ministers' meeting to consider the B privatisation proposals and recommendations by the Ministries and, if satisfied with the proposals, to make recommendations to Cabinet. The IMCCPP can request that the proposals be reviewed and be re-submitted. The Cabinet provides the overall policy framework and guidelines on privatisation of public enterprises. It decides which enterprises are to be privatised and it approves proposals or refers them back for further consideration. The stages C in the privatisation of State-owned enterprises are outlined in paragraph 5 of the Publication. These stages encompass (1) the initial review and planning stage; (2) the detailed assessment stage; (3) the approval by IMCCPP and Cabinet stage; (4) the pre-privatisation stage; (5) the privatisation transaction stage; and (6) the post-completion stage. At Stage (2) the privatisation D strategy is presented to the IMCCPP together with methods of sale, "percentages to whom", employment and indigenisation issues, among others. At Stage (3) the strategy is formally presented to IMCCPP and, if necessary, further research and assessment are conducted. The privatisation strategy is at that stage presented to Cabinet and Cabinet formally issues its decision. At Stage (4) information memoranda (such as The Memorandum), E brochures and briefings and establishment of pre-qualification processes and pre-qualification criteria, if necessary, are produced. Formal documents, such as tender documents, including conditions of sale and bid acceptance criteria, are prepared and Cabinet gives its final seal of approval. It is necessary for me to quote the entire stage "IV" as it appears at p 9 of the F Publication:

"Stage IV

Pre-Privatisation Preparation Stage

(i) Production of information memorandum, brochure, and briefing etc. (Prospectus, if share issue or placement), and establishment of pre-qualification process and pre-qualification criteria if necessary. G

(ii) Preparation of formal documents and guidelines for enterprise sale (tender documents, listing papers) including conditions of sale and bid acceptance criteria. Review of procedures.

(iii) Presentation of marketing and PR strategy, and initial pre-marketing activity (e.g. including initial discussions with 'sales channels', H embassies, brokers, etc).

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(iv) Procedure Manual Compliance check, *pre-launch* meeting of all A relevant parties and *'sign-off* of transactions by Cabinet."

At Stage (5) invitations to bid or participate are issued, information memoranda are supplied and bids are received and evaluated and contracts are entered into. All formalities for the completion of the transaction are completed and payments are received among other things. At Stage (6) the exercise is wound up. B

The information in the Publication indicates to the public that the IMCCPP and Cabinet's *formal* involvement in the privatisation process or in the process of disposing of Government shares in private companies ends at Stage (4) which means that at that point the decisions will have been made as to the methods or strategies of sale and to whom the shares may be sold. At that stage Cabinet gives its seal of approval and authorises PAZ to proceed C with the transactions. Thus, beyond this stage the task is left to the implementers, PAZ in particular, to complete the transactions.

The Memorandum i.e. The Information Memorandum on the Open Tender for the Government of Zimbabwe's 88 526 968 shares held in the Demerged Companies of the Former Astra Limited. D

The Memorandum was issued by the financial advisers of PAZ, ReNaissance Advisory Services (Private) Limited (hereinafter referred to as "ReNaissance") and Trust Merchant Bank with the approval of PAZ. It contained information on the demerged companies. It was provided to the investors as the basis on which investors could make their own judgment on each company. It E contained a disclaimer by PAZ to the following effect:

"PAZ is not bound to accept any of the bids submitted. It also reserves the right to reject bids in whole or in part, to discuss different or additional aspects with any Bidder, to cancel or terminate this bid process before or after the date of closure for receipt of the bids without prejudice and F giving any reasons. However such decision shall be communicated to all Bidders in writing prior to or upon termination of the bidding process."

In terms of clause A6.2, bidders were at liberty to bid for any number of shares without restriction. If the shares were under-subscribed, the under-subscribed shares were to be offered to the general public. A floor-price of the shares was given in clause A5 of the Memorandum in respect of each of the demerged G companies, and the prospective investors were "free to bid for the shares at a price higher than the floor-price". PAZ made it abundantly clear that it was not obliged to accept the highest bid. In clause A7 PAZ advised that the disposal of the shares was targeted to be completed before the end of the year 2001 and that: H

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A "The disinvestment responsibility was handed over to PAZ, the Government's privatisation agency, who in turn appointed professional advisors to handle the transaction."

It was observed in clause A7.2 that the disposal of the shares had, as its objectives, to create value for all stakeholders, to serve the need for empowerment, to raise as much foreign currency as possible, to serve the B ends of transparency and to improve the liquidity of the shares. It was recognised that the shares were illiquid because only a small portion of the shares was in the hands of active investors. It was noted that the shares were trading at ±$10 at the time when the decision to carry out the demerger was made, and at $17.50 on the last day of trading before Astra Limited was C suspended from the Zimbabwe Stock Exchange pending the listing of the demerged companies. In a letter to the investing public (being clause C of the Memorandum) PAZ advised as follows:

"The Privatisation Agency of Zimbabwe, on behalf of the Government of Zimbabwe, hereby gives consent to the publication and distribution of this Information Memorandum and for the extension of an invitation to D all interested persons, to tender for all or part of the Government of Zimbabwe's 88 526 968 shares held in Astra Limited through Finance Trust of Zimbabwe (Private) Limited being disposed of in the manner described in this Information Memorandum.

The Privatisation Agency of Zimbabwe confirms that specific Government authority has been received to proceed with the privatisation E of Astra Limited in the manner contemplated in this information Memorandum."

This letter was signed by Mr Andrew Bvumbe, the director of PAZ and the deponent to PAZ's opposing affidavit in this application. The letter was PAZ's representation to the investing public as

to the scope of its authority in respect of the disposal of the shares. This letter, read together with the F Publication and the contents of the Memorandum, gives an appreciation of the legal standing of PAZ. I shall revert to this later on.

In terms of clause D5 of the Memorandum titled "Instructions to Tenderers", the bidder was to bear all the costs associated with the preparation and submission of its bid. The bidder could purchase the actual tender documents G at the offices of PAZ for US$5 000 or its Zimbabwe Dollar equivalent at the official exchange rate of one US$ to 55 Z$. The tenders were to be opened in the Boardroom at PAZ offices immediately after the closing time. No bids were to be withdrawn for a period of 60 days from the date of opening of the bids and, if a tenderer or bidder withdrew its bid during that period, it was to H be liable to PAZ for any additional expenses incurred by PAZ by calling for

fresh bids or by having to accept any less favourable bid. Such a tenderer A would also forfeit its bid security, which was assessed at 10 per cent of the total value of the shares it had applied for. The bid security which the tenderer was required to furnish was to remain valid for 45 days beyond the validity of the bid. PAZ reserved to itself the right to extend the period of the validity of the bid. Any bid which was not accompanied by an acceptable bid security was to be rejected. B

The undisputed facts

UKI, acting in terms of the Memorandum, submitted its bids for all the demerged companies, as I have already indicated. In order to obtain the official sets of the actual tender documents for each bid it was required to pay $275 000. It paid altogether the sum of $825 000 to PAZ on 3 August 2001 C for the three sets of tender documents. It submitted a bid security to the value of $53 558 791,44 which was issued to its favour by Diamond Insurance Company (Private) Limited.

The tenders were opened on 3 August 2001. The bids were valid until 3 October 2001. On 3 October PAZ extended the period of validity of the bids D by 14 days to 16 October 2001. On 3 October PAZ, through ReNaissance, gave as its reason for extending the period its inability to announce the winning bidder or bidders. In a further letter of the same date PAZ elaborated on its failure to announce the winner and said:

"PAZ is currently not in a position to announce the winning bidder(s) as the Government process has not been completed." E

On 4 October PAZ advised UKI in writing that it had completed the adjudication process and that it was in the process of obtaining the necessary approvals from Cabinet, through the IMCCPP, before making a public announcement of the winners. It gave the assurance that the announcement would be made within the bid period. At this point in time UKI had written several letters of complaint to PAZ about PAZ's handling of the bid process and, in particular, about its seeming inability or reluctance to announce the winning bidders. In accepting the extension of the bid validity period to 16 October 2001, UKI had complained in writing on 3 and 4 October in separate letters to PAZ. In the letter of 4 October it complained that the bid process had not been transparent. It accused PAZ of having written a letter to its G competitors and not to them, and stated that that raised concern about the possible reasons for extending the period within which to complete the tender process. It complained further about an article which had appeared in the *Herald* newspaper giving the bid figures, and said that that article indicated that other undisclosed criteria were being used to determine the awards. It also complained that, from information it had gathered, the tender process H

A was subject to political lobbying by management bidders who had used privileged information during the bid process. In a long response on 11 October PAZ reminded UKI of the provisions of the Memorandum and the rights of PAZ thereunder. It also denied as valid UKI's accusations of lack of transparency, absence of impartiality and the use of undisclosed criteria.

On 14 November 2001 PAZ convened a meeting which was attended by all B the bidders and PAZ's financial advisers. At that meeting PAZ advised that the IMCCPP had come up with new proposals on the allocation of shares which the IMCCPP intended to table before Cabinet on 20 November 2001. The proposal was that the shares were to be allocated as to 10 per cent each to management and employees and to the National Investment Trust, 11.53 C per cent to the general public and 35 per cent to an anchor investor — meaning the winning bidder. PAZ also advised that the IMCCPP was recommending or had decided that no single bidder who had the highest bid in more than one company would be accepted as the anchor investor in all those companies: it would have to choose and take up shares in only one company. The minutes of the meeting reflect that none of the bidders was D amused by the information given by PAZ. The minutes indicate that some of the bidders complained about the change of goal posts, about PAZ and its advisers being corrupt and

having received bribes (at least one of them threatened to sue the Government, PAZ and its advisers), and about the manner in which the whole process had been handled. UKI followed up on this meeting with a letter dated 14 November. In that letter it complained that E the parameters of the tender process had been changed and the process had been "rendered a sham". It complained at the fact that whilst the IMCCPP proposed to allot shares to the anchor investors on the basis of the bid price and on the assumption that the other investors (those who were to receive 10 per cent and 11.53 per cent shares) were to be allotted their shares based on F the market value of the shares, it was no longer clear on what basis the allotments would be made. It complained that the management had submitted bids along with the other bidders, and yet the IMCCPP's new proposal was favouring them. It expressed grave concern at the fact that in terms of the new proposal it would only be awarded shares in one company, yet it had incurred expenses in respect of the three companies. It expressed concern at the G proposal to award 10 per cent of the shares to the National Investment Trust which had not submitted a bid. It also expressed concern at the 35 per cent shareholding which it was now proposed to award to the anchor investor, because that did not give control of the company to the anchor investor.

On 24 April 2002, PAZ advised the bidders that the tender process was being H reopened. It cited the fact that the tender documents had expired because

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there had been no further extension of the validity period of the bids after 16 A October, 2001 and, as a result, some bidders had recalled their bids. It, however, did not indicate which bidders had done so. It cited the fact that the share prices of the demerged companies had risen substantially. It therefore called upon the bidders to reconfirm their continued interest in acquiring the shares in order for PAZ to decide "on the way forward with the tender B process". The letter was addressed to all the five bidders and it reads:

"You will recall that at our last meeting, which was attended by all bidders who responded to the above open tender held in PAZ boardroom on Wednesday 14 November 2001, the Director of PAZ communicated the shareholding allocations which were recommended by the Inter- Ministerial Committee on Commercialisation and Privatisation. C

Subsequent to that last meeting, there have been some changes that have taken place on the ground i.e.

(a) The bid bonds that accompanied the tender documents expired and some bidders have recalled their bid bonds.

(b) There was no further extension of the validity period of the bids following the expiry of the 16 October 2001 extension. D

(c) The market conditions have changed drastically from the time the respective company valuations were conducted, which is more than eight months ago. These valuations formed the basis of the floor prices for the open tender. There has been a significant rally of the share prices of the three companies as reflected on the ZSE. E

As a potential investor who had previously expressed interest in acquiring shares in the demerged companies, PAZ by way of this letter, would like you to reconfirm whether you are still interested in acquiring the shares on offer in the demerged companies given the changes that have been alluded to above. It is imperative that the above should be taken into consideration in deciding the way forward with the tender process. F Could you please reconfirm your interest or otherwise in writing by close of business on 8 May 2002."

UKI responded to this letter and demanded that PAZ should "proceed to implement the shareholding allocation communicated on 14 November 2001 in accordance with the tender documents" and it threatened to take legal action against PAZ if it did not comply. A different position of PAZ on the G whole matter was communicated in a letter dated 28 May 2002 addressed to UKI by A.N. Bvumbe. The letter reads:

"We refer to previous communications in respect of the above matter.

It is with regret that we have to notify you that the Government of Zimbabwe has decided to hereby terminate with immediate effect the current bid process which commenced on 23 July, 2001 in terms of the H

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A Disclaimer in the Information Memorandum.

However in the event that the Government of Zimbabwe decides to dispose its *(sic)* shareholding, investors who participated in the terminated bid process will be informed accordingly."

Meanwhile, on 26 September 2001 the director of PAZ had written a letter to the Competition Commission. The heading of the letter was: "Potential B Implications of the Proposed Disposal of

Tractive Power Holdings to the Winning Bidder: UKI". PAZ in that letter inquired, now that it was about to allot the shares to the winning bidder, about the implications of the transaction on "competition". Details of UKI's other investments which were material to the inquiry were given. In the last paragraph of the letter PAZ stated:

C "By way of this letter, PAZ is requesting the Competition Commission to quickly investigate any potential for future unfair trade practices by the winning bidder. PAZ hopes you will be able to give us your opinion on this transaction by the end of day tomorrow, Thursday 27 September 2001."

This was a timely inquiry as it was made before the end of the bid validity D period. On 28 September 2001 the Competition Commission replied and assured PAZ that, on the limited information which the Commission had been able to gather, the sale of the shares in Tractive Power Holdings to UKI was unlikely to raise any major competition concerns. It also assured PAZ that it was going to conduct a more thorough assessment and would E communicate its findings in due course. As of 14 January 2002, UKI had lodged this application and had served it on the Attorney-General. In a letter dated 4 June the Attorney-General advised UKI's legal practitioners that he was consulting with the Minister of Finance and that he hoped that the matter could be resolved amicably. He wrote to UKI's legal practitioners on 20 June F the following letter:

"Ukubambana Kubatana Ltd v Privatisation Agency of Zimbabwe and Finance Trust of Zimbabwe (Pvt) Ltd

G My letter of 14th instant refers.

As advised during our telephone conversation of today's date I confirm that I had the opportunity to discuss with my clients and wish to advise that a decision to rescind the, termination of the tender process has been reached and agreed upon. The Government, through the Privatisation H Agency of Zimbabwe is to communicate this position, then withdraw the

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letter of termination and proceed forthwith to finalise the tender process. A Results of the tender will be announced as soon as possible but not later than 5th July, 2002. It is our sincere hope that you will also accordingly reconsider whether to proceed or not with your application.

Yours faithfully B

A.R. CHIGOVERA

ATTORNEY-GENERAL."

On 21 June 2002 the Director of PAZ wrote to all the bidders and advised them that the Government had withdrawn its letter of 28 May 2002 by which C it had purported to terminate the tender process. He further advised that the tender process would proceed to finality and an announcement of the result of the process would be made within fourteen days of the letter. Then on 5 July the Director of PAZ wrote another letter to all the bidders in which he said:

"As you are aware the Government of Zimbabwe, in August 2001, D through the Privatisation Agency of Zimbabwe invited for tenders for the acquisition of Government's 66.53 percent equity in the demerged companies of the former Astra Limited. Bids were received from five investor groups. The bids have been evaluated and adjudicated upon, and the Government has not accepted any of them. In this regard, Government will retain E ownership of its equity in the three de-merged companies."

On 9 July 2002, UKI's legal practitioners responded to the above letter. They pointed out that the letter did not announce the results of the bidding process as contemplated in the Memorandum; that it was inconsistent with the Government's clear decision to dispose of its interest in Astra Limited; that F it confirmed that the process had been tampered with; that the whole process was far from transparent and objective; and that non-legal entities and parties not privy to the process appeared to have influenced the decision. They advised that they were pursuing this application.

UKI's Case

UKI seeks in this application an order that PAZ be compelled to announce, G within seven days of the court's order, the results of the open tender pursuant to PAZ's undertaking in the Memorandum, and that Fintrust be compelled to allot forthwith the shares to the winning bidders. Its case is basically that it submitted its bids along with other bidders. To do so it had expended large sums of money in payment for the tender documents and the security bond. H

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A The bids were opened publicly and the tenders became known. The bids were adjudicated upon and the winners were identified. The announcement was to have been made before the bid validity period expired on 16 October 2001. PAZ failed to do so. It was in breach of the terms of the tender as enshrined in the Memorandum. It, or the Government, could not rely on the disclaimer provision in the Memorandum because that disclaimer applied to PAZ only B and not to Government; that the

disclaimer was valid up to the expiry of the bid validity period on 16 October 2001 and as such, once the adjudication had been completed as advised at the meeting on 14 November 2001, what remained was for PAZ to announce the winners and allot shares to them. UKI averred emphatically that:

C "The tender process was an open public tender, involving public securities and First Respondent (PAZ), a public agency. It is important that in the public interest, the process be conducted in a fair and transparent manner to its conclusion. The bidders participated in good faith and are entitled to be informed of the outcome of the process in the normal way."

It averred that it was entitled to sue PAZ as a separate entity from Government D because PAZ had represented itself in the Memorandum as such. It pointed to the following indicators that the tender process had been manipulated. *First,* two of the five bidders, Quelch Investments (Private) Limited and Tramurag Investments (Private) Limited, were management-owned companies and they had submitted bids at a price below the floor prices in respect of Tractive Power Holding and Astra Industries. Their bids should E have been disregarded for that reason. It therefore found it odd that it was suggested that the management companies, which had in any case submitted bids below the floor price, should be favoured with a 10 per cent holding as had been suggested at the meeting on 14 November 2001. *Second,* PAZ sought to introduce other criteria in the adjudication of the tenders and the F award of the shares when it referred UKI's bid to the Competition Commission when that was not contemplated in the Memorandum. *Third,* despite the existence of a winning bidder as at 28 September 2001, as stated in PAZ's letter to the Competition Commission, PAZ nonetheless extended the bid validity period to 16 October 2001. *Fourth,* the reason for the extension of the bid validity period was not genuine because, having realised that there G was a winning bidder as at 28 September 2001, PAZ contended that it was not, as of 4 October 2001, in a position to announce the winner. *Fifth,* PAZ re-introduced into the tender process the IMCCPP as a player yet in the Memorandum it had been specifically stated that:

"Specific Government authority ... (had been obtained) ... to proceed with the privatisation of Astra Limited in the manner contemplated in the H Information Memorandum."

Sixth, the decision with regard to an anchor investor as communicated at the A meeting of 14 November 2001 was not in accordance with he Memorandum and neither was the proposal or decision to bring in the National Investment Trust and other persons or entities which had not submitted any bids. They pointed out that the reduction of the shares proposed to be allocated to a winning bidder; the number of companies in which a winning bidder could B participate; the accommodation of losing bidders or non participating entities, which changes were suggested at the meeting on 14 November, were clearly inconsistent with the terms of the Memorandum. *Seventh,* that the decision to reopen the tenders as communicated on 8 May 2002 was inconsistent with the terms of the Memorandum. *Eighth,* PAZ's unwillingness to proceed to finalise the tender process after receiving advice from the Attorney-General C and after communicating the decision that the earlier cancellation of the process had been rescinded, smacked of bad faith. *Ninth,* that the shares in the demerged companies had been manipulated to create the impression that they were now trading at higher values on the Zimbabwe Stock Exchange. In this regard UKI averred that, as at 3 October 2001, the share price was below the floor price. The same situation obtained as at 14 November 2001. It averred D that speculation on the shares only began well after the time when the results of the tender process should have been announced; that a small percentage of the shares in the demerged companies were deliberately traded to give them an upward movement and provide a justification for PAZ to abandon the tender process; that PAZ had, in any case, procrastinated in order to buy time whilst the share prices were being manipulated, using small volumes of E shares; that in any case the share price was not the basis of the valuation for determining the floor price and was not an indicator of the value of the companies, hence the management's bid was below the floor prices. The current floor prices, it contended, were therefore not relevant to the matter. All in all, UKI submitted that PAZ had abused a public process; that it had F manipulated the rules; and that it was attempting to award the tenders to preferred bidders and, in particular, to the management companies, in a corrupt and opaque manner.

Respondents' Case (PAZ and FINTRUST)

Fintrust, the legal owner of the shares in the demerged companies, did not G have any problem with any decision which the court might make. At the hearing, its legal practitioner applied to be excused after indicating Fintrust's preparedness to abide by the court's decision. Fintrust had, however, filed two short affidavits which, in my view, have an important bearing on this application. In its first affidavit, filed of record on 18 June 2002, it confirmed that it was the legal owner of the shares and that Government was the H

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A beneficial owner of the shares. It averred that it was not entitled to sell or transfer the shares to any person without the express authority of the Government. It drew the court's attention to the fact that the Director of PAZ and Dr Utete, the Permanent Secretary to Cabinet, would file affidavits to deal with the factual and legal allegations put forward by UKI. In its second B affidavit, filed of record on 6 August 2002, Fintrust's deponent advised as following:
"I refer to paragraph 2(4) of my previous affidavit. In that subparagraph I anticipated the Opposing Affidavit of Mr Bvumbe and an Affidavit from Dr Utete the Permanent Secretary to Cabinet as my Legal Practitioners had been informed at a meeting in the Attorney-General's Office that it was the First respondent's intention to file these two C affidavits. Despite attempted inquiries our Legal Practitioners *(sic)* we were not informed that First Respondent had decided not to file a Notice of Opposition and Opposing Affidavit at that stage but to initially engage in correspondence instead. In the circumstances I now find that the reference to an Affidavit from Dr Utete was included under a D misunderstanding and I apologise to this Honourable Court for this reference having been included."
In my view it is significant that Fintrust explained and apologised for the absence of an affidavit from Dr Utete. I will revert to this later.
The affidavit filed on behalf of PAZ dwelt mainly on PAZ's lack of legal standing to sue or to be sued, and it also dwelt at length on the involvement E of Government in terminating the tender process. It averred that PAZ was not a legal entity but a unit in the Office of the President and Cabinet and, as such, UKI had sued the wrong party: it should instead have sued Government as the beneficial owner of the shares: it should have done that in compliance with the State Liabilities Act [*Chapter 8:14*]. It said that the delays in progressing with the tender process were not caused by it but by the IMCCPP, F which took several months deliberating on the matter. It did not deny that its own internal processes had yielded UKI as the winning bidder for the shares in Tractive Power Holdings and in Astra Industries but stated that:
"Despite the results of the internal adjudication process within, PAZ cannot sell without IMCCPP and Cabinet Authority. IMCCPP and G Cabinet rejected the bids and PAZ cannot sell."
In this connection, PAZ averred that when it issued the Memorandum it was doing no more than request the public to submit offers and that each offer was to be accepted or rejected, not by it, but by Government. It averred that the bidders were always aware that Cabinet approval was necessary before any allocation of shares could be made. This, it said, was the reason given in the H letters written on its behalf on 4 and 11 October 2001 for its inability to
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announce the result and that was what the bidders were advised at the meeting A on 14 November 2001. It referred to the disclaimer provision in the Memorandum and averred that that was the basis on which Government had acted when it rejected all the bids as communicated to the bidders by the letter of 5 July 2002.
PAZ denied UKI's allegations of improper conduct and bad faith. It explained B that PAZ normally consulted the Competition Commission because one of the objectives of privatisation is to increase competition and ensure that monopolies are not created through the privatisation process. It denied that the share prices in the demerged companies were manipulated. It averred that the Government's objective in disposing of its stake in Astra Limited was to create value for itself and "as such it would be irresponsible if not illegal, to C sell these shares at prices they were trading at in 2001". It pointed out that at the time that the tender was floated, Government could have raised $1.6 billion from the sale of the shares and that, as at 23 July 2002, it could have raised $11.7 billion. It contended that, as the shares were not transferred in 2001, Government was now entitled to dispose of them at their current prices. D
PAZ also averred that, in terms of the Memorandum, no rights accrued to any of the bidders because such rights could not accrue unless and until a firm acceptance of their offers had been communicated to them. In the last paragraph of the opposing affidavit PAZ put its position clearly as follows:
"There was no contract concluded with the Applicant and the Government is not obliged to sell to it. Government has decided not to sell. That is the E end of the matter."
The Issues and the Arguments
The issues for determination in this application are essentially two in number. It seems to me that both parties recognised that there are only these two issues for decision. The first is whether PAZ is an entity separate from the F Government such that it carried out its task outside the framework of Government and it could, after adjudicating on the bids, announce the winners without further

recourse to the Government. In other words, did it have the mandate to enter into contracts with investors and, acting on its own, to transact the business in issue? Put differently, the issue is whether PAZ is such an entity as can enter into contracts in its own right and consequently sue G or be sued in its own right. The second issue arises depending on the answer to the first issue. It is: if PAZ is a separate entity, whether it concluded a contract with UKI to which it must be held, thereby entitling UKI to the relief it sought in these proceedings.

(a) Whether PAZ has a separate legal standing H

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A In order to determine the status of PAZ it is necessary to have regard to its constituent instrument, to the objectives for which it was established, its *modus operandi* and the representations it, or the Government, has made relative to its status.

There is no doubt that PAZ was established in terms of the Confidential Circular Letter No. 1 of 2000 issued by the Office of the President and B Cabinet. That letter indicates quite clearly that PAZ is a unit in the Office of the President and Cabinet. I have already outlined its functions as spelt out in that letter. The letter however was of restricted circulation and it was marked "confidential". Under normal circumstances, the contents of that letter would not be available to the public at large. There is no indication or C assertion on the papers that that letter was made available to the bidders or the general investing public. What was available to the public, however, was the Publication which outlined the *modus operandi* of PAZ. I have already indicated what in terms of the Publication are the roles of the IMCCPP and Cabinet and at what stage their involvement in the privatisation of, or in the disposal of Government shares held in, private companies formally ended. I D stress the word "formally'" because, in the normal course of events consultations between Government and its instrumentalities is an ongoing exercise. In terms of the Publication Cabinet "signs off" transactions germaine to this application at Stage IV. In my view, once Cabinet has "signed off" the transaction, PAZ is then clothed with authority to transact the business concerned. There is no formal requirement after Stage IV for PAZ to revert E to Government on any issue. PAZ outsourced professional services. In terms of clause 6 of the Publication, it invited bids from interested consultants and, with the assistance of officials from the relevant Ministries, it selected a winning consultant based on certain criteria, one of which was the cost to PAZ of hiring the consultant. It was made clear in clause 6 that PAZ was to F pay the consultant's fees. There is no suggestion in this application or elsewhere that when a consultant entered into a contract for professional services, it entered into such contract not with PAZ as a separate entity but with the Government. If the contract was with Government, then the Government Tender Board would have been involved. It seems to be quite clear that the successful consultant entered into the contract with PAZ in its G own right. This is so because, as stated in clause 1 of the Publication, PAZ is "a single semi-autonomous institution". In terms of its mission statement, it manages the privatisation programme in Zimbabwe. It seems to me that PAZ has, from a reading of the Publication, a *sui generis* status quite different from that of other Government departments or agencies.

H The Memorandum contains provisions similar to those in the Publication

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with respect to PAZ's status. The Memorandum was indeed an invitation to A the public to deal with PAZ in respect of the shares in the demerged companies. It was issued with the consent of PAZ on behalf of Government. See *PTC v Support Construction (Pvt) Ltd* 1998 (2) ZLR 221 (S) and *Telcon Italia SRL v PTC & Anor* 2000 (2) ZLR 92 (H). The confidentiality clause in the Memorandum enjoined the bidders and the "advisors and their B principal, PAZ/or FTZ" to maintain confidentiality. The covenant on confidentiality is, in the main, as between the bidders and PAZ. It would be reading too much into this clause if it were to be said that Government, *qua* government, was bound by the clause because, if it were to be so, then the Government would have fettered its future executive action in advance, which thing it may not do. See *Waterfalls Town Management Board* v C *Minister of Housing,* 1956 R&N 691 (SR), 1957 (1) SA 336 (SR) and *Murray v McLean,* NO 1969 (2) RLR 541 (G).

The disclaimer clause of the Memorandum stipulated that the bidders agreed to indemnify PAZ for any losses which may have arisen from the use of the information contained in the Memorandum. It further proclaimed that PAZ was not bound to accept any bids submitted and that it reserved to itself the D right to reject bids in whole or in part and to "cancel or terminate this bid process before or after the date of closure for receipt of the bids without prejudice and giving any reasons". It restricted the exercise of these rights to where its intentions were communicated to all bidders in writing "prior to or upon termination of the bidding process". This was a self-imposed stricture E but a very reasonable one in the circumstances. In clause A7.1 of the Memorandum PAZ made it quite

clear that the "disinvestments responsibility was handed over to PAZ who in turn appointed professional advisors to handle the transaction". In the letter to investors (clause C of the Memorandum) the Director of PAZ categorically stated that PAZ confirmed that specific governmental authority had been received to proceed with "the privatisation F of Astra Limited in the manner contemplated" in the Memorandum. The "Form of Tender" (clause D1) was the standard letter to be signed by a bidder in which he made an irrevocable tender in respect of the shares subject only to its acceptance by PAZ. It referred to the allocation of the shares by PAZ in terms of the Memorandum. That standard letter was to be accompanied by a bid security in favour of PAZ. The standard letter on confidentiality, which G all bidders were required to sign (clause D4 of the Memorandum), required a bidder to "undertake to you (PAZ) (for yourself and as agent and/or trustee for the Government of Zimbabwe and of the Company) to keep you, the Government and the Company indemnified and held harmless from and against all actions ... arising out of... non-performance by us of any of the H

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A terms contained in this undertaking". This covenant was in favour of three entities - PAZ, Government and Astra Limited. The Instructions to Tenderers (Clause D5 of the Memorandum) contained a number of contractual terms binding on PAZ and the bidders. It dealt with the validity of bids, the costs of bidding (which were to be borne by the bidder and in respect of which PAZ made it clear it would not be responsible or liable), and the payment of the B purchase price to PAZ by bank certified cheque. In subclause 6 of clause D5, PAZ specifically stated that it did not bind itself to accept the highest or any tender. In terms of subclause 8 of clause D5 a bid was to be held good for sixty days and a withdrawal of the bid attracted liability to PAZ for any additional expenses it might incur as a consequence, by having to call for fresh tenders or having to accept less favourable tenders.

C The withdrawal of a bid also attracted a forfeiture of the bid security in favour of PAZ. Subclause 9 of clause D5 provided for the furnishing of a bid security equivalent to 10 per cent of the total value of shares applied for and that PAZ had the right to reject any bid which was not accompanied by an acceptable bid security. In clause D6 the conditions applicable to the bid bond were D stated. It was stipulated that if PAZ performed its obligations, and the tenderer did not, then the surety was obliged to pay the amount of the bond to PAZ. If any suit arose in respect of the bid bond, the tenderer or the surety had the right to sue PAZ and *vice versa* before the expiry of one year from the date of the award.

E Having regard to these terms in the Memorandum, one is left in no doubt that the bidders and their guarantors were entering into a contract and assumed rights and obligations, not as against the Government of Zimbabwe but as against as an entity established by Government to transact the business concerned. It would, in my view, not have been in the contemplation of the bidders and their guarantors that they were entering into a contract not with F PAZ but with Government. It could not have been in their contemplation that if any misunderstanding or the need for litigation arose, they were pitting themselves against Government and not the single semi-autonomous entity which PAZ proclaimed itself to be. Investors are generally quite circumspect about whom they enter into contracts with. They would normally adopt different strategies depending on who they are dealing with. If they are G dealing with Government they would consider different factors compared to when they are dealing with an entity other than Government. Equally it could not have been in the contemplation of Government that if any of the bidders breached the terms of the Memorandum it would itself have to sue the bidder concerned. Therefore, to summarise on the factual position I find that PAZ, H through the Publication and the Memorandum, represented itself as an entity

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with the responsibility, authority and power to conduct and manage the A privatisation programme. It further represented that:

1) the responsibility to disinvest was handed over to it by Government;
2) it, and no one else, was giving consent to the publication and distribution of the memorandum;
3) it, and on one else, had received Government authority to proceed with B the privatisation of Astra Limited;
4) the liability for withdrawal of any bid was to itself and to not any other body;
5) it reserved to itself, and to on one else, the right to extend the bid validity period; and C
6) it, and no one else, had the obligation to announce the winning bidders;

among other representations which I have already mentioned.

In our law, the concept of an agent is that of a person who enters into a contract for his principal on which, generally, he cannot be sued. The investigation here must relate to whether PAZ was acting

as an agent of Government in this D sense. I have shown how the IMCCPP and Cabinet were involved, and at what stage of the privatisation process they ceased to be formally involved. I have shown how the bidders and PAZ assumed rights and obligations under the Memorandum. These are very strong indicators of the relationship between Government and PAZ.

In *The Law of Agency in South Africa* 3 ed. at p 32 the authors, De Villiers E and MacIntosh, state that it is often difficult to decide whether, in a particular contract, the relationship between the parties is that of principal and agent or not. They state at p 32 that:

"The fact that one party is described as "agent" in a document is not conclusive. Even if the parties have designated their contract by a F particular name or have otherwise attempted to disguise the nature of the transaction, the court will examine the facts of the case and determine the true nature of the contract."

At p 34 the authors cite several authorities in support of the view that it does not follow that the phrase "on behalf of, where it appears in a document, necessarily suggests agency, for the language of the whole document must G be considered". I think the same can be said of a party to a suit such as the present. It is not conclusive of a relationship of principal and agent that the one party says that it is an agent of the other. The court must examine the facts of the case, as I have endeavoured to do, and determine the true nature of the relationship. In *Cloete & Cloete v Rex* 1945 OPD 204 the appellants had been H

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A convicted of carrying on the trade or occupation of brokers or agents of the Wheat Industry Control Board without a licence in contravention of a statute. On appeal it was held that the contract between the appellants and the Wheat Industry Control Board did not remotely resemble agency in the accepted connotation of that term. The contract was one *sui generis* as the appellants were neither servants nor agents of the Board. See also *S v Mount Hampden* B *Potato Growers (Pvt) Ltd & Anor* 1975 (2) RLR 143 (A), 1976 (1) SA 800 (RA). It will be seen from these two cases that a relationship between a purported principal and agent may not in fact be a relationship of principal and agent as it is normally understood but it can be one *sui generis.* I am satisfied that the relationship created between Government and PAZ, as C indicated in the Memorandum and the Publication, is one which is *sui generis. PAZ* was established as an agency of Government but it had, as I have already shown, many characteristics which took it out of the ordinary relationship of principal and agent. I am therefore satisfied that, arising from the *sui generis* nature of the relationship, PAZ was in a position to contract in its own right and to assume rights and obligations for itself in respect of D which it could sue and be sued in its own right.

There are other factors which support the conclusion I have reached. The onus of proving the existence of an agency is on the party who alleges it. The court cannot rely upon statements, conduct or admissions of the "agent" himself to establish authority where that is the very fact in issue (*The Law of Agency in South Africa op. cit.* at p 90-91). In the present case PAZ alleged E that it was an agent of Government. It adduced no evidence apart from that contained in the Confidential Circular Letter No. 1 of 2000 and the Memorandum. In application proceedings, evidence is adduced by way of affidavits. In this case, PAZ could have filed an affidavit from Government to establish that it was acting as an agent. Its failure to file such an affidavit is significant. Significant too is the fact that Dr Utete, the Permanent Secretary to the Cabinet, who it had been anticipated would file an affidavit in support of PAZ, did not do so. The explanation for his failure to file a supporting affidavit is given, but it is not convincing. The necessity for an affidavit from Dr Utete had been recognised at the meeting held at the Attorney-General's Office. That affidavit was nonetheless not filed. This, G however, is not to say that Dr Utete's affidavit would have been conclusive as to the fact of PAZ's agency. The court would still have had to examine the facts and come to its own conclusion. There were no affidavits by Government to confirm PAZ's status as a Government agent. The conclusion is not unreasonable that Government was unwilling to confirm what PAZ averred H in its affidavit.

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If I am wrong in reaching the conclusion that PAZ is a separate entity which A can sue and be sued in its own right because its status as such is *sui generis,* my conclusion can still be supported on two other bases which were not directly canvassed by the parties. An agent may be liable on contracts made by himself in the following situations: (a) where he expressly takes upon himself personal liability, even though he is known to be acting as an agent B (b) where a contract is made with him in the belief and on the faith that he is the principal and (c) where he impliedly warrants that he has an authority which he, in fact, does not have. See *The Law of Agency in South Africa op. cit.* at Chapter XII.

I do not consider that it is necessary for me to cite the several authorities referred to in respect of the above propositions. From the affidavits filed of C record it seems to me that PAZ attracted liability to itself
in respect of the tender process which it managed. It may well have been known to UKI that PAZ was selling the shares on behalf of Government. PAZ, however, expressly took upon itself personal liability. It assumed obligations for itself in respect of the confidentiality provisions, the provisions relating to the payment of moneys (for tender documents and the purchase price), the d furnishing of the bid security, the penalties which it imposed on defaulting tenderers and the provisions to the effect that it alone would accept the bids, adjudicate on them and announce the results of the tender.
UKI averred that it related to PAZ in the belief and on the faith that PAZ was the principal. It referred to the role of the IMCCPP and Cabinet and to the E stage at which they ceased to be involved in the disinvestiture process as spelt out in the six stages of the privatisation process in the Publication. It referred to the contents of the Memorandum such as, the requirement to furnish a bid security; the penalty attendant on the withdrawal of a bid; PAZ's reservation of rights to itself in respect of the acceptance of bids and the extension of the period of validity of the bids; PAZ's role as acceptor and adjudicator of the F bids; PAZ's right to terminate or cancel the tender process within a given time frame; the undertaking given directly to PAZ in respect of confidentiality; PAZ's unequivocal statement to the effect that it had received "*specific"* Governmental authority to proceed with the privatisation of Astra Limited; PAZ's discretion to allot the shares (D1 of the Memorandum); PAZ's G absolute right to refuse, in full or in part, the application for shares and without giving reasons; PAZ's refusal to bear any responsibility for the costs associated with the preparation and submission of the bids. These are only some of the indicators cited by UKI for its belief that it was dealing with PAZ as a principal. PAZ does not deal with these indicators in its opposing affidavit nor does it endeavour to show that the belief which UKI entertained H
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A was unreasonable on any basis. It instead was content to argue, *ex post facto,* that it was not the principal. It referred to the letter from its legal practitioners dated 4 June 2002 in which they stated that PAZ "is not a legal entity but merely a unit in the office of the President and Cabinet", and to the Confidential Circular Letter No. 1 of 2000. It referred to the fact that the beneficial owner of the shares was Government, as if that on its own sufficed B to show that it did not deal with UKI as a principal. Whilst in para 14 of its opposing affidavit PAZ endeavoured to show that Government had a right to terminate the tender process, it did not go further to explain why PAZ made reference to itself as the principal actor in the disclaimer clauses and in the clause in which it is stated "PAZ is however not obliged to accept the highest bid" and "PAZ does not bind itself to accept the highest or any tender" or that C PAZ "may refuse in whole or in part without reason being given" any application for shares.
The liability of PAZ arising from it expressly taking upon itself personal liability or arising from the reasonable belief of the other party that it was the principal, is a liability arising in contract. I am satisfied that PAZ did not deal D with these issues sufficiently or at all in an attempt to persuade me to find in its favour. From the above analysis of the provisions of the Memorandum and the Publication, I find that PAZ expressly warranted that it had the authority to transact the disinvestiture process in its own right as a principal. This is so because there is a written contract in the form of the Memorandum which I had to construe. 1 have shown what I construe the language used in the E Memorandum to mean and have also shown what I consider to have been the parties' intentions as expressed in that Memorandum. For this reason, I will not examine an agent's liability based on an implied warranty of authority, which in certain cases attracts personal liability for the agent. The second basis is that the position of PAZ is akin to that of an auctioneer, F whose personal liability on a contract of sale can be established by evidence that he assumed personal liability. From what I have said so far, it is obvious that I hold that PAZ assumed personal liability in the same sense an auctioneer would. Another factor which makes the position of PAZ akin to that of an auctioneer is that the sale of the shares, in terms of the conditions in the Memorandum, is completed upon the completion of the bid process, G in the same way as an auctioneer's sale is completed with the "fall of the hammer". The case of *Sugden & Ors v Beaconhurst Dairies (Pty) Ltd & Ors* 1963 (2) SA 174 (E) provides an instructive reference point. In that case O'Hagan J at 187B-D stated:
"In my opinion the fact that the sale was not to be concluded at the fall of H the hammer does not mean that the transaction was something other than
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an auction sale ... In the present case the transaction in which the highest A bidder became bound to buy the property bid for, if the seller accepted his bid, was effected at a public auction, and the fact that the completion of the sale - in other words the acceptance of the bid - was made dependent on an event other than the formal declaration of the auctioneer at the time of the sale does not appear to me to affect the issue. It is simply a case where the seller reserved the right to decline the highest offer B made, while the offeror was bound if the seller decided to accept the bid."

In the present case it seems to me that the hammer fell when PAZ determined the winning bidder, which it confirmed it did in its letter to the Competition Commission and the letters in which it confirmed that the adjudication process had been completed. The letter of 21 June 2002, in which PAZ stated that "Government will announce the results of the open tender ... within the C next fourteen (14) days", also shows that the hammer had long since fallen by that date.

I may at this point appear to have addressed the second basis of PAZ's opposition to the relief sought by UKI. I need to do so now, although some of what I have said earlier deals with the issue to some extent. The issue was D properly articulated by PAZ in the heads of argument filed on its behalf. In paras 18 and 19; the issue is put thus:

"18. It is respectfully submitted that the central issue here is what rights, if any, accrued to bidders in circumstances where they had submitted their bid and the period of adjudication had been extended.

19. It is respectfully submitted that in the instant matter the Government E did no more than invite offers - it did not make an offer itself. It is only in circumstances where tenders are invited and an indication is made that the highest or the lowest tender will be accepted that an offer can be said to be made by the party requesting tenders to be made ..."

UKI's position, with which I agree, is that PAZ was a separate entity which F sold the shares and it must be obliged to comply with the terms of the tender. PAZ's position must however be examined from the point of view of its defence. It was submitted on its behalf that the specific terms of the tender were that:

"The Government of Zimbabwe would not be obliged to accept any bid; G
approval of Cabinet would have to be had and obtained; the first respondent (PAZ) would do no more than make recommendations."

I have already rejected the argument that Government had any further role to play after it "signed-off" the transaction. PAZ's case, on the papers, is grievously weakened in respect of its submission about Government's decisive role in the transaction by the absence of any affidavit from a H

A Government representative that what is attributed to Government is in fact what it did. PAZ did not file any affidavit in support of the following averments: that there were "governmental processes" to be completed before an announcement of the winning bidders could be made; that the IMCCPP in fact said what was reported to the meeting of 14 November as having been its decision; that as at 28 May 2002 Government had in fact decided to B terminate the tender process; that as at 21 June 2002 Government had decided to rescind its decision to terminate the tender process; and that as of 5 July 2002 Government had rejected all the bids and decided to retain ownership of its equity in the demerged companies. The only letters that were placed before the court as projecting the position of Government were those by the Attorney-General and, in particular, his letter of 20 June in which he stated C that Government had rescinded its decision to terminate the tender process as at that date. In my view, PAZ should have filed a supporting affidavit from a representative of Government in respect of all the averments which it was making relative to the alleged mutating position of Government. On the contrary, all that there is in the papers filed by PAZ are its own assertions that D Government said this or said that. The fact that Dr Utete did not file an affidavit when it had been anticipated he would do so adds weight to the view that PAZ may not be telling the truth or the whole truth about Government's position in this matter.

I have already determined that PAZ is an entity *sui generis,* and that even if it was an agent it assumed personal liability in respect of the transactions concerned in this application. This conclusion renders it E unnecessary to consider the submissions by PAZ based on the attitude allegedly adopted by Government in this matter. That leaves only one question to be determined: whether the tender process had reached a stage at which PAZ can be obliged to announce the results of the tender process and allot the shares to the winning bidders as prayed for by UKI.

F It is not in dispute that PAZ completed the tender process by adjudicating on the winners. In the letter to the Competition Commission it specifically stated that UKI was the winner in respect of the shares on offer in Tractive Power Holdings. In several other letters, or documents to which I have already made reference, PAZ acknowledged that the adjudication process had been completed. The

minutes of 14 November 2001 are a clear indication that the G winner was known by that date, hence the only concern expressed at that meeting was that no single winning bidder was to be allotted shares in more than one company or allotted more than a maximum of 35 per cent of the shares in that one company. This obviously was a reaction to UKI's having been the highest bidder in Tractive Power Holding and in Astra Industries.

H The relief sought by UKI is peculiarly against PAZ, which professed to be the

2002 (2) ZLR p720

Chinhengo J

entity that would conduct the tender process efficiently, professionally, and A transparently. The relief sought is to compel PAZ to announce the results and allot the shares. The relief sought does not mean that after allotment the owner of the shares will automatically transfer the shares to the winning bidder, although it would be expected to do so. That however would be a different matter altogether and one which I am not called upon to decide in B this application nor on which I need express any firm opinion. I am satisfied that the UKI is entitled to the order it sought.

I would like to conclude this judgment by recommending that where Government wishes to hand over an important responsibility to some entity, as it is expressly stated it wished to do and in fact did in respect of the C privatisation and disinvestment programme, it should ideally do so through legislation. I am not saying that Government may not establish an entity separate from itself to undertake a specific function outside the limits of any public department. I think, however, that it is always preferable to do so through legislation. Even Mr *Phillips,* for PAZ, was unable to say that Government may not establish a separate legal entity other than through D legislation. Legislation has the advantage of defining the legal status of the entity so established. It would make clear what the entity's functions and powers are. It would remove any room for confusion, debate, speculation or disputation as to the status of the entity concerned and save the court the burden of determining, as I have had to do in this application, the true nature of the entity which was established without legislative support. Legislation E would also remove any room for the entity so established to blame or fault the Government where the entity itself has, as did PAZ in this case, failed to carry out a responsibility placed upon it in an efficient and transparent manner. Investment issues are very important. Both local and foreign investors' confidence is enhanced if the responsibilities, powers and status F of an investment or disinvestment entity are clearly spelt out. It is no wonder that when the PAZ found itself being sued in this case, the Government did not feel inclined to support it by filing an affidavit or otherwise confirming that what PAZ said was its position was indeed so.

I therefore order that: G

1. The first respondent be and is hereby ordered to announce to the bidders, within seven (7) days of the date of this order, the results of the open tender, pursuant to the Information Memorandum dated 19 July 2001.
2. Pursuant to paragraph 1 above, the second respondent shall forthwith allot the shares, subject to the said tender, to the winning bidders. H

2002 (2) ZLR p721

Chinhengo J

A 3. The costs of this application be borne by first respondent.

Dube, Manikai & Hwacha, applicant's legal practitioners.

Costa & Madzonga, first respondent's legal practitioners.

B *Coghlan, Welsh & Guest,* second respondent's legal practitioners.

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Source:

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[zRPz]POSTS & TELECOMMUNICATIONS CORPORATION v ZIMBABWE POSTS & TELECOMMUNICATIONS WORKERS UNION & ORS 2002 (2) ZLR 722 (S)

2002 (2) ZLR p722

Citation	2002 (2) ZLR 722 (S)
Case No	Judgment No. S-107-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	9 July 2002; 26 November 2002
Judgment	26 November 2002
Counsel	*J C Andersen SC,* for the appellant *L T Biti,* with him *H Zhou,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

[zFNz]Flynote
Contract —validity —*justus* error on part of party to contract—when may- be relied on by party seeking to resile from contract
Employment —collective bargaining agreement —Minister's power to interfere with —powers limited to amending agreement in terms of s 81 E of Labour Relations Act [*Chapter 28:01*] —not competent to direct one party to ignore agreement
[zHNz]Headnote
The appellant (the PTC) reached an agreement with its workers regarding salary increases. The new salaries were gazetted as an industrial agreement. After paying the new wages for a few months, the PTC F sought to resile from the agreement on the grounds that the salary bill had proved to be beyond its means. The respondents did not accept this and took industrial action. The matter was referred to the Minister of Labour, with a request for her to amend the agreement. The Minister, instead of doing so, ordered the PTC to pay a different, lower level of salaries and to refer the matter to a mediator. The respondents obtained G an order from the High Court requiring the PTC to comply with the gazetted agreement. The PTC also claimed that there had been an error on its part when it agreed to the salaries.
Held, that the Minister was not empowered to direct the PTC to ignore the industrial agreement, norto refer the matter to a mediator. The agreement thus remained intact and effective. H
2002 (2) ZLR p723
Cheda JA
A *Held,* further, that even if the figures were a result of an error on the PTC's part, it could not be regarded as *a justus error.* The test is whether the party who is trying to resile is to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself. The PTC had been negligent in not checking what effect the increases would have on its wage bill despite the fact that its B ability to pay was raised during the negotiations.
[zCAz]Cases cited
George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A)
Horty Invstms (Pty) Ltd v Interior Acoustics (Pty) Ltd 1984 (3) SA 537 (W)
C *Mabhena v Harare Polytechnic College* HB-22-94
University of Zimbabwe v Gudza 1996 (1) ZLR 249 (S)
[zCIz]Case information
J C Andersen SC, for the appellant
L T Biti, with him *H Zhou,* for the respondents
[zJDz]Judgment

D **Cheda JA:** The appellant is the Posts and Telecommunications Corporation, the organisation responsible for postal and telephone services in Zimbabwe.

The respondents are the Workers' Union which represents the employees of the appellant, and the two others are former workers of the appellant who took E voluntary retirement packages, represented by one Emmanuel Kasaki.

Although the respondents filed different applications at the High Court, the two cases were dealt with together because of the common background and overlapping issues involved.

This appeal is against the decision of the High Court in which it ordered the F appellant to pay the respondents' salaries and allowances in accordance with the agreement reached by the parties and recorded in SI 26 of 2000.

Before I go into the merits I prefer to set out the background to this case and the events that led to the dispute.

It is the practice of the appellant to hold meetings every year and negotiate with the respondent Union's representatives, new salary increases and other G benefits for each coming year in accordance with s 74 of the Labour Relations Act [*Chapter 28:01*].

Once an agreement is reached, it is referred to the National Employment Council (NEC) of that particular industry. If accepted by the NEC, the agreement is published in a statutory instrument and forms the basis of new H salaries and other allowances for the workers in the following year. The

agreement is then binding on all the parties, that is, the employer and A employees.

In March 1999 the appellant decided that its employees should be paid on the basis of the median quartile of the market. This decision was made by the appellant's Board.

Following this decision, negotiations were held between the appellant's B management and the respondents' representatives on the increases to be made to the various grades of the appellant's employees.

Several meetings were held and several issues were raised for discussion.

By January 2000 the negotiating committee was able to present its findings to the NEC. C

Still in January, the appellant announced to its employees that agreement had been reached and there was a new salary structure based on the median quartile as opposed to the lower quartile in which they had been before. It was also agreed that October 1999 was to be the date on which the new salaries would be made effective.

A statutory instrument was then published, SI 26 of 2000, to record and make D the agreement official.

The appellant proceeded to pay the respondents, in service, according to the new salary structure, from October 1999 to March 2000.

In March, the appellant advised the respondents that it could no longer continue to pay salaries in accordance with SI 26 of 2000 as the salary bill had E proved to be beyond its means.

The respondents did not accept this and resorted to collective job action.

The matter was referred to a labour officer who issued an order that the respondents return to work and the appellant pay them according to what was agreed, pending new negotiations. The negotiations failed and the respondents F resorted to collective job action once more. The matter was also referred to the Minister of Labour and Social Welfare, whose decision I shall deal with later.

When the appellant would not pay the respondents according to the agreement, the respondents approached the High Court in order to enforce payment by G the appellant at the agreed salary levels.

The High Court ordered the appellant to comply with SI 26 of 2000.

In its appeal against this decision the appellant raised the following issues:

(a) its refusal to pay the respondents on the basis of SI 26 of 2000 is lawful because of the decision of the Minister who ordered that the appellant H

A pay the respondents according to the previous salary levels with the added 45 per cent across the board;

(b) incorrect figures had been used in the negotiations;

(c) the approval of the appellant's Board had not been obtained for the figures used at the negotiations.

B When the respondents resorted to collective job action because of the disagreements and the matter was referred to the Minister, the Minister responded by issuing a directive in which she stated:

"The Collective Bargaining Agreement as reached to us is very clear and in all our calculations it will show that the agreement does not need to be amended. What seems to be in dispute are the salary figures to be applied C when implementing the Agreement ... the parties to the agreement are to appear before the Hon Justice HB Hwacha who has been appointed as an Independent Mediator to resolve the dispute in terms of s 100(2). Arbitration costs are to be borne by PTC. Justice Hwacha will contact you directly on the arbitration proceedings.

In the interim, workers will continue to be paid current reduced salaries. D Any further adjustments for the salaries will be done after the decision of Justice Hwacha."

The Minister was responding to a request to amend the agreement on SI 26 of 2000. She refused to amend it. Having so refused, she sought to amend it by directing the appellant to ignore the contents of the agreement. E She was wrong. She could not direct the appellant in that way unless she amended the instrument. She was supposed to act in terms of s 81, which she did not do. Accordingly the agreement remained intact and effective. Her directive was wrong and was properly set aside by the court *a quo.*

The allegation that the figures used were wrong is not convincing. The appellant was asked during negotiations to provide the respondents with the F actual figures instead of just referring to the median quartile.

The appellant's experts and technocrats were tasked to produce the figures. They did. The figures were accepted by the appellant and presented to the negotiating committee.

There were available by then figures produced by Lorimak at the request of G the appellant. The appellant chose to work out and produce its own figures. It is only when the appellant was faced with an enormous salary bill that the issue of the figures was raised. It has not been explained how the figures are erroneous. There is no satisfactory explanation on how the error was actually made. There is no evidence from the persons who compiled the figures to H explain the error they made, bearing in mind that the appellant's experts were

tasked to produce the figures. They acted for and on behalf of the appellant. A

I could go as far as saying even if one accepted that the figures were a result of an error it cannot be regarded as *a justus error.* See *University of Zimbabwe v Gudza* 1996 (1) ZLR 249 (S) and cases cited therein. If it was, it would have been noticed when the figures were discussed by the negotiating committee. The error would have been noted when the figures were discussed with the B National Employment Council. It would have been noticed by the Board. It would have been noticed when the salaries of the workers were being prepared.

I cannot believe that the appellant and its experts could simply agree on the new salaries without bothering to find out what the resultant salary bill would be. C

In fact, during the negotiations, the minutes show that this issue was raised by one of the participants in the meeting who asked them to consider the Corporation's ability to pay. Another councillor asked the meeting:

"... to consider the fact that in real terms the Corporation's payable burden would increase by 85% if C.B. is put together with the market adjustment." D

Such issues raised at the meeting would clearly attract the attention of the appellant's experts. It is highly improbable that such reminders could have been ignored by the appellant. If they were ignored then it cannot be said that there was a *justus error.*

The appellant also raised the issue that the authority of the Board had not been E obtained for the figures presented to the NEC. There is nothing to suggest that the authority was a requirement. In any case, the Board was represented in the negotiations at a very high level. The appellant could not have gone as far as presenting the figures to the NEC, advising the workers of the result of the negotiations, publishing SI 26 of 2000 and paying the new salaries for some months without getting the Board's approval if such approval was necessary. F I consider that the Board must have known, and authorised the payments, or if they did not authorise them, then such authority was not a requirement.

This is because, having decided that the workers should be moved to the median quartile, the Board would have been kept up-to-date with discussions and progress made towards what they resolved. G

There is nothing to suggest that the Board complained of anything done without its authority. I do not believe that management could determine new salaries and even pay them without the Board knowing about them. SI 26 of 2000 was gazetted and they would have seen it.

The Minister's powers on the agreement are regulated by the Labour Relations Act. She could only exercise powers given to her by the Act. I agree H

Cheda JA

A with the respondents' submission that once she decided that the agreement was correct and did not need to be amended, she had no powers to refer to a mediator an agreement which was correct. What would the mediator be doing if the agreement was correct?

The Minister did not find that the agreement fell under any of the provisions of s 81 where she is empowered to amend it.

B It seems to me the proper opportunity to put things right was missed when the matter was referred to the Minister. Had the Minister acted in terms of the powers conferred on her by the Act, the agreement on SI 26 of 2000 could have been amended.

A good opportunity for the appellant to mitigate its problem on the heavy salary bill was not taken advantage of when parties were asked to re-negotiate the agreement. The minutes show that the respondents did offer certain compromises which were not taken advantage of by the appellant. Instead the appellant chose to unilaterally vary the agreement without authority. In so doing the appellant was wrong.

D The voluntary retirees simply want the appellant to pay them whatever was the difference between what they were paid and what they should have been paid. This is because the increases were back-dated to the time when they were still in service. What it means is that those who remained in service were paid better salaries while those who left were paid less but for the same months, especially the back-dated salaries. I see no reason why they should E not be paid that difference. The fact that the decision to increase the salaries and back-date them was made when they had left, or left soon after that, should not be a reason to exclude them.

I therefore see no reason to interfere with the decision of the court *a quo.*

Negotiations were held on the instruction of the appellant's Board that the F workers be placed on the median quartile. Figures were worked out by the appellant's experts and technocrats. The appellant's Board was represented on the negotiating committee. Agreement was reached and published in the Statutory Instrument. The new salaries were paid for several months. It was only when the appellant realised the enormousness of the resultant wage bill, that it reneged on the agreement.

G It was only then that the appellant turned round, sought to dispute its authority and raised the issue of errors in the figures.

It must be pointed out that having previously asked some consultants to work out figures for it, the appellant abandoned those figures and asked its own experts to produce figures which the appellant then chose to rely on. The H appellant cannot now turn round and say there was an error in the figures. The

appellant was simply negligent in not checking what effect the increases would have on its wage bill despite the fact that its ability to pay was raised during the negotiations. Even when the wage bill proved too high the appellant continued to pay it for five months until the banks advised that they would not continue to accept further withdrawals on the overdrafts.

There was clearly no *justus error* in what the appellant did. The point is B illustrated by *University of Zimbabwe v Gudza, supra.*

The same point is dealt with in *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 (3) SA 537 (W). In *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471 Fagan CJ stated the following:

"When can an error be said to *be justus* for the purpose of entitling a man C to repudiate his apparent assent to a contractual term? As I read the decisions, our courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in fact, said: Has the first party -the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself?"

The above is also supported by the case of *Mabhena v Harare Polytech* D *College* HB-22-94 where it was held that "... the College could not resile from the contract on the basis of its unilateral mistake".

I see no merits in the appeal and it is dismissed with costs.

Sandura JA and Gwaunza AJA concurred E

Coghlan Welsh & Guest, appellant's legal practitioners

Honey & Blanckenberg, first respondent's legal practitioners

Kantor & Immerman, second respondent's legal practitioners F

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Source:
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[zRPz]MERISTEM INVESTMENTS (PVT) LTD v NMB BANK LTD 2002 (2) ZLR 729 (H)
2002 (2) ZLR p729

Citation	2002 (2) ZLR 729 (H)
Case No	Judgment No. HH-211-02
Court	High Court, Harare
Judge	Smith J
Heard	20 November 2002; 27 November 2002
Judgment	27 November 2002
Counsel	*E Matinenga,* for the applicant *A P de Bourbon SC,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

[zFNz]Flynote
D **Exchange control** — acquisition of foreign currency — payment for articles purchased — payment to be made in foreign currency — rate at which payment to be made to person acquiring the currency — payment to include premiums and other charges paid to acquire the currency
[zHNz]Headnote
E The applicant contracted to supply computers to the respondent merchant bank. It deposited funds sufficient to cover the cost of the computers (which had to be paid for in US dollars) at the then unofficial market rate of exchange of 135:1. The official rate stood at 55:1. When the computers were acquired and the account for them presented (the account being in foreign currency), the respondent acquired the necessary D money at the prevailing market rate, which was substantially higher than when the contract was formed. It debited the cost of acquiring the foreign currency against the applicant's account; this resulted in a substantial overdraft against the applicant's account. The applicant sued for the balance.
Held, that the applicant wanted the respondent to facilitate the acquisition of foreign currency which the applicant could use to purchase the computers it needed to fulfil its obligations under its contract with the respondent. It must have been well aware that the respondent would have to get the foreign currency on the parallel market. The respondent did not purchase the currency for itself and then sell it to the applicant. H If it had, then it would have had to sell the currency to the applicant at
2002 (2) ZLR p730
Smith J

the official exchange rate. What the respondent did was facilitate the A purchase from a third party of the foreign currency the applicant needed to buy the computers. The applicant, as the purchaser of the computers, used the currency to pay the purchase price. Accordingly, the applicant was legally bound to pay the respondent the premiums that the respondent had to pay in order to obtain the foreign currency. B

[zCAz]Cases cited

Chiraga v Msimuko 2002 (2) ZLR 368 (H)

Dubev Khumalo 1986 (2) ZLR 103 (S)

Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd 2002 (1) ZLR 632 (B)

Jajhbay v Cassim 1939 AD 537 C

[zCIz]Case information

E Matinenga, for the applicant

A P de Bourbon SC, for the respondent

[zJDz]Judgment

Smith J: The applicant (hereinafter referred to as "Micromart") operates a D current account with the respondent D (hereinafter referred to as "NMB"). On 28 February 2002 Micromart deposited $51 840 000 into its current account. That was money which Micromart had borrowed to finance the purchase of computers which it was to supply to NMB, since its tender had been accepted by NMB. Micromart had been awarded the contract on the basis that the price of the individual computers was ZW$280 000, based on a supply cost of E US$ 728 per computer. That reflects an exchange rate of just over 387:1. Because the computers quoted in the Micromart tender were no longer being manufactured when the time came to supply them, the contract was altered so as to increase the price of each computer by ZW$13 985, due to an increase in the cost of each computer of US$50. The rate of exchange was just over 279:1. Micromart then imported the computers and presented the invoices to F NMB which made the necessary payments in a foreign currency.

Micromart alleges that NMB debited various amounts to its account which it had no authority to do, and that resulted in its account being in overdraft in an amount in excess of $43 million. That meant that Micromart could not continue trading. It therefore filed this urgent application seeking an order G that NMB reverse the unauthorised debit in its current account and restore the credit balance of $2 278 814.57 and that NMB recredit its account with the total of all misappropriated funds, estimated to be in the region of $39 326 345. NMB opposes the application. It submits that the debits it made in Micromart's account were properly made. It claims that the debits included the premiums it paid in order to obtain foreign currency on the H

A parallel market and the Zimtrade surcharges, the foreign bank charges and the telegraphic transfer charges it was required to pay.

Mr *Matinenga* conceded that the tender document submitted to NMB by Micromart quoted an exchange rate of 135:1 but argued that that was of no relevance to the matter in dispute. The accepted tender did not place any obligation on NMB to secure foreign currency on behalf of Micromart. All B NMB was required to do was to pay the invoices presented to it in its capacity as a foreign currency dealer. There was never any understanding between the parties that NMB would source foreign currency to pay the invoices. Any such understanding would have introduced an element of uncertainty into their contract. Micromart expected that NMB, being a registered foreign C currency dealer, would have applied "the international cross rates prevailing on the day of the transaction on all foreign exchange transactions" related to the facility — in other words, that it would apply the official exchange rate. There was no obligation on NMB to go outside the law. It was Micromart's understanding that NMB would comply with the law. The fact that NMB went beyond the law shows that there was a clear violation of the Exchange D Control Regulations. He referred the court to *Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H) and *Chiraga v Msimuko* HH-167-02 * as cases supporting his arguments.

Mr *de Bourbon* submitted that NMB, in order to assist Micromart to fulfil its contractual obligations, had agreed to source the foreign currency needed to E purchase the computers. NMB did not itself have the foreign currency and had to obtain it at a premium on what is termed the parallel market. Such acquisition had been anticipated by Micromart in its tender since it had used an exchange rate of 315:1 and, when there was a price increase due to the change of the type of computer supplied, regard was had to "the concurrent increase of the US$ on the parallel market". Micromart presented invoices F totalling US$ 273 59.38 to NMB for NMB to source the foreign currency concerned and to pay the suppliers of the computer equipment. The total sum required was duly paid by NMB. NMB made an administrative error and did not debit all the transactions to Micromart's current account as the transactions occurred. The error was realised in August 2002 and adjusting entries were

made in the sum of $43 741851. That had the effect of putting Micromart into G overdraft for an amount in excess of $48.8 million as at 4 November. Micromart wants the debits reflecting the premiums to be reversed. That would mean that Micromart would make a double profit because it has already made a considerable profit over the cost of acquiring the computers.

2002 (2) ZLR p732

Smith J

Mr *de Bourbon* further argued that for the court simply to reverse the A premium, thereby allowing Micromart to make a double profit, without reversing the contract as a whole would not be in keeping with the principles of the law of contract. If the contract between the parties was illegal, *ex turpi causa,* then the whole contract must be set aside. If, however, the contract was one of *in pari delicto,* then to do justice between the parties the present B application must be dismissed: see *Dube v Khumalo* 1986 (2) ZLR 103 (S) which relied on *Jajhbay v Cassim* 1939 AD 537. Simple justice between man and man does not require any relief being given to Micromart. It is not illegal for a bank to source foreign currency from a third party.

It is not in dispute that Micromart, after it had tendered for and was awarded the contract to supply computers to NMB, opened its account with NMB. C Micromart borrowed $51840 000 to finance the acquisition of the computers it was to supply to NMB and deposited that money in the account it had opened. Virtually every adult in Zimbabwe, and definitely every businessman and woman in this country, is aware that there is an official rate of exchange for different foreign currencies, such as the US dollar, the pound sterling and the South African rand, which bears no relation to reality, and that there is a D parallel market for foreign currencies where the rates of exchange change from day to day, depending on the law of supply and demand. In addition, as mentioned in the *Echodelta* case, *supra,* there are schemes for sectors such as gold miners and tobacco growers which, in effect, introduce different rates of exchange for producers in those sectors. It is Government which has fixed E the official rates of exchange and which has introduced the schemes for the gold mining and tobacco growing sectors but it is the private sector, and the law of supply and demand, that introduced and fuels the parallel market. Government is well aware of the existence of the parallel market. There can be no doubt that on occasions Government agencies and parastatals source foreign exchange on the parallel market because it is not available at the F official rate from the Reserve Bank of Zimbabwe or authorised foreign exchange dealers. In the *Echodelta* case, *supra,* Echodelta, which is a company based in the United States, was suing a local company which had supplied services to it at a holiday resort in Mozambique for the payment of monies due to it. The amount claimed was in US dollars. The local company was prepared to pay an equivalent amount in Zimbabwe dollars using the G official rate of exchange which was, and still is, 55:1. Echodelta was not prepared to accept that rate of exchange because it would have to procure its US dollars for repatriation on the parallel market and that would mean that it would obtain, in US dollars, only 19 per cent of the debt it was owed. This court held that the local company was obliged to use the official rate of H

2002 (2) ZLR p733

Smith J

A exchange because that was the effect of the amendment to the Exchange Control (Exchange Rate Management) Order, 2000 (SI 255B of 2000) (hereinafter referred to as "the Exchange Rate Management Order") that was made by SI 261A of 2001. That amendment inserted a section in the Exchange Rate Management Order which required that any person who sells or provides any goods or services shall abide by the official exchange rate B when fixing his prices for the goods or services.

In this case, however, different principles apply. The Exchange Rate Management Order requires all foreign currency dealers to sell foreign currency at the stipulated rate of exchange. The relevant provisions that were in force prior to 2 August 2002 when they were amended by SI 225 of 2002, C read as follows:

"*Adherence to international cross rates*

5. A foreign currency dealer shall apply the international cross rates prevailing on the day of the transaction on all foreign exchange transactions.

Prohibition against direct customer-to-customer transactions

6. A D foreign currency dealer shall not permit or facilitate direct customer-to-customer transactions".

NMB is an authorised foreign currency dealer. Had it sold foreign currency to Micromart it would have been required to do so at the official rate. However, what NMB did was to facilitate the purchase from a third party, which was not subject to the Exchange Rate Management Order, of the E foreign currency needed by Micromart to purchase the computers. The seller of the foreign currency required a premium which NMB was obliged to pay in order to obtain the foreign currency

for Micromart. If it had refused to pay the premium it would not have been able to obtain, on behalf of Micromart, the foreign currency that Micromart needed to enable it to perform its F obligations under its contract with NMB. Micromart would not have been able to purchase the computers it had contracted that it would supply.

I have said earlier that all businessmen and women in this country are well aware of the existence of the parallel market. Business would not exist without it. Micromart is well aware of the existence of the parallel market because, when it submitted its tender, it quoted the price of the computers as G being ZW$280 000 per computer based on a supply cost of US$728 per computer, which is well above the official rate of 55:1. Then, when it had to supply different computers than those originally offered, it increased the cost of each computer by $13 985 because there was a US$50 increase in the procurement cost. Micromart wanted NMB to acquire US dollars on its H behalf to enable it to purchase the computers it was obligated to supply to

2002 (2) ZLR p734

Smith J

NMB. It must have realised that the only source for obtaining US dollars that A would be open to NMB would be the parallel market. It is only those in high places or who have the right contacts or friends who can obtain foreign currency at the official rate. Those who have foreign currency and wish to change it for Zimbabwe dollars do not sell it to authorised dealers at the official rate unless they are required by law to do so and cannot avoid or evade B their legal obligation. They would lose out financially if they did so. Instead of getting more than 1500 Zimbabwe dollars to one US, at present day rates, they would get only 55 Zimbabwe dollars.

On the papers before the court I find that Micromart wanted NMB to facilitate the acquisition of US dollars which Micromart could use to purchase the computers it needed to fulfil its obligations under its contract with NMB. It C must have been well aware that NMB would have to get the US dollars on the parallel market. NMB did not purchase the US dollars for itself and then sell the US dollars to Micromart, it merely sourced the US dollars, on behalf of Micromart, which Micromart, as the purchaser of the computers, used to pay the purchase price. Accordingly, Micromart is legally bound to pay NMB the premiums that NMB had to pay in order to obtain the US dollars. D

The application is dismissed with costs.

Mudambanuki & Associates, applicant's legal practitioners

Costa & Madzonga, respondent's legal practitioners E

* See above, at p 368 of this volume —*Editor*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/EASTERN MOTORS (PVT) LTD v CITY OF MUTARE 2002 (2) ZLR 735 (H)

[zRPz]EASTERN MOTORS (PVT) LTD v CITY OF MUTARE 2002 (2) ZLR 735 (H)
2002 (2) ZLR p735

Citation	2002 (2) ZLR 735 (H)
Case No	Judgment No. HH-212-02
Court	High Court, Harare
Judge	Makarau J
Heard	4 December 2002

Judgment	4 December 2002
Counsel	*G Mandizha,* for the applicant *L T Biti,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

[zFNz]Flynote
Contract — option — nature of contract of option —failure by party to D exercise option within stipulated period —effect
[zHNz]Headnote
The applicant took occupation of a piece of land in terms of a written agreement with the respondent council. The agreement gave it an option to buy the land. The time stipulated in the agreement depended on the completion of certain developments by the respondent. After these were E completed, the applicant failed to exercise the option to purchase and the respondent sought to repossess the land, citing the applicant's failure to meet payments for the stand and conditions relating to the development of the stand.
Held, that an option comprises two distinct parts, an offer to sell, and an F agreement to keep that offer open for a stipulated period. The acceptance of the offer within the stipulated period brings into being a valid sale agreement. The offer to purchase the land was made to the applicant when the option agreement was concluded. It was up to the applicant during the stipulated time to accept the offer and thereby bring into being a sale agreement. The fact that the actual purchase price had not G been determined *at the time the option* agreement was concluded did not change the position that it was up to the applicant to accept the offer H upon the completion of the developments effected by the respondent.
2002 (2) ZLR p736
Makarau J
[zCAz]Cases cited A
Hersch v Nel 1948 (3) SA 686 (A)
Venter v Birchholtz 1972 (1) SA 276 (A)
[zCIz]Case information
G Mandizha, for the applicant
L T Biti, for the respondent B
[zJDz]Judgment
Makarau J: Sometime in 1994, the applicant entered into a written agreement with the respondent in connection with a piece of land called stand 5992 Mutare. The agreement was headed "Memorandum of Agreement of Option to Purchase Land". In pursuance of the agreement, the applicant took C occupation of the land. For reasons that are in dispute, the applicant did not exercise the option to purchase the land. In December 1998, the applicant received a letter from the respondent advising it that the land had been repossessed and the applicant had to vacate and remove its property from the land. To enforce its repossession of the land, the respondent disconnected water supplies to the land. The applicant then approached this court on 18 D May 2001 by way of court application. In the application, the applicant seeks an order declaring the option to purchase agreement valid and binding between the parties.
The respondent has opposed the application on the basis that the applicant did not exercise its option to purchase the land and is therefore not entitled to be E in possession of the land.
The facts giving rise to this application are as follows.
The parties entered into an agreement granting the applicant an option to purchase stand 5992 Mutare in 1994. In terms of the agreement, the applicant was required to pay a fee for the option. The applicant paid the sum of $5 000 F for which it received a receipt. The details of the receipt were machine printed onto the respondent's copy of the agreement.
There is a dispute between the parties as to what amount the applicant had to pay as the option fee in terms of the agreement. The respondent argues that the agreement stipulated the sum of $100

000 and thus the payment of the lesser sum of $5 000 was without the consent of the respondent and a breach G of the agreement. The applicant in turn argues that the amount paid was paid with the full knowledge and consent of the respondent.

This is not a dispute capable of resolution on the basis of the papers filed of record. It is, however, not material to the real dispute between the parties. I therefore need not make a finding as to the correct amount that the applicant H

A had to pay as an option fee. The parties are agreed that there was binding between them an option agreement for which a fee had to be paid. In my view, the alleged underpayment of that fee, while giving the respondent a possible claim for the balance of the fee, does not invalidate or render a nullity the option agreement between the parties.

After the agreement had been concluded, the applicant took occupation of the B piece of land. This was in terms of the option agreement. It thereafter effected certain improvements on the land. At the same time, the respondent undertook certain infrastructural developments on the property required of it in terms of clause 3 of the option agreement. These were completed in September 1996.

C In December 1998, the respondent resolved to repossess the property, citing the applicant's failure to meet payments for the stand and conditions relating to the development of the stand. The applicant then filed this application.

Clause 3 of the option agreement provides as follows:

"3. The option hereby granted shall be exercised by the offeree on D completion of the infrastructural development of the industrial township wherein the stand/s is are situated and the offeror undertakes to use its best endeavours to complete such development by 30th September 1992."

The legal dispute between the parties is whether or not the option agreement between them is still binding. The respondent has alleged that the option E agreement was cancelled or lapsed because the applicant did not exercise the option to purchase the land in question. The applicant in turn has argued that the option could not have been cancelled or lapsed because the respondent did not invite it to exercise the option and, until it does so, the option must remain open and binding between the parties.

In my view, a resolution of the above dispute lies in analysing the nature of F the legal concept of the option.

In *Hersch v Nel* 1948 (3) SA 686 (A) Davies AJA had this to say about an option:

"An option has been analysed into an offer to sell, together with an agreement to keep that offer open for a certain time — *Boyd v Nel* G (1922 AD 414 at p 421) and numerous other cases. But perhaps, a better way is to look at it simply as an agreement between the giver and the holder of the option by which the giver has bound himself to sell a certain thing to the holder at a certain price if the holder shall require him to do so within the time fixed by the option. By this agreement, the giver grants and the holder acquires a right to buy."

H Thus, in my view, it appears quite clear from the above analysis of the option

agreement that the offer to sell the thing is already a part of the option A agreement. The second part of the agreement is merely to bind the grantor of the option not to make and accept another offer in connection with the thing offered for sale, pending the holder of the option making up his or her mind to accept the offer and purchase the item sold within the stipulated period. That this is so appears to be confirmed by the decision in *Venter v Birchholtz* 1972 (1) SA 276 (A) wherein it was held that an option is to be regarded as B a contract *sui generis,* which consists of an offer to sell coupled with an agreement to keep the offer open for a period. It appears implicit from the above decisions and numerous others on the subject that an option comprises two distinct parts: an offer to sell, and an agreement to keep that offer open for a stipulated period. The acceptance of the offer within the stipulated period brings into being a valid sale agreement. C

Viewed against the foregoing, the argument by the applicant loses force. The offer to purchase the land was made to the applicant when the option agreement was concluded. It was the first part of the option agreement. The second part was an agreement by the respondent to keep that offer open until a certain date. Thus, it appears to me to follow that the respondent was not D obliged at law to make another offer to the applicant or to invite the applicant to accept the offer. There was no express requirement in the option agreement for the respondent to repeat the offer to the applicant. I can see no basis for implying that requirement. In my view, it was up to the applicant during the

stipulated time to accept the offer and thereby bring into being a sale agreement. This it did not do.
E
It is not in dispute that the time stipulated in the option agreement for the applicant to exercise the option was conditional upon the completion of certain developments on the land. It is further not in dispute between the parties that these developments were completed in September 1996. It is further common cause that by the time the land was repossessed by the F respondent, two years later, the applicant had not exercised the option, waiting for an invitation from the respondent to exercise the option. In my view, the option lapsed when it was not taken up during the stipulated time. It could not remain open beyond the stipulated period because that is not the nature of option agreements at law.
Mr *Mandizha* submitted that the applicant could only exercise the right to G purchase the land upon the completion of the infrastructural developments on the land and that any earlier invitation to the applicant to accept the offer was premature. He is right to the extent that the completion of the developments on the land marked the end of the stipulated period within which the applicant had to accept the offer, which it failed to do, with the legal consequences I have described above. I have already discussed my basis for holding that, in H my view, no second or repeat offer was necessary.
2002 (2) ZLR p739
Makarau J
A The applicant has raised the issue that at the time of the conclusion of the option agreement, the final selling price of the piece of land had not been set. This is correct. The option agreement records that an estimate of the purchase price was indicated to the applicant and that the actual price would be determined upon the completion of the infrastructural developments. In my view, the fact that the actual purchase price was not determined at the time B the option agreement was concluded does not change the position that it was up to the applicant to accept the offer upon the completion of the infrastructural developments effected by the respondent. The applicant has not argued that it attempted to accept the offer and asked for the actual price of the land to be determined. There is no indication on the papers before me that the offer C was accepted subject to the determination of the actual price.
On the basis of the foregoing, I find no merit in the application. The application is accordingly dismissed with costs.
Makombe & Associates, applicant's legal practitioners.
D *Honey & Blanckenberg,* respondent's legal practitioners.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2002/Volume 2/ANNANDALE v MATERIAL FINANCE (PVT) LTD 2002 (2) ZLR 740 (H)

[zRPz]ANNANDALE v MATERIAL FINANCE (PVT) LTD 2002 (2) ZLR 740 (H)
2002 (2) ZLR p740

Citation	2002 (2) ZLR 740 (H)
Case No	Judgment No. HH-213-02
Court	High Court, Harare
Judge	Smith J
Heard	16 September 2002; 4 December 2002
Judgment	4 December 2002

Counsel *P C Paul,* for the applicant
P Nherere, for the respondents

Case Type Civil Application

Annotations Link to case annotations

[zFNz]Flynote
Company — shares — assets — sale of — company's sole assets being sold — requirement that sale be authorised by shareholders in general meeting — unanimous assent of members of company obtained though not in formal meeting — effect D
Contract — sale — agreement that part of sale price be payable in Zimbabwe currency but calculated in relation to a foreign currency value — value at time of agreement — subsequent effective devaluation of local E currency — intention of parties at time determining factor
[zHNz]Headnote
The applicant was buying a property from the respondent, by means of buying all the shares in a company owned by the respondent. The company's only assets consisted of the property. It was agreed that part F of the purchase price was to be determined in Zimbabwe currency, by reference to an amount in US dollars, plus a percentage. The agreement was reached before the "parallel" currency market had developed, where the official exchange rate was substantially below the unofficial, parallel rate. The applicant paid the amount at the official rate plus the agreed percentage, plus interest. The respondent argued, not only that G the wrong amount had been paid, but that the sale of the shares had not been authorised by the company in general meeting in terms of s 183 of the Companies Act.
Held, that at the time of the agreement, the parties had not envisaged that the parallel market would arise. The contract reflected the intention of the H parties at the time.
2002 (2) ZLR p741
Smith J
A *Held,* further, that s 183 was applicable in relation to the sale of the shares, since those shares were the respondent's sole assets and the ownership of the property was the major undertaking of the company. However, the section existed for the protection of shareholders; and as this was a family company, and the family had agreed to the sale, the unanimous assent of the members of the company to the transaction had the same B effect as if the formalities prescribed by the Act had been strictly followed.
[zCAz]Cases cited
Ally & Ors NNO v Courtesy Wholesalers (Pty) Ltd & Ors 1996 (3) SA 134 (N)
C *Levy & Ors v Zalrut Investms (Pty) Ltd* 1986 (4) SA 479 (W)
Sugden & Ors v Beaconhurst Dairies (Pty) Ltd & Ors 1963 (2) SA 174 (E)
[zSTz]Legislation considered
Zimbabwean Legislation:
Companies Act [*Chapter 24:03*]. s 183(1)(b)
South African Legislation:
Companies Act 61 of 1973, s 228
[zCIz]Case information
P C Paul, for the applicant E
P Nherere, for the respondents
[zJDz]Judgment
Smith J: The respondent (hereinafter referred to as "Material Finance") is the shareholder of a company called Crinnis Property Investments (Pvt) Ltd (hereinafter referred to as "CPI"). In October 1999 the applicant (hereinafter referred to as "Annandale") entered into an agreement with Material Finance F to buy the shares in CPI. The sole asset of CPI is a property known as 2 Crinnis Road, Chisipite (hereinafter referred to as "the Property"). The principal terms of the agreement were that the purchase price of the shares was $6 million, of which $ 1 million was to be paid by 18 October 1999. $1 million by 29 October and $2 million by 30 November. The balance, calculated as being the Zimbabwe dollar equivalent of US$ 50 000 plus 10 per cent, with G interest at 5 per cent *per annum* from 1 December 1999, was payable on 31 May 2001. On payment of the initial $1 million on 18

October, Material Finance was to release the share certificates in CPI to Annandale. Full rights in CPI were to vest in Annandale on payment of the $2 million on 30 November, but ownership would not be transferred to Annandale until H final payment was made. Annandale duly paid the first three payments

2002 (2) ZLR p742

Smith J

payment was made. Annandale duly paid the first three payments totalling A $4 million by 30 November 1999. However he was not able to pay the final instalment on the due date. There were some discussions between the parties and an exchange of e-mails.

According to Annandale, the results of the further discussions were as follows. It was agreed that the balance outstanding on 31 May 2001, inclusive C of interest, was US$53 750. Material Finance advised that the rate of exchange to be used was Z$56.925 equals US$1. That meant that the outstanding purchase price was $3 365,690, of which $1 million was to be paid by 14 May 2001, $900 000 was to be paid by 31 May 2001 and the remaining $1 553 630, which included interest at 3 per cent for June and July, was to be paid by 31 July 2001. It was a specific term of the new agreement C that any change in the US$ selling rate *viz-a-viz* the ZW $ (as advertised by Standard Chartered Bank) must be used to calculate the outstanding balance due. These payments were all duly made. However, Material Finance still refuses to transfer the shares in CPI to Annandale. Hence he is seeking an order that the shares be transferred to him as well as all the records, minute book and other papers relating to CPI. d

Material Finance opposes the application on two grounds. Firstly, that there was no authorisation of the sale of the shares as required by s 183 of the Companies Act [*Chapter 24:03*] (hereinafter referred to as "*Chapter 24:03*") since the shares are the sole asset of the company. Secondly, Annandale has neither paid nor tendered to pay the full and correct purchase price; in E particular he refuses to apply correctly the agreed formula for calculating the final instalment.

The Property is the sole asset of CPI. All the shares in CPI are owned by Material Finance, the sole purpose of which is to hold those shares. The shares in Material Finance are all owned by a company called EBC Holdings F (Pvt) Ltd (hereinafter referred to as "EBC") and the shares in that company are owned by four members of the Clinton family. Two of the shareholders are Paul Clinton and his father and they are the directors of CPI, Material Finance and EBC. As regards the intention of the parties, Paul Clinton states that before signing the sale agreement, he made it clear to Annandale that, due to the weakening of the Zimbabwean currency, and the fact that Annandale G would only make final payment by 31 May 2001, the final instalment payment was to be fixed by reference to US dollars. Annandale agreed to that. That was to ensure that the final payment in Zimbabwe dollars would continue to reflect a true relationship to the actual exchange rate at the date of payment. Clause (4) of the sale agreement provides for the final instalment to be "the H

2002 (2) ZLR p743

Smith J

A equivalent of US $50 000 in Zimbabwe dollars plus 10 per cent, payable by 31 May 2001, plus interest calculated from December 1999 at 5 per *cent per annum".* In his opposing affidavit Paul Clinton explained this provision as follows.

"It is appropriate to explain the reason for the extra 10 per cent in the fourth instalment of the purchase price. At the time of the sale agreement B being concluded the Applicant and I were fully aware that reference to the exchange rate for US dollars published at the time was unrealistic, and that reference was widely made to the 'parallel' rate of exchange. This effectively indicated a premium which would be paid to give one the equivalent purchasing power of the true US dollar rate which at that time was some 10 per cent above the bank's advertised rates. This C reflected our intention from the outset that, when payment of the final instalment was made, the Applicant would be obliged to pay a premium which effectively meant paying an amount equivalent to the parallel rate for US dollars at that time.

Clause (4) of the sale agreement was intended to set out a formula for calculation of the final instalment. To arrive at the appropriate amount D one would add to the advertised exchange rate a premium which would be the difference between the advertised rate and the parallel rate. At the time of concluding the sale agreement in October 1999 this premium was 10 per cent and it had been at this level for some time. The inclusion of a reference to 10 per cent in clause (4) of the sale agreement was intended by both of us to indicate that a variable premium would be paid to reflect E the true value of the currency. The figure of 10 per cent was merely illustrative of the premium at the time and not intended to be prescriptive of the actual premium which would vary. The true intention therefore was that calculation of the amount for payment of the final instalment would be made at the effective parallel exchange rate as at the date of payment which would include a premium in addition to the advertised F bank rate."

Paul Clinton further stated that by the time payment became due he discovered that the advertised bank "sell" rate was highly artificial and no longer bore any relationship to the true value of the Zimbabwe dollar as compared to the US dollar. The banks pegged their advertised "sell" rate at 56.925 "but the premium between that rate and the parallel rate had gone up to approximately G 300 (i.e. about 500 per cent) as opposed to the original 10 per cent as used in explaining the formula. He claimed that it was the intention of himself and Annandale that the final payment should be calculated on the above basis and not on the direct equivalent of the artificial advertised rate of 56.925. Accordingly, he would seek to rectify clause (4) of the sale agreement so that H it would read as follows:

2002 (2) ZLR p744
Smith J

"the equivalent of US $50 000 plus a premium in an amount reflecting as A a percentage the difference between the bank's advertised sell rate and the parallel rate of exchange at the date of final payment (which premium at the date of signature of the agreement is 10 per cent), payable by 31 May 2001 plus interest calculated from 1 December 1999 at 5 per cent per annum".

In his answering affidavit Annandale made the following points. A search at B the Register of Companies showed that EBC owns 900 shares in Material Finance and Paul Clinton owns 98. The shareholders of EBC are Paul Clinton, his father, his brother and his sister. All of these were well aware of the sale of the Property to him. Furthermore, Material Finance undertook to take all necessary steps to transfer the shares of CPI to him. Therefore it is C estopped from relying on s 183 of *Chapter 24:03*. Clause (4) of the sale agreement clearly sets out the intention of the parties, as does their subsequent conduct. The parties agreed to fix the purchase price against the US dollar value in an attempt to protect Material Finance from any devaluation of the Zimbabwe dollar. That is why clause (4) made provision for the rate of exchange to be increased by 10 per cent. That was the cushion to protect D Material Finance from any exchange rate devaluation. At the time the parties had no idea how badly the Zimbabwe dollar would devalue. There was no discussion at the time of "actual exchange rates" or "official exchange rates" or "parallel exchange rates" because the sale agreement was entered into in October 1999 and the foreign exchange crisis only arose in February 2000. It was not until about April 2000 that commercial banks and bureaux-de E - change in Zimbabwe started supplying foreign currency at a premium and what is now known as the parallel market started to develop. During the negotiations and when the sale agreement was signed, the parties thought only of the official rate of exchange, as quoted by the Standard Chartered Bank, and that is what was recorded in clause (4) of the agreement. F

Mr *Paul* agreed that the sale agreement was for the disposal of the whole or the greater part of the assets of Material Finance. He submitted, however, that even assuming that the approval of Material Finance in general meeting had not been obtained, that did not render the contract null and void. Non- compliance with s 183 of *Chapter 24:03* is not a point that can be taken by the company, only the shareholders can do so. Furthermore, all the shareholders G were aware of the sale of the Property to Annandale since he paid part of the purchase price to some of them and he has been living on the Property since 1999. In *Sugden & Ors v Beaconhurst Dairies (Pvt) Ltd* & *Ors* 1963 (2) SA 174 (E) at 179 it was held that the provision requiring shareholder approval was enacted as a measure of protection for the shareholders and not the company. As regards the proposed rectification of the sale agreement, Mr H

2002 (2) ZLR p745
Smith J

A *Paul* argued that clause (4) of the sale agreement clearly expresses the intention of the parties. However, even if one accepted the contention by Material Finance that it did not express its intention, there is no evidence to show that it did not express the intention of Annandale.

Mr *Nherere* submitted that the dispute could not be resolved on the papers if B justice is to be done. The sale agreement has been varied by subsequent e- mails and discussions which can only be resolved by *viva voce* evidence. He further submitted that s 183 of *Chapter 24:03* is mandatory and has not been complied with. Therefore the sale agreement is null and void. There is no evidence that the shareholders tacitly or expressly consented to the sale of the Property. He further submitted that, in order for the true version of the sale C agreement to be enforced, rectification of the contract should be allowed.

I consider that the dispute can be resolved on the papers. Clause (4) of the sale agreement states that the final instalment of the purchase price would be the Zimbabwe dollar equivalent of US $50 000 plus 10 per cent thereof. At the time the agreement was signed, which was in October 1999, no-one could have imagined that the value of the Zimbabwe dollar would fall to the extent D it did in April 2002 and in the months thereafter. Furthermore, no reasonably sane person would have imagined that the Government would insist on sticking to an official rate of exchange which is so out

of touch with reality and, at the same time, permit the parallel market for foreign currencies to exist and flourish to the extent that it has over the past two years. Clearly, E therefore, clause (4) of the sale agreement reflects the intentions of the parties at the time the agreement was signed. The parties obviously realised that the Zimbabwe dollar would depreciate and so they provided that the rate of exchange to be used would be the official rate, which was the only rate then in existence, plus 10 per cent thereof.

When Annandale was unable to pay the final instalment and so had to alter F the terms of the sale agreement relating thereto, he made an offer to Material Finance. In response to that offer, Material Finance bemoaned the fact that it was being faced with a considerable loss of approximately 60 per cent in real terms and then said it accepted the offer subject to some minor adjustments. One of them was set out as follows: "The current sell rate of the US $ *vis-à-vis* the ZW $ (as advertised today by Standard Chartered Bank) G is 56.9250. Therefore, based upon the above, the outstanding balance equates to ZW$ 3,365,690 (56.9250 + 10 per cent = 62.6175 x US$ 50 000 + 5 per cent interest over 18 months)". It then added "Please note that any change in the US$ sell rate *vis-à-vis* the ZW $ (as advertised by Standard Chartered Bank) must be used to re-calculate the outstanding balance due". The H response was dated 11 May 2001. At that stage the parallel market was alive

2002 (2) ZLR p746

Smith J

and flourishing. Every businessman or woman, and most other people in the A urban areas, were very well aware of the great disparity between the official rate of exchange and the rate of exchange on the parallel market. Yet even at that stage, Material Finance clearly accepted that the US$ 50 000 was to be calculated in accordance with the official rate of exchange. There is no mention in its response to the parallel market. To the contrary, it was B specifically stipulated by Material Finance that the sell-rate of the US$ *vis-à-vis* the ZW$ was to be the rate as advertised by the Standard Chartered Bank.

For the reasons set out above, I am satisfied that the final instalment of the purchase price that was due amounted to $3 365 690 and that Annandale has duly paid the amount that was owing. C

It is accepted by Annandale that Material Finance did not comply with the requirements of s 183 of *Chapter 24:03*. What is the effect of such non- compliance?

As argued by Mr *Paul,* a company acts through its directors and not through its shareholders. Paul Clinton, in his opposing affidavit, said that neither the D directors of Material Finance nor the shareholders "considered" the sale agreement and that "no resolution relating thereto was considered or approved by the directors or shareholders". The company which owns the Property is CPI, all the shares in which are owned by Material Finance. The shares are the only asset held by Material Finance. The shares in Material Finance are all held by EBC which is obviously a "family company". Paul Clinton, his E brother and his sister each own 1000 of the shares and his father owns two of the shares. His father and he are the directors of EBC, Material Finance and CPI. Both his father and his brother were aware of the sale of the shares in CPI to Annandale. The payments of $1 million on 14 May and of $1553 630 on 31 July were made to his father and that of $900 000 on 31 May was made to his brother. Clearly, therefore, since he and his father were the directors of F EBC and of Material Finance, the directors of the two companies had resolved to sell the shares of CPI. There might well have been no formal resolution approved by the directors at a meeting of the board of directors, but the fact remains that the directors did in fact agree to the sale of the shares. Paul Clinton was the one who negotiated the sale with Annandale and who G actually entered into the agreement with him. The other director, his father, was the one who received a large part of the purchase price. He must have been well aware that the money he was being given was for the shares.

Section 183 of *Chapter 24:03* is applicable in relation to the sale of the shares of CPI since those shares are the sole assets of Material Finance and the ownership of the Property is the major undertaking of the company. The H

2002 (2) ZLR p747

Smith J

A shares of Material Finance are owned by EBC and the shares of EBC are all held by the members of the Clinton family. Paul Clinton owns 1000 shares, as does his brother, David, and his father owns two shares. His sister, Gail owns 1000 shares. As stated above, he, his brother and his father were well aware of the sale of the shares in CPI to Annandale. They never objected to the sale. They participated therein, even if it was merely by accepting part of B the purchase price. Their combined shareholding was such that, if a meeting of shareholders had been held, they would have been able to carry a resolution to approve the sale because their votes totalled 2002 whereas the sister held only 1000 shares. Accordingly, I am satisfied that the majority of the shareholders of EBC and of

Material Finance were well aware of the sale of the CPI shares, and therefore of the Property, and had consented thereto.

C Section 183 (1) of *Chapter 24:03* provides that the directors of a company shall not be empowered, without the approval of the company in general meeting:

"(b) to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company." D

A similar provision appears in s 228 of the Companies Act 61 of 1973 of South Africa. In *Levy & Ors v Zalrut Investments (Pty) Ltd* 1986-(4) SA 479 (W) at 484H - 485F van Zyl J referred to the South African provision and then went on to say:

"It seems clear from a reading of s 228 aforesaid that the intention of the E Legislature was to place a limitation on the powers of the directors of a company in respect of the disposal of the whole or major portion of its undertaking or assets, even should such power have been conferred on the directors in terms of the company's memorandum or articles. On the other hand, it is expressly stipulated that the general meeting of a company indeed has such power, in so far as it may approve the said disposal by means of an authorisation or ratification of the transaction in F terms of which the disposal is to be effected. It would hence appear that the said s 228 was introduced with a view to regulating the procedure required for a disposal described therein and, as such, it was clearly designed for the benefit of shareholders. This is in accordance with the finding in the *locus classicus* relating to s *70dec* (2) of the previous Companies Act 46 of 1926, namely *Sugden & Ors v Beaconhurst* G *Dairies (Pty) Ltd & Ors* 1963 (2) SA 174 (E), in which O'Hagan J said of the said section (at 179G):

'The subsection is a fairly recent innovation in our company legislation. It has no counterpart in the English statute. Its purpose, I think, was to secure a measure of protection for shareholders by giving them control over the disposal of the undertaking of a company or the whole or H greater part of the assets of the company...'

2002 (2) ZLR p748

Smith J

Section 228 of the present Act is the exact counterpart of s 70 *dec* (2) of A the previous Act and there seems to me no reason why its intention and ambit should be differently construed from the earlier provision.

In the *Sugden* matter the question of unanimous consent of members instead of approval by the general meeting of a company was discussed with reference to certain English authorities. In this regard O'Hagan J said the following (at 180H-181A): B

'There is no reason, in my opinion, why the principles followed in these decisions should not apply to the facts of the present case. It is true that s 70 *dec* (2) prescribes the formality of a general meeting for the approval of the resolution to which the subsection relates; but inasmuch as the subsection was designed for the benefit of shareholders, why should the shareholders not be able to waive compliance with the C formalities that are ordinarily attendant upon the convening of a general meeting? In my view, where the only two shareholders and directors express, whether at the same time or not, their joint approval of a transaction contemplated by s 70 *dec* (2), their decision is as valid and effectual as if it had been taken at a general meeting convened with all the formalities prescribed by the Act'. D

I am in respectful agreement with this *dictum* and find it equally applicable in s 228 of the present Act. I am hence of the opinion that the unanimous consent of the shareholders of a company to a specific transaction has the same effect and validity as the approval of such transaction by a general meeting of the company."

Support for the views expressed in *Sugden's* case, *supra,* were also voiced in E *Ally & Ors NNO v Courtesy Wholesalers (Pty) Ltd &* Ors 1996 (3) SA 134 (N) where Magid J at 145G - 146C said:

"In *Sugden & Ors v Beaconhurst Dairies (Pty) Ltd & Ors* 1963 (2) SA 174 (E) O'Hagan J had occasion to consider the purpose and effect of s 70 *dec(2)* of the Companies Act 46 of 1926 which was the precursor to F and is, so far as this case is concerned, indistinguishable from s 228 of the Companies Act.

Sugden's case dealt with the sale of a property, which the learned Judge assumed constituted the greater part of its assets. It was held that as the only two members and directors of the company had expressed their joint approval of the transaction their decision was valid and effectual as if it G had been taken at a general meeting convened and managed in accordance with the prescribed formalities. This principle has become known as the principle of unanimous assent.

In *Gohlke & Schneider & Anor v Westies Minerale (Edms) Bpk & Anor* 1970 (2) SA 685 (A) at 694E Trollip JA described the principle as a sound one which should be accepted as settled law. H

2002 (2) ZLR p749

Smith J

A In *Sugden's* case *supra* at 180H-181A, O'Hagan J said:
'It is true that s 70 *dec* (2) prescribes the formality of a general meeting for the approval of a resolution to which the subsection relates; but inasmuch as the subsection was designed for the benefit of shareholders why should the shareholders not be able to waive compliance with the formalities that are ordinarily attendant upon the convening of a general B meeting? In my view, where the only two shareholders and directors express - whether at the same time or not - their joint approval of a transaction contemplated by s 70 *dec* (2), their decision is as valid and effectual as if it had been taken at a general meeting convened with all the formalities prescribed by the Act'. I respectfully agree with this *dictum.* I therefore hold the clear view that C the unanimous assent of the members of a company to a particular transaction has the same effect as if the formalities prescribed by the Companies Act had been strictly followed".
The submission on behalf of the respondent that the shareholders of EBC had not approved of the sale of the property to Annandale cannot be accepted. The opposition to the transfer of the shares is solely because the value of property D rose substantially after the conclusion of the sale of the shares, and the condition that was inserted in the agreement in order to cater for any increase in the value of property was not adequate for the purpose. Furthermore, the coming into existence of the parallel market was something which Paul Clinton did not expect. That is not surprising, because I am sure that no sane E person would ever have expected Government to stick to an official rate of exchange and yet allow the parallel market to flourish side by side with the official market. Had the other shareholders considered that they had been prejudiced because the shares were sold behind their backs, they would have instituted the necessary action to set aside the sale. They did not do so. They did not file any affidavit in this case saying that they objected to the sale. As F they are all members of one family, they must have been well aware that this action had been instituted. Annandale acquired the property in 1999 and has been living there since then. They have taken no steps to have him evicted.
An order is granted in terms of the draft order filed with the application.
G *Wintertons,* legal practitioners for applicant
Ali Ebrahim, legal practitioners for respondents

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