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S v DENHERE 2003 (1) ZLR 1 (H)

Citation	2003 (1) ZLR 1 (H)
Case No	Jugdment No. CRB 190/02
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	14 October 2002
Judgment	14 October 2002
Counsel	Details not supplied
Case Type	Case transferred for sentence
Annotations	No case annotations to date

Flynote

C **Criminal procedure (sentence)** — *common law crimes — housebreaking with intent to steal and theft — value of property stolen — relevance of — weight to be given to traumatic effect on victim of having home violated.*

Headnote

In considering sentence for the crime of housebreaking with intent to steal and theft, the court should not focus unduly on the value of the property D stolen and thereby completely miss the essence of the nature of the offence and its impact on the victim. As with pocket picking, the actual value of the property taken is fortuitous as the crime often takes the form of a "lucky dip". The accused usually intends to steal whatever is in the victim's house and if he emerges with paltry rather than valuable spoils, this is of very little significance. *

E The crime of housebreaking was developed as a means of protecting the security, sanctity and privacy of the home. Its purpose is not so much to protect the dwelling as a building but to protect its security. This security is far more than the safety of the occupant behind locked doors.

It represents the indefinable idea that the *home* as contrasted with the F house is inviolable; that whatever terrors rage in the outside world, every individual exercises his greatest freedom in that place where he conceives and builds his family, a place to which he imparts part of his soul. An unwarranted intrusion into one's home, one's private space, gives rise to feelings of fear, outrage, insult and indignation. Somehow the victim feels violated. Insurance can compensate for the economic loss, but G nothing can compensate for the feelings of fear, insult, anger and loss of security resulting from the invasion of one's privacy. The crime also affects many more people than just the complainant. It traumatises the family, the children and relatives and deprives them of amenities of life. It is also a violent crime. The violence, actual and potential, is often

underestimated. The violence and furtive entry, often during the dead of A night, is accompanied with an implicit threat of force and a preparedness to use force on the occupants should they disturb the burglar.

Case cited

AG v Makoni S-42-88 B

Judgment

Hlatshwayo J: The accused was convicted on his own plea of guilty by a senior magistrate of housebreaking with intent to steal and theft. The senior magistrate then referred the matter to the High Court for sentence as he felt that the appropriate sentence, given the value of the property stolen and the C accused's previous convictions, was well in excess of his jurisdiction.

The brief facts as contained in the charge sheet and as read and admitted to by the accused person at the trial were as follows.

On 6 May 2002, at Charles Tinarwo Mapfumo's homestead in Musendo Village, Chief Nyamandi, Gutu, the accused, in the company of another man D who is currently at large, unlawfully and with intent to steal broke into at night and entered Charles Tinarwo Mapfumo's home; more specifically, the intruders broke the dining-room window pane and opened the latch, gained entry and stole property valued at $93 300, consisting of, among other things, a television set, a radio cassette recorder, 2 x 12volt batteries, a wall watch and a solar panel. Property valued at $1500 was recovered but E property valued at $91 800 was not recovered.

The accused's previous convictions are as follows. On 10 December 1997 he was convicted on a charge of robbery and sentenced to two months' imprisonment, wholly suspended for five years. On 27 May 1998 he was convicted on a charge of common assault and sentenced to a fine of $150 or in default of payment 15 days' imprisonment. On 4 January 1999 the accused F was convicted of housebreaking with intent to steal and theft and sentenced to a fine of $440 or 30 days and then on 19 January in the same year, 1999, he was convicted of theft by conversion and sentenced to one month's imprisonment, of housebreaking and theft (two counts) and sentenced to six months, and stock theft (two counts), for which he was sentenced to 54 G months, and the suspensions of 1997 and 1999 were brought into effect, four months added, making a total of 58 months.

Over a period of four years the accused was convicted on nine counts of offences involving violence, theft and dishonest, an average of over two such offences per year. Now, focussing on the housebreaking and theft, the accused's previous convictions show that in one year alone (1999) he was H

A convicted of three housebreakings with intent to steal and theft, for all of which he was sentenced to six months and $400 or 30 days. But, on the other two counts for which he was sentenced to six months, the sentence was ordered to run concurrently with the sentence of eighteen months for stock theft.

B The punishment received for the offences of housebreaking with intent to steal and theft outlined above trivialise the offence, as I will demonstrate shortly. But first I will examine the effect of the previous convictions.

In *Attorney-General v Makoni* S-42-88 a 40 year old accused was convicted of theft of a car worth $6500. He had previous convictions stretching back to 1966. In 1972, 1973 and 1976 he was convicted of housebreaking with intent C to steal and theft. In 1978 he was convicted on three counts of robbery and sentenced to a total of nine years' imprisonment. In 1984 he was sentenced to two years' imprisonment for a crime of dishonesty. Ruling that a sentence of two years' imprisonment imposed by the trial court was manifestly inadequate and that a sentence of six years would have been appropriate, the Supreme Court said that the offender had an appalling record and had exhibited no D contrition at all regarding his latest crime:

> "It is clear to me that the respondent is a person for whom prison holds no terrors. His attitude to society has been to rob and terrorise it. Short and long sentences imposed for the various crimes of dishonesty have not deterred him from his general attitude to society. As against him the welfare of society must be protected. A salutory principle of our law is that E the public must be protected from offenders who persistently commit heinous crimes against society. For such persons only medium or longer sentences would be appropriate. The respondent's whole attitude over the years has been to prey on society. Sentences of personal deterrence having failed to reform him, must now be applied the principle of exclusion from society in order to give society a respite from his anti-social activities."

F The above observations and admonitions apply *mutatis mutandis* to the present case.

The excessively lenient sentences passed for housebreaking and theft reflect a misplaced focus on the value of the property stolen and completely miss the essence of the nature of the offence and its impact on the victim. The crime of G housebreaking, also called burglary, was developed as a means of protecting the security, sanctity and privacy of the home, as pointed out by Milton in *S A Criminal Law and Procedure* p 792. Its purpose is not so much to protect the dwelling as a building but:

> "to protect its security. This security was far more than the safety of the H occupant behind locked doors. It represented the indefinable idea,

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> existent at all times, that the *home* as contrasted with the house was A inviolable; that whatever terrors raged in the outside world, every individual exercised his greatest freedom in that place where he conceived and built his family, a place to which he imparted part of his soul."

The sanctity and inviolability of the home is also well known in traditional society, hence the greetings and salutations as one approaches a home: B "*Tisvikewo!"* in Shona and "*Ekuhle!"* in Ndebele, meaning, "May we approach your home".

As also observed in the Law Reform Commission of Canada in *Criminal Intrusion Working Papers 48* (1986):

> "The worst thing about break and enter is how worrying it is. This is especially so when it happens to you in your home. An unwarranted C intrusion into our homes, our private space, gives rise to feelings of fear, outrage, insult and indignation. Somehow we feel violated. Insurance can compensate for the economic loss, but nothing can compensate for our feelings of fear, insult, anger and loss of security resulting from the invasion of our privacy."

The focus on the value of the goods stolen, unless the theft is truly trifling and D insignificant, is misplaced as Milton *op cit* at p 139 observes, because the crime of housebreaking with intent to commit the crime provides that a person who, intending to rob, murder or rape another or to commit some other crime, enters the other's habitation for this purpose, can be punished even though he has proceeded no further in his criminal objects than to force an entry into the E premises. Further, as with pocket picking, the actual value of the property taken is fortuitous as the crime often takes the form of a "lucky dip". The accused usually intends to steal whatever is in the victim's house and if he emerges with paltry rather than valuable spoils, this is of very little significance.

The crime of housebreaking and theft also consists of many crimes rolled into one. The "breaking" constitutes malicious injury to property. The "entry" F constitutes criminal statutory trespass, and theft, of course, constitutes an unlawful deprivation or property. The crime also affects many more people than just the complainant. It traumatises the family, the children and relatives and deprives them of amenities of life. It is also a violent crime. The violence, actual and potential, is often underestimated. The violence and furtive entry, often during the dead of night, is accompanied with an implicit threat of force G and a preparedness to use force on the occupants should they disturb

the burglar. Burglary violence is also aptly captured in the indigenous languages' terms for the crime: "*kupaza*", in Shona, and "*ukugqekeza*" in Ndebele.

In mitigation the accused pointed out his personal circumstances, in that he is 22 years old, unemployed and has no valuable assets. He appealed for leniency H

2003 (1) ZLR p5

Hlatshwayo J

A from this court. Although the accused did not mention it himself in mitigation, the court will also take into account that he surrendered himself to the police and pleaded guilty and therefore assisted in the administration of justice.

However, in aggravating the offence, I have already pointed out that the nature of the crime itself is a serious one. The accused violently broke a window pane B and opened a window at night. That kind of breaking and entry must have struck terror, instilled fear, anger and insult, not only to the complainant, but to his family, relatives and friends who might have been in those particular premises.

The accused also deprived them of amenities and their humble necessities of life. The items stolen consist of lifetime investments and are difficult to C replace. In the rural areas a radio, let alone a television and a solar panel, is a prized possession, a centre and focus of family and indeed community life. The accused deprived them not only of gadgets but a way of life, source of light, a source of information and entertainment. Nothing of meaningful value was recovered.

D I must also take into account the accused's appalling criminal record, outlined above, and I will also take as aggravatory the prevalence of the offence. Householders have turned their houses or homes into prisons of durawalls, electric fences, razor wires and all sorts of iron screens, hideous devices and alarms which detract from the serenity and beauty a home should have. Thus, they have literally turned their homes into prisons and incarcerated themselves E in their homes. The courts must reverse this trend and imprison the real culprits. It is the criminals who must be sent to prison and must go to prison for sufficiently long spells, not just to give society a deserved break from their nefarious activities but also to act as a deterrent to any would-be burglar.

Because of your appalling record I would like to warn you, and hereby order it to be endorsed on your record that you have been so warned, of extended F imprisonment should you in future commit any offence stipulated in the seventh Schedule, *viz* that you will be liable to imprisonment for a minimum of seven years and a maximum of 15 years and should you be sentenced to a second extended term, you will be incarcerated for 15 to 20 years.

For the current offence of housebreaking with intent to steal and theft, taking G into account factors in mitigation and those in aggravation, I hereby sentence you to nine years' imprisonment.

* This judgments was received too late to be included in the 2002 (2) ZLR – *Editor*

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CHIBANGUZA MOTOR CAR REPAIRS & SPARES (PVT) LTD v MUTYASIRA NO & ORS 2003 (1) ZLR 6 (H)

2003 (1) ZLR p6

Citation 2003 (1) ZLR 6 (H)

Case No	Judgment No. HH-228-02
Court	High Court, Harare
Judge	Smith J
Heard	16 December 2002; 6 January 2003
Judgment	6 January 2003
Counsel	*T Magwaliba*, for the applicant *A M Gijima*, for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Costs — *de bonis propriis — legal practitioner — practitioner making* C *unsubstantiated allegations of impropriety against another officer of court*

Court — *officer — Master — allegations of impropriety made against Master — legal practitioner's responsibilities when making such allegations — effect of failure to act responsibly* D

Legal practitioner — *conduct and ethics — allegations of impropriety against another officer of court — practitioner's responsibilities when making such allegations — effect of failure to act responsibly*

Headnote

Two brothers each owned half the shares in the applicant company. When one E brother died, a dispute arose over the value placed by the surviving brother on properties owned by the company. The executor and the deceased's widow believed that too low a value was placed on the properties and that they would be prejudiced as a result. The Master directed that an independent valuation be undertaken by a neutral party. F The surviving brother sought to have the Master's decision set aside as grossly unreasonable, alternatively, that it was malicious and capricious.

Held, that when the Master has, or appears to have, acted improperly, then a legal practitioner is required to bring the matter before the court. However, before doing so, the legal practitioner must be satisfied that there is some evidence to substantiate the claim. Where a legal practitioner G associates himself with an application which impugns the integrity of the Master, or any other officer of the court, he must put forward valid reasons, supported by credible evidence, to substantiate the allegations made.

Held, further, that a legal practitioner is expected to act responsibly, especially where allegations of impropriety on the part of another officer H

Smith J

A of the court are made. In this case, the Master had exercised powers conferred on him by law. He had acted responsibly. There was no onus on him to consult anyone as to the appointment of a responsible valuator. The application was vexatious and the legal practitioner and the surviving brother would be required to pay the costs *de bonis propriis* on the higher scale.

Case cited B

General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd 1998 (2) ZLR 301 (H)

Case information

T Magwaliba, for the applicant

A M Gijima, for the first respondent

Judgment

Smith J: Felton Chibanguza (hereinafter referred to as "Felton") is the managing director of the applicant. He owns a half share in the company. The other half share was owned by the late Charles Chibanguza (hereinafter referred to as "the Deceased") who died on 28 March 2002. The Deceased's estate was registered with the third respondent (hereinafter referred to as "the Master"). The first respondent (hereinafter referred to as "Mutyasira") was appointed as executor of the estate. On 22 July 2002 the Deceased's widow (hereinafter referred to as "Cecilia") wrote to Mutyasira complaining about the valuation of the hotels which are owned by the applicant, as she believed that the valuations were ridiculously low. She requested that a neutral valuator be appointed because the valuator that had made the valuations was appointed by Felton, who is an interested party. She sent a copy of that letter to the Master. As a result of that letter, on 25 July the Master appointed the second respondent (hereinafter referred to as "Ferreira") to value the movable and immovable assets of the Deceased's estate. As a result of the appointment, the applicant's legal practitioners wrote to Mutyasira's legal practitioners on 2 August, saying that their client rejected the proposed valuation "as an exercise in futility". They said that the valuation of selected assets of the company, as opposed to the shares in the company, was without merit. The estate had no claim to the hotels and the assets therein; its only claim was in respect of the value of the shares. Furthermore, Ferreira was not qualified to value shares. Accordingly, their client would not participate in the proposed valuation and would not allow Mutyasira or Ferreira access to its properties for the purposes of valuation.

On 7 August the applicant filed this application, seeking an order setting aside the decision of the Master directing Mutyasira to value the assets of the applicant. The grounds of review were that the decision was grossly

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unreasonable and only explicable on the basis that the Master did not apply his mind to the facts before him and that the decision was biased and manifestly activated by malice. In the founding affidavit, Felton said that he did not agree with the valuation exercise. The Deceased's estate had a claim in respect of the shares in the applicant but not in respect of the assets owned by the company. It is the shares that must be valued and not the assets. The decision to value the assets was taken by the Master without consultation with him. There should have been such consultation. It was never explained to him how Ferreira came to be appointed. He might well have been suggested by Cecilia. The Master should have obtained his consent before making his decision to appoint Ferreira. The decision of the Master is grossly unreasonable, and not explicable other than on the grounds that he did not apply his mind to the facts of the case or, alternatively, the decision is malicious and capricious.

Mutyasira opposed the application. In his opposing affidavit, he said that Cecilia had objected to the valuer who had been appointed by Felton, since he is an interested party, and said she wanted a neutral person to do the valuation. Initially, Felton had not objected to the appointment of Ferreira. It was only when he and Ferreira arrived at the Mazoe Hotel to do the valuation that an objection was raised, and they were told to go to the Christmas Pass Hotel first, as it was less busy. Mutyasira said that, in his opinion, the shares accruing to the Deceased's estate must be determined by the value of the assets owned by the applicant. A valuation by Ferreira would not be a futile exercise because the interests of the beneficiaries are at stake.

An affidavit by Cecilia was filed by Mutyasira. She said that Mutyasira had showed her copies of valuations of the hotels owned by the applicant. They had been effected at the instance of Felton. She believes that the values placed on the hotels are unrealistically low, having regard to current property market trends. She also believes that if the values obtained by Felton are used for the purpose of the administration of the estate, she and her children would be prejudiced irreparably. She had been advised that, based on the valuations received, her late husband's shareholding in the applicant would amount to $l.5 million, which would be swallowed up by estate duty and administration expenses. She asked the Master to appoint a neutral valuator. She had never met Ferriera and did not suggest that he be appointed.

The Master filed a report in which he made the following statements. Because Cecilia had complained about the values assigned to the various properties by Sommerfield Real Estate, which had been nominated by Felton, he had appointed Ferreira to value the businesses. Ferreira was his nominee and not the nominee of Cecilia. The Master commented that, in his 21 years as an officer of the High Court, this is the first time that he has been made a party H

2003 (1) ZLR p9

Smith J

A to an application properly formulated by a legal practitioner, who is also an officer of the High Court, that seeks to prevent the Master from exercising the authority conferred on him by the Estate Duty Act [*Chapter 23:03*]. Cecilia clearly spelt out her fears about the *bona fides* of Felton. He feels that her fears are confirmed and fortified by the filing of this application. Why should Felton try to prevent a very simple, procedural exercise to confirm the value B of assets in which the Deceased had an interest from being carried out? As the estate is dutiable, the Master is obliged to obtain sworn valuations of all properties as defined in s 6(1)(f) of the Estate Duty Act [*Chapter 23:03*]. It is his prerogative to appoint a valuer and he is not required to consult anyone before doing so. He submitted that there are two issues which affect the C Deceased's estate:

(a) all properties owned by the applicant must be valued and the value set out in an inventory for the purposes of the deceased estate and its administration. That exercise involves the hotels and other immovable properties owned by the applicant;

(b) all movable assets which are jointly owned must be valued. Stock returns D as at the date of death should be submitted to the executor. Any trading (post-death) should be properly recorded, since the estate has an entitlement to its half share until it receives the final share. The executor is entitled to call in an auditor if he feels that transactions are not being carried out above-board and in a lawful manner.

E The Master said that his experience in this area is that when relatives behave in a manner such as Felton is, it signifies the beginning of "property grabbing" in order to deprive the widow and children of benefits they should inherit. It amounts to interference of the highest order with the duties of the Master. He submitted that, in order to show its displeasure, the court should award costs on the legal practitioner and client sale against Felton and his legal practitioners. F He further submitted that legal practitioners, as officers of this court, must act in a professional manner and the institution of an application to stop the Master from carrying out his statutory duties is very unprofessional. Finally, the Master said that the values assigned to the various properties by Sommerfield Real Estate were poorly done and are not acceptable for purposes of administration.

G After filing this application the applicant filed a second application (case No HC 8199/02) seeking an order that Mutyasira be removed from his position as executor of the estate of the Deceased.

After this application was set down for hearing, the applicant filed a chamber H application seeking an order that the hearing of this application be deferred

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2003 (1) ZLR p10

Smith J

indefinitely pending the hearing of the application in case No HC 8199/02. A The chamber application is premised in the following averments. If the application in case No HC 8199/02 succeeds, Mutyasira would cease to be executor. If, however, this application had been heard by that stage and was successful, the incoming executor may be interdicted from performing his duties. If this application fails, Mutyasira may proceed with his functions. In B the founding affidavit it is stated that the family of the Deceased and Felton have agreed on a peaceful resolution of the outstanding matter in principle and therefore case No HC 8199/02 should be resolved first. Mutyasira opposed the postponement of the hearing of this application.

It is difficult to see what *locus standi* the applicant has in this matter. The Deceased was the owner of half the shares in the applicant. On the appointment C of Mutyasira as executor, he stepped into the Deceased's shoes and was therefore entitled to exercise the voting rights attaching to the half-share in the company. Furthermore, the applicant has no *prima facie* interest in the administration and distribution of the Deceased's estate. It is only the widow and children who have an interest therein. Obviously, they have a vital interest in the valuation of the Deceased's estate. Even Felton, the Deceased's brother, D has no direct interest in the estate. He does not allege that he will inherit any share of the estate.

In the founding affidavit, Felton claims that it is the shares in the applicant that must be valued and not the assets owned by the applicant. That may well have been the case if the Deceased owned less than half the shares in the company. E In such a case, it would have been the selling price of the shares he held that would have been relevant. However, since he owned half of the shares, the position is different. Furthermore, if the value of the assets were irrelevant, as claimed by Felton, why did he appoint Sommerfield Real Estate to value the assets? The allegations by Felton that the decision by the Master to appoint Ferreira to value the assets of the estate is grossly unreasonable because the F Master did not apply his mind to the facts or is malicious and capricious, are not based on any solid, factual evidence. They are highly defamatory of the Master and must be rejected with contempt. The Master acted on the basis that Cecilia had registered a complaint about the valuation of the assets in the estate of her late husband. He exercised powers conferred on him by law. He G acted responsibly. There is no onus on him to consult anyone as to the appointment of a responsible valuer. As Felton has no interest in the estate, it would have been highly irresponsible for the Master to have consulted him. Obviously the executor, Mutyasira, and the duly appointed valuer, Ferriera, would have had to consult Felton as to a convenient time for the valuation exercise to be carried out but that consultation would be as to the modalities H and not the principle.

Smith J

A In his founding affidavit, Felton took umbrage in the fact that he, as the remaining director and shareholder of the applicant, had not been consulted before Ferreira was appointed, and claimed that the Master's decision was clearly biased in favour of Cecilia. No grounds are given for the conclusion that the decision was biased. To accused the Master of acting without applying his mind to the facts of the matter and of bias in the exercise of his functions B are very serious charges. If they were substantiated they would justify his removal from office. Felton gives no basis for the allegations. They are based on the false premise that the Master was obliged to consult him before deciding to appoint a valuator. Had the Master decided to consult Felton before acting on Cecilia's request he could then have been charged with acting improperly. Felton then went on to allege that the appointment of Ferreira C might well have been suggested by Cecilia. He gives no reason for that allegation. The Master, in his report, states that Ferreira is his nominee, not Cecilia's. In his answering affidavit Felton then switches his attack to allege that Ferreira is not an appropriate person to be appointed because he is not suitably qualified. Again, no reasons are given for that assertion.

D In his answering affidavit, Felton also attacks Mutyasira, alleging either gross negligence on his part or that he is acting on the instructions of one of the beneficiaries of the estate to prejudice not only the other beneficiaries. but also the fiscus. These, too, are very serious allegations which are made without any foundation being laid to substantiate the charges.

E The founding affidavit in the chamber application for the postponement of the hearing of this application is deposed to by Mr *Magwaliba*, the legal practitioner for the applicant. He states that he is authorised by the company to swear to the affidavit. There is a supporting affidavit from Felton who says that he is a director of the applicant and authorised to swear to the affidavit on its behalf; that he authorised Mr *Magwaliba* to swear to the founding affidavit.

F As the Deceased owned half the shares in the applicant and since Mutyasira, as executor of the Deceased's estate, is entitled to exercise the voting rights conferred by those shares, one wonders how the company authorised Mr *Magwaliba* to swear to the founding affidavit. Mutyasira has opposed the chamber application so he is hardly likely to have agreed to the filing of the application by the applicant.

G In his founding affidavit, Mr *Magwaliba* made the following comments. The family of the Deceased and Felton have agreed on a peaceful resolution of the outstanding matters in principle. They have agreed that Mutyasira steps down as executor or is removed by the court; that the Deceased's son inherits his father's shares in the applicant and is appointed a director; and that Cecilia H inherits the Deceased's shares in other companies and all other movable and

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Smith J

immovable property. The Master's response is that any such agreement is not A binding at law. The Deceased left several children, some born out of wedlock, who are entitled to inherit something.

Distribution of the estate must be made in terms of the Deceased Estates Succession Act [*Chapter 6:02*]. The agreement between the parties prejudices the other children.

There is nothing in the papers which justifies the claims that "maladies" B (as claimed by *Magwaliba*) have been found which necessitate the removal of Mutyasira as executor. In fact, it seems that the opposite might well be the case. Mutyasira wishes to administer and distribute the estate in accordance with the law and Felton does not want him to do so. Mutyasira has been appointed executor by the Master. He cannot be removed from office merely because certain parties want him removed. He can only be removed for good C cause.

The attitude of the Master, as shown in his report, is fully justified. It is surprising that the legal practitioner allowed himself to be made a party to this application. Where the Master has, or appears to have, acted improperly, then clearly a legal practitioner is required to bring the matter before the court. D However, before doing so the legal practitioner must be satisfied that there is some evidence to substantiate the claim. In *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (H) at 303A-B Gillespie J said:

> "It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. E Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief that he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency". F

Likewise, where a legal practitioner associates himself with an application which impugns the integrity of the Master, or any other officer of the court, he must put forward valid reasons, supported by credible evidence, to substantiate the allegations made. A legal practitioner is expected to act responsibly, especially where allegations of impropriety on the part of another officer of the court are made. G

Since the application has clearly been made by Felton to further his own interests, and not those of the applicant, it is only right that he must be liable for the costs and not the company. I regard this application as being vexatious and therefore the costs must be paid on the higher scale. H

Smith J

A The application and the chamber application are dismissed. The costs of the applications must be paid by Felton Chibanguza and his legal practitioner on the legal practitioner and client scale, their liability being joint and several, the one paying, the other to be discharged.

B *Magwaliba, Matetu and Kurira*, legal practitioners for the applicant *C Mpamwe & Associates*, legal practitioners for the first respondent

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NUNES v NUNES 2003 (1) ZLR 14 (H)

Citation	2003 (1) ZLR 14 (H)
Case No	Judgment No. HH-220-02
Court	High Court, Harare
Judge	Hungwe J

Heard 20 March 2002; 8 January 2003

Judgment 8 January 2003

Counsel *T Masendeke*, for the plaintiff

Case Type Unopposed divorce action

Annotations No case annotations to date

Flynote

Family law — *husband and wife — divorce — domicile— husband alleging* C *domicile in another country — how domicile established*

Headnote

The parties were born, raised and married in Zimbabwe, but had moved to Botswana some 17 years before the wife instituted an action in Zimbabwe for divorce. After initially indicating that he did not oppose the action, the husband changed his mind. He said that he himself was instituting an D action in Botswana and averred that he was no longer domiciled in Zimbabwe.

Held, that in order to change domicile, there must be both an intention to reside indefinitely in a new country *animus manendi* and residence in that country. A person alleging a particular domicile of origin must make E out a *prima facie* case and he discharges the burden of proof if he establishes facts tending to prove rather than to disprove his allegation. The facts averred by the husband showed that he had obtained a new domicile of choice, and the court thus had no jurisdiction.

Cases cited F

Bowie v Liverpool Royal Infirmary [1930] AC 588

In re *Field (3)* [1966] 2 WLR 717

Hopkins v Hopkins [1950] 2 All ER 1035 (PDA)

Case information

T Masendeke, for the plaintiff G

Judgment

Hungwe J: The plaintiff sued her husband for divorce in August 2001. In her declaration, she gave their address as 44 Creswick Road, Hillside, Harare. She averred that the defendant is domiciled in Zimbabwe and considers Zimbabwe as his permanent home.

The summons was served on the defendant personally at the Deputy Sheriff's H

Hungwe J

A office on 23 August 2001. He then deposed to an affidavit of waiver the following day in which he indicated that he did not oppose the grant of the decree of divorce sought by the plaintiff. It was on that basis that the plaintiff applied for the matter to be set down on the unopposed roll.

Before the matter was heard on the unopposed roll, the defendant suffered a change of heart. He filed an affidavit withdrawing his affidavit of waiver. In B that affidavit, filed on 7 September 2001, the defendant states that by the time the present proceedings were filed, he had already commenced similar proceedings in the High Court of Botswana seeking the same relief; the plaintiff had taken advantage of the emotional stress he was going through as a result of his mother's illness

and his daughter's elopement, to persuade him C to agree to her commencing these proceedings on an uncontested basis. She also hoped to avoid scandal back in Botswana. The allegation of scandal arises from the facts set out in the particulars of claim attached to the summons issued out by the Botswana High Court in which it is revealed that she ran away with a man with whom she is now living. Most importantly, he avers that neither he or she is domiciled in Zimbabwe as they have lived in Botswana for 17 years. D They continue to live there. She is in the process of applying for citizenship.

In the face of this affidavit, the plaintiff changed legal practitioners. Her current practitioners must have missed the importance of the withdrawal of the affidavit of waiver because they persisted with the action on an uncontested basis.

E The affidavit raises the question of jurisdiction. This court cannot proceed to hear a matter in which it has no jurisdiction. The defendant has averred that they both reside in Gaborone, Botswana. They have been so residing for the past 17 years. Having been born in Zimbabwe, the parties' domicile of origin would naturally be Zimbabwe. The marriage having been celebrated at Bulawayo in 1976, the court could assume jurisdiction on the basis of *lex loci* F *celebrationis*. But, having finally moved home and established themselves in Gaborone, it would appear that the parties have adopted a new domicile of choice.

In order to change domicile, there must be both an intention to reside indefinitely in a new country *animus manendi* and residence in that country:

G See *Bowie v Liverpool Royal Infirmary* [1930] AC 588; Re *Field (No. 3)* [1966] 2 WLR 717.

One factor without the other is insufficient. A person alleging a particular domicile of origin must make out a *prima facie* case and he discharges the burden of proof if he establishes facts tending to prove rather than to disprove H his allegation: see *Hopkins v Hopkins* [1950] 2 All ER 1035 (PDA). Where

Hungwe J

it is claimed that a domicile of origin has changed to one of choice, the onus A of proof is on the party claiming that such a change has taken place.

In this case the defendant has been living in Botswana for 17 years. That is *prima facie* evidence of domicile. The plaintiff is said to have applied for Botswana citizenship. In order to decide whether the court has jurisdiction in the matter, the court looks to the husband's domicile rather than that of his B wife. She follows his domicile. It is therefore his domicile that is decisive on the issue of jurisdiction. I am satisfied that the defendant has proved a *prima facie* case of change of domicile by both parties. That being so, it follows that this court has no jurisdiction to hear the divorce suit brought by plaintiff.

Her claim is therefore dismissed with costs. C

Honey & Blanckenberg, applicant's legal practitioners

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CHALLENGE AUTO (PVT) LTD & ORS v STANDARD CHARTERED BANK ZIMBABWE LTD 2003 (1) ZLR 17 (H)

Citation 2003 (1) ZLR 17 (H)

Case No	Judgment No. HH-221-02
Court	High Court, Harare
Judge	Ndou J
Heard	25 July 2002; 8 January 2003
Judgment	8 January 2003
Counsel	*A A Dehwe*, for the applicants *L Uriri*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

C **Practice and procedure** — *default judgment — rescission — factors to be taken into account — default blamed on applicant's legal practitioners — need for affidavit from the practitioners accepting blame*

Headnote

The applicants sought rescission of a default judgment given against them after they were barred for failing to file a plea. They blamed their former D legal practitioners for the default, but did not explain how the practitioners were to blame and did not file an affidavit from them. The application for rescission was filed more than two and a half months after the applicants learned about the judgment, and they had made a part payment in satisfaction of the judgment.

E *Held*, that it was necessary for the applicants to file an affidavit from their former legal practitioners accepting blame for the default, because they blamed the practitioners for their dilatoriness.

Held, further, that the factors which the court takes into account in applications for condonation for non-compliance with the rules are: the degree of non-compliance and the explanation therefor; the prospects of success F on the merits; the importance of the case; the convenience of the court; and the avoidance of unnecessary delay in the administration of justice.

Held, further, that apart from their attempt to blame their former legal practitioners, the applicants had advanced no facts justifying their dilatoriness, and even on the merits they had no prospects of success. They had not shown good cause for the court to exercise its discretion in G their favour to condone the late filing of their application.

Cases cited

Bishi v Secretary for Education 1989 (2) ZLR 240 (H)

Cobra & The Wildcat (Pvt) Ltd v Tundu Distributors (Pvt) Ltd 1990 (1) ZLR 133 (H) H

Ndou J

Independence Mining (Pvt) Ltd v Soko S-188-93 A

Loomcraft Fabrics CC v Nedbank Ltd & Anor 1996 (1) SA 812 (A)

Saitis, V & Co (Pvt) Ltd v Fenlake (Pvt) Ltd 2002 (1) ZLR 378 (H), [2002] 4 All SA 50 (ZH)

Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S)

Case information

A A Dehwe, for the applicants

L Uriri, for the respondent

Judgment

Ndou J: The respondent, which I shall refer to as the Standard Chartered Bank, sued the applicants *ex contractu*.

The applicants, who were the defendants, entered an appearance to defend. On account of their dilatoriness, the applicants were barred from pleading and judgment was entered for the Standard Chartered Bank on 19 April 2001. The applicants launched this application to set aside this judgment. In their founding affidavit the applicants admitted that they obtained knowledge of the entry of the judgment on 25 July 2001. For some reason, they only filed this application on 19 October 2001 (that is a delay of well in excess of one month). The application fell foul of Order 9 r 63(1) of this court's Rules, which reads:

> "A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment is to be set aside."

The applicants are out of time and they apply for their delay to be condoned so that the application may be entertained on its merits. The applicants are vague about the date when they consulted their legal practitioners about entry of the judgment against them, but at the latest this would have been on 21 August 2001 when the second applicant consulted Standard Chartered Bank's legal practitioners about the execution of the latter's judgment. In the founding affidavit, the applicants omitted to disclose the explanation which was tendered to the second applicant by their legal practitioner for the omission to file their defence to Standard Chartered Bank's action. The applicants seem to be reluctant to recite the exact manner of their erstwhile legal practitioner's failing. In the circumstances, the court has a difficulty in assessing the moral blameworthiness, if any, of their erstwhile legal practitioners. Furthermore, the applicants' erstwhile legal practitioners have to file an affidavit in support of the application accepting blame for the default judgment: see *Independence Mining (Pvt) Ltd v Soko* S-188-93 and *Cobra & The Wild Cat (Pvt) Ltd v Tundu Distributors (Pvt) Ltd* 1990 (1) ZLR 133 (H).

In casu, the affidavit is necessary because the applicants blame their erstwhile

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legal practitioners for their dilatoriness. In this regard, Mtambanengwe J in the *Cobra & The Wild Cat* case *supra*, stated on 135G-136B:

> "Where, as is implied in applicant's affidavits in this case, the allegation is made which amounts to charging a legal practitioner of gross dereliction of duty, and a flagrant violation of this court's rules it is my view that it is incumbent upon the applicant to afford the legal practitioner involved an opportunity to condemn himself, if that be the case, from his own mouth; he should be asked to swear an affidavit as to the facts for which he is being blamed. Failure to do so on the part of the applicant, particularly after his attention has been drawn to the need to do so, as in this case, must inevitably lead the court to draw the necessary inference that the applicant is not being truthful … It was for the applicant to put facts before this court revealing the true position. The applicant has failed to do so …"

I agree with the observations of the learned judge. I appreciate what McNally J stated in *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 213A-B:

> "One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence."

At 211E-F, the learned judge had earlier on stated as follows:

> "While courts are inclined to frown upon plaintiffs who 'snatch at their judgments' the impression must not be gained that the Rules may be flouted with impunity and that as long as you are only a day or two late rescission will be granted on request. A reason for the delay must be given and it must be an acceptable reason … But one who puts forward a 'reason' which is an insult to the intelligence of the court may have more difficulty in satisfying the court of his good faith."

See also *V Saitis & Co (Pvt) Ltd v Fenlake (Pvt) Ltd* 2002 (1) ZLR 378 (H); [2002] 4 All SA 50 (ZH).

The factors which the court takes into account in application for condonation for non-compliance with the Rules were set out in *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H) at 243B-C. These are:

(a) the degree of non-compliance with the rules; G

(b) the explanation therefor;

(c) prospects of success on the merits;

(d) the importance of the case;

(e) the convenience of the court; and H

(f) the avoidance of unnecessary delay in the administration of justice.

2003 (1) ZLR p20

Ndou J

In casu, the applicants, as pointed out earlier, had knowledge of the default A judgment on 25 July 2001. They did not act until 19 October 2001. Besides an attempt to blame their erstwhile legal practitioners, there are no other facts justifying their tardiness or dilatoriness. There is no affidavit from their erstwhile legal practitioners on this issue. Even on the merits, the applicants do not have any prospects of success. It seems to me that this application was B merely launched to buy time. Even after they became aware of entry of the default judgment, the applicants went further and made part payment of $1 200 000. It is in dispute in this matter that Standard Chartered Bank paid the irrevocable letter of undertaking in breach of the terms of the banking facility. The applicants have, however, sought to rebut the Bank's case that there was no incompetence or negligence or impropriety in its handling of the C settlement of the irrevocable letter of undertaking in their founding affidavit. For the essential nature of irrevocable documentary credits, see *Loomcraft Fabrics CC v Nedbank Ltd & Anor* 1996 (1) SA 812 (A). In light of the partpayment after the judgment was entered and the fact that such part-payment was made without any reservation, such payment clearly was made towards reduction of the judgment debt. D

This application is devoid of merit and does not meet the factors set out in the *Bishi* case *supra*. Bearing in mind the convenience of the court, the need to bring finality to litigation, the unreasonableness of the explanation for the delay and the lack of *bona fides* on the prospects of success on the merits, I find that this application has no merit. The applicants have not shown good E cause for this court to exercise its discretion in their favour to condone the late filing of the application for rescission of the judgment of this court entered on 19 April 2001. I, accordingly, dismiss the application with costs.

Mapfumo, Debwe & Partners, applicants' legal practitioners F

Honey & Blanckenberg, respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/S v MANYANGE 2003 (1) ZLR 21 (H)

S v MANYANGE 2003 (1) ZLR 21 (H)

2003 (1) ZLR p21

Citation	2003 (1) ZLR 21 (H)
Case No	Judgment No. HH-1-03
Court	High Court, Harare
Judge	Makarau J

Heard 16 December 2002; 8 January 2003

Judgment 8 January 2003

Counsel *L M Kabote*, for the applicant
N Mushangwe, for the respondent

Case Type Bail application

Annotations No case annotations to date

Flynote

C **Criminal procedure** — *bail — pending appeal — factors to be considered by court — onus on applicant to show positive reasons for grant of bail — relevance of applicant's prospects of success on appeal*

Headnote

In an application for bail pending appeal, as distinct from bail pending trial, the presumption of innocence is inoperative, and for his application to D succeed an applicant must show that there are positive reasons why bail should be granted. It is not enough for the applicant to show that he has reasonable prospects of success on appeal; he must go further and establish that there are positive grounds for granting him bail pending appeal and that the granting of bail will not endanger the interests of justice. The onus is on him to tip the balance in his favour.

E The applicant had been convicted by a magistrate of theft of a motor vehicle and sentenced to an effective five years' imprisonment. He noted an appeal against conviction and sentence. Nine months later he applied for bail pending appeal, contending that his appeal had good prospects of success. Counsel for the State conceded that a different court might have F come to a different verdict, despite evidence showing that the applicant had run away from the police to avoid detection and arrest.

Held that it was not enough for the applicant simply to point to some inadequacies in the State case; he had to show that, in addition to his prospects of success on appeal, the interests of justice would not be endangered if he was granted bail.

G *Held*, further, that in view of his attempt to escape arrest and the prison term imposed on him, the onus was on the applicant to show that his release on bail would not result in him absconding, thereby prejudicing the interests of justice. He had failed to discharge this onus.

Makarau J

Cases cited A

R v Mthembu 1961 (3) SA 468 (D)

S v Tengende & Ors 1981 ZLR 445 (S)

S v Williams 1980 ZLR 466 (A)

Case information

L M Kabote, for the applicant B

N Mushangwe, for the respondent

Judgment

Makarau J: In April 2001, the applicant was convicted of one count of theft of a motor vehicle by a Harare magistrates court. He was sentenced to seven years' imprisonment, two of which were

conditionally suspended. The C applicant noted an appeal to this court against both conviction and sentence. Pending determination of the appeal, he applies for bail.

In his application for bail, the applicant contends that his appeal against both sentence and conviction has good prospects of success. In support of this contention, he submits that the State failed to prove that the applicant was D properly identified by one of the witnesses. He further submits that the identity testimony of this witness is unreliable. The applicant further attacks the testimony of the other witnesses and reaches the conclusion that the charges against him were trumped up by the police.

The respondent concedes that a different court, furnished with the same facts, might arrive at a different verdict. In making this concession, the respondent E submits that the trial magistrate erred in relying on the testimony of the arresting detail, which evidence amounted to a confession on the part of the applicant. In view of the fact that the applicant was not properly warned and cautioned before the confession, the respondent submits that the trial court should not have admitted this evidence. On the basis of the foregoing, the respondent does not oppose the applicant's application for bail. F

It therefore appears to me that the applicant's application is based solely on the ground that he has an arguable case on appeal.

There is a clear distinction in our law between the principles governing the granting of an application for bail pending trial and one for bail pending appeal. In the former, the presumption of innocence operates in favour of the G granting of the application unless there are positive reasons for refusal. In an application for bail pending appeal on the other hand, the presumption of innocence is inoperative, as the applicant is a convicted and sentenced offender. For his application to succeed, such an applicant must show in his application that there are positive reasons why bail should be granted. In the H

Makarau J

A absence of positive grounds, bail should be denied: see *S v Tengende & Ors* 1981 ZLR 445 (S)

It is trite that bail is a matter for the discretion of the court. In exercising its discretion the court considering an application for bail pending appeal must be satisfied that there are reasonable prospects of success on appeal and that the granting of bail will not endanger the interests of justice. This has been the B approach of this and the South African courts in such matters: see *R v Mthembu* 1961 (3) SA 468 (D); and *S v Williams* 1980 ZLR 466 (A)

It thus appears to me that the consideration of such an application cannot rest on the consideration of whether there is a reasonable prospect of success on appeal alone. In *S v Tengende & Ors (supra*), it was held that the mere fact that C there are reasonable prospects of success on appeal alone, or that the appellant has a reasonably arguable case on appeal, does not entitle an applicant to bail. In this regard, Baron JA rejected the submission by the applicant's legal practitioner that because the applicant had been granted leave to appeal, (which meant that he had a reasonably arguable case), there was no reason to deny him bail. In rejecting the submission, he had this to say at p 448 G-H:

> D "There is, I think, force in this submission in so far as it relates to the narrow question of the prospects of success. But I do not approach the matter on this basis alone; I approach it on the basis I have already indicated, namely, whether, taking into account all the factors relevant to the question of bail pending appeal, the applicants have shown that the court's discretion should be exercised in their favour."

E It further appears to me from the authorities that the applicant must go further than showing that he has reasonable prospects of success on appeal and establish that there are positive grounds for granting him bail pending appeal and that the granting of bail will not endanger the interests of justice. This is so because the consideration of bail is in essence a balancing of two F conflicting interests. These are the liberty of the applicant on one hand and the proper administration of justice on the other. Where an accused has been convicted and sentenced, he is not as of right entitled to his liberty. He must prove his entitlement to it, taking into account the interests of justice and the integrity of the justice delivery system. The onus is on him to tip the balance in his favour.

G The above represents the approach that these courts have followed in considering bail pending appeal and I have no reason for departing from that approach.

In the application before me, the applicant has contended that he has good prospects of success on appeal. In so doing, he has attacked the individual testimonies given by the witnesses and sought to show that such testimony was H unreliable or inadequate to secure a conviction.

Makarau J

I have given the matter my most anxious consideration. In my view, it is not A adequate for the applicant to simply show some inadequacies in the State case and argue that because of these, he is entitled to bail as he has a reasonable prospect of success on appeal. That was the submission that was rejected in *S v Tengende & Ors (supra*). The applicant must show that in addition to his prospects of success on appeal, the interests of justice will not be endangered if he is granted bail. B

The applicant was convicted of one count of car theft. He was acquitted on two other charges. At the time of his arrest, he had run away from his pursuers, who included the police. He does not in his evidence dispute that he scaled a prefabricated wall to get into a residential property whereat he was subsequently apprehended. The trial court was not impressed by the accused's explanation C of why he had to scale the walls before he was apprehended. In other words, the trial court made a finding as to the credibility of the applicant in this regard. It did not find him credible. I have not been given any reason why I should not be guided by the trial magistrate's findings on the credibility of the witnesses who appeared before him. The applicant ran away from his pursuers before apprehension to avoid detection and arrest. D

In view of the above evidence against the applicant and the fact that the applicant has been sentenced to a fairly lengthy prison term of which he has already served nine months, a factor that may induce him to abscond, the onus is clearly on the applicant to show that his release on bail will not result in him absconding and thereby prejudice the interests of justice. E

The concession made by the respondent does not, in my view, take into account the above factors. While it may be correct that the applicant may have an arguable case on appeal, that is not the only factor that I should take into account in determining an application of this nature.

In this application, it is pertinent to note that the application for bail is being F made nine months after conviction and sentence. The record of proceedings in the trial court had been transcribed for the purposes of this bail application. In the application, the applicant has not indicated what efforts he has made to have the appeal set down for hearing now that the record is available. It has not been indicated to me how long it will take for the appeal to be determined.

Taking all the above factors into account, I am of the view that the applicant G has failed to discharge the onus on him to satisfy me that there are positive grounds why he should be allowed out on bail pending the determination of his appeal.

Accordingly, the application for bail is dismissed.

Makarau J

A *L M Kabote & Co,* applicant's legal practitioners

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

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S v MICKLETHWAIT 2003 (1) ZLR 26 (H)

Citation	2003 (1) ZLR 26 (H)
Case No	Judgment No. HH-03-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	17 December 2002; 8 January 2003
Judgment	8 January 2003
Counsel	Miss *Travlos,* for the appellant Mrs *Ziyambi,* for respondent
Case Type	Bail appeal
Annotations	Link to case annotations

Flynote

Criminal procedure — *bail — condition — condition amounting to eviction* C *of person from his land — invalidity of condition where person charged with failing to vacate his land in contravention of s 9(1)(b) of Land Acquisition Act [Chapter 20:10]*

Headnote

The appellant faced a charge of contravening s 9(1)(b) of the Land Acquisition Act [*Chapter 20:10*], the gist of the charge being that he had failed to D vacate his farm three months after being served with an acquisition order under s 8 of the Act. He was granted bail on condition that he vacated his farm and did not visit it except under police escort. He appealed to the High Court against this condition on the ground, *inter alia,* that it amounted to an eviction which could not be ordered except after conviction in terms of s 9(3) of the Act. E

Held that the scheme under the Land Acquisition Act is that an owner or occupier of land which is under compulsory acquisition can be evicted only if (a) the Administrative Court confirms the acquisition of his property or (b) a court issues an order of eviction upon the person's conviction on a charge of contravening s 9(1)(b) of the Act. F

Held, further, that a condition of bail which removes a person from his property amounts to an eviction of the person concerned. A judicial officer is not empowered to evict an owner or occupier of any land the subject of an acquisition order under the Land Acquisition Act, or to do anything that amounts to an eviction, unless and until the owner or occupier has been convicted of an offence under s 9(1)(b) proviso (ii) of G the Act and the court, as it is obliged to do, has issued an order of eviction against him.

Chinhengo J

Cases cited A

S v Croshaw & Ors CRB 2412/02, 2406/02 & 2434/02

S v Hubert & Anor HB-111-02

S v Prior HH-163-02

Legislation considered B

Land Acquisition Act [*Chapter 20:10*], ss 8 & 9

Case information

Miss *Travlos,* for the appellant

Mrs *Ziyambi,* for respondent

Judgment

C **Chinhengo J:** The appellant is a farmer in Nyanga District. He was served with an order in terms of s 8 of the Land Acquisition Act [*Chapter 20:10*] (hereinafter called "the section 8 order") sometime in 2000. According to his warned and cautioned statement which he gave to the police on 28 August, 2002, the section 8 order had two flaws. The section 8 order related not to the D appellant, but to an entity called Astro African Enterprise Company, which was the title holder of the farm from 1910. The section 8 order also referred to a piece of land far larger than what the appellant owns. The appellant stated that after receiving the section 8 order in 2000, nothing was done about it in that year or the following year. It was only in the year 2002 that he was charged E with the offence of contravening proviso (ii) to s (9)(1)(b) of the Land Acquisition Act [*Chapter 20:10*] (hereinafter called "the Act"). The charge reads:

> "Contravening section 9 (1)(b) of the Land Acquisition Amendment Act 6/ 2000 as read with section 9 (2) of the Land Acquisition Amendment Act 6/2000 in that on 10th day of August 2002 and at Rodel Ranch, Juliasdale, F Nyanga, Anthony Bertram Micklethwait failed to comply with the conditions of an eviction order issued to him by the State, that is to say, failed to vacate his acquired farm 'Rodel Ranch' after three months."

The appellant applied for bail to the magistrates court at Mutare and he was admitted to bail on payment of $5 000. He was, in addition, ordered to vacate his farm and not to visit it except under police escort. He later applied to have G this condition altered and it was altered to provide that the appellant may visit the farm only with a police escort or with the approval of the "Lands Committee". It is against the decision of the magistrate imposing this amended condition that the appellant appealed to this court. He sought to have this condition set aside and replaced with a condition to the effect that he may H remain on his farm until he is properly evicted following a conviction in terms

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of s 9(2) of the Act or an order by the Administrative Court confirming the A compulsory acquisition of his farm.

The appellant's contentions are that:

a) the condition imposed by the magistrates court amounts to an eviction and that the magistrates court is not empowered to make such order prior to the appellant's trial and conviction; B

b) the imposition of what amounts to an eviction order at remand stage offends against the presumption of innocence, hence the Act empowers a court to issue an order of eviction only after conviction;

c) the condition, amounting as it does to an eviction order, offends against all notions of justice and fair play as it requires the appellant to cease all C agricultural actions and to vacate his home and place of employment before he has been found guilty of any criminal conduct;

d) the condition imposed is unduly onerous;

e) he has not been treated equally before the law because other persons who are alleged to have committed the same offence have been granted bail without being ordered to vacate their farms. D

The simple question to be answered in this appeal is whether a court may impose a condition that a person charged with contravening proviso (ii) to s 9(1)(b) of the Act may not remain at his property before he has been tried and convicted. Three decisions of this Court are relevant to a determination of the question before me. The first case is a short judgment by Kamocha J, E handed down on 10 September 2002 in the matter of *Keith Croshaw* CRB 2412/02, *Rita Lewis* CRB 2406/02 and *Derrick Scutt* CRB 2434/02. The three appellants had been charged with contravening proviso (ii) to s 9(1)(b) of the Act and, on being admitted to bail, a condition that they be evicted from their farms was imposed. In setting aside that condition Kamocha J curtly stated at p 1-2 of his judgment the following: F

"Quite clearly the magistrate did not have power in law to impose such a condition which can only be imposed on people who have been convicted. The appellants have not yet been convicted.

The State had argued that a magistrate had a discretion to impose any condition in a bail application. I did not understand the State counsel to G suggest that the magistrate has a licence to impose conditions which are contrary to law. The magistrate cannot impose conditions which should only be imposed to *(sic)* convicted persons.

I am satisfied that the magistrates were wrong in law to impose such a condition. H

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Chinhengo J

A The appeal therefore succeeds. It is ordered that the offending condition be and is hereby revoked…"

The second decision is that in *Peter John Rawson Hubert and William Watson Mackinney v The State* HB 111/2002 in which, on admission of the appellants to bail, the following condition was imposed:

B "Accused ordered (*sic*) not to go back to the farm unless with prior arrangements with the police."

Chiweshe J found that the condition was proper. At p 2 of his judgment he reasoned thus:

"I do not understand the magistrate by imposing that condition to have evicted the appellant from his farm. A prohibition from returning to the C farm pending trial is not in my view an eviction. The appellant cannot go back to the farm without prior arrangements with the police. The condition applies to the appellant personally. It does not apply to those who may claim lawful presence on the farm through the appellant, such as members of his family and his employees. He has not been ordered to remove his farm implements, produce or other belongings. The criticism levelled D against the magistrate is therefore unwarranted."

The learned judge continued at p 3 of his judgment and said that:

"*Prima facie* the appellants' continued occupation of their respective properties is illegal, rendering them liable to criminal sanctions if convicted. That there is a *prima facie* case against the appellants is a fact that has not been disputed either in the court *a quo* or in this court. What E appellants allege is the fact that they have a defence to the charge arising from the non-compliance by the State with the procedures laid down in the Act. The correct procedure for the appellants would have been either to challenge the validity of the section 8 orders served on them or to challenge the right of the State to place them on remand."

The learned judge analysed the nature of the charges against the appellants in F these words:

"What is the nature of the charges that the appellants face? Charges in terms of section 8 (1)(b) of the Act arise from the concept that an accused person has unlawfully remained in occupation of land in respect of which he is under orders to vacate. In that regard he is deemed to be interfering with the rights of the Acquiring Authority. It appears to me that where G there is the existence of a *prima facie* case against the accused person, and where bail is granted, that a prohibition of the nature imposed by the magistrate would be proper and in the interests of justice. *Prima facie* the accused person's continued occupation of the property concerned constitutes an offence.

H The legislature intended that persons served with section 8 orders vacate

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2003 (1) ZLR p30

Chinhengo J

the properties concerned by the appointed date. That condition imposed A by the magistrate is in line with the spirit and letter of the Act. The condition is of course temporary and subject to the outcome of the trial. It does not amount to an eviction."

Chiweshe J distinguished the case before him from Kamocha J's decision in the cases of *Croshaw, Lewis and Scott*, *supra*. He said at p 2-3 of his judgment that: B

"My attention has been drawn to the judgment of my brother Kamocha J in the matter of *Keith Croshaw CRB 2412/02, Rita Lewis CRB 2406/02 and Derick Scutt CRB 2432/02*. Those cases are clearly distinguishable from the present cases. I have not had sight of the records of proceedings in the court *a quo* in those cases. According to the judgment the appellants C 'were granted bail and attached to that was a condition that the appellants should be evicted from their properties. They were aggrieved by that condition and appealed to this court. Quite clearly the magistrates did not have the power in law to impose such conditions, which can only be imposed on people who have been convicted. The appellants have not yet been convicted.

Thus my brother Kamocha J was presented with cases in which the D magistrates had ordered eviction before conviction. That such an order would be contrary to the provisions of the Act cannot be in dispute. In the present case however the magistrate did not order an eviction but a prohibition from returning to the properties concerned without police escort. The distinction is obvious." E

The third case to come before this court was that of *Leita Mary Prior v The State* HH-163-02. In that case a magistrate had imposed, as condition (b) of the appellant's admission to bail, that:

> "She does not return to her farm or homestead unless in the company of a police officer and for the purpose of removing her personal belongings."

Smith J set aside that condition. He found it to be unreasonable. He considered F and accepted the argument by Mr *Samkange* that that condition was tantamount to convicting the appellant when she was pleading not guilty to the charge of contravening s 9(1)(b) of the Act. He also accepted that the condition was tantamount to sentencing the appellant before conviction. He rejected Mrs *Ziyambi's* argument that the condition was only a temporary measure pending G the determination of the matter and that it did not infringe on the presumption of innocence. He also rejected Mrs *Ziyambi's* contentions that, in the past, conditions have been imposed where an accused is asked to move off his place of residence pending the outcome of the matter for various reasons and that, because the farm forms the basis of the matter and there were settlers on the farm, the condition was imposed to preserve peace between the settlers and the H

Chinhengo J

A appellant. The learned judge found that the condition was unreasonable because it did not oblige the police to accompany the appellant to her farm if she wished to return to it for any reason. Because the police were not so obliged she was potentially placed in a situation that she could not exercise a right granted to her by the order of the court. He found the condition to be unreasonable for various other reasons detailed in the judgment. At p 4 of his B judgment Smith J made what I consider to be a seminal observation. He said:

> "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 C right to occupy the property and to live in the house. Her right of ownership is being 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 D that the owner can be evicted from his land. Condition (b), in effect, amounts to an eviction of the appellant from her land before she is convicted of any offence. That cannot be lawful."

Smith J, in my view, came to the same conclusion as Kamocha J. I agree with their reasoning and conclusions. It seems to me that in the *Peter John Rawson Hubert* case, *supra,* Chiweshe J was preoccupied with semantics where he E sought to distinguish the case before him from that decided by Kamocha J on the basis that in the one before him the appellants had been "ordered not to go back to their farms unless with prior arrangements with the police" and in the one before Kamocha J the "appellants should be evicted from their properties". It does not appear to me that the condition was any different in its effect in both F cases. In the case before Kamocha J, the magistrates could not have ordered the eviction of the appellants because, as recognised by Chiweshe J at p 2 of his judgment, eviction usually involves the removal of the owner or occupier and all persons claiming the right of occupation through him together with their belongings. It is clear to me that in both cases Kamocha and Chiweshe JJ were dealing with a prohibition against the appellants from returning to G their homes, which condition was found to be both unreasonable and unlawful by Kamocha and Smith JJ becase they considered that it was tantamount to an eviction. Even Chiweshe JJ accepted that an order which amounts to an eviction would be contrary to the provisions of the Act — see his remarks at p 3 of his judgment. In my view therefore, had Chiweshe J not made a H distinction between an eviction order proper and a prohibition from returning

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Chinhengo J

to the farm, which distinction as I have said, in my view, is more of form than A substance, he would no doubt have arrived at the same conclusion as had Kamocha J and as did Smith J later. I would therefore respectfully disagree with the conclusion reached by Chiweshe J.

It is important to note that s 8 (2)(b) of the Act authorises an acquiring authority to exercise any right of ownership over the land subject to a section B 8 order, including the right to survey, demarcate or allocate the land concerned, but without undue interference to the living quarters of

the owner or occupier of that land. Although subs (3) of s 8 of the Act provides that the effect of an order made in terms of subs (1) thereof in that the ownership of the land specified therein immediately vests in the acquiring authority, that is dependent on the section 8 order having been validly made. Thus Smith J was correct C when he said that in the case before him the appellant remained the owner of the land in question, that because she was contesting the validity of the section 8 order. Similarly, in this case the appellant is contesting the validity of the section 8 order that was served on him. Until the court determines that issue the provisions of s 8 (3) of the Act cannot apply.

At p 1-3 of his judgment in *Peter John Rawson Hubert, supra* Chiweshe J D stated that the appellants before him were charged with the contravention of s 8(1)(b) of the Act "it being alleged that they unlawfully interfered with the rights of the Acquiring Authority by remaining in occupation of their farms having been served with orders in terms of s 8 of that Act to vacate their respective farms". At p 3 his Lordship analysed the nature of the charge which E the appellants were facing as I have already shown.

It seems to me that there was an erroneous reference, perhaps a typographical error, in the reference in Chiweshe J's judgment to s 8(1)(b) of the Act. That section does not exist in the Act. The section of the Act which makes it an offence to interfere with the acquiring authority's exercise of rights of F ownership conferred by s 8(2) of the Act is s 8(7). If that was the section with which Chiweshe J was concerned, then his conclusion may have been correct : a person who interferes with the exercise by the acquiring authority of the rights conferred on it by s 8(2) may conceivably be excluded from the farm so as to enable the acquiring authority to exercise those rights. The reason for his exclusion will be the fact of interference and not the fact that he *prima* G *facie* has committed an offence. If there was any basis for distinguishing the two cases, the one by Chiweshe J from the one by Kamocha J, that distinction could only have been on this score.

If Chiweshe J was dealing with a contravention of s 9(1)(b) as read with s 9(2) of the Act, which Kamocha and Smith J were concerned with, then I must confess that I find it difficult to appreciate the point of distinction. H

2003 (1) ZLR p33

Chinhengo J

A Section 9(1)(b) is not very elegantly drafted. It provides that the service upon the owner or occupier of a section 8 order "shall constitute notice in writing" to him that he should cease to occupy or use the land concerned and that if he fails to do so he shall commit an offence. It is not clear whether the making of the order constitutes notice that the owner or occupier is guilty of an offence if he fails to comply with the order or whether the creation of the offence is a B separate provision. That an offence is created by s 9(1)(b) only becomes apparent on a reading of s 9(2). Section 9 (b) of the Act creates two offences — the first being a failure or refusal to cease to occupy, hold or use the farm forty-five days after receiving a section 8 order. The second is a failure or refusal to cease to occupy the living quarters ninety days after receiving a C section 8 order. When a person is charged with contravening either s 9(1)(b) as read with s 9(2) or with contravening proviso (ii) to s 9(1)(b), he can only be evicted upon conviction and upon an order for his eviction being made. For clarity s 9(3) provides that:

> "A court which has convicted a person of an offence in terms of paragraph (b) of subsection (1) or proviso (ii) thereto… shall issue an order to evict D the person convicted from the land to which the offence relates."

I therefore agree with the conclusions reached by Kamocha J and Smith J in the cases which I have cited, that a judicial officer is not empowered to evict an owner or occupier of any land the subject of a section 8 order or to do anything that amounts to an eviction, unless and until the owner or occupier has been convicted of the offence charged and the court, as it is obliged to do, E has issued an order of eviction against him. It is clear therefore that, whilst the Legislature intended that a person served with a section 8 order should vacate the property on or before the appointed day, it also deliberately created offences for failing to do so and mandated the courts to determine the issue and, if the person is convicted, to order his eviction. If the Legislature had F intended that upon the expiration of the forty-five days in s 9(1)(b) or the ninety days in proviso (ii) to s 9(1)(b) a person should be evicted without a conviction, then it would have provided accordingly. In my view, the Legislature did not create an offence which would continue to be committed all the time that the person concerned remained on the farm after receiving a section 8 order. The offence of remaining on the farm is just one offence, regardless of G the fact that the person so charged remains on the

farm after being charged. As such, therefore, the contention that if the person returns to the farm pending trial he is committing or continuing to commit the offence is without substance. In its wisdom the Legislature determined that the offence is but one in respect of which a person may be charged, tried and convicted and that only H upon conviction should he be ordered to vacate the land or dwelling concerned.

Chinhengo J

In this case, the charge against the appellant is an allegation that he committed A the offence of contravening proviso (ii) to s 9(1)(b) by continuing to occupy his dwelling place ninety days after he received the section 8 order. Whether he committed that offence or not is a matter to be determined by a court, and until that happens the presumption of innocence operates in his favour. In my view a condition of bail which removes him from his property amounts to an B eviction of the person concerned. Such a condition is not only against the presumption of innocence but, it in effect, pre-empts the outcome of the criminal trial on the charge which the appellant faces. In that sense it amounts to an eviction which may be ordered only upon conviction. I do not think that it is necessary to deal with the other contentions advanced by the appellant. For the sake of clarity I need to emphasise that the scheme under the Act is that C an owner or occupier of land which is under compulsory acquisition can only be evicted if (a) the Administrative Court confirms the acquisition of his property or (b) a court issues an order of eviction upon the person's conviction on a charge of contravening s 9(1)(b) of the Act. Finally, I would recommend that those responsible for drafting charges of contravening s 9(1)(b) of the Act must exercise care that the charges are properly formulated. The charges D should make it clear which of the two offences in s 9(1)(b) as read with s 9(2) and in proviso (ii) to s 9(1)(b), the person is alleged to have contravened. The charge which the applicant faces seems to suggest that an eviction order has been issued by the State. That cannot be so as an eviction order can only be issued by a court after the conviction of the appellant.

The order which I make is the following: E

The condition imposed by the magistrate that the Appellant vacate Rodel Ranch and that he shall not visit Rodel Ranch save under police escort or with the approval of the Lands Committee be and is hereby set aside and that it be replaced by the condition that:

> "The applicant (appellant) shall reside on Rodel Ranch until the finalisation F of his case."

Henning Lock Donagher Winter, c/o Atherstone & Cook, appellant's legal practitioners

Office of the Attorney-General, for the respondent G

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A.L. GEORGE (PVT) LTD v MIN OF PUBLIC SERVICE, LABOUR & SOCIAL WELFARE & ORS 2003 (1) ZLR 35 (H)

Citation	2003 (1) ZLR 35 (H)
Case No	Judgment No. HH-08-03
Court	High Court, Harare
Judge	Chinhengo J

Heard 6 January 2003; 8 January 2003

Judgment 8 January 2003

Counsel *R.M. Passaportis,* for the applicant
N. Mutsonziwa, for the first respondent
C. Selemani, for the second to sixth respondents

Case Type Civil Application

Annotations No case annotations to date

Flynote

C **Employment** — *termination of by employer — whether Labour relations (Terminal Benefits and Entitlements of Agricultural Employees Affected by Compulsory Acquisition) Regulations, 2002 (SI 6/2002) applies where acquisition formalities have not been completed — what constitutes employer for the purposes of SI 6 of 2002 — whether tenant farmer* D *included — meaning of "belonging to" in s 3(1) of SI of 2002— whether seasonal workers covered by SI 6 of 2002.*

Headnote

A tenant farmer sought to terminate workers' employment under the Labour Relations (Retrenchment) Regulations, (SI 404 of l990) rather than the Labour Relations (Terminal Benefits and Entitlements of Agricultural E Employees Affected by Compulsory Acquisition) Regulations (SI 6 of 2002), holding that the latter regulations could not apply as the farm in question had yet to be formally acquired and that the regulations could not apply to tenant farmers, but only to owners of farms. It was further argued that seasonal workers are not entitled to any retrenchment F package under the regulations.

Held, that although the formalities for acquisition had not been completed, all interested parties accepted that the farm has been acquired and that the real reason for retrenchment. Hence SI 6 of 2002 applied.

Held, further, that in the phrase "any farm or part of a farm belonging to" in s 3(1) of SI 6 of 2002 the words "belonging to" must be accorded a G meaning extending beyond ownership to include the relationship of a thing to a person who may not be the owner but has possession, control or use of the thing. A leased farm thus "belongs" to a tenant farmer in this sense and the tenant farmer's labour relations are thus governed by SI 6 of 2002.

Chinhengo J

Held, further, that the definition of employee in s 2 of SI 6 of 2002 includes A seasonal workers, who are thus entitled to the retrenchment packages stipulated in those regulations

Cases cited

Badenhorst v Van Rensburg 1985 (2) SA 321 (T) B

Legislation considered

Labour Relations (Terminal Benefits and Entitlements of Agricultural Employees Affected by Compulsory Acquisition) Regulations, 2002 (SI 6 of 2002), ss 2 & 3(1) C

Case information

R.M. Passaportis, for the applicant

N. Mutsonziwa, for the first respondent

C. Selemani, for the second to sixth respondents

Judgment

Chinhengo J: This application arises from an allegation by the applicant D that it was forcibly removed from a farm, Chikwepa Farm, near Marondera, which the applicant leased from 1993. The owner of the farm is Forest Lodge Nursery (Pvt) Ltd (hereinafter called "Forest Lodge"). Forest Lodge owned two farms in the Marondera area, Chikwepa Farm aforesaid and Billabong Farm. E

It is common cause that Forest Lodge was served with notices issued in terms of ss 5 and 8 of the Land Acquisition Act [*Chapter 20:10*] (hereinafter called "the Act") in respect of Billabong Farm. After an application for the approval or confirmation of the compulsory acquisition of Billabong Farm was lodged with the Administrative Court in terms of s 7 of the Act, Forest Lodge, in addition to opposing the application, offered Chikwepa Farm in substitution F for or in lieu of the acquisition of Billabong Farm. This is permissible in terms of s 6A of the Act. The applicant and Forest Lodge both averred that the acquiring authority did not formally accept Chikwepa Farm in terms of s 6A(6) of the Act. Forest Lodge's position on this aspect of the matter is clearly spelt out in an affidavit by Andrew James Ker Thompson on its behalf where he averred in paragraphs 5, 6, 8, 9 and 10, that — G

> "5. After receiving the Section 7 Application, I approached the Area Lands Committee in Marondera. I offered Chikwepa Farm and in exchange wished to keep Billabong. I completed the relevant form, signed it on behalf of the Company and submitted it to the Committee. At that time I dealt with a Mr Mazaiwana. I was told that the Committee would consider my offer and get back to me. H

Chinhengo J

> 6. I A never heard from the Area lands Committee again concerning my offer described above. I did make several inquiries and I have been assured that Billabong Farm has been de-listed. However, I have never received any documentation to that effect and the de-listing has not appeared in the Government *Gazette.*
>
> 7. … B
>
> 8. Chikwepa Farm is un-listed. It has never received a Section 5 Notice. It remains the property of Forest Lodge Nursery (Pvt) Ltd.
>
> 9. Although the offer to relinquish Chikwepa Farm was made nearly a year ago, I am prepared to re-offer this farm on condition that I keep Billabong Farm. This is a decision which the Area Lands Committee and the Government authorities must make. C
>
> 10. I am advised that during these proceedings the allegation was made that Chikwepa Farm has been taken over by Government. This is incorrect. If Government had taken over the farm, I would have been advised and the formalities complied with. I repeat that acceptance of my written offer to relinquish Chikwepa Farm has never been communicated to me. Neither has Billabong Farm been de-listed D which is the other part of the equation."

The applicant on its part accepts that indeed Forest Lodge offered Chikwepa farm in substitution of Billabong Farm. It averred that two persons, namely a Mr Munzara and a Mr Musoni, have been allocated Chikwepa Farm and they have settled on it after it was subdivided into two portions. The applicant E alleged that Mr Munzara and Mr Musoni have been instrumental in inciting its farm workers, ten permanent employees and forty contract and seasonal workers, to disrupt its farming activities and to threaten its directors and members of their family. The applicant averred that in September and October 2002, the workers refused to do any work until they received their terminal packages in terms of the Labour Relations (Terminal Benefits and Entitlements F of Agricultural Employees Affected by Compulsory Acquisition) Regulations, 2002 (SI 6 of 2002) (hereinafter called "the Regulations"). It averred that during that period the workers would stay off work for a few days, then work, go off again for a few days and return to work. He said that on 19 November 2002 the situation further deteriorated. The workers barricaded the deponent's family in the farm homestead. They broke the security fence, lit fires by the G gate and beat drums for hours on end. They threw sticks and rocks on the roof of the homestead and threatened to commit other acts of violence if the applicant did not pay their terminal benefits. They threatened to take possession of tractors and other farm equipment together with cattle and sell them. The applicant averred that these disturbances were quelled by the police later in the H evening on that day, when the police persuaded the workers to leave.

Chinhengo J

The applicant further averred that as a result of these disturbances and threats A it decided to vacate Chikwepa Farm because it considered that it was no longer safe for the directors to stay on the farm. It averred that the directors cannot go back to the farm because the situation which exists on the farm is dangerous to them and to their families. The applicant averred that it was forced to move off the farm and that although it has never wanted to stop farming and to B terminate the workers' contracts of employment, it has been forced to do so because of the disruptions and threats. In essence the applicant averred that the farming operations have not stopped because Chikwepa Farm has been compulsorily acquired but because of the disruptions and the threats.

The purpose of this application in so far as the applicant was concerned was to seek the court's endorsement that the termination of its workers' employment C on Chikwepa Farm and the payment of their terminal benefits should be in accordance with the provisions of the Labour Relations (Retrenchment) Regulations, 1990 (SI 404 of 1990) (hereinafter called "the retrenchment regulations") and not in terms of the Regulations (SI 6 of 2002).

The applicant has two reasons for adopting this position. The first, as it must D be apparent, is that its proposal to lay off the workers has not been prompted by the compulsory acquisition of Chikwepa Farm as envisaged in the Regulations but by factors unconnected to the status of the farm in so far as its acquisition is concerned. Its second reason is that even, if it were conceded that Chikwepa Farm has been compulsorily acquired, the Regulations do not, and were never intended to apply to a lessee of a farm such as the applicant. E I will refer to a lessee of a farm as a "tenant farmer". The applicant contended that a proper reading of the Regulations shows that those Regulations were intended to apply only to the owner of the farm who is not only the target of the Regulations, but also the person from whom compensation payable in terms of ss 25 and 29C of the Act may be withheld until the workers on the farm concerned have been paid. The applicant is, in this application, concerned F only with the question whether the terminal benefits of its workers should, for the reasons advanced by him, be paid in terms of the Regulations or in terms of the retrenchment regulations. That is the straightforward issue for my determination.

The applicant has also sought interim orders to the effect that the seasonal G workers be declared to be disentitled to any "retrenchment package" and that the workers on Chikwepa Farm be interdicted from interfering with the removal from the farm of the applicant's movable assets, which it alleged are valued at $65 million, and further interdicted from threatening or harassing the deponent and certain members of his family and directors of the applicant. As a part of the final order sought, the applicant asked the court, in addition to H

Chinhengo J

A confirming the interim orders above, to declare that the Regulations do not apply to an employer who is not the owner of the farm on which the employees are employed.

The first respondent opposed the granting of the provisional order and so did the second to sixth respondents. The basis of their opposition is that the Regulations apply to the termination of the employment of the applicant's B employees. The first respondent dealt only with the applicability of the Regulations to the applicant and its workers. The first respondent argued that a tenant farmer should comply with the Regulations where he or it intends to lay off workers because the farm on which they are employed has been compulsorily acquired.

C The second to sixth respondents (who I shall refer to as "the workers" because they represented the workers in this application) averred that, to the best of their knowledge, Chikwepa Farm was compulsorily acquired in lieu of Billabong Farm and, as is common cause, Forest Lodge offered Chikwepa Farm in substitution of Billabong Farm. They averred that as a result of the offer of Chikwepa Farm, the acquiring authority demarcated and allocated D Chikwepa Farm to Mr Munzara and Mr Musoni. They attached as proof of the allocation two letters of offer of land on Chikwepa Farm written by the Minister of Lands, Agriculture and Rural Resettlement and addressed to Mr Munzara and Mr Musoni. In so far as the workers were concerned, Chikwepa Farm has been compulsorily acquired, two farmers have been settled on it and E their employer should pay them terminal benefits in terms of the Regulations.

It is unfortunate, and to the detriment of the applicant's case that the applicant did not cite the Minister of Lands, Agriculture and Rural Resettlement as a party to these proceedings. The failure to make the Minister a party to these proceedings resulted in it being impossible for me to become fully informed about the precise status of the farm. The evidence before me suggests that F

Chikwepa Farm has been acquired in terms of s 6A of the Act with the consent of the owner. The evidence also suggests that it is for that reason that the applicant decided to terminate its workers' contracts of employment. The background to the matter which I have outlined in some detail indicates that — G

a) when Billabong Farm was listed for compulsory acquisition and the necessary notices were served on the owner, the owner offered Chikwepa Farm in substitution of Billabong Farm;

b) the owner was advised that the acquiring authority was accepting his offer of Chikwepa Farm and that Billabong Farm would be de-listed, that is to say, it would be removed from the list of farms proposed for compulsory H acquisition;

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c) Chikwepa Farm was then divided into two farms which were allocated to A Messrs Munzara and Muzoni who have since taken occupation;

d) having become aware of these developments, the workers at Chikwepa Farm demanded from their employer the payment of the benefits to which they are entitled in terms of the Regulations;

e) it is the demand for the payment of the benefits by the workers which B prompted the intermittent "stay aways" and the alleged disruption of farming operations by the workers as well as the alleged harassment of the applicant's directors or management personnel;

f) it was only after these developments had taken place that the applicant decided that it should lay off its workers and cease farming operations and vacate Chikwepa Farm. C

In my view, it is quite clear that the real reason that the applicant decided to lay off his workers and pay them terminal benefits, albeit that he wants to pay them in terms of the retrenchment regulations, is that Chikwepa Farm has been acquired for resettlement purposes in terms of s 6A of the Act. Any other interpretation as to the causes of the termination of the workers' employment D would be puerile, far-fetched and not in accordance with the realities. The fact that the formalities for the de-listing of Billabong Farm and the acceptance of Chikwepa Farm for acquisition in lieu of Billabong Farm may not have been completed is irrelevant to this application. What is relevant in my view is the existence of an offer by Forest Lodge of Chikwepa Farm and the oral acceptance of that farm by the acquiring authority. There is some evidence that E the acquiring authority has accepted Chikwepa Farm and that it has acted on that acceptance. It has proceeded to allocate Chikwepa Farm to Messrs Munzara and Musoni. It has not taken any further steps to acquire Billabong Farm and has in fact assured the owner of Billabong Farm, as it emerges from paragraph 6 of applicant's affidavit, that Billabong Farm will be de-listed. I am F therefore quite satisfied that although the formalities for acquiring Chikwepa Farm may not have been completed, all the interested parties understand and accept that Chikwepa Farm has been acquired and that the real reason that the applicant wishes to lay off its workers is its appreciation that Chikwepa Farm has been compulsorily acquired for resettlement purposes. As such therefore I find that the Regulations apply to the termination of the contracts of G employment of the workers at Chikwepa Farm.

It seems to me that the applicant and, indeed, Forest Lodge doubt the *bona fides* of the acquiring authority about the verbal agreement reached in respect of Billabong and Chikwepa farms. The lack of mutual trust between the farmer and the Government has dogged the land acquisition exercise over the last few H

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A years and has resulted in some of the problems that have bedevilled the land redistribution exercise. That trust can exist only if the two parties act with forthrightness in the undertakings which they make.

I now proceed to deal with the applicant's second argument as to why the Regulations do not apply to it. The applicant's argument is contained in paras B 14:1 and 14:2 of its affidavit. Therein the applicant averred that —

> "14:1 I maintain that the Regulations under S.I. 6/02, S.I. 101/02 and S.I. 232/02 are unreasonable because they are vague. The definition of an "employer" includes the "manager, agent or representative" of the employer. This definition runs contrary to basic legal principles. A manager can never be an employer. This would lead to absurd C situations and results. Many farms may be owned

by one person, leased to another and operated under the direction of a third. Who is responsible for the payment of the retrenchment package? Clearly the owner would not be liable because he does not employ the persons concerned. The lessee would not be liable because, on a strict interpretation of the Regulations, the Lessee does not own the farm which has precipitated the termination of the worker's employment. D The same argument would apply to the entity carrying on the farming operations on the property.

14:2 The Regulations seem to be premised on the assumption that the employer and the owner of the land are one and the same …"

To begin with, it must be noted that the Regulations were put in place for the E benefit of the farm worker who would be left in the cold where a farm on which he was employed was compulsorily acquired and his employer has left the farm. It must be noted also that the regulations were put in place to benefit the farmer/employer who would be burdened with a workforce whose source of work has been taken away. The employer would then be able, in compliance with the Regulations, to lay off his workers.

F The Regulations define the words "employee" and "employer". An employee is —

"any person employed by, or working for, any employer in the agricultural industry and receiving or entitled to receive remuneration in respect of such employment or work."

G This definition is very wide and it covers contract and/or seasonal employees. The provisions of the Regulations therefore apply to all employees as defined.

An "employer" is defined as —

"any person who employs or provides work for another person in the agricultural industry and remunerates or expressly or tacitly undertakes H to remunerate him and includes a manager, agent or representative of such

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person who is in charge or control of the work upon which such other A person is employed."

Again the meaning of employer has been widened to cover any person who must be held responsible for ensuring that employees covered by the Regulations receive their benefits on termination of their employment consequent upon the acquisition of the farm on which they were employed. A tenant farmer is B obviously an employer as defined because it is he who employs or provides work to the employee and remunerates him. And the farm employee is obviously the tenant farmer's employee because he is employed by, or works for, the tenant farmer.

The Regulations provide in s 3(1) as follows —

"Notwithstanding any other statutory instrument, arrangement or agreement C to the contrary, if it becomes necessary for an employer to terminate the employment of any employee because any farm or part of a farm belonging to the employer has been compulsorily acquired for resettlement or other purposes in terms of the Land Acquisition Act [*Chapter 20:10*], the following amounts shall be payable by the employer to each employee whose employment is so terminated …" D

There then follows an itemisation of the payments to be made.

The important words in this provision and on which the applicant relied for the proposition that a tenant farmer is not covered by the Regulations are the words "belonging to". The applicant contended that these words must be construed as a reference to the owner of the farm and not a lessee. That is why E the applicant made a further argument that, because s 3(1) of the Regulations is concerned with the owner, the notices in terms of ss 5 and 8 of the Act can never relate to it as lessee but only to the owner. I do not think that this is a correct argument at all.

The words "belonging to" ordinarily connote ownership. They may however, F and depending on the context, not only encompass ownership but denote something far wider than ownership. An extended meaning can therefore be ascribed to the words "belonging to" to describe the relationship of a thing to a person who is not the owner thereof but has possession, control or use of the thing. This extended meaning was recognised and accepted in *Badenhorst v Van Rensburg* 1985 (2) SA 321 (T). I am satisfied that the words "belonging G to" as used in s 3(1) of the Regulations do not denote ownership only but they also denote a relationship to the farm arising from possession, control or use and which places the person concerned in the position of owner in so far as the matters with which the Regulations deal are concerned. Thus whether the person is a

tenant farmer, or his manager or agent or representative, the farm concerned is regarded as belonging to him for the purposes of the Regulations. H

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A A close analysis of s 3(1) of the Regulations indicates that the Regulations are not concerned with the status of the employer in respect of the farm as such, provided that the farm belongs to him in the sense I have outlined above and he employs employees on it. The provision also makes it clear that the farm or part of a farm which has been compulsorily acquired need not be owned by the employer, *vide* the phrase "any farm or part of a farm belonging to the B employer". Apart from what I have said about the words "belonging to", the provision is clear that it is concerned with the termination of the employee's employment on "any farm" that is to say any farm whether owned or not owned by the employer as long is it belongs to him (in the sense I have stated) and he employs employees on it and as long as it has been compulsorily acquired.

C Section 3(1) of the Regulations also makes it quite clear that it is for the employer to decide that it may become necessary to terminate the employment of the employees. The determination that it has become necessary to do so is that of the employer. This is a sensible provision because an employer may, depending on his own circumstances, decide not to terminate the employees' employment as when he can absorb the employees in his other businesses. D Thus, whether or not a farm has been acquired is a factual matter which the employer can determine on his own before he makes the determination that it has become necessary to terminate his workers' contracts of employment. And even where his appreciation of the factual position with regard to the status of the farm may be erroneous, he may still be able to lay off his workers in terms of the Regulations if no other person came forward to contest that factual E position. I may also note that the applicant's reason for terminating the employment of its employees is not convincing. It has laid no basis for me to agree with it that the criteria for retrenchment in terms of the retrenchment regulations have been met. The applicant seems to me to be asking for a blank cheque to proceed in terms of the retrenchment regulations without showing F any good cause therefor. I have no basis for giving such a blank cheque.

Section 4 of the Regulations seems to some extend to support the finding which I have made. It provides that if at any time after a preliminary notice is served on an employer in terms of s 5 of the Land Acquisition Act, the employment of any person on the farm referred to in that notice is terminated, then it shall be presumed for the purposes of s 3 of the Regulations that such G employment was terminated because of such acquisition, unless the contrary is proved by the employer concerned. The assumption in s 4 of the Regulations is that the employer is invariably the owner of the farm in respect of which a preliminary notice of acquisition is issued. That is not always the case, as is exemplified by this application. The same assumption is also made in s 6 of H the Regulations in respect of the withholding of the compensation payable in

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terms of s 25 or 29C of the Act. Whilst ss 4 and 6 of the Regulations are A relevant to the owner of the land, it is only s 6 which is exclusively so. Section 4, read together with s 3(1) of the Regulations, appears to me to be obliquely relevant to the tenant farmer also, especially where the acquisition of the farm is in terms of s 6A of the Act or a section 8 order had been issued in respect of another farm the subject of the substitution offer. The essential point being B that land which is acquired pursuant to s 6A of the Act will inevitably not be subject of a notice in terms of s 5 of the Act but it will be land which is compulsorily acquired anyway. I think that the presumption in s 4 of the Regulations may work to the benefit of the tenant farmer and it applies to him. He can take advantage of it and rebut that presumption in an appropriate case. I think, in a way, the applicant in this case endeavoured to show that the C termination of its workers' contracts of employment were occasioned by factors other than the acquisition of Chikwepa Farm and, as it were, it purported to rebut the presumption in s 4 of the Regulations without acknowledging the relevance of that section to its situation. If that was the applicant's endeavour, he failed in that regard.

The last issue which I must address is whether the seasonal workers should not D benefit from the Regulations. I have already said that they are covered by the definition of "employee" in s 2 of the Regulations. They must therefore benefit from the Regulations. The extent of the payments to which the seasonal workers are entitled to, in my view, be determined by reference to s 5(3) of the

Regulations which empowers the Agricultural Employee E Compensation Committee established by that section to determine what benefits and entitlements, if any, are due to any employee. For the purposes of my decision on the relief sought in respect of seasonal workers the question as to how their benefits or entitlements will be determined is not before me. What is before me is the question whether they are covered by the Regulations or not. I have determined that they are. F

I think that from what I have said above it is evident that the applicant has not made a case for the issuance in its favour of a provisional order in the terms stated. The applicant is not unwilling to pay its workers in respect of the termination of their employment by it. The applicant's concern was solely whether the payments should be made in terms of the Regulations or in terms G of the retrenchment regulations. I am satisfied that the applicant has failed, for the reasons I have outlined in this judgment, to make out a *prima facie* case for the issuance of a provisional order in its entirety.

I did not get the impression that the applicant was seriously concerned about the alleged threats and harassment by the workers. The workers denied those allegations and stated that if they are paid their benefits and entitlements the H

A whole matter will become resolved. That explains why the relief sought by the applicant in that regard was quite incidental to the issue of whether he should pay his workers in terms of the Regulations or the retrenchment regulations. The latter was the mainstay of its application. That also explains why its affidavit does not contain persuasive evidence to support the incidental relief. The dispute between the parties will be resolved upon the applicant paying its B workers in terms of the Regulations. The respondents did not argue that there is any basis in law on which they could interfere with the applicant's right to remove his movable property nor did they admit that they have threatened to take possession of the applicant's movable assets and sell them. They also did not admit that they have harassed the applicant's directors and members of C their family. As any such action, if embarked upon, would be unlawful anyway, I think that I can issue, as a final order, an order restraining the respondents from interfering with the applicant's removal of its movable assets and restraining them further from harassing the applicant's directors. Such an order is merited on the facts of this case.

I have not addressed the question of urgency because the manner in which this D matter evolved from the day that the application was lodged meant that the question of urgency did not have to detain me. In any case all the parties proceeded, despite Mr *Selemani's* half-hearted submissions to the contrary, on the understanding that the application had to be resolved. I will order that the applicant pay the costs as it has not succeeded on its main claim which was the main reason for instituting these proceedings.

E In the result:

(a) the main application is dismissed;

(b) a final order in terms of paras 4 and 5 of the draft order is issued to wit—

> "(i) The Respondents and all employees on Chikwepa Farm in the District of Marondera be and are hereby ordered not to interfere in F any way in the removal from the farm of applicant's movable assets.
>
> (ii) The Respondents and all persons occupying Chikwepa Farm through them, be and are hereby interdicted from threatening or harassing Alan Leornard George, Melanie George, Roxanne George, Dustin George, Colin George and Kephas Mhlanga."

G (c) The applicant shall pay the costs of this application.

Honey & Blanckenberg, applicant's legal practitioners.

Civil Division of Attorney General's Office, first respondent's legal practitioners.

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GOKWE SOUTH ELECTION PETITION 2003 (1) ZLR 46 (H)

Citation	2003 (1) ZLR 46 (H)
Case No	Judgment No. HH-4-03
Court	High Court, Harare
Judge	Makarau J
Heard	15 January 2003
Judgment	15 January 2003
Counsel	*H Zhou,* for the petitioner *A Matika,* for the respondent
Case Type	Election Petition
Annotations	No case annotations to date

Flynote

Election — *election morality — high standards imposed by Electoral Act* C

Election — *election petition — corrupt and illegal practices — when render election void — liability of candidate for conduct of his agents — meaning of "agent" — need for candidates to take reasonable precautions to prevent corrupt practices*

Words and phrases — *agent — Electoral Act [Chapter 2:01] — s 124 — wide meaning of — when candidate's supporters become his agents* D

In matters of election petitions*, our courts are to be guided strictly by the four corners of the Electoral Act [Chapter 2:01] as there is no common law on the matter. The provisions of the Act which deal with illegal and corrupt practices create a very high electoral morality for all Zimbabweans.* E

Headnote

In s 124(a) of the Electoral Act, which renders an election void if there has been a corrupt or illegal practice committed by or with the knowledge and consent or approval of a candidate or any of his agents, the term "agents" comprehends not just the candidate's polling agents and election agents F but anyone whom the candidate has set in motion to conduct the election or to canvass votes on his behalf.

In this election petition the court found that the petitioner (the unsuccessful candidate in the parliamentary election concerned) had been assaulted and severely injured by supporters of the successful candidate. So severe were his injuries that he had been hospitalised until after the election and G a rumour had spread through the constituency that he had died. As a result of the rumour, some voters did not cast their votes.

Held that the successful candidate had relied on his supporters and campaign team to canvass votes on his behalf. To that extent they were his agents for the purposes of s 124 of the Electoral Act, and their assault on the petitioner rendered the election void. H

Makarau J

A *Held*, further, that the election was not validated by s 125 of the Act since the successful candidate had not taken any reasonable precautions to prevent violence in the constituency, and the violence — the assault on the petitioner — was neither trivial nor unimportant. Furthermore, the rumour of the petitioner's death may have affected free franchise in the constituency.

Cases cited B

Blackburn Election Petition (1869) 20 LT 823

Buhera North Election Petition 2001 (1) ZLR 295 (H)

Chiredzi North Election Petition HH-84-01

C *Drogheda Election Petition* (1869) 1 O'M & H 252

Hurungwe East Election Petition 2001 (1) ZLR 285 (H)

Snyman v Schoeman & Anor 1949 (2) SA 1 (A)

Legislation considered

D Electoral Act [*Chapter 2:01*], ss 124 & 125

Case information

H Zhou, for the petitioner

A Matika, for the respondent

Judgment

Makarau J: The petitioner was the candidate for the Movement for E Democratic Change ("MDC"), in the general elections held on 24 and 25 June 2000. The respondent was his rival and was fielded by the Zimbabwe African National Union-Patriotic Front, ("ZANU-PF"). During the election, the petitioner polled 3615 votes while the respondent polled 12644 votes. The respondent was duly returned as the Member of Parliament for Gokwe South.

F On 26 July 2000, the petitioner filed the above petition, seeking an order that the return of the respondent to Parliament be set aside and that fresh elections be held in the constituency. The petitioner alleged that the respondent and members of his party were guilty of corrupt practices, which saw the constituency experiencing a wide range of violent activities.

The petition was opposed.

G In his opposing affidavit, the respondent denied that he was personally or through his agents, guilty of the alleged corrupt practices. He further denied that war veterans in the constituency represented him in any manner, and averred that any statements issued by the President and other members of his party are immaterial to the petition before me as such statements were issued H without his knowledge or consent.

Makarau J

In support of the petition, the petitioner gave the following evidence. A

After he became the candidate of his party in April 2000, he put a campaign strategy in place. He had planned to hold several meetings with the electorate in the constituency. He also planned to use flyers with information about his party and to move around the constituency informing the villagers about what his party stood for. B

His campaign did not proceed as planned. Some of the members of his campaign team were assaulted and some had to abandon their homes as a result of the violence. He was personally severely assaulted on 19 June 2000 when he had gone to furnish the constituency registrar with a list of the names of his polling agents.

He stopped at Gokwe Centre to make copies of the list. As he was in the place C where the copies were being made, he saw through the window that his driver and another person, who was a passenger in his vehicle, were being assaulted. He came out of the shop where he had been making the copies and after walking a distance of about 50 metres away from the vehicle, one of the

assailants recognised him and the group came after him. He ran towards the D court complex where the registrar's office is located. He could not outpace the group. When he looked back after being challenged to stop, one of the assailants hit him with a stone on the forehead and he fell down. He then got up and ran towards the building complex. The crowd followed him. He entered the nearest office and asked the occupant therein to telephone the police. The group attacking him had now surrounded the office complex and was throwing E missiles at him through the open windows. He tried to hide under desks but was still hit on the head by the missiles. He left this office and went into another nearby office and sought refuge under the desks. He was now bleeding profusely. The bloodstains and trail alerted his assailants as to his new hiding place and the attack continued. None of the registrar's staff came to his aid. F

Riot police eventually rescued him after some 45 minutes of being under attack. As a result of the assault, he sustained four scalp lacerations, a laceration on the forehead, chest contusion, rib fractures, multiple bruises and plural haematoma. He was in hospital until after the election. (The doctor who attended to him in hospital swore to an affidavit in which he described the injuries as very serious.) G

During the time that he was in hospital, word went out to his village and constituency that he had died as a result of the injuries sustained in the assault.

He voted on 25 June in the afternoon after pleading with the hospital staff to be allowed to go and dispel the rumour that he had died. He voted at Kana Mission in the constituency and went home to Muyambi village to reassure his H

A parents that he had not died. He returned to hospital immediately thereafter.

The witness gave his evidence well. He was not shaken under cross-examination. I have no reason why I should not rely on his evidence.

The petitioner then called Previous Hapanyengwi. She gave the following evidence. She resides in Manoti village, in the Gokwe South constituency. B She is a member of the MDC. She used to cook sadza for sale at a shopping centre in the constituency.

On the day when the President addressed a rally at Gokwe Centre, a group of between seven and ten ZANU-PF supporters approached her and searched her place for MDC cards. They did not find any. They then left the following morning after calling upon her to follow them and buy ZANU-PF cards. They C had spent the night at her place, hoping that the petitioner would visit her that night. During the night they were teaching her their party slogans and songs. On the morrow, she did not follow them to buy the ZANU-PF cards as suggested.

The group returned the following evening and held a political meeting at her D fireplace. At the meeting they were persuading her to join ZANU-PF. She had visits of a similar nature from this group two or three days before the poll.

Some members of this group informed her that the petitioner had died from injuries sustained during the assault of 19 June. She did not vote as the same group had said they did not want to see her at the polling station.

E The evidence of this witness did not take the petitioner's case much further. She is a young and unmarried woman who cooks and vends sadza at a growth point. The witness appeared to have been on very friendly terms with both the petitioner and the ZANU-PF youths. The petitioner is reported to have on one occasion called upon her to serve him with sadza well into the night and the ZANU-PF youths hoped he would visit her on the night they slept at her place. F The ZANU-PF youths did not coerce her by use of force to join their party but were instead teaching her slogans and songs. Her evidence as to why she did not vote is inconsistent with the friendly relationship that seemed to have existed between her and the youths. I reject it as being unreliable.

The petitioner also called one Pirwai Gava. His evidence was to the following effect. He resides in the constituency, under Chief Muyambi, the petitioner's G father. He is a member of the MDC. At one stage before the elections, he was chased away from a school where he had gone to recruit polling agents and election monitors.

At Manoti Business Centre, he was also disturbed from holding a meeting with polling agents of his party. A motor vehicle came to where he and other H party members were holding the meeting and the occupants of the vehicle set

Makarau J

upon them. He fled and was captured and assaulted. He did not know the A people who had assaulted him but knew that they were ZANU-PF supporters.

On 23 June 2000, he was assaulted again. He had arrived at Manoti Business Centre at night to look for the other polling agents. He found they had been assaulted and had fled. He also fled the area and returned on 26 June after the results of the polls had been announced. B

He did not vote as his metal identity document had been taken away from him on 23 June 2000.

This witness did not give his evidence well. It did not flow smoothly and he was not easy to follow as he testified. His testimony was not consistent and for these unsatisfactory features, I would reject it. C

The petitioner then called Ernest Nkomazana. His evidence was to the following effect. He resides in the constituency and contested the general elections as an independent candidate in which he polled 1419 votes. He witnessed the assault on the petitioner on 19 June 2000 at Gokwe Centre. He had also gone to the registrar's office on this date to submit his list of polling agents. He recognised some of the people who assaulted the petitioner. These D people are ZANU-PF supporters. In particular, he saw one Johannes Dzenga assault the petitioner. He did not see how the petitioner left the registrar's offices.

This witness gave his evidence well. He was forthright in his responses to the questions put to him in cross-examination. He was a former member of E ZANU-PF and he personally knows some of the members of that party. I am therefore satisfied with his evidence as it relates to the identity of the petitioner's assailants. The witness had good demeanour in the witness box and I would rely on his testimony as being credible.

Next to be called was one Murambiwa Ngwerume. His evidence was to the following effect. He resides in Highfield, Harare. He is a member of the MDC F where he is a driver. During the period in question, he was the petitioner's driver. On 19 June 2000, he drove the petitioner to Gokwe Centre. When the petitioner left the vehicle to go and make copies of certain documents, a group of ZANU-PF supporters approached his vehicle and assaulted him for being a member of the MDC. Riot police rescued him and took him to the police G station together with some of his assailants. He did not see the petitioner after that. He later received word that the petitioner had been killed.

The witness gave his evidence well and was not shaken under cross-examination. I found him a credible witness and will accept his evidence.

Charles Shave was called next. He is a member of the MDC. During the run-up to the election, he was in the constituency. He did not manage to H

Makarau J

A campaign for his party as ZANU-PF supporters assaulted him. He was assaulted on 14 June 2000. He owed some money to one of the supporters. He then promised to pay the money back the following day. He then attended a ZANU-PF meeting to give his creditor the money. Ten men who were at the meeting accused him of selling the land back to the white men. They then assaulted him. These men had seen him wearing an MDC T- shirt whilst at his B communal home on an earlier occasion. He was assaulted for quite some time before he was released. He then made a report to the police. He was hospitalised but left hospital against medical advice. Upon leaving hospital, he attended a ZANU-PF rally where he surrendered his MDC T-shirt and card. He did not do so voluntarily. He thereafter attended several other ZANU-PF C meetings at which he denounced the MDC and told the gathering that the petitioner had been killed.

The evidence of this witness did not impress. It did not have a ring of truth around it. He gave the impression of a direction-less youth whose political loyalty can be briefly bought. I formed the impression that the witness was not telling the truth. For instance, the reason why he was assaulted when he D attended a ZANU-PF rally to allegedly pay back a loan is incredible. So is his testimony

that upon leaving hospital against medical advice, he attended a ZANU-PF rally to surrender his MDC T/shirt and card and that he did not do so voluntarily. He lied. For these reasons, I would not rely on the testimony of this witness.

E The petitioner then called one Boniface Gwatiringa. His evidence was to the following effect. He resides in the Gokwe South constituency. He is a member of the MDC. On 21 June 2000 at around 10.45 a.m, he was approached by a group of people, wearing ZANU-PF T-shirts. He was at work at Cottco. The group manhandled him and demanded that he tell them of his work-mates who were also members of the MDC. He declined to do so. He was assaulted and F then taken out of the premises into the bush where he was detained. He was released around 6.00 p.m. On the voting day, he did not vote as he found some of his assailants waiting by the entrance to the polling station. He did not see the petitioner from 19 June. One of the known ZANU-PF supporters, a Mrs Zivanai Paripari spread the rumour at Manoti Business Centre that the petitioner had died.

G This witness gave contradictory evidence. For instance while in his oral evidence before the court he testified that he had not voted, in an affidavit sworn to before the petition was filed, he swore that he voted. He testified under cross-examination that because of the assault on him, he gets confused about what happened to him during this period. Due to these unsatisfactory H features in his evidence, I would not rely on the evidence of this witness unless other reliable evidence corroborates it.

Makarau J

After this witness, the petitioner closed his case. A

The respondent gave evidence. It was as follows. He is the Member of Parliament for Gokwe South. He represented Gokwe East in the last Parliament. In the Third Parliament, he represented Gokwe South. He was a councillor for the local District Council prior to becoming a Member of Parliament.

He heard about the assault on the petitioner on 19 June 2000. He did not send B anyone to assault the petitioner. He personally did not hear the rumour that the petitioner had been killed.

He knows the petitioner's family and they also know him. He visits the petitioner's family regularly to consult with the petitioner's father, who is a chief in the area. C

During the run up to the elections he did not personally campaign in the petitioner's area. This he did not do as he thought that the whole area supported the petitioner's candidature. This, however, did not rule out the possibility that some members of his party may have campaigned for him in the area.

He noted that most of the witnesses called by the petitioner were also from the D petitioner's home area. He did not know of the incidents of violence that the petitioner's witnesses testified to. He denied that at one rally he said that members of the MDC should be killed. He did not personally send anyone to harass members of the MDC.

During the period before the election, he received information that there was E political violence in the constituency. Whenever he got news of the violence from the police, it would have ended and so he did not personally do anything about preventing the occurrence of violence in the constituency.

He was aware that some members of MDC believed that the petitioner had died as a result of the injuries sustained when he was assaulted at Gokwe Centre on 19 June 2000 and that some did not vote as a result of that news. F

While the respondent gave his oral evidence well, in some respects it contradicted the contents of his opposing affidavit filed of record. For instance, while he testified in court that he personally did not do anything to prevent the occurrence of violence in the constituency, in his opposing affidavit he stated that he always preached against political violence at all the G rallies he addressed.

Further, the respondent maintained that Johannes Dzenga also known as "Cruiser" was not at Gokwe Centre on 19 June when the petitioner was assaulted. This he maintained in the face of positive identification by Nkomazana, the independent candidate. Having set up an alibi for Dzenga, the H

Makarau J

A onus was on the respondent to prove it. He did not call Dzenga or any other witness and no explanation was given me as to why this was so.

The respondent did not call any witnesses and closed his case after testifying.

The above represents a summary of the evidence upon which I now have to determine whether or not the election of the respondent should be set aside.

B The petition before me was brought in terms of the provisions of the Electoral Act [*Chapter 2:02*]. Section 124(a) of the Act provides that:

> "Subject to sections *one hundred and twenty, one hundred and twentyfive and one hundred and twenty-six —*
>
> (a) if upon the trial of an election petition the High Court certifies to the Minister that any corrupt practice or illegal practice has been committed C with reference to the election the subject of the petition, by or with the knowledge and consent or approval of the candidate returned at that election, or by or with the knowledge and consent or approval of any of his agents, the election of that candidate shall be void, and a fresh election shall thereupon be held."

It is trite that in matters of election petitions, our courts are to be guided strictly D by the four corners of the Electoral Act as there is no common law on the matter. Thus in accordance with the provisions of the Act, I must determine whether or not the acts proved by the petitioner are corrupt practices as defined in the Act.

Corrupt acts are provided for in s 105 of the Act to include the use of force or E threats to use force against any person to influence that person's conduct at the election. In my view, s 105, and the other sections in the Act that create illegal and corrupt practices, create very high electoral morality for all Zimbabweans.

I have considered the evidence led from the petitioner's witnesses and have F discounted most of it as unreliable. Thus, it is my finding that the petitioner has not been able to prove general violence in the constituency.

I am, however, satisfied that the petitioner himself was severely assaulted on 19 June 2000 by supporters of the respondent's party, who included Dzenga, a member of the respondent's campaign team. After this assault, a rumour that the petitioner had died circulated. As a result of this rumour, some voters may G not have cast their votes for the petitioner.

The respondent has sought to deny that he sent any people to assault the petitioner. This may be so, but his supporters perpetrated the assault. The issue that then presents itself to me for determination from these facts, is whether the respondent's supporters are to be regarded as his agents for the purposes H of the electoral law.

Makarau J

My reading of the electoral law is that there is a clear distinction between an A election agent appointed in accordance with the provisions of the Act and an agent for the purposes of finding the respondent guilty of corrupt or illegal practices under the Act. That this is so appears from a reading of s 125 of the Act, which refers to the two different types of agents in different capacities in the same section. Using the golden rule in the construction of statutes, it B appears to me that the words "election agent" and "agent" in this part of the Act are used to mean two different concepts.

To resolve the issue of whether or not a member of the respondent's campaign team and his supporters are his "agents" for the purposes of s 124 of the Act, I have had recourse to decided English cases on the issue. This has been necessary because, while the terms "polling agent" and "election agent" are C defined in the Act, the term "agent" is not.

In the matter of the *Blackburn Election Petition* 1869 (L) 20 LT 823, referred to by Devittie J in the *Buhera North Election Petition* 2001 (1) ZLR 295 (H), it was held that any one set in motion by the respondent to conduct the election or canvass votes on his behalf is his agent for the purposes of the electoral law. D

In my view, it cannot be disputed in the matter before me that the respondent relied on his supporters and campaign team to canvass votes on his behalf. Thus to this extent, these were his agents for the purposes of s 124 of the Act. In accordance with the high electoral morality established by our electoral law, his supporters and members of his campaign team are regarded as

his agents as their acts were meant to further his campaign and garner more votes for him. He won the prize as a result of their efforts.

In the circumstances of the matter before me, I must find that the respondent is guilty of a corrupt practice through his agents.

To avoid working an injustice against a candidate, who may have been unaware of the acts done by his (political) agents, the electoral law provides an escape clause in s125. It provides as follows:

> "When upon the trial of an election petition the High Court finds that a candidate at the election the subject of the petition has been guilty by his agent of the offence of treating or undue influence or of an illegal practice with reference to that election, and the candidate has proved to the satisfaction of the High Court that —
>
> (a) no corrupt practice or illegal practice was committed at that election by the candidate himself or by his election agent and that the offences mentioned in the said finding were committed without the sanction or connivance of the candidate or his election agent; and
>
> (b) the candidate and his election agent took all reasonable precautions for preventing the commission of corrupt practices and illegal practices

> at that election; and
>
> (c) the offences mentioned in the finding were of a trivial, unimportant and limited character;
>
> then the election of that candidate shall not, by reason of the offences mentioned in the finding, be void, nor shall the candidate or the election agent be subjected to any incapacity under this Act."

I now turn to consider whether there are any circumstances upon which the election of the respondent can be saved, notwithstanding that the corrupt practice has been proven against him.

It is common cause that the respondent himself did not commit the corrupt practice. His election agent did not commit the offence. The offence was committed by a group of supporters who included one Johannes Dzenga, a member of his campaign team who I have found to be the agents of the respondent for the purposes of the electoral law.

According to the evidence before me, the respondent, contrary to his assertions in the opposing affidavit, did not take any reasonable precautions to prevent the commission of corrupt practices at the election. This the law enjoins him to do if he is to avoid having his election set aside on account of corrupt practices found to have been committed in relation to his election.

It is my further view that the assault on the petitioner was neither trivial nor unimportant. The attack on the petitioner resulted in him sustaining serious injuries. Riot police had to be called in to rescue him from the assailants. The assault was further important in that it was targeted at the candidate himself. While it was a single incident, the rumour that spread after the incident was such as to negative conditions for a free franchise.

In *Chiredzi North Election Petition* HH-84-01, Ziyambi J cited with approval a passage from *Snyman v Schoeman & Anor* 1949 (2) SA 1 (A) at 6 where van den Heever JA observed that:

> "Not all riotous behaviour will render an election void. From the cases decided in Great Britain it would appear that to this end, riotous behaviour must have been so grave as to amount to intimidation liable to induce persons of ordinary courage to refrain from exercising their votes; it must be general and of such a nature that the result of the election might reasonably be supposed to have been affected, without proof that it was in fact affected — in other words, conditions must have prevailed which negative the concept: free election. Sporadic assaults and acts of intimidation will not justify the setting aside of an election."

In this petition, Ziyambi J held that although she could not find that the respondent was guilty of breach of the Electoral Act in any way, she entertained no doubt that the people of Chirezi North were not free to exercise

their right to vote for the candidate of their choice. Devittie J came to the same conclusion in the *Hurungwe East Election Petition* 2001 (1) ZLR 285 (H). In this regard, he referred to the English authorities on the issue. This he did because our Electoral Act closely follows the wording of the English equivalent. He cited with approval the remarks of the judge in the *Drogheda Election Petition*

(1869) 1 O'M & H 252 at 256 where it was held that, for general intimidation to succeed as a ground for voiding an election: B

> "… it must be shown to spread over such an extent of ground, and to permeate through the community to such an extent that the tribunal considering the case is satisfied, if it be so, that freedom of election has ceased to exist in the constituency."

In the matter before me a single act has been proved. It was not general in nature C but was used for general intimidation when the rumour spread that the petitioner had died. The rumour was spread not only in Gokwe but one witness, who resides in Harare, also received word that the petitioner had been killed. It is common cause that after the rumour spread, some voters did not exercise their right to vote. I have been persuaded in this regard by the testimony of the respondent who, under cross-examination, conceded that the D rumour resulted in some people not casting their votes. I am therefore satisfied that the assault of the petitioner, while not in itself affecting free franchise generally in the constituency, generated a rumour that spread over the constituency and permeated through the community to the extent that it had the effect of negating free franchise in the constituency. The law does not require me to have proof that it actually did affect free franchise. E

Further, my reading of s 125 is that the respondent, to save his election, must satisfy the court on all the three grounds listed in the section cumulatively. In other words, the word "and" in the section is used in its conjunctive sense.

It is therefore my finding that the respondent has not proved to my satisfaction the grounds listed in s 125 of the Act. His election cannot be saved. F

Accordingly, I make the following order:

1. The election of the respondent is hereby set aside.
2. The registrar of this court shall certify to the minister the finding of this court that corrupt practices were committed in respect of that election in terms of s 124(a) of the Act. G
3. The respondent shall bear the petitioner's costs.

Honey & Blanckenberg, petitioners legal practitioners;

Ziumbe & Mtambanengwe, respondent's legal practitioners. H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/BEST OF ZIMBABWE LODGES (PVT) LTD & ANOR v CROC OSTRICH BREEDERS OF ZIMBABWE (PVT) LTD & ORS 2003 (1) ZLR 57 (H)

BEST OF ZIMBABWE LODGES (PVT) LTD & ANOR v CROC OSTRICH BREEDERS OF ZIMBABWE (PVT) LTD & ORS 2003 (1) ZLR 57 (H)

Citation	2003 (1) ZLR 57 (H)
Case No	Judgment No. HH-6-03
Court	High Court, Harare
Judge	Makarau J
Heard	6 November 2002; 15 January 2003
Judgment	15 January 2003

Counsel *E W W Morris*, for the applicants
A P de Bourbon SC, for the respondents

Case Type Opposed application

Annotations No case annotations to date

Flynote

Property and real rights — *spoliation order — when may be granted — delay in seeking remedy — when may disable court from granting relief*

Headnote

The first respondent owned some land on which was built a safari D lodge. The lodge was built and operated as a joint venture between the first respondent and another company. That company ceded its rights, and assigned its obligations under the agreement to the first applicant. The joint venture agreement was such that the first respondent had to stock and maintain a game park on the land, while the first applicant had to E operate and maintain an hotel on the land. A third party was involved, the obligation of which was to take hotel guests on safari in the game park.

In November 1998, the first applicant was placed under provisional liquidation. A provisional liquidator was duly appointed and took over the control and custody of the assets of the company, including the facility. He decided not to continue with the business of running the safari lodge, F which he proceeded to close down. He posted security guards to protect the facility and the assets of the company in liquidation.

The respondents moved onto the property. The actual date on which they did so was in dispute. After the respondents moved onto the property, they effected much needed renovations. After the renovations, they began to run the business of operating the safari lodge through the third respondent. G They put into storage the other assets of the first applicant. They claimed that they were cancelling the lease agreement, though the applicants disputed this claim. When the respondents moved onto the property, they did so in the presence of the applicant. At one stage, both parties were on the property, with one party exercising greater custody and control H over the property than the other. A stage was eventually reached when the

Makarau J

respondents were in full control of the facility even though the applicants A maintained a presence at the facility.

About a year after it was issued, the provisional liquidation order was discharged. This displeased the respondents, who filed a notice of appeal against the order discharging the provisional order. The appeal was subsequently dismissed. After the discharge of the provisional order, the B provisional liquidator removed from the scene. The applicants then indicated to the respondents that they wished to deploy certain of their workers at the facility to continue with the running of the business. The respondents barred them entry.

The applicants sought a spoliation order. This was opposed by the respondents on the grounds that the fact that they started making entry onto the C property in August 1998 took away the right of the applicants to allege peaceful and undisturbed possession of the property. They also argued that that the remedy of *mandament van spolie* was not a remedy for settling contractual disputes.

Held, that the fact that the applicants did not resort to litigation at the stage the respondents entered onto the property was irrelevant for the purposes D of determining whether or not they were in peaceful and undisturbed possession of the property. It might be relevant to the question of whether or not they consented to the dispossession.

Held, further, that the applicants never accepted the cancellation of the lease agreement. The litigation commenced by the respondents to cancel the E lease was not prosecuted and was still pending between the parties. The relief sought for the restoration of possession of the facility was not ancillary to any other relief and there was no indication that the applicants were seeking possession of the facility other than for the sake of regaining lost possession.

Held, further, that the evidence was that the applicants never acquiesced in F the dispossession.

Held, further, that any action that results in a party parting with possession without his consent and outside the legal process can found an application for spoliation. Although the application was made more than a year after the applicants lost possession, for any delay to operate to disable the court from granting relief to the applicant, it must be consistent only with G a finding that the applicant acquiesced in the dispossession and further, must be so extensive as to disable the court from granting practical relief. The delay by the applicants was not consistent only with a state of mind confirming or displaying that they acquiesced in the disturbance of their possession; it was clearly related to the provisional liquidation of the first applicant, put in motion by the respondents. Further, the delay was H

Makarau J

A not so gross that practical relief could not be afforded the applicants. *Held*, further, that the application should be granted.

Cases cited

Jivan v National Housing Commission 1977 (3) SA 890 (W)

B *Manga v Manga* 1991 (2) ZLR 251 (S)

Nino Bonino v de Lange 1906 TS 120

Ntshwaqela v Chrmn, Western Cape Regional Services Council 1988 (3) SA 218 (C)

Parker v Mobil Oil of Southern Africa (Pty) Ltd 1979 (4) SA 250 (NC)

Case information

C *E W W Morris*, for the applicants

A P de Bourbon SC, for the respondents

Judgment

Makarau J: "Croc-Ostrich Breeders of Zimbabwe (Private) Limited owns some land. On this land is built a safari lodge. It was built and operated as a joint venture between Croc-Ostrich and TA Trading Corporation (Private) D limited. TA ceded its rights, and assigned its obligations under the agreement to Best of Zimbabwe (Private) Limited. The joint venture agreement is such that Croc-Ostrich must stock and maintain a game park on the land, Best of Zimbabwe must operate and maintain an hotel on the land. A third party was involved, the obligations of which was to take hotel guests on safari in the game park, … The facility thus described is known as Pamuzinda Safari E Lodge." Per Gillespie J in a matter between the parties and reported in 1999 (2) ZLR 410 (H)

This is an application for a spoliation order in respect of the facility known as Pamuzinda Safari Lodge. The facts giving rise to this application are largely common cause and are as follows:

F In November 1998, the first applicant was placed under provisional liquidation by an order of this court. A provisional liquidator was duly appointed and took over the control and custody of the assets of the company, including the facility. The provisional liquidator decided not to continue with the business of running the Safari Lodge, which he proceeded to close down. He posted security guards to protect the facility and the assets of the company in G liquidation.

The respondents moved onto the property. The actual date on which the respondents took possession of the facility is in dispute. The applicants allege that this was immediately after the provisional liquidation order had been granted in November 1998. The respondents deny this and allege that they H moved onto the property in August 1998, before the provisional order was

Makarau J

granted, but after the application for the compulsory winding up of the first A applicant had been filed.

The dispute of fact arising regarding the date when the respondents moved onto the property is not, in my view, material to the real dispute between the parties. It is my further view that the dispute is capable of resolution on the basis of the papers before me without doing injustice to any of the parties, as B I shall show.

It is common cause that after the respondents moved onto the property, they commenced to effect much needed renovations to the property. After the renovations, they began to run the business of operating the safari lodge through the third respondent. They put into storage the other assets of the first applicant. C

In December 1999, the provisional liquidation order was discharged. This displeased the respondents. A notice of appeal was filed against the High Court order discharging the provisional order.

After the discharge of the provisional order, the provisional liquidator removed from the scene. The applicants then indicated to the respondents that D they wished to deploy certain of their workers at the facility to continue with the running of the business. The respondents barred them entry.

The appeal by the respondents was dismissed with costs in December 2000, upholding the High Court's decision that the liquidation of the applicant was highly suggestive of "an abuse of process" and that the respondent's persistence E in the proceedings was "but to harass or oppress the applicant or fraudulently deprive it of its rights."

The issue that I have to determine is whether or not against the backdrop of the facts I have outlined above, the applicants are entitled to a *mandament van spolie.*

To succeed in an application of this nature, the applicant only has to show that F he was in possession of the property and was unlawfully ousted from such possession. This is trite.

To resolve the issue before me, I first have to determine whether or not the applicants were in possession of the facility at the time the respondents first moved onto the property. Without making a specific finding on the issue, I will G at this stage accept the respondents' averment that they started to enter "more regularly and frequently upon the premises in view of the cancellation of the lease agreement and having regard to the general deterioration in the maintenance and upkeep of the premises and the obvious need to rectify this untenable state of the premises" in August 1998. This, in my view, will then mark the earliest time the respondents started dispossessing the applicants. H

2003 (1) ZLR p61

Makarau J

A It has been argued for the respondents that the fact that they started making entries onto the property in August 1998 took away the right of the applicants to allege peaceful and undisturbed possession of the property in the proceedings before me. I am at a loss as to how the very act of dispossessing the applicants can be construed as taking away their right to allege that, prior to that date, they were in peaceful and undisturbed possession of the property. The fact that the B applicants did not resort to litigation at this stage is irrelevant for the purposes of determining whether or not they were in peaceful and undisturbed possession of the property. It may be relevant to the question of whether or not they consented to the dispossession.

In my view, possession is the physical relationship one has to property. One C either has it or does not. It lies in having control over the property with the intention of deriving some gain from that possession. Prior to August 1998, it has not been disputed that the applicants were in control of the facility. It is further not capable of dispute that they exercised that control in terms of the lease agreement between them and the respondents with the intention of conducting business for themselves. On the basis of this reasoning, I would D find that the applicants had peaceful and undisturbed possession of the facility in August 1998.

The next issue I have to determine is whether or not the moving of the respondents onto the property in August 1998 dispossessed the applicants.

Spoliation has been described as any wrongful deprivation of possession. In E the case of *Nino Bonino v De Lange* 1906 TS 120 at 122, a case that has since been followed in this jurisdiction, Innes CJ had this to say at about what constitutes spoliation:

> "And the spoliation which the court would in this way set aside need not necessarily consist of acts of violence… The best definition I have been able to find is the one given by Leyser who states that spoliation is any F illicit deprivation of another of the right of possession which he has…"

In *Ntshwaqela v Chairman,Western Cape Regional Services Council*,1988 (3) SA 218 (C) Howie J held that squatters who had been made to leave a certain farm, part of which they had occupied, by means of a threat of arrest by the police, had been dispossessed by means of duress and that such G dispossession was unlawful. In so holding, the judge had this to say at p 225G of the report:

> "In the present matter, applicants were dispossessed against their will and without the authority of any order of this court, or any order of a magistrate's court … In acting as they did, whether as principals or agents, all respondents took the law into their own hands. They were guilty of H what is called self-help. This court must insist on observance of the

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> principle that a person in possession of property, however unlawful his A possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by due process of law. If he is interfered with unlawfully the court will not condone such interference. It will redress the situation pending the taking of lawful action for ejectment."

It appears to me from the foregoing that any action that results in a party parting B with possession without his consent and outside the legal process can found an application for spoliation.

In the matter before me, there is no evidence that the applicants agreed to the "frequent" and "regular" entries of the respondents onto the property in August 1998. The respondents allege that they moved onto the property as they C had advised the applicants that they were cancelling the lease agreement. In fact, on 8 September 1998, the first applicant's legal practitioners wrote a letter to the respondents' legal practitioners challenging the cancellation of the lease. In that letter, the point that the applicants considered themselves to be in peaceful and undisturbed possession of the property is made.

At this stage it may be pertinent to deal with the issue raised by the respondents D that the remedy of *mandament van spolie* is not a remedy for settling contractual disputes. That this is the correct position at law appears from the case of *Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 (4) SA 250 (NC). In that case, it was held that the remedy was not competent as Parker had conceded that the possession of the equipment would be of no use to him and E had merely sought its possession as a way of enforcing the contract between him and the respondent.

I would distinguish the *Parker* case from the matter before me. *In casu,* the applicants never accepted the cancellation of the lease agreement. The litigation commenced by the respondents to cancel the lease was not prosecuted and is still pending between the parties. The relief sought before me for the F restoration of possession of the facility is not being sought as ancillary to any other relief. Further, there is no indication that the applicants are seeking possession of the facility other than for the sake of regaining lost possession. For these reasons, I would hold that the *ratio decidendi* in *Parker*'s case is not of application to the facts before me. G

While I have no doubts that the movement of the respondents onto the property in August 1998 was outside the legal process, the issue whether this on its own constitutes deprivation of possession for the purposes of a spoliation order has exercised my mind. I have posed this question because when the respondents moved onto the property, they did so in the presence of the applicant. Thus at one stage, both parties were on the property with one party exercising custody H

A and control over the property greater than the other. A stage was eventually reached when the respondents were in full control of the facility even though the applicants maintained a presence at the facility.

In my view, August 1998 marked the beginning of the dispossession of the applicants. The dispossession continued even after the appointment of a provisional liquidator in November 1998. It

was completed at some point B when the guards posted on the property by the provisional liquidator were reduced in role to mere spectators and were no longer in control of the facility.

The issue that may arise at this stage is whether or not the provisional liquidator acquiesced on behalf of the company to this gradual dispossession. I have no evidence before me that he did. Indeed, the respondents concede that C the applicants protested by way of letters at the intrusion by the respondents onto the property. Some of the letters were directed to the provisional liquidator, prodding him into taking action against the respondents. Thus, while the provisional liquidator did not take any positive steps to have the dispossession of the applicants declared wrongful and unlawful, the managers of the applicants, whose capacity to act on behalf of the applicants had been D suspended during the period of provisional liquidation, protested at the dispossession on behalf of the applicants. I therefore find that the applicants cannot be held to have acquiesced to the dispossession at any stage.

One issue remains for my determination. It has been argued on behalf of the respondents that I must deny the applicants relief on account of the period of E time that has lapsed from the time the applicants lost possession to the time the application for a spoliation order was made. In this regard, it has been highlighted before me that a period in excess of one year lapsed between the two dates.

In determining whether or not I should deny the applicants the relief they seek on account of the alleged delay, I have been guided by the decision in F *Manga v Manga* 1991 (2) ZLR 251 (S) where Gubbay CJ had this to say:

> "I am satisfied that *in casu* a delay of five months cannot be regarded as consistent only with acquiescence on the part of the applicant in the dispossession. Nor was the delay so extensive as to disable the court *a quo* from granting any practical relief."

G In arriving at this decision, the Supreme Court followed the decision in *Jivan v National Housing Commission* 1977 (3) SA 890 (W) where the unqualified proposition that the remedy *mandament van spolie* will be denied to an applicant who fails to take immediate action to have possession restored to him was rejected. The judge proceeded to qualify the proposition as detailed H by the then Chief Justice in the *Manga* case.

2003 (1) ZLR p64

Makarau J

My understanding of the legal position is that for any delay to operate to A disable the court from granting relief to the applicant, it must be consistent only with a finding that the applicant acquiesced in the dispossession and, further, must be so extensive as to disable the court from granting practical relief. As was stated at p 893 in the *Jivan* case:

> "It is conceivable that the delay of an applicant to bring the petition either B confirms or displays a state of mind in which the applicant acquiesced in the alleged disturbance of his possession, and, in such an event, I am satisfied that he would not be entitled to a *mandament van spolie*."

I am satisfied that the delay by the applicants *in casu* is not consistent only with a state of mind confirming or displaying that they acquiesced in the disturbance of their possession. The delay is clearly related to the provisional liquidation C of the first applicant, put in motion by the respondents, for the reasons elaborated by Gillespie J in his judgment 1999 (2) ZLR 410 (H). Further, in my view, the delay is not so gross that practical relief cannot be afforded the applicants.

On the basis of the foregoing, I would grant the application. I now make the following order: D

1. The respondents are hereby ordered to forthwith restore possession of certain piece of land in the district of Hartley known as Strathmore, measuring 919.8006 hectares and held under Deed of Transfer No. 604/86 to the applicants, failing which the Deputy Sheriff is hereby authorised to tale possession of the property and restore it to the E applicants.
2. The respondents shall, jointly and severally, bear the applicants' costs, save for the costs of 8 October 2002.

Gollop & Blank, Applicant's legal practitioners. F

Coghlan, Welsh & Guest, respondents' legal practitioners.

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MASENDEKE v CENTRAL AFRICA BUILDING SOCIETY & ANOR 2003 (1) ZLR 65 (H)

Citation	2003 (1) ZLR 65 (H)
Case No	Judgment No. HH-7-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	13 December 2002; 15 January 2003
Judgment	15 January 2003
Counsel	*E R Mutama*, for the applicant *A Maingauta*, for the first respondent
Case Type	Urgent Application
Annotations	Link to case annotations

Flynote

C **Practice and procedure** — *execution — sale of dwelling — High Court Rules, 1971 — O 40 R 348(5a) — right of execution debtor to apply for postponement or suspension of sale — when application may be granted*

Headnote

Where a judgment debtor applies under O 40 R 348(5a) of the High Court Rules, 1971, for the postponement or suspension of the sale in execution D of his dwelling, the judge can grant the application if he or she is satisfied:

(a) that the dwelling is occupied by the debtor or his family and that he or his family will suffer great hardship if the dwelling is sold and they are evicted;

(b) that the debtor has made a reasonable offer to settle the judgment debt E or that the occupants require a reasonable period in which to find some other accommodation;

(c) that there is some other good ground for postponing or suspending the sale or the eviction of the occupants.

It is not enough that the debtor or his family will suffer hardship if the dwelling is sold: the judge must be satisfied that they will suffer more F than the ordinary hardship which persons deprived of their place of residence ordinarily suffer. The hardship must be great in that it results in the execution creditor being rendered homeless or destitute.

The requirements in (a) and (b) are disjunctive even though in r 348(5a) they are linked by "and", so if one requirement is eminently met then the fact G that the other requirement has not been fully met does not debar the applicant for obtaining an order postponing or suspending the sale. So where the hardship is not so great but the debtor has made a very reasonable offer of settlement, an order should be granted in his favour.

Chinhengo J

Legislation considered A

High Court Rules, 1971 (RGN 1047 of 1971), O 40 R 348(5a).

Case information

E R Mutama, for the applicant

A Maingauta, for the first respondent

Judgment

Chinhengo J: The applicant was sued by the first respondent (CABS) for B the payment of $229 674.39 being money lent and advanced to him together with interest charges. This claim was in accordance with the terms and conditions of a first mortgage bond passed by the applicant in favour of CABS over Stand 1218 Fort Victoria Township of Fort Victoria Township Lands. The money had therefore been advanced to enable the applicant to purchase a dwelling. In terms of the mortgage bond the applicant was required to pay C the amount lent and advanced in monthly instalments of $7 550. As at 1 December 2001, the applicant was in arrears of $23 350. CABS's claim included a further claim for interest charges at the rate of 38 per cent *per annum* on the sum of $229 674.39, costs on a legal practitioner and client scale and an order that the property be declared specially executable. D

The summons was served on the applicant on 16 January 2002. The applicant did not enter an appearance to defend the claim because he did not dispute the indebtedness. A judgment in default was entered against him on 2 July 2002. A writ of execution against immovable property was issued on 20 September 2002 and served on the applicant's domestic worker at the *domicilium citandi et executandi* (the dwelling) on 22 November 2001. E

The applicant then instituted the present application on an urgent basis in terms of Order 40 r 348A of the High Court Rules, 1971. In terms of subrule (5a) of r 348A, a person whose dwelling has been attached when he or his family members occupy the dwelling as at the date of attachment may, within ten days after the service upon him of the notice of attachment of immovable F property under r 347, make a chamber application for the postponement or suspension of the sale of the dwelling or for the postponement or suspension of the eviction of its occupants. The applicant was out of time in making this application. He accordingly applied for condonation of the late institution of these proceedings. I readily granted condonation because the explanation which he gave for the delay was reasonable. He said that he resides at his G workplace at Masvingo Teachers' Training College and visits his home (the dwelling) every other weekend. He said that when the domestic worker was served with the notice in terms of r 347, she did not appreciate its importance and that she only gave it to him when he visited the dwelling on 16 December 2002. The domestic worker filed an affidavit in support of the applicant's averment on this point. I was satisfied that the applicant did not wilfully H

Chinhengo J

A neglect to make the application within the time prescribed by the rules of this Court and I granted the application for condonation.

In the founding affidavit, the applicant averred that the dwelling is the only dwelling for him and his family and that they all would be destitute without a dwelling of their own.

B He averred that before the judgment in default was entered against him his legal practitioners were negotiating a settlement with the judgment creditor's legal practitioners and that there had been some positive developments in that regard. In their letter of 7 March 2002, CABS's legal practitioners had made an indication that they were prepared to accept the proposed settlement. Part of the letter reads:

> C "In your letter of 5 February 2002, you have suggested that your client intends to settle the arrears on his loan account but you have not indicated the manner in which he proposes to do this. Perhaps you will be kind enough to let us have these details for onward transmission to our clients for their consideration."

It appears nothing further took place until the execution creditors issued the D writ of attachment and execution.

The applicant averred that he was surprised when the judgment creditor issued and served the writ of execution because he had thought that a settlement was in the offing. In further support of the present application, the applicant proposed to settle the debt together with the interest claimed by monthly E instalments of $50 000 beginning on 20 December 2002. He averred that he had in fact paid $50 000 on 26 November 2002 before he became aware that his property had been attached. He sought a provisional order the terms of which would suspend the sale of his dwelling whilst he made payments in terms of his own proposal.

F At the hearing of this application, I made an order in favour of the applicant and undertook to give my reasons for that decision. This judgment is in fulfilment of that undertaking.

The attachment by creditors of dwellings became such a pernicious problem that the Legislature stepped in to provide some relief to debtors and their families who are in distress because their only dwelling is to be attached and G sold in execution. Rule 348A was inserted into the High Court Rules by the High Court (Amendment) Rules, 2000 (No. 35), SI 80/2000. In terms thereof, if a dwelling has been attached the Sheriff is required, upon receiving documents relating to the attachment, to send forthwith to the Secretary of the Ministry responsible for the administration of the Housing and Building Act H [*Chapter 22:07*], a written notice that the dwelling has been attached. The

Chinhengo J

Sheriff is also enjoined not to take any further steps in regard to the sale of the A dwelling or the eviction of the occupants for a period of ten days. Within this ten day period, the Secretary may notify the Sheriff that he intends to satisfy the execution creditor's claim from the National Housing Fund established by s 14 of the Housing and Building Act. Again, for a period of 30 days the Sheriff must take no further steps to sell the dwelling concerned. The Secretary may B within that 30 day period lodge a chamber application with a judge for an order staying the sale of the dwelling concerned, and if the judge is satisfied as to the propriety of such an order he or she may issue a provisional order directing that the sale shall not take place for a period of three months at the most pending the confirmation of the order. That provisional order shall not be confirmed unless the execution creditor's claim has been satisfied or the C Secretary has, within the three months, undertaken to settle the claim from the National Housing Fund.

The alternative approach to the above is that provided in subrule (5a) of r 348A. In terms thereof, if a dwelling has been attached and it is occupied by the execution debtor or members of his family, the execution debtor may, within ten days after service upon him of the notice of attachment, make a D chamber application for the postponement or suspension of the sale of the dwelling concerned or the eviction of its occupants. In terms of subrule (5c) of r 348A, the Registrar is required, without delay, to notify the Sheriff or his deputy that the application has been filed and to serve a copy of the application on the execution creditor and set the application down for hearing after E notifying the execution creditor and the applicant of the set down date.

At the hearing of the application, the judge must satisfy himself/herself, first, that the dwelling is occupied by the execution debtor or his family and that it is likely that he or his family will suffer great hardship if the dwelling is sold or they are evicted from it; and second that the execution debtor had made a reasonable offer to settle the judgment debt or that the occupants require a F reasonable period in which to find other accommodation or that there is some other good ground for postponing or suspending the sale of the dwelling concerned or the eviction of its occupants, as the case may be. If the judge is so satisfied he/she may order the postponement or suspension of the sale of the dwelling concerned or the eviction of its occupants on such terms and G conditions as he may specify. I must, in passing, observe that subrule (5e)(b)(ii) should really stand alone as (5e)(c), because this is a separate ground on which a judge may base his decision to postpone or suspend the sale of a dwelling.

It is necessary to underline the requirements of r 348A(5e) in regard to the aspects on which the judge must be satisfied. It is not enough that the execution debtor or his family will suffer hardship if the dwelling is sold. The H

Chinhengo J

A judge must be satisfied that the hardship is great. In my view, the hardship must be more than the ordinary hardship which persons deprived of their place of residence ordinarily suffer such as the attendant inconveniences in finding and paying for alternative accommodation or the need to relocate to another residential place such as a rural home or a rented accommodation. The hardship must be great in that it results in the execution creditor being B rendered homeless or destitute. The second requirement relevant to this application is whether the execution debtor has made a reasonable offer to settle the judgment debt. Subrule 5e)(b)(iii) of r 348A also empowers the judge to postpone or suspend the sale of the dwelling for "*some other good ground*".

The applicant is a school teacher and it seemed to me that his family resides C in the dwelling where he employs a domestic worker. He himself ordinarily resides at the school because he said that he goes to the dwelling every other week. There was no evidence of the kind of accommodation which he has at the school. It did not seem to me that he was one likely to suffer great hardship if the dwelling was sold. It would seem that the requirement of great hardship must be viewed against the other requirement that a reasonable offer to settle D the judgment debt had been made by the execution debtor. Although the word "and" is used at the end of para (a) of subrule (5e) of r 348A, I do not think that it should be read conjunctively so as to say that the two requirements of great hardship and the making of a reasonable offer must both be met before an order postponing or suspending a sale of a dwelling can be made. I think that the word "and" must be read disjunctively so that if one requirement is eminently E met then the fact that the other requirement has not been fully met does not necessarily debar the applicant from obtaining the order of postponement or suspension of the sale. That this is the correct construction to be placed on the word "and" is supported by the fact that a judge is empowered to make the order of postponement or suspension if there is some other good ground for F doing so. As such, therefore, where the hardship is not so great, but the execution debtor has made a very reasonable offer of settlement, an order should be granted in his favour. Conversely, where the offer of settlement is not entirely reasonable but the hardship which the execution debtor will suffer is extreme, an order should again be made in his favour. The applicant had, by the time that he received the notice in terms of s 347, already paid $50 000 F which not only covered the arrears but probably covered the interest charges as well. In his founding affidavit, the applicant offered to pay $50 000 a month, the first such payment being made on or before 20 December 2002. The payment of $50 000 and the offer to make similar payments until the judgment debt was settled appeared to me to be eminently reasonable, despite the fact that the hardship he was to suffer if the house was sold was unlikely to be great.

2003 (1) ZLR p70

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It was for this reason that I granted the provisional order whose final and A interim relief was the following:

"Terms of the Final Order Sought

1. The sale of Stand 1218 Fort Victoria Township Land be and is hereby suspended on condition that the applicant pays an amount of $50 000 at the end of each month beginning on 20 December 2002 until the B debt is settled and if the applicant defaults on any one payment execution will proceed.
2. The applicant pays the costs.

Terms of the Interim Order

That pending the final determination of this matter

1. The sale of Stand 1218, Fort Victoria Township Lands be and is C hereby suspended on condition that the applicant pays an amount of $50 000 on or before the last day of each month provided that the payment for the month of December 2002 shall be made on or before 20 December 2002. In the event that the applicant defaults in respect of any one payment, the sale in execution of Stand 1218, Fort Victoria Township Land shall proceed. D
2. The Deputy Sheriff shall suspend any action towards the sale in execution of the property referred to in para 1 hereof.
3. A copy of this order shall be served on the first and second respondents' legal practitioners."

In conclusion, I would like to put to rest any misconception that an application E in terms of r 348A may be treated other than on an urgent basis. Counsel for the first respondent had argued to that

effect. In terms of r 348A(6) any such application shall be treated as urgent. As such, no valid argument can be advanced against the urgent treatment of an application in terms of r 348A. F

Mwonzora & Associates c/o Gula-Ndebele & Partners, applicant's legal practitioners

Winterton, Holmes & Hill c/o Honey and Blanckenberg, respondents' legal practitioners G

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Source:
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MATSIKA v JUMVEA ZIMBABWE (PVT) LTD & ANOR 2003 (1) ZLR 71 (H)

Citation	2003 (1) ZLR 71 (H)
Case No	Judgment No. HH-9-2003
Court	High Court, Harare
Judge	Chinhengo J
Heard	2 October 2002; 15 January 2003
Judgment	15 January 2003
Counsel	*TH Gunje*, for the applicant
Case Type	Unopposed application
Annotations	Link to case annotations

Flynote

Contract — *enforceability — in pari delicto rule — when may be relaxed —* C *principles*
Contract — *sale — validity — purchase price paid in foreign currency — whether legal*

Headnote

The applicant paid the respondent, in US dollars, for a specific vehicle that the respondent was shipping from Japan. Both parties were residents of D Zimbabwe. The vehicle was, on arrival, delivered to someone else, and a promised substitute of the same make and model never materialised. The applicant sought the delivery of a similar vehicle or a refund of the purchase price. The question arose whether a transaction in Zimbabwe in foreign currency was legal.

E *Held*, that the Reserve Bank of Zimbabwe Act [*Chapter 22:10*] does not prevent transactions in currency which is not legal tender. The transaction was, however, tainted by illegality because of the provisions of s 4(1)(a)(ii) of the Exchange Control Regulations, 1996.

Held, further, that the court may relax the *in pari delicto* rule to prevent injustice between man and man. Where public policy is not foreseeably F affected by a grant of the relief claimed, a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment. Where there is an illegal contract, and the criminal law provides a sanction,

ordinarily the courts should not increase the punishment of one delinquent and lessen that of the other by enriching one to the detriment of the other. In this case, the respondents G had no legal or moral claim to the money nor any other equitable right. They had given no value for the money received and stood to gain for no reason at all. They had breached the agreement. Consequently, the *in pari delicto* rule should be relaxed in favour of the applicant.

Chinhengo J

Cases cited A

Dube v Khumalo 1986 (2) ZLR 103 (S)

Jajbhay v Cassim 1939 AD 537

Mawere v Mukuna 1997 (2) ZLR 360 (H)

Young v van Rensburg 1991 (2) ZLR 149 (S)

Case information

TH Gunje, for the applicant B

Judgment

Chinhengo J: This is an unopposed application in which the applicant claimed the delivery of a motor vehicle which he purchased from the respondents. In the alternative, he claimed a refund of the purchase price.

The facts of the case are these. On 23 May 2002, the first respondent entered C into an agreement of sale with an entity known as Habin Investments. The agreement was for the sale by the first respondent and the purchase by Habin Investments of a motor vehicle, a Toyota Camry, which was to be shipped from Japan by the first respondent. In the agreement of sale, the motor vehicle was identified by its colour, chassis numbers, year of manufacture, gear box numbers and other incidental details of identification. D

The purchase price was the sum of US$2 800 payable by making a deposit of US$1 700 with the balance being paid in unspecified instalments at the end of each month. The agreement provided in this regard that:

> "The remaining balances to be paid on or before the 30th of each month."

The instalments as I have mentioned were not specified. E

The agreement also provided that the ownership of the motor vehicle should pass to the purchaser after the purchase price was paid in full. The motor vehicle was, however, to be delivered to the purchaser within 121 days from the date on which the deposit was paid.

The applicant paid the deposit on 23 May 2002 and a further amount of F US$1 730 on 18 June 2002. The motor vehicle was not delivered within the agreed period nor at any time thereafter despite demand. In the founding affidavit, the applicant did not explain why Habin Investments is not the applicant. I will assume for the purposes of this judgment that the applicant was trading in the name Habin Investments and that Habin Investments is not G a corporate body. The applicant averred that when the motor vehicle was brought into Zimbabwe, the respondents sold it to another person and that the second respondent then fraudulently represented to him that another vehicle of the same model would be made available to him. This did not happen.

In this application, the applicant sought an order compelling the respondents to deliver to him a similar model motor vehicle. In the alternative, he sought H

Chinhengo J

A an order that the respondents refund to him the sum of US$3 430 together with interest thereon at the prescribed rate of interest. No date from which the interest is to be calculated is specified. There was no explanation in the founding affidavit why the applicant was claiming a sum greater than the amount he said he had paid.

The court application was served by a clerk in the employ of the applicant's B legal practitioners "by handing a copy of the court application to a receptionist, responsible person at the address of service who accepted service on behalf of first and second respondents". The name of the receptionist is not mentioned but the address at which the service was effected is that given in the agreement of sale as the address of the purchaser. I will again assume that the court C application was properly served.

At the hearing, I raised a number of issues which were of minor concern. Some satisfactory answers and some not so satisfactory answers were given. I became concerned that one issue had not been dealt with to my satisfaction – the issue being whether the parties were entitled under our law to transact business in foreign money i.e. in United States dollars and not in Zimbabwe dollars. In D other words, the question which vexed me was whether two Zimbabweans, both resident in the country, were entitled to buy and sell in United States dollars. I directed that the applicant's legal practitioner should file written submissions on this issue and I reserved my judgment. Those submissions were filed.

E The applicant's legal practitioner submitted that the transaction between the parties was illegal because it contravened s 4(1)(a)(ii) of the Exchange Control Regulations, 1996 (SI 109 of 1996) (hereinafter called "the Regulations"). He submitted that the *in pari delicto* rule applied, but the court should, in its discretion, relax that rule on the basis that the respondents would be unjustly enriched, that the transaction was not a shameful or immoral one F and that the applicant was not aware that the transaction violated the Regulations.

The issues to be determined are whether: (a) the transaction is illegal i.e. whether Zimbabweans can buy and sell to each other or trade within Zimbabwe in a currency other than Zimbabwean dollars and cents; and (b) if it is illegal, G can the court relax the *in pari delicto* rule in favour of the applicant.

The Decimal Currency Act [*Chapter 22:04*] was enacted to provide for the introduction of a decimal currency in Zimbabwe. In s 3, the Decimal Currency Act provides that the currency units of Zimbabwe shall, from 17 February 1970, be the Zimbabwe dollar and the Zimbabwe cent. Though this Act was H concerned with the decimalisation of the currency units, it declared as a given

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that that is the currency of Zimbabwe. The currency of Zimbabwe is issued by A the Reserve Bank of Zimbabwe in terms of ss 12 and 15 of the Reserve Bank of Zimbabwe Act [*Chapter 22:10*]. In terms of ss 13 and 16 of that Act, a tender of notes and coins issued by the Reserve Bank and which have not been demonetised shall be legal tender in Zimbabwe. The Reserve Bank of Zimbabwe Act does not positively provide that persons in Zimbabwe may not B transact business in foreign money in the way that the applicant and the respondents did. This would appear to be permissible if there was no regime of foreign exchange controls. And if it were permissible, a conflict of laws of a very limited nature would arise because an obligation governed by Zimbabwean law results in a duty to pay a sum in foreign money. Sections 13 and 16 of the Reserve Bank of Zimbabwe Act recognise the distinction between money C which is legal tender and money which is not legal tender in Zimbabwe, following the principle that all legal tender is money but not all money is legal tender. Thus, outside the exchange control regime, the transaction between the parties to this application would not be illegal even though it would not have been done in money which is legal tender. Generally transactions in money which is not legal tender is of little concern in Zimbabwe because no money D circulates here which is not legal tender.

The President of Zimbabwe is empowered by s 2 of the Exchange Control Act [*Chapter 22:05*] to make regulations which may prohibit or restrict dealings in any currency. The Exchange Control Regulations, 1996, were made for that purpose. E

In s 4(1)(a)(ii), the Regulations provide that no person in Zimbabwe shall exchange foreign currency with any person other than an authorised dealer without the permission of the exchange control authority. Subsection (2) of s 4 provides that if any person obtains any foreign currency in Zimbabwe, he shall comply with any condition that an exchange control authority may give him in regard to the use to which the foreign currency may be put or the period F for which it may be retained. Section 11 of the Regulations prohibits a Zimbabwean resident from making any payment outside Zimbabwe or incurring any obligation to make a payment outside Zimbabwe unless he has been authorised by an exchange authority to do so.

The applicant's legal practitioner submitted and conceded that the transaction G in this case was conducted in contravention of s 4(1)(a)(ii) of the Regulations. I agree that this provision of the Regulations was contravened when the applicant and the respondents exchanged the sums of US$1 700 and US$1 730 without the permission of an exchange authority. Their transaction was therefore tainted with illegality.

Zimbabwe currently suffers from a severe shortage of foreign currency. It was H

Chinhengo J

A suffering the same shortage when the parties to this application entered into the agreement of sale. It is absolutely necessary that, in the current situation of shortage of foreign currency, all available foreign currency should be properly accounted for and that every citizen or resident should comply with the controls imposed by the Regulations. To enter into transactions in foreign currency, as did the parties to this application, can only compound the B difficulties which the country faces in regard to the availability and optimum utilisation of the scarce foreign currency available.

It is trite that this court has the discretion to relax the effect of the maxim *in pari delicto potior est conditio possidentis* and not deny judicial assistance to a person who parts with money in furtherance of an illegal transaction. The C situations where the court may relax the rule are where they must prevent injustice between man and man. This principle was recognised and applied in *Dube v Khumalo* 1986 (2) ZLR 103 (S) and *Young v van Rensburg* 1991 (2) ZLR 149 (S). Having regard to the foreign currency situation in Zimbabwe and to the need to discourage persons from engaging in illegal transactions involving foreign currency, I have to decide whether the public policy D imperative of doing justice between man and man should take precedence over the need, also dictated by public policy, to discourage transactions of the nature involved in this case. I think that the need to discourage transactions of the nature involved in this case, in the current situation in Zimbabwe, should generally take precedence. This consideration would present a point of distinction between this case and *Dube* and *Young supra.*

E There is however a criminal sanction to the contravention of the Regulations. In this regard, I am much persuaded to adopt the statement of Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544-545 which was quoted with approval in *Dube* and *Young supra.* The learned Chief Justice stated as follows:

> "… courts of law are free to reject or grant a prayer for restoration of F something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim (*in pari delicto*). And in this last connection, I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and G therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent H unjust enrichment."

Chinhengo J

I must say that in this case, public policy is probably "foreseeably affected by A a grant or refusal of the relief claimed" in the sense that a grant of the relief claimed would appear to encourage, rather than discourage, persons from engaging in illegal transactions which impact negatively on the foreign currency situation of this country at a time of dire foreign currency need.

In this case, however, the full nature of the transaction has not been disclosed B because the respondents did not oppose the application. The background facts given by the applicant are scanty. What those facts do clearly establish, however, is that respondents have no legal or moral claim to the money nor other equitable right. The respondents have given absolutely no value for the money they received. They stand to gain for no reason at all. The agreement of sale was weighted against the applicant, in that in terms of clause (e) thereof C if the applicant cancelled the agreement for any reason he was to suffer a cancellation penalty of twenty *per centum* of the purchase price. It should be held against them that it is the respondents who breached the agreement. I am satisfied that in these circumstances the *in pari delicto* rule should be relaxed in favour of the applicant. D

In the written submissions filed by the applicant's legal practitioner, it was explained that the amount appearing in the prayer as being the total amount claimed in the sum of US$3 430 is made up of the actual purchase of US$2 800 and import duty charges paid by the applicant to the respondents. I am satisfied that the respondents have had notice of the total amount claimed as it appears in the draft order attached to the court application. The interest claimed on a E debt sounding in foreign money cannot be at the prescribed rate of interest: see *Mawere v Mukuna* 1997 (2) ZLR 360 (H). In the absence of a date from which interest is to be calculated I will order that it be calculated from 2 September 2002, being the date on which the court application was served on the respondents. As for the basis of the liability of the second respondent, I can only say that if he did not think that he was jointly liable with the first F respondent he should have opposed the application.

The agreement of sale in clause (f) thereof provided that any dispute would be resolved in the magistrates court. The parties consented to that court's jurisdiction. The applicant brought this matter to the High Court in defiance of a clear term of the agreement of sale. My order of costs will reflect my G disapproval of the institution of these proceedings in this court. I do not think that it would be proper for me to order that the respondents should deliver a similar model car as that would be to assist the parties to complete an otherwise illegal transaction. My order will only be for restitution to be made. Due to the shortage of currency in the country, I will order that the applicant receive payment in Zimbabwe dollars at his option. H

Chinhengo J

A Accordingly, it is ordered that:

(a) the respondents shall pay to the applicant, jointly and severally, the one paying the other to be absolved, the sum of US$3 430 together with interest thereon from 2 September 2002 at the rate applicable to any foreign currency denominated account in United States Dollars held by any commercial bank in Zimbabwe or at the rate applied by any court in B the United States of America of jurisdiction equivalent to or greater than that of this court;

or

At the option of the applicant, the respondents shall pay, jointly and severally, the one paying the other to be absolved, the equivalent in C Zimbabwe dollars of the sum of US$3 430 together with interest thereon at the prescribed rate of interest calculated from 2 September 2002 to the date of payment in full.

(b) the respondents shall pay, jointly and severally, the one paying the other to be absolved, the costs on the scale applicable to the magistrates court.

D *T Chinyoka & Gunje,* applicant's legal practitioners

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LOWVELD LEATHER PRODUCTS (PVT) LTD v INTERNATIONAL FINANCE CORPORATION LTD & ANOR 2003 (1) ZLR 78 (H)

Citation 2003 (1) ZLR 78 (H)

Case No Judgment No. S-114-02

Court Supreme Court, Harare

Judge	Sandura JA, Cheda JA & Ziyambi JA
Heard	21 November 2002; 16 January 2003
Judgment	16 January 2003
Counsel	*P Nherere*, for the appellant *A P de Bourbon SC*, for the first respondent No appearance for the second respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Practice and procedure — *judgment expressed in foreign currency — when to be made — whether execution may be levied in foreign currency*

Headnote

The appellant borrowed money from the respondent, an international financial organization with its headquarters in the United States of America. The D amount borrowed was denominated in United States dollars and the loan agreement stated specifically that the appellant was to repay the loan in that currency. The appellant defaulted and the first respondent obtained judgment against it. The appellant then sought to interdict the first respondent from executing the judgment, pending determination of an E application it had filed in the High Court for an order directing that the judgment debt could be paid in Zimbabwe dollars at the official rate of exchange rather than at a much more favourable "parallel" or blackmarket rate. The appellant did not allege that it was impossible to repay the debt in United State dollars. The High Court dismissed the appellant's application for an interdict, and the appellant appealed. F

Held, that since the parties had agreed specifically that the loan would be repaid in United State dollars and not in any other currency, and the appellant had not alleged or proved impossibility of performance, the appellant's performance had to be *in forma specifica,* i.e. is exactly in the manner specified in the agreement. To order repayment in Zimbabwe dollars at the official rate of exchange would be grossly unfair and unjust G to the first respondent, even though execution of the judgment could not be levied in foreign currency.

Cases cited

Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe 1988 (2) ZLR 482 (SC)

Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd 2002 (1) ZLR 632 (H) H

Sandura JA

Case information

A *P Nherere*, for the appellant

A P de Bourbon SC, for the first respondent

No appearance for the second respondent

Judgment

Sandura JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for an interim interdict B restraining the respondents from proceeding with the

sale in execution of the appellant's property, pending the determination of an application for certain declaratory relief.

The relevant facts are these. The appellant is an exporter of wet blue hides from Zimbabwe, for which it earns foreign currency. On 10 March 1997 the C appellant and the first respondent ("the IFC") concluded a loan agreement, in terms of which the IFC disbursed to the appellant US$300 000.00 to enable the appellant to conduct its export business. The agreement specifically provided that the loan was to be repaid in United States dollars.

After conducting its export business, the appellant reneged on the agreement and did not pay the loan as previously agreed. Consequently, the IFC D instituted legal proceedings against it in the High Court and obtained a judgment for payment of:

(a) US$300 000.00;

(b) US$155 122.05, being interest on the sum of US$300 000.00 up to 1 January 2002; E

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

(d) Further interest on the sum of US$300 000.00, calculated from 2 January 2002 to the date of payment in full;

(e) Commitment fees of US444.41; and F

(f) Collection commission and costs of suit on a legal practitioner and client scale.

When the judgment was not satisfied, the IFC sued out a writ of execution and the appellant's property was subsequently attached. Thereafter, negotiations aimed at reaching a settlement were embarked upon but without success. The appellant then tendered payment of the full judgment debt in Zimbabwe G dollars, the United States dollars payable in terms of the judgment having been converted to Zimbabwe dollars at the official exchange rate of US$1 = Z$55. The tender was rejected by the IFC which insisted that payment had to be in foreign currency as agreed. Consequently, the appellant filed an urgent application in the High Court seeking an interim interdict restraining the H respondents from proceeding with the sale in execution, pending the

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determination of an application for an order directing that payment of the A judgment debt be made in the Zimbabwe dollar equivalent of the foreign currency due, the conversion being at the official rate obtaining on the date of payment. The urgent application was dismissed with costs. Aggrieved by that decision, the appellant appealed to this court.

The requisites for the grant of an interim interdict are well established. They B are: (a) a *prima facie* right; (b) a well-grounded apprehension of irreparable harm if the interim interdict 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 relief.

The learned judge in the court *a quo* dismissed the appellant's application because, in his view, the appellant had not established a *prima facie* right to C the ultimate relief sought in the main application, i.e. an order directing that payment of the judgment debt be made in the Zimbabwe dollar equivalent of the foreign currency due. In the circumstances, he was of the view that the appellant's application for the ultimate relief was unlikely to succeed.

In my view, the learned judge was correct. According to the loan agreement, D the appellant did not have the right to repay the loan in Zimbabwe dollars. In terms of that agreement, the appellant accepted the following condition:

> "**Currency Indemnity**
>
> The obligation of the Company [i.e. the appellant] is 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 E 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 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 F 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 under or in respect of this Agreement."

The term "Dollars" was defined as "the lawful currency of the United States of America". G

Quite clearly, the parties specifically agreed that the loan would be repaid in United States dollars and not in any other currency. This special stipulation distinguishes the present case from the case of *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC). In addition, unlike Makwindi Oil Procurement (Private) Limited, a local company, the IFC is an international H

Sandura JA

A financial institution with its headquarters in the United States of America and normally conducts its business in United States dollars.

In the circumstances, the performance must be *in forma specifica*, i.e. exactly in the manner specified in the loan agreement, unless the appellant alleged and proved impossibility of performance, which it did not do.

B Mr *de Bourbon*, who appeared for the IFC, submitted that the law would fail the parties if the appellant were permitted to pay the judgment debt in Zimbabwe dollars, bearing in mind the existence of a parallel market on which the exchange rate is more attractive than the fixed statutory exchange rate, as disclosed by the evidence led in *Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H) He submitted as follows:

> C "The capital sum due in terms of the judgment is US$517 677.72 with further interest from 2 January 2002. That capital sum at 55:1 converts to $28 472 274.60.
>
> Thus, in effect, the appellant is saying that it will pay $28 472 274.60 in full satisfaction of its obligation to the first respondent.
>
> However, to pay that sum at the current parallel market rate (approximately D 900:1) would mean an expenditure of US$31 635.86, or 10.54% of the original disbursement of US$300 000.00.
>
> Put differently, the appellant stands to make a profit from the loan of US$268 364.14 …"

I agree that that result would be grossly unfair and unjust and should not be E sanctioned by this court.

Mr *Nherere*, who appeared for the appellant, submitted that the learned judge in the court *a quo* erred in holding that it was possible in this country to levy execution in foreign currency. With respect, the learned judge did not say that. On the contrary, he was alive to the fact that execution could not be levied in F foreign currency. In his judgment he said the following:

> "Mr *Mutero* also added that his client [i.e. the IFC] 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 Articles of Agreement between it and the Zimbabwe Government. …
>
> The applicant [i.e. the appellant] also could not challenge the fact that G despite the fact that the sale in execution was to be in local currency, the first respondent [the IFC] was to negotiate with the Zimbabwe Government in order to effectively have the judgment debt satisfied in full as ordered in HC-1130-2002 without contravening any provisions of the Exchange Control Act and Regulations."

My understanding of Mr *de Bourbon's* argument was that after the sale in H execution the proceeds thereof would be converted to United States dollars in

---

Sandura JA

terms of an agreement between the IFC and the Government of Zimbabwe. The A submission that such an agreement existed was not challenged in the court *a quo* and in this court. I must, therefore, accept that such an agreement exists, although the details thereof have not been given. However, the fact that the appellant did not ask for the details of the agreement must mean that it is aware of the terms of the agreement and that Mr *de Bourbon's* submission is correct. B

In the circumstances, the appeal is devoid of merit and is, therefore, dismissed with costs.

Cheda JA and Ziyambi JA: cocurred C

Kantor & Immerman, appellant's legal practitioners

Sawyer & Mkushi, first respondent's legal practitioners

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Source:
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MATABELELAND ZAMBEZI WATER TRUST v ZIMBABWE NEWSPAPERS (1980) LTD & ANOR 2003 (1) ZLR 83 (H)

Citation	2003 (1) ZLR 83 (H)
Case No	Judgment No. S-3-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Ziyambi JA
Heard	20 January 2003
Judgment	20 January 2003
Counsel	*R M Fitches,* for the appellant *R Moyo,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Practice and procedure** — *discovery — documents in possession of third party — when order may be granted compelling such party to disclose documents — legal or other action must be contemplated*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 20(1) — right to information — whether section entitles one* D *person to demand information from another*

Headnote

The appellant, the applicant in the court *a quo*, had sought an order against the respondents that they disclose certain information, failing which that they be held to be in contempt of court. A newspaper owned by the first E respondent published a series of articles in which it alleged that employees of the appellant had defrauded the appellant of sums of money. The appellant denied the allegations, claiming that they were defamatory. Although it said it did not intend to sue the respondent, it sought discovery of the documents in possession of the newspaper which would apparently have substantiated the allegations.

F *Held*, that discovery can only be granted in aid of some existing proceedings, or at the most in aid of intended proceedings. Even where a party intends to sue, it cannot start by demanding information in order to found a claim against its opponent. The court cannot order the other party to provide information that will open it to legal action by the party asking for information. The court can only make an order for disclosure where G action has been commenced and the suing party needs the information during the pleadings under the Rules on requests for further particulars. It is also permissible to seek disclosure of information but only where the party actually intends to take action.

Held, further, that s 20(1) of the Constitution is not applicable where there H is no right to the information.

2003 (1) ZLR p84

Cheda JA

Cases cited A

Cerebos Food Corp Ltd v Diverse Foods SA (Pty) Ltd & Anor 1984 (4) SA 149 (T)

Irvine v Serfontein, Irvine v Villiers 1979 RLR 273 (G)

Priday v Thos Cook & Son (SA) Ltd 1952 (4) SA 761 (C)

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

Singer Mfg Co v Kilov & Anor 1959 (3) SA 215 (W)

Stuart v Ismail 1942 AD 327

Legislation referred to

Constitution of Zimbabwe 1980, s 20(1) C

Case information

R M Fitches, for the appellant

R Moyo, for the respondents

Judgment

Cheda JA: This appeal is against the refusal of the High Court to grant the following order: D

IT IS ORDERED THAT:

1 The respondents be and are hereby ordered and directed to supply in writing to the applicant's legal practitioners, within seven days of the date of issue of this order, the following —

(a) all the names, (and) positions held within the applicant, of E employees, officials and trustees of the applicant who are alleged to have acted in a fraudulent or dishonourable or negligent manner, or any other manner which is inconsistent with the aims and objectives of the applicant, and which conduct is the subject of the articles and editorials set out in Annexures 'A' to 'F', inclusive, annexed to this application; F

(b) the dates and places and the description of alleged acts of misconduct set out in Annexures 'A' to 'F' inclusive, and the names of the alleged perpetrators of the aforesaid alleged misconduct.

2 In the event that the two respondents fail to comply with paragraph G 1 above, the first and second respondents shall be held to be in contempt of court and pay a fine of $10 000.00 a day until they comply with the provisions of paragraph 1 above.

3 That the two respondents pay the costs of this application.

After hearing submissions by the appellant's counsel, we dismissed the appeal with costs, without hearing the respondents' counsel, and said our reasons H would follow. These are the reasons.

2003 (1) ZLR p85

Cheda JA

A The above order was sought by the appellant following a series of articles in the newspaper called "*The Chronicle*", which is edited by the second respondent.

The first story was published on 27 October 1999 with the heading "MZWT loses thousands to fraudulent claims". The first part of the story read:

B "Tens of thousands of dollars have been allegedly looted from the Matabeleland Zambezi Water Trust by officials who make fraudulent claims particularly after foreign trips, it was learnt recently."

This was then followed by more details on the story, which covered two half columns on the front page and a quarter of the centre page.

The following day, 28 October 1999, a further article appeared on the front C page headed "MZWT Board to hold urgent meeting on claims". On p 4 of that paper there was a Comment Column headed

"MZWT should probe claims". The comment urged the appellant to investigate the matter by carrying out an audit.

On 29 October 1999 the paper carried another story headed "MZWT urged to D tick off contempt officials". The first part of the story read:

> "The Matabeleland Zambezi Water Trust has been called upon to purge itself of officials suspected of pilfering the Trust's funds."

When the matter came to the High Court the respondents opposed the application. The editor of the newspaper, Mr Stephen Mpofu, the second respondent, who made an affidavit on behalf of the two respondents, pointed E out that the articles were directed, not at the Matabeleland Zambezi Water Trust ("the Trust") itself, but at the officials and employees of the Trust, and that none of the articles ever pointed at the Trust as being corrupt. He pointed out that the report of the then Mayor of Bulawayo was also to the same effect. The second respondent denied any defamation of the Trust itself and said it F had never been alleged that the Trust was corrupt and therefore its reputation had never been damaged.

The second respondent said there was no duty on the respondents to do the applicant's work for it, as it could investigate for itself and that the appellant seemed to be on some fishing expedition. He said it would not be in the public interest or the interest of justice for him to be ordered to divulge the G information sought.

When its application was dismissed, the appellant appealed on the following grounds, which I deal with in turn –

1 *The learned judge in the court a quo erred in law in finding that s 20(1) of the constitution of Zimbabwe did not create a right of access to* H *information*

Cheda JA

This is not a constitutional case. The above section falls under Chapter III, A which is the Declaration of Rights and is headed "Protection of freedom of expression". The section deals with freedom of expression and freedom to receive or impart ideas without interference. In short, where there is a right to receive certain information, it is that right which should not be interfered with. The one who claims under the section should first of all establish such right, then show that such right is being interfered with. B

In this case that right has not been established. The section does not, in my view, cover a situation where one can approach and demand information from another party.

The right to demand information can arise but under different circumstances, which I will deal with as it falls under the next ground of appeal. C

2 *The learned judge erred in fact in finding that there was no point in granting the relief sought by the appellant against the respondents because the appellant had no cause of action against the said employees, whereas the appellant had made it clear that as a public body it needed to investigate the allegations of sleaze made against it and thereafter if* D *necessary take whatever action was necessary*

Firstly, the appellant is demanding from the respondents information which it has in its records. The appellant would know which of its officials have travelled outside the country, and it should be easy to trace even their travel claims. E

Secondly, it is the appellant which indicated to the respondents that it did not intend to sue, thus raising the question as to what the information was required for.

Thirdly, it was pointed out that there was no allegation against the Trust, but against its officials and employees. The appellant has not indicated what cause of action it has, but has not ruled out any action. F

Fourthly, even under circumstances where a party intends to sue, it cannot start by demanding information in order to found a claim against its opponent. The court cannot order the other party to provide information that will open it to legal action by the party asking for information. The court can only make an order for disclosure where action has been commenced and the suing party G needs the information during the pleadings under the Rules on requests for further particulars. It is also permissible to seek disclosure of information but the authorities seem to limit this to cases

where the party actually intends to take action. A number of South African authorities deal with this point:

In *Stuart v Ismael* 1942 AD 327, it was stated in the headnote that:

> "The power of a Court to order a person in possession of the necessary H

Cheda JA

> A information to disclose the names of persons for the purposes of an action which the applicant intends to bring exists when justice would be defeated without such a disclosure and is not confined to cases where information is required of the names of members of an unincorporated body."

The decision of the court which had granted an order under the above B circumstances was upheld.

In *Priday v Thos. Cook & Son (SA) Ltd* 1952 (4) SA 761 (C), Van Winsen J stated at p 764:

> "I was, however, unable to find any authority for the proposition that one person is entitled to obtain the production for inspection of the books and C documents of another, and in which he has no proprietary interest, in circumstances where litigation is neither pending between such persons nor even certain to eventuate."

I consider that the principle of disclosure is the same in the above case as in the case before this Court.

In *Singer Manufacturing Company v Kilov & Anor* 1959 (3) SA 215 (W) the D case is summed up in the headnote which reads:

> "A person who *bona fide* wishes to sue a partnership but does not know the names of the partnership with certainty may request any known partner or other person who is known to be connected with the business, to reveal the names. If the partner or other person refuses, the Court will order him to give the names and to pay the costs occasioned by his unwarranted E refusal."

See also *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd & Anor* 1984 (4) SA 149 (T).

All these authorities have two things in common, that is, the person must be in need of, and does not have, the information, and the information must be F required for purposes of bringing an action against a certain party. The information cannot be sought on a fishing expedition.

In this case the appellant does not intend to bring any action against anyone. It has clearly said so. In addition, to that, it has already argued that when an audit was carried out no wrongdoing was established against its officials or G employees.

The question that arises is "What is the information required for?" The appellant does not intend to bring any action against its officials or employees. While it submits that it needs the information in order to deal with its officials or employees, I do not consider that the principles that compel such information to be given cover administrative actions.

Cheda JA

It is not in the interest of justice to order disclosure in this case, since there is A also the hidden danger that publication of the names of the persons concerned would open the respondents to an action for defamation by the persons who will have been named who would also rely on the statement by the appellant that no wrongdoing was established against them.

It does not assist the appellant at this stage to suggest that it might consider B suing. It should not have taken a position so prematurely if the possibility of suing still existed. It is not clear how the appellant can turn against its own finding that there was no wrongdoing by its officials.

3 *The learned judge erred in law in not finding that because —*

(a) the allegations made against the appellant by the respondents were defamatory (and) C

(b) the appellant, prima facie, had a cause of action against both respondents and/or its employees or officials

The respondents had a common law duty to disclose the information the appellant sought

Part of this ground of appeal has been covered in ground two above, save to D add that the respondents merely blew the whistle about the activities of the appellant. There is no defamation of the appellant. If any action for defamation was to be raised, it can only be by the officials and

employees concerned, that is, if they were named. There is no common law duty to disclose as claimed by the appellant. Reporting dishonest activities of the appellant's officials is E different from "taking part in the *tortious* conduct" of another party. Accordingly, the duty to assist the appellant does not arise at all.

4 *The learned judge erred in fact in finding that the disclosure sought was for the purposes of gratification of curiosity and not for the purposes of vindicating rights*

I have already pointed out that the appellant said it had found no wrongdoing F on the part of its officials and employees and did not intend to sue. The learned judge was therefore entitled to come to that conclusion in the absence of any other reason for wanting the information. The appellant cannot be wanting to discipline its employees when it has already told us it found no wrongdoing on their part. G

5 *The learned judge erred in fact in finding that the appellant did not believe that its rights were violated by employees*

It is not clear here which employees are referred to. If it is the respondents' employees, I have already dealt with the fact that the appellant was not defamed. If it is the appellant's employees, the appellant has already openly H

Cheda JA

A defended them against any wrongdoing. It cannot again be heard to say they violated its rights.

6 *The learned judge erred in fact in finding that the appellant could obtain the information it sought from the respondents through its own internal investigations*

B In fact, the appellant has obtained the information from its records. That is why it is able to say there was no wrongdoing on the part of its officials or employees. This is strengthened by an article published by the respondents, wherein a director of the appellant, Mr Eric Bloch, responded to the paper's stories. The article is headed "MZWT funds safe in financial houses". He stated as follows in part of that article:

> C "It must be stressed moreover that no expenditure has been incurred by the Company other than fees paid to the Registrar of Companies, printing of stationery, and a limited amount on promotion of share subscriptions.
>
> All monies received are invested in building society accounts and Treasury Bills funding investment into economic ventures. None of the officials of the Trust have any access to the funds."

D In another part of the same article he says:

> "While I have no knowledge as to the substance or otherwise of the allegations against the Trust and its officials, they in no manner pertain to the Company and shareholders' funds are wholly secure."

To sum up, I begin by pointing out that at the hearing of the appeal the E appellant could not even explain what the cause of action was founded on when asked.

When the information was sought, there was no intention to sue the respondents. According to the appellant's own report following an investigation or audit, there was no wrongdoing on the part of its officials and employees. Trust funds F were invested and were safe. The officials of the Trust have no access to the funds. The question remains unanswered as to what the information is sought for.

It was argued that the appellant has a right to the information sought. The constitutional provision referred to under the Declaration of Rights is concerned with the interference with the right to receive information. It is based on human G rights. Even if one argues that it applies to the appellant in this case, in order to bring a claim the appellant must first establish the right to receive such information, then prove that such right is being interfered with. In my view, this means that information is supposed to flow from a certain source and the respondents are interfering with that flow of information to the appellant.

H In this case, that right to the information has not been established.

Cheda JA

Refusing to disclose certain facts or information cannot be held to be A interference.

On the other hand, it has been argued by the respondents that the appellant is asking for information which it has in its records. That is why the appellant has been able to respond and say there is no wrongdoing on the part of its officials and employees. B

The appellant now suggests that it may sue for defamation. Who is to be sued for defamation? If the appellant said its officials defamed it but it is not aware of their identity, and the appellant needs that information in order to institute an action, then the basis of the request may be understood. But that is not the case here. If the appellant wishes to sue the respondents it can proceed to do so without asking for the names of its employees, and the identity of the C employees would then be sought under our rules of discovery, depending on the need to do so. The respondents cannot be asked to make a disclosure that will make them open to an action by the officials and employees since the appellant has already said they did no wrong.

It was conceded by counsel for the appellant that the respondents had not D involved themselves in some "*tortious* conduct" against the appellant. So no duty arises to give information on that basis.

Reference was made to the case of *Shamuyarira v Zimbabwe Newspapers (1980) Ltd* 1994 (1) ZLR 445 (H). That case deals with issues that arose during litigation. It is distinguishable from this case where, according to the appellant, E litigation was not intended at the time of the court application. I referred earlier to South African authorities which dealt with the issue where litigation is intended.

Even the Zimbabwean authorities of *Shamuyarira's* case *supra*, and *Irvine v Serfontein*, *Irvine v de Villiers* 1979 RLR 273 (G) deal with these points because there was litigation. F

The fact that the appellant has not taken a clear position whether it intends to sue or not supports the argument that it is on a "fishing expedition". The appellant cannot even state that it intends to bring an action, for what wrong, and against which party.

I am satisfied that the appellant has not shown that it is owed a duty of G disclosure by the respondents.

Accordingly, the decision to dismiss its application was upheld, and the appeal was dismissed with costs.

Cheda JA

A Chidyausiku CJ and Ziyambi JA concurred

Manase & Manase, appellant's legal practitioners

Coghlan & Welsh, respondents' legal practitioners

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Source:
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KARIGAMBE & ANOR v JOGI & ORS 2003 (1) ZLR 92 (S)

Citation	2003 (1) ZLR 92 (S)
Case No	Judgment No. S-111-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza AJA

Heard 3 September 2002; 20 January 2003

Judgment 20 January 2003

Counsel *E T Matinenga,* for the appellants
A P de Bourbon SC, for the first respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Practice and procedure — *execution — sale — cancellation — grounds for cancellation — sale not genuine — effect would be to unjustly enrich* C *debtor*

Headnote

The appellants owed money to a building society, which attached their property in execution of the judgment obtained. The appellants, aware of the attachment, sold the property to the first respondent, who paid part of the purchase price so that the appellants could settle their debts with D the building society. The appellants did not do so. The building society refused to cancel the sale in execution, which went ahead. The first respondent put in a bid, to protect his interest. His bid was the highest. He subsequently applied for the sale in execution to be cancelled.

Held, that a sale in execution can be set aside on any ground. In this case, the sale was not genuine; the purpose of the first respondent attending the E sale and bidding was to protect his interest. It was not to purchase the property for a second time. The previous sale to the first respondent remained the proper and valid sale. If the sale in execution were not cancelled, the appellants would be paid more than they had agreed to in the previous agreement of sale. F

Legislation considered

High Court Rules, 1971 (RGN 1074 of 1971), rr 340 and 359

Case information

E T Matinenga, for the appellants

A P de Bourbon SC, for the first respondent G

Judgment

Cheda JA: The appellants owed certain sums of money to Central Africa Building Society ("CABS") and other creditors. The creditors sued for their money and had the property of the appellants attached. A sale in execution was eventually arranged. In the meantime the appellants sold the same property to H

Cheda JA

A the first respondent by private treaty in an agreement of sale which was signed by the appellants and the first respondent.

Both the appellants and the first respondent were aware that the property was under attachment by the fourth respondent, the Sheriff of the High Court. The first respondent paid the appellants part of the purchase price so that they could settle with their creditors. This would have had the effect of releasing B the property from attachment. However, the appellants did not settle their debts. CABS refused to consent to the cancellation of the sale in execution as the sale between the appellants and the first respondent had been arranged without their consent.

On 3 March 1999 the first appellant advised the first respondent that the sale C in execution was on and that the first respondent should come and bid in order to protect his interest. The first respondent did exactly that.

At the sale in execution, the first respondent made a bid up to $3.1 million. The next highest bid was for $3 million. The second respondent, Mr Shumba, was never declared a purchaser and has not shown any interest in the matter.

D The first respondent subsequently applied to the High Court for the auction sale to be set aside. The High Court granted the first respondent's application. The appellants argue that the sale by private treaty was a fraud. That cannot be so. Rule 340 of the High Court Rules provides as follows:

> "A sale in execution shall be stopped as soon as sufficient money has been raised to satisfy the said warrant and the costs of the sale."

E There is therefore nothing wrong with entering into an agreement with a person who provides sufficient money, on the condition that such person can buy the property, and an agreement is entered into by the parties to that effect.

Generally, a sale by public auction should not be set aside unless it falls under the provisions laid down in r 359, that is, if "(a) the sale was not properly F conducted; or (b) the property was sold for an unreasonably low price, or on any other good ground." Accordingly, the basis of the first respondent's application properly falls under "any other good ground".

In their supplementary heads of argument, the appellants argue that the first respondent could not be an interested party. This submission cannot be correct, given the fact that they had signed an agreement with him and he had G parted with a large sum of money as a deposit for the property. The court *a quo* was correct in holding that he was an interested party. They recognised his interest and even invited him to come and protect it.

Even the fraud they allege cannot assist the appellants. I have pointed out that it is not a fraud; but I should point out also that even if it had been, they could H not be allowed to benefit from their own fraud as they had approached the first

---

respondent and sold the property to him when it was already attached. He must A have found himself in a difficult situation when the same property he had already purchased was being offered for sale to other persons by auction yet he had paid money in order to stop its sale.

The sham bidding referred to by the appellants in their supplementary heads of argument came about because they withheld the money that he paid and did B not settle with their creditor, CABS.

The purpose of the first respondent attending the sale and bidding up to $3.1 million was to protect his interest, as suggested by the first appellant. It was not to purchase the property for the second time. For that reason, there was therefore no genuine or valid sale in execution.

If a different party had made a higher bid than the first respondent, then the sale C would be proper and binding, as such a sale would have been by an innocent and genuine party. Such sale would have superseded the sale to the first respondent.

The appellants continued to recognise the sale to the first respondent as valid up to the date of the sale in execution. That is why they asked the first D respondent to come and protect his interest. They had not cancelled the previous sale. They had received money as part payment. They had not even offered to refund it.

When the first respondent made part payment it was to enable the appellants to "settle with (their) creditors", as the first respondent put it. If the appellants E had done so, the sale in execution would not have taken place. It came about because the appellants had not paid the creditor, CABS.

When the first respondent applied for the cancellation of the sale in execution, no-one else objected except the appellants. CABS, the then outstanding creditor, did not object. It seems satisfactory arrangements have been made to pay CABS. F

Mr Shumba, who was referred to as the next highest bidder, has not shown any interest in the matter. This is understandable, as he lost nothing and cancellation of the sale will not prejudice him in any way.

Cancellation of the sale in execution will mean that only the previous sale to the first respondent remains the proper and valid sale. G

The argument by the appellants that that sale was cancelled is not correct as there was no cancellation. It cannot be said to be an illegal sale either, because if CABS had given consent that would have been the end of the matter, even if it was entered into when the sale in execution was pending. H

Cheda JA

A If the sale in execution is not cancelled, it simply means the appellants have the advantage of being paid more than they had agreed to in the previous agreement of sale. I agree with the court *a quo* that equity requires that the sale in execution be cancelled, as the first respondent will be required to pay more, while the appellants will be enriched by their own mishandling of the matter. I say "mishandling" because, firstly, when they were given part payment they B should have paid their creditors but they did not, thus prejudicing the first respondent and putting his interest into jeopardy. Secondly, it is the appellants who asked the first respondent to go and bid to protect his interest. They knew that this bidding was not to purchase the property again but to protect the first respondent's interest. They now want to benefit from that arrangement. This C cannot be allowed.

Accordingly, the appellants' appeal cannot succeed. This means that the sale by private treaty stands and, as such, they should be evicted from the property.

The end result is that the appeal fails on the two matters and it is dismissed with costs.

D Sandura JA and Gwaunza AJA concurred.

Mudambanuki & Associates, appellants' legal practitioners

Robinson & Makonyere, first respondent's legal practitioners

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FRONTINE MARKETING SERVICES (PVT) LTD v GRAIN MARKETING BOARD & ORS 2003 (1) ZLR 96 (S)

Citation	2003 (1) ZLR 96 (S)
Case No	Judgment No. S-116-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Malaba JA & Gwaunza JA
Heard	26 November 2001; 20 January 2003
Judgment	20 January 2003
Counsel	*Ms L L Chipato,* for the applicant *D Machingura,* for the first respondent *B Patel,* with him *Y Dondo,* for the second and third respondents
Case Type	Constitutional application

Annotations No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe — 1980 — Declaration of Rights — s 16(1) — compulsory acquisition of property — freedom of trade or economic activity — not a constitutionally protected right — not property in terms of s 16 — right to buy or sell maize not a legally protected interest — can be regulated by law — s 21 (right to freedom* D *of association) — right to trade with any person of one's choice — not a constitutionally protected right*

Headnote

The applicant, an importer of maize, challenged the sections of the Grain Marketing (Controlled Products Declaration) (Maize and Wheat) Notice, E 2001, which vest in the Minister of Lands, Agriculture and Rural Resettlement the exclusive privilege of declaring any product to be a controlled product, and vesting in the Grain Marketing Board the exclusive privilege of determining whether or not to grant any person permission to remove from, or bring into, a prescribed area any controlled agricultural produce, or any product derived therefrom, as being F inconsistent with the Constitution. The applicant challenged the resulting monopoly of the Grain Marketing Board on the ground that it infringed the applicant's constitutional rights in terms of s 16(1) and s 21(1) of the Constitution. The applicant sought a declaration that it be entitled to import, market, distribute, acquire and dispose of maize or maize G products into Zimbabwe, free from interference from the Grain Marketing Board.

Held, that freedom of trade or economic activity is not protected by s 16(1) of the Constitution.

Held, further, that the Zimbabwean Constitution does not contain a provision dealing with the freedom of trade, occupation or profession, or the right H

Sandura JA

A freely to engage in economic activity. As the right freely to engage in economic activity of one's choice is not specified in the Declaration of Rights, it must mean that the right is not one of those afforded protection by the Constitution.

Held, further, that it would be wholly inappropriate and incorrect to describe the alleged right to buy and sell maize as property or as a legally protected B interest, and it is accordingly not protected by s 16(1) of the Constitution.

Held, further, that as the alleged right to buy and sell maize is not protected by the Constitution it can be, and is, regulated by law in the Grain Marketing Act [*Chapter 18:14*]. Thus, the question of the applicant' s claim that a right to trade with any person of its choice in the course of C buying and selling maize fell away.

Cases cited

JR1013 Investments CC & Ors v Minister of Safety and Security & Ors 1997 (7) BCLR 925 (E)

Matthews & Ors v Young 1922 AD 492

Legislation considered D

Constitution of the Republic of South Africa (Act 108 of 1996), s 22

Constitution of Zimbabwe 1980, ss 11, 16(1) and 21(1)

Grain Marketing Act [*Chapter 18:14*], ss 26, 29, 33, 34, 35(1)

E Interim Constitution of the Republic of South Africa (Act 200 of 1993), s 26

Grain Marketing (Controlled Products Declaration) (Maize and Wheat) Notice 2001 (SI 235A of 2001)

Case information

Ms L L Chipato, for the applicant

D Machingura, for the first respondent

B Patel, with him *Y Dondo,* for the second and third respondents

Judgment

Sandura JA: This application has been brought to this court in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution"), for redress in respect of alleged contraventions of the Declaration of Rights. The applicant seeks the following relief:

> "IT IS HEREBY DECLARED THAT:
>
> 1. Section 3 of Statutory Instrument 235A of 2001, the Grain Marketing (Controlled Products Declaration) (Maize and Wheat) Notice, 2001, and section 29 of the Grain Marketing Act [*Chapter 18:14*] (are) inconsistent

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Sandura JA

> with section 16(1) of the Constitution of Zimbabwe and (are) therefore invalid insofar as (they):
>
> (a) vest in the Minister of Lands, Agriculture and Rural Resettlement the exclusive privilege of declaring any product to be a controlled product; and
>
> (b) vest in the Grain Marketing Board the exclusive privilege of determining whether or not to grant any person permission to remove (from) or bring into a prescribed area any controlled agricultural produce or any product derived therefrom.
>
> 2. Section 26, section 33 and section 34 of the Grain Marketing Act [*Chapter 18:14*] and Statutory Instrument 235A of 2001 are inconsistent with section 21(1) of the Constitution of Zimbabwe and (are) therefore invalid insofar as they:
>
> (a) (have) declared the whole of Zimbabwe to be a prescribed area; and
>
> (b) vest with the Grain Marketing Board the exclusive privilege of carrying on the trade of marketing, importing, buying, selling, acquiring and disposing of all controlled products in Zimbabwe.
>
> IT IS ORDERED THAT:
>
> 3. The applicant be and is hereby entitled to import the maize product into Zimbabwe free from interference from the Grain Marketing Board.
>
> 4. The applicant be and is hereby entitled to market, distribute, acquire and dispose of all grain, including the maize commodity or any product derived therefrom, free from interference from the Grain Marketing Board.
>
> 5. The second respondent is hereby directed to issue the applicant with Import Permits in terms of the Control of Goods (Import and Export) (Agriculture) Order, 1993.
>
> 6. The applicant is hereby entitled to commence the importation of maize into Zimbabwe in line with the permits already granted to it by the second respondent."

The first respondent, through its counsel, indicated that it would abide by the decision of this court, but the second and third respondents opposed the application.

The background facts are these. The applicant is a company duly incorporated in accordance with the laws of Zimbabwe. It carries on the business of agents, importers, exporters, distributors, buyers and sellers of all classes of goods and commodities. It would like to import maize into Zimbabwe and sell it in Zimbabwe without involving the first respondent ("the GMB"). Although it has been issued with permits to import maize into Zimbabwe by the second respondent ("the Minister"), once the maize has been imported it cannot be

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Sandura JA

sold or otherwise disposed of to anyone other than the GMB. That is so because, in terms of the provisions of the Grain Marketing Act [*Chapter 18:14*] ("the Act"), the GMB has the monopoly of buying and selling maize.

In the circumstances, the applicant challenges that monopoly on the ground that it infringes the applicant's constitutional rights guaranteed in terms of s 16(1) and s 21(1) of the Constitution.

I now wish to set out the constitutional and statutory provisions in issue.

Section 16(1) of the Constitution, in relevant part, reads as follows:

> "… no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that —
>
> (a) requires —
>
> (i) in the case of land or any interest or right therein …; or
>
> (ii) in the case of any property, including land, or any interest or right therein, that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public; and
>
> (b) to (f) …"

Section 21(1) of the Constitution, which deals with the protection of the freedom of assembly and association, reads as follows:

> "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."

Section 26 of the Act, which deals with the functions and duties of the GMB, reads as follows:

> "The functions and duties of the Grain Marketing Board shall be —
>
> (a) to do all things necessary and consistent with the provisions of this Act to ensure the orderly marketing of controlled products within any prescribed area;
>
> (b) to buy and sell any controlled product which is delivered to or acquired by it under the provisions of this Act;
>
> (c) to provide storage, handling and processing facilities for controlled products;
>
> (d) to maintain stocks of controlled products as it may consider necessary;
>
> (e) to import or export controlled products as it may consider necessary;
>
> (f) to do such other things, whether in relation to a controlled product or

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> not, not inconsistent with this Act, as may be required by the Minister."

Section 29(1) of the Act, which deals with the declaration of controlled products, reads:

> "The Minister may, by statutory instrument, declare any agricultural product or any product derived therefrom to be a controlled product and shall specify in the statutory instrument the area within which the product shall be a controlled product."

Section 33(1) of the Act, which deals with the sale or disposal of controlled products, reads:

> "Subject to subsection (8), section *thirty-five* and any order made in terms of paragraph 1 of the Schedule, no person shall sell or otherwise dispose of any controlled product within the prescribed area except to the Grain Marketing Board."

Finally, section 34(1) of the Act, which deals with the acquisition of controlled products, provides as follows:

> "Subject to subsection (8) of section *thirty-three*, section *thirty-five* and any order made in terms of paragraph 1 of the Schedule, no person shall buy or otherwise acquire within the prescribed area any controlled product otherwise than from the Grain Marketing Board."

It is important to note that, in terms of s 35(1) of the Act, any person who has acquired a controlled product from the GMB in terms of the Act is permitted to sell or otherwise dispose of the controlled product within the prescribed area in the normal course of business, provided he complies with any terms and conditions set by the GMB. Similarly, any person may acquire such controlled product from the person selling or otherwise disposing of it in the normal course of business.

I now come to the declaration of maize as a controlled product. On 16 July 2001, the Minister, acting in terms of s 29(1) of the Act, issued the Grain Marketing (Controlled Products Declaration) (Maize and Wheat) Notice, 2001, published in Statutory Instrument 235A of 2001 ("the Notice"), which declared that maize, maize-meal, wheat and wheat-flour were, with effect from that day, controlled products within the whole of Zimbabwe.

The effect of the declaration, as far as the applicant was concerned, was that G if it imported maize into Zimbabwe it could not sell or otherwise dispose of it except to the GMB, as required by s 33(1) of the Act.

The most important issue which arises in this application is whether the freedom of trade or economic activity is protected by s 16(1) of the Constitution. In my view, it is not. Unlike the South African Constitution, the Constitution of Zimbabwe does not have any provision dealing with the freedom of trade, H

Sandura JA

A occupation or profession, or the right freely to engage in economic activity.

Section 26 of the Interim Constitution of the Republic of South Africa (Act 200 of 1993) read as follows:

> "26. Economic activity
>
> (1) Every person shall have the right freely to engage in economic activity B and to pursue a livelihood anywhere in the national territory.
>
> (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and C equality."

However, the above section was not reproduced in the final Constitution of the Republic of South Africa (Act 108 of 1996). In this regard, section 22 of the final Constitution, which replaced section 26 of the Interim Constitution, reads as follows:

> "22. Freedom of trade, occupation and profession
>
> D Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

In passing, I wish to say that there are important differences between section 26 of the Interim Constitution and section 22 of the final Constitution E of the Republic of South Africa. As Jones J said in *JR1013 Investments CC & Ors v Minister of Safety and Security & Ors* 1997 (7) BCLR 925 (E) at 928 F-G:

> "The differences between the rights enshrined in the new Constitution and the interim Constitution are significant. The old section, section 26, entrenched a right to engage in economic activity and to pursue a F livelihood. It gave this right to any person. The new Constitution confines its application to citizens. It does not give them the right to engage in or pursue anything. Instead it gives them a right to choose a trade, occupation or profession. The new Constitution has deliberately brought about a change. The right to choose a trade, occupation or profession is entirely different in nature from a right either to engage in economic activity or to G pursue a livelihood. It is wider in content. It is sacrosanct."

Thus, although the final Constitution of the Republic of South Africa grants to every citizen the right to choose his/her trade, occupation or profession, the practice of such a trade, occupation or profession may be regulated by law.

It is pertinent to note that in terms of s 11 of the Constitution of Zimbabwe, H which is the preamble to the Declaration of Rights, the fundamental rights and

Sandura JA

freedoms of the individual afforded protection are those specified in the A Declaration of Rights. The section, in relevant part, reads:

> "Whereas persons in Zimbabwe are entitled … to the fundamental rights and freedoms of the individual specified in this Chapter, … the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms …".

In my view, the fact that the right freely to engage in economic activity of one's B choice is not one of the fundamental rights and freedoms of the individual specified in the Declaration of Rights is significant. It must mean that the right is not one of those afforded protection by the Constitution.

In addition, I do not believe that the submission made on behalf of the applicant, that "the applicant's right to trade in the maize commodity is C property within the meaning of, and is

guaranteed by, s 16(1) of the Constitution", has any validity. Such a right is not an absolute right.

Commenting on the right to trade, De Villiers JA had this to say in *Matthews & Ors v Young* 1922 AD 492 at 507:

> "In the absence of special legal restrictions a person is without doubt D entitled to the free exercise of his trade, occupation or calling, unless he has bound himself to the contrary. But he cannot claim an absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is E the right to exercise his calling without unlawful interference from others."

The same point is made, perhaps more forcefully, by McKerron in *The Law of Delict* 7 ed at p 270, where the learned author says the following:

> "But this right is subject to and conditioned by the existence of like rights in others. It is therefore not a right in the strict sense, in the sense of a F legally protected interest, but merely a liberty or power – that is, a capacity of doing something which the law does not forbid, a mere negation of duty."

In the circumstances, it would be wholly inappropriate and incorrect to describe the alleged right to buy and sell maize as property or as a legally G protected interest. Accordingly, it is not protected by s 16(1) of the Constitution.

Having come to that conclusion, the other issue, that is, whether the applicant's right to trade with any person of its choice in the course of buying and selling maize is protected by s 21(1) of the Constitution, falls away. That is so because the alleged right to buy and sell maize is not protected by the Constitution and H

Sandura JA

A can, therefore, be regulated by law, which has been done by the enactment of the Grain Marketing Act [*Chapter 18:14*].

It therefore follows that the application is without merit and ought to be dismissed.

Finally, as far as costs are concerned, Mr *Patel*, who appeared for the second B and third respondents, informed the court that in view of the fact that important questions have been raised in this application, if the application is dismissed there should be no order as to costs. I am in complete agreement with that approach.

In the circumstances, the application is dismissed with no order as to costs.

C Chidyausiku CJ, Cheda JA, Malaba JA and Gwaunza JA concurred

Jabula Legal Practitioners, applicant's legal practitioners

Dube, Manikai & Hwacha, first respondent's legal practitioners

D *Civil Division of the Attorney-General's Office*, second and third respondents' legal practitioners

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Source:
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BAILEY NO v DEPUTY SHERIFF, HARARE 2003 (1) ZLR 104 (H)

Citation 2003 (1) ZLR 104 (H)

Case No Judgment No HH–12-03

Court	High Court, Harare
Judge	Guvava J
Heard	31 October 2002; 22 January 2003
Judgment	22 January 2003
Counsel	*W Ncube,* for the applicant *C Selemani,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Practice and procedure — *execution — Deputy Sheriff's entitlement to* C *commission — execution stayed by court order after property attached — Deputy Sheriff not entitled to commission, only to fees relating to disbursements*

Words and phrases — *"withdraw" (writ of execution)* D

Headnote

The question for determination was whether or not the Deputy Sheriff is entitled to claim and be paid commission in respect of a writ of execution where he has effected attachment but before the sale in execution, in circumstances where there has been an order for stay of execution and a court order rescinding the judgment to which the writ of execution E relates.

Held, that under the Rules, the Deputy Sheriff was entitled to three per cent of the value of the property attached as commission in the event that a writ of execution is withdrawn after attachment but before the sale is carried out.

Held, further, that applying the ordinary interpretation of the word "withdraw" F in the context of r 8(1)(c) of the High Court (Fees and Allowances) Rules, 2000, it means the judgment creditor must cancel or retract the order given to the Deputy Sheriff

Held, further, that the writ was not withdrawn by the applicant but execution was stayed in terms of a court order. A judgment creditor cannot be G penalized by being required to pay the commission of the Deputy Sheriff in circumstances, where in effect, he is complying with a court order. The Deputy Sheriff was, however, entitled to the fees relating to his disbursements. H

2003 (1) ZLR p105

Guvava J

Legislation considered A

High Court (Fees and Allowances) Rules, 2000 (SI 82 of 2000), s 8 (1)

Case information

W Ncube, for the applicant

C Selemani, for the respondent

Judgment

B **Guvava J:** The applicant in this matter seeks a declaratory order that the respondent is not entitled to raise a commission in the sum of $456 786.18 or any other amount against a writ of execution issued in case HC 12283-00. The applicant also asks for costs of suit.

The facts relating to this matter are generally common cause. The applicant in C this case obtained a default judgement against one Mtawarira in case HC 12283-00. A writ of execution was issued out of

this court on 19 February 2001. The Deputy Sheriff was instructed to execute the writ by the applicant's legal practitioners at Dulais Farm, Bindura, which was the address which the applicant had for Mtawarira. When the Deputy Sheriff D attempted service of the writ of execution he was advised that Mtawarira had moved to Muziti Farm in Norton. The applicant then instructed the Deputy Sheriff to effect service at the new address in Norton and the Deputy Sheriff proceeded to attach property at that address. When Mtawarira became aware of the attachment he filed an urgent application in this court for stay of execution. He also made an application for rescission of the default judgment. E The applicant consented to judgment in the application for rescission of judgment as he was of the view that it was likely to succeed as the summons had been served in Bindura after Mtawarira had already moved to Norton. He also consented to the application for stay of execution.

The Deputy Sheriff was then advised not to proceed with the sale of the property which he had attached, as the court had granted an order for stay of F execution and the judgment had been set aside.

It was on the basis of this attachment that the Deputy Sheriff thereafter submitted a claim to the applicant for commission on the value of the writ in the sum of $456 786.18.

The question which falls for determination by this court is whether or not the G Deputy Sheriff is entitled to claim and be paid commission in respect of a writ of execution where he has effected attachment but before the sale in execution, where there has been an order for stay of execution and an order of this court rescinding the judgment to which the writ of execution relates.

The respondent raised a point *in limine* at the beginning of the hearing. He H alleged that the applicant had followed the wrong procedure in pursuing the

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relief sought. He argued that the proper procedure was for the applicant to have A the Deputy Sheriff's bill taxed by the Sheriff in accordance with r 457(2) and (5) of the High Court Rules. In my view, the issue before the court is not whether the Deputy Sheriff has made a proper claim in accordance with the Rules, but one of actual entitlement to the commission. The question of entitlement is a legal issue which a taxing officer cannot determine. His B mandate is to examine the reasonableness or otherwise of the costs raised by the Deputy Sheriff. He therefore cannot deal with the issue raised. In any event, even if he could deal with the issue raised, there is nothing in the Rules which would prohibit the applicant from referring the matter to this court for a determination without having to first seek a ruling by a taxing officer. In my view, the point raised by the respondent *in limine* cannot succeed. C

In considering the merits of the main matter before me, it is necessary to examine the legislation which deals with fees and allowances for the Deputy Sheriff. In terms of s 56 of the High Court Act [*Chapter 7: 06*], rules which regulate the fees and allowances to be paid in respect of service or execution of any process of the High Court are published in a Statutory Instrument which may be altered from time to time. The Statutory Instrument which was D applicable at the relevant time was the High Court (Fees and Allowances) Rules, 2000, published in SI 82 of 2000. The provision which is relevant to the Deputy Sheriff's fees in respect to execution provides as follows:

> "8.(1) In respect of execution —
>
> (a) … E
>
> (b) …
>
> (c) when a writ is withdrawn by the judgment creditor, or the judgment debtor's estate is placed under sequestration or liquidation after movable property has been attached but before sale, three *per centum* of the value of the property attached, but such value shall not exceed the amount directed to be recovered." F

It is clear from this provision that the Deputy Sheriff is entitled to three per cent of the value of the property attached as commission in the event that a writ of execution is *withdrawn* after attachment, but before the sale is carried out. The question which arises therefore is whether or not, on the facts of this case, the applicant withdrew the writ, as envisaged by the provision. The word "withdraw" G is defined as "to discontinue, to cancel, retract" in the *Oxford Dictionary of Current English* (new revised edition 1998). Applying the ordinary interpretation to the word "withdraw" in the context of the provision cited, it means the judgment creditor must cancel or

retract the order given to the Deputy Sheriff. (It appears to me that this must be a voluntary cancellation or

Guvava J

withdrawal by the judgment creditor). The word "withdrawn" which is used in the provision, must, as there is no evidence to the contrary, be construed in its normal grammatical sense.

An examination of the provision indicates that the provision was designed to protect the office of the Deputy Sheriff from litigants who use that office to attach property, and after they are paid by a debtor, they simply withdraw their instructions, thereby depriving the Deputy Sheriff of his hard-earned commission.

The circumstances of this case appear to fall outside the purview of this provision and the mischief sought to be dealt with. The writ was not withdrawn by the applicant but execution was stayed in terms of a court order lawfully issued out of this court. In my view, there is a clear distinction between a withdrawal by a judgment debtor in circumstances where the judgment upon which the writ is premised is in existence and there is no order for stay in execution and one, as in this case, where there is a court order staying execution and setting aside the very judgment upon which the writ was issued. Where there is a court order staying execution, the decision that the Deputy Sheriff refrains from effecting the sale is not at the instance of the judgment creditor but as a result of an order by the court. Thus a judgment creditor cannot be penalised by being required to pay the commission of the Deputy Sheriff in circumstances where, in effect, he is complying with a court order. The fact that the creditor, who is the applicant in this case, consented to the judgment does not alter this position, as the Deputy Sheriff will still be acting in accordance with a court order. Thus the respondent in this matter, whilst being entitled to the fees relating to his disbursements as set out in the Rules, is not entitled to the commission in respect of the value of the attached goods.

Accordingly, the applicant is entitled to the relief that he seeks.

It is hereby declared that:

1 The Deputy Sheriff is not entitled to raise a commission in the sum of $456 786.18 or any other amount, in respect to a writ of execution issued out in case HC 12283-00 on 19 February 2001.

2 It is ordered that the respondent shall pay the costs of suit.

Coghlan, Welsh & Guest, applicant's legal practitioners

Matipano & Musimwa, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/BVUNZAWABAYA & ORS v COMMISSIONER OF PRISONS & ANOR 2003 (1) ZLR 108 (H)

BVUNZAWABAYA & ORS v COMMISSIONER OF PRISONS & ANOR 2003 (1) ZLR 108 (H)

Citation	2003 (1) ZLR 108 (H)
Case No	Judgment No. HH-225-02
Court	High Court, Harare
Judge	Makarau J
Heard	13 November 2002; 22 January 2003

Judgment 22 January 2003

Counsel *L T Biti*, for the applicants
Mr Mutsonziwa, for the respondents

Case Type Opposed application

Annotations No case annotations to date

Flynote

Review — *application — proceedings pending in lower tribunal — when* C *High Court will hear matter — principles — tribunal's lack of jurisdiction to decide matter in issue — grounds for High Court to consider matter*

Regulations — *validity — statute published in Revised Edition of Laws — statute omitting provision contained in previous version of statute* D *— regulations published in terms of omitted provision – such regulations to be treated as pro non scripto*

Statutes — *Prisons Act [Chapter 7:11] — s 28 — prohibited activities — no prohibition against participation in political activities — invalidity of regulations proscribing such activities* E

Headnote

The applicants, all prison officers, were charged before a prisons disciplinary board on allegations that they had contravened various provisions of the Prisons Act and Regulations by taking part in political activities. They were alleged to have supported the principal opposition party before and during the general election in 2000. They were placed on interdiction F from duty and half pay, the Commissioner purportedly acting in terms of s 6(1) of the Prisons (Staff) (Discipline) Regulations, 1984 (SI 289 of 1984). They were later charged with misconduct, it being alleged that what they did constituted active participation in politics. The respondents claimed that the charges were valid, being based on s 19 of the Prisons (Staff) (General) Regulations, 1968 (RGN 405 of 1968) G

The applicants brought the matter on review before the High Court, claiming that their rights under various sections of the Declaration of Rights were being violated.

Held, that, in determining whether or not judicial review of an administrative tribunal should be excluded or deferred, one of the considerations is whether the tribunal has the power to redress wrongs of a reviewable H

Makarau J

A character. Another is whether the tribunal, its powers and procedures are suited to redress the particular wrongs of which the applicant complains.

Held, further, the issues raised by the applicants could not be determined by the tribunal and for this reason the court should hear the matter.

Held, further, that while the tribunal could determine the validity of the charges which the applicants faced, the court had the power to determine B the validity of the law on which the charges were based.

Held, further, there was no current provision in the Prisons Act which prohibited political activities, although such a provision had been in the equivalent provision of the Act before the current edition was published. It had been properly omitted by the Law Reviser when the 1996 Revised C Edition of the Laws was published. Even if the Law Reviser had acted outside the scope of his powers, the current version of the law was the sole version.

Held, therefore, that any regulatory provisions which purported to prohibit political activities must be regarded as *pro non scripto*.

Cases cited D

Musandu v Chairperson, Cresta Lodge Disciplinary & Grievance Cttee HH-115-94

Tutani v Min of Labour & Ors 1987 (2) ZLR 88 (H)

Legislation considered E

Prisons Act [*Chapter 7:11*], s 28

Prisons (Staff) (General) Regulations, 1968 (SI 405 of 1968), s 19

Statute Law Compilation and Revision Act [*Chapter 1:03*], s 11(3)

Case information

F *L T Biti*, for the applicants

Mr Mutsonziwa, for the respondents

Judgment

Makarau J: The applicants are all prison officers. It is alleged that during the general election held in July 2000, they were actively involved in politics in that they individually, and in different circumstances, distributed campaign G material for the Movement for Democratic Change Party (MDC) in and around the Chikurubi area; they played active roles in mobilising sympathisers from Chikurubi Old Training Deport to go and attend a victory celebration for a local member of Parliament which was held at Chamboko farm; some of them attended the victory celebration party and uttered words critical of the H Government during the announcement of the results of the Presidential

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Makarau J

elections and the Masvingo mayoral elections. As a result of these allegations, A the applicants were all placed on interdiction from duty on half pay in terms of s 6(1) of the Prisons (Staff) (Discipline) Regulations, 1984 (SI 289/84) (hereinafter referred to as "the Discipline Regulations").

In November 2001, the applicants were charged with misconduct. The charges levelled against most of the applicants are two-fold. Firstly, they are charged B with contravening s 3 (4) of the Discipline Regulations in that they contravened or failed to comply with any regulations made under the Prisons Act [*Chapter 7.11*] with which it was their respective duties to comply. In the alternative, the applicants are charged with contravening s 3(46) of the Discipline Regulations in that they are guilty of acts, conduct, disorder or neglect of duty to the prejudice of good order or discipline. C

Secondly, the applicants are charged with contravening the provisions of s 28 (1) of the Prisons Act [*Chapter 7.11*], in that during the period in question, they were individually concerned in employment other than the duties assigned to them in accordance with the Act.

Upon being served with the above charges, the applicants, through the office D of their legal practitioners, protested at the propriety and constitutionality of the charges. Notwithstanding their protests, the applicants were all summoned to appear before a disciplinary hearing on 13 December 2001. For reasons that have not been disclosed in the papers before me, the hearing was postponed to some date in 2002. At the resumed hearing of the matter, the parties agreed to stay proceedings pending determination of this application which had been E filed in January 2002.

In the application before me, the applicants pray for an order that charges 1 and 2 on the charge sheets served upon them in November 2001 be set aside on the basis that such charges are *ultra vires* and contravene certain sections of the Constitution. F

At this stage I wish to comment briefly on the nature of the application before me. This is an interlocutory application to declare null and void certain charges that the applicants are facing before the disciplinary hearing set up by the first respondent in terms of the Prisons Act. The issue that presents itself to me is whether or not I should withhold my jurisdiction at this stage and refer the matter back to the disciplinary tribunal for the determination of the issues G raised by the applicants.

The issue arises because this court has often discouraged access to it whilst the proceedings in the inferior tribunal are still under way. This has been evident mostly in employment matters pending

before the machinery set up under the Labour Act [*Chapter 28.01*]. In an unreported judgment, *Musandu* H

Makarau J

A v *Chairperson, Cresta Lodge Disciplinary & Grievance Cttee* HH-115-94 Smith J, in my view, captured the general thinking behind this approach by the courts when he said:

> "In my view, this court should not be prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to apply to court rather than to proceed by way of the domestic remedies B provided. The factors mentioned by Mtambanengwe J in *Tutani's* case (*supra*) should be carefully considered before a decision is made. A litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for approaching the court earlier."

In the case of *Tutani v Minister of Labour and Ors* 1987 (2) ZLR 88 (H), Mtambanengwe J held that in determining whether or not judicial review of C the decision of an administrative tribunal is excluded or deferred, and whether an applicant should first exhaust his domestic remedies, the court should have regard to a number of factors. The learned Judge proceeded to list these. They include the subject matter of the statute, the body of persons that makes the initial decision and the bases upon which the decision is to be made. The D composition of the appellate tribunal, the manner in which it exercises its jurisdiction, including the ambit of any rehearing on appeal, the powers of the appellate tribunal including its power to redress or cure wrongs of a reviewable character, and whether the tribunal, its powers and procedures are suited to redress the particular wrong of which the applicant complains, are also factors that the judge said should be taken into account before a court E withholds its jurisdiction.

In my view, the above two cases are authority for the proposition that the common law jurisdiction of this court in employment cases may be withheld after a careful consideration of the factors mentioned by Mtambanengwe J and the court is satisfied that there are no good reasons why the applicant should F approach the court earlier than the completion of the case before the inferior tribunals. I agree with the position enunciated in these *dicta* and further hold that the same approach is applicable to the matter before me.

Applying the principle in the above cases to the facts of the application before me, I note that the applicants are raising an alleged breach of the provisions of the Constitution. This is the basis of their application. According to the G *dicta* in *Tutani's* case *supra,* two of the factors I have to take into account are the power of the inferior tribunal to redress or cure wrongs of a reviewable character and whether the procedures and powers of the inferior tribunal are suited to redress the particular wrong of which the applicant complains. It is clear to me that the issue raised by the applicants is one where the inferior H tribunal does not have jurisdiction. The powers of the disciplinary tribunal to

Makarau J

recommend the suspension, reduction in rank or discharge of any prison A officer in terms of the Act do not extend to the determination of issues of a constitutional nature. On this basis alone, it is my view that the applicants have shown good cause for approaching the court before the completion of the proceedings before the disciplinary tribunal set up by the first respondent.

Despite my finding that good cause has been shown for this court to entertain B the application at this stage, I am well aware that the charges before the disciplinary tribunal can be amended during the proceedings before that tribunal. Due to that fact, I am of the view that it will be highly undesirable for me, at this stage, to set aside any of the charges that the applicants are facing before the tribunal. The validity of the charges before it is an issue that appears to me to be within the ambit of the powers of the tribunal. All I can do at this C stage is to determine the validity of the law upon which the charges are currently based.

The issue that remains for my determination is whether or not the charges leveled against the applicants are *ultra vires* ss 20, 21 and 22 of the Constitution or are in contravention of ss 11, 18 and 23 of the Constitution as D alleged. The argument on behalf of the applicants is that the factual charges upon which they have been charged with misconduct is their alleged active political involvement with the Movement for Democratic Change. The applicants base their argument as such on the statements recorded from the witnesses of the first respondent, which were tendered as part

of the first respondent's case before the disciplinary tribunal. (The statements tend to indicate that the applicants were actively involved in political activities during the period in question). In response, the respondents have argued that the charges against the applicants as they stand are valid, in that they are based on s 19 of the Prison (Staff) (General) Regulations, 1968 (RGN 405 of 1968), which defines what constitutes active participation in politics for the purposes of s17 (3) of the Prisons Act, 1955.

In my view, before I consider whether or not the factual basis upon which the charges levelled against the applicants contravene the Constitution, I have to determine whether or not the subsidiary legislation that the respondents are relying on is *intra vires* the current Prisons Act. In the event that I find that the section of the subsidiary legislation under consideration to be *ultra vires* the current Prisons Act, then the inquiry must end and the parties must be guided accordingly. The issue of the constitutionality or otherwise of the legislation will only arise if I find the subsidiary legislation to be *intra vires* the current Act.

To determine this matter, I must trace the history of the statutory law relating to prisons from the Prisons Act No 9 of 1955 (hereinafter referred to as "the

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Federal Act") to the Prisons Act [*Chapter 7.11*] (hereinafter referred to as the "current Act").

Section 19 of the Federal Act prescribed certain acts as being prohibited activities on the part of prison officers. It read as follows:

> "17(1) No prison officer shall be concerned in any employment other than the duties assigned to him by or in accordance with the provisions of this Act.
>
> (2) No prison officer shall accept any bribe, fee, gratuity, or reward from, or, without the permission of the Director, have any business dealings with, prisoners, visitors to prison, persons known to be ex-prisoners, or friends of prisoners and ex-prisoners.
>
> (3) Except with the written consent of the Minister and in accordance with such directions as the Minister may give, no prison officer shall commit any act which is prescribed as being an act constituting active participation in politics."

After the dissolution of the Federation the Federal Act remained in force: see SRGN 693 of 1963 In 1963, regulations were made providing for the conditions of service of senior and junior and subordinate officers. All such regulations contained a section prescribing what constituted prohibited activity and a section that defined, for the purposes of s 17 (3) of the Federal Act, the acts that would constitute active participation in politics.

The Prisons (Staff) (General) Regulations, 1968 (RGN 405 of 68), (hereafter referred to as the "Prisons General Regulations") repealed the earlier regulations. However, they too contained a section setting out what constituted prohibited conduct on the part of prison officers and a section prescribing what constituted active participation in politics for the purposes of s 17 (3) of the Federal Act.

When the Revised Edition of the Laws was published in January 1976, in terms of the Revised Edition of the Laws Act 1973, the Federal Act became the Prisons Act [*Chapter 21*]. What had been s 17 of the Federal Act became s18 of Chapter 21. There was no change in the provisions. The Prisons General Regulations remained in force as though they had been made under Chapter 21.

The 1996 Revised Edition of the Laws replaced the 1974 Revised Edition. Chapter 21 became the Prisons Act [*Chapter 7.11*], the Act currently in force. What was s18 of Chapter 21 became s 28 of the current Act. However, the new s 28 had two subsections only. The third subsection was omitted. The provisions of s 28 are as follows:

> "**28 Prison officers and prohibited activities**
>
> (1) No prison officer shall be concerned in any employment other than the duties assigned to him in accordance with this Act.
>
> (2) No prison officer shall accept any bribe, fee, gratuity or reward from, or, without the permission of the Commissioner, have any business dealings with, prisoners, visitors to prisoners or persons he knows to be ex-prisoners or friends of prisoners and ex-prisoners."

There is no provision prohibiting a prison officer from participating in politics. Although the Prisons General Regulations are still in force and define what constitutes active participation in politics, there is no corresponding section in the parent Act that prescribes active participation in politics as a prohibited activity. C

It is clear that the third subsection of s18 of Chapter 21 was omitted when s 28 of the current Act was reprinted. The Law Reviser did the omission when he compiled the Revised Edition of the Statutes in 1996.

In terms of the Statute Law Compilation and Revision Act [*Chapter 1.03*], the Law Reviser is empowered to make amendments, omissions and alterations to D the law in the process of revising the law, to bring it into conformity with the Constitution, the Interpretation Act [*Chapter 1.01*], and the Statute Law Compilation and Revision Act. In view of the fact that the current Act has been in existence for six years in this state and has always fallen under the administration of the second respondent, I have no doubt that the omission by the Law Reviser was in accordance with the provisions of the law. E

In any event, even if the Law Reviser acted outside the scope of his powers in amending the law as he did through the omission, I am bound to apply the provisions of the current Act as they are by the provisions of s 11(3) of the Statute Law Compilation and Revision Act that reads:

> "The version of any existing law re-issued in terms of subsection (1) shall, F upon publication in the *Gazette*, be the sole version of the law concerned in all courts of law and for all purposes whatsoever."

I have no discretion in this matter. I am bound to read the Prisons Act [*Chapter 7.11*] as the sole version of the law of the land in relation to the administration of prisons in Zimbabwe. I cannot make reference to past statutes that are not part of the current Act to ascertain what the law is. Accordingly, I must regard G the provisions of s19 of the Prisons General Regulations as *pro non scripto*. So must the respondents.

In view of the finding I have made above, it is not necessary that I proceed to determine whether or not the provisions of the regulations under scrutiny are *ultra vires* the Constitution. The question has fallen away. H

2003 (1) ZLR p115

Makarau J

A The issues raised in this matter are interlocutory in nature. The disciplinary proceedings against the applicants are pending before a tribunal set up by the first respondent. Were it not for the reasons I have set out at the beginning of this judgment, I would have withheld my jurisdiction in the matter. For these reasons, I will not make an order as to costs.

In the result, I would make the following order: B

1. It is hereby declared that the provisions of s 19 of the Prisons (Staff) (General) Regulations 1968, (RGN 405 of 1968) are to be read as *pro non scripto*.
2. Each party is to bear its own costs.

C *Honey & Blanckenberg,* applicants' legal practitioners

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 1/2003/Volume 1/JERE v CHITSUNGE 2003 (1) ZLR 116 (H)

JERE v CHITSUNGE 2003 (1) ZLR 116 (H)

2003 (1) ZLR p116

Citation 2003 (1) ZLR 116 (H)

Case No	High Court, Bulawayo
Court	Judgment No. HB-10-2003
Judge	Cheda J
Heard	18 October 2002; 23 January 2003
Judgment	23 January 2003
Counsel	*K Phulu*, for the applicant *G Nyathi*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Family law — *child — custody — factors to consider in awarding custody — custodian mother wishing to take child out of jurisdiction — move in* C *child's best interests — application granted*

Headnote

The applicant and the respondent were formerly married. When they separated, the applicant sought to remove the child of the marriage to England, where she had a job. Her application was granted. The respondent D appealed against the order. The applicant sought leave to execute the order pending the appeal.

Held, that the likelihood of irreparable harm being suffered by the respondent if leave to execute pending appeal were granted should also be considered in relation to the child. The interests of the child being paramount, the interests of the parents are secondary. In determining what is the interests E of the child, the court should consider, *inter alia*;

(1) the fitness or otherwise of the custodian parent
(2) the age of the child
(3) the sex of the child
(4) the length of time the child has lived with either party or with his or F her relatives
(5) the degree of emotional stress the child would suffer in event of being separated from the other parent
(6) any risk of ill-treatment by either party or by a member of the party's household.

In this case, the applicant had several factors in her favour. Her move to G England was in the child's interests.

Held, further, that no irreparable harm would befall the respondent that could not be cured if the appeal went in his favour. The court was also entitled to look at the grounds of appeal and the chances of success. The respondent was seeking joint custody, an untenable argument as the H

Cheda J

A parties lived oceans apart. The prospects of success were thus very doubtful.

Cases cited

Nash v Nash [1973] 2 All ER 704 (CA)

Santam Ins Co Ltd v Paget (2) 1981 ZLR 132 (G)

Case information

B *K Phulu*, for the applicant

G Nyathi, for the respondent

Judgment

Cheda J: This is an application for leave to execute an order of this court C granted in case No. HB 48/02 pending the outcome of the respondent's appeal against the said order.

The applicant and the respondent are married under customary law and there is one minor child, hereinafter referred to as "the child". Due to matrimonial problems, the parties separated, resulting in the applicant moving to England, where she is presently working as a physiotherapist, leaving the child with her D relative. The applicant applied to this court and was granted an order to remove the child to England. The respondent then noted an appeal with the Supreme Court against that decision. The applicant now applies that, pending the outcome of the appeal, she be allowed to execute her order.

The respondent through his legal practitioner has opposed this application on the basis that this will deprive him of his right of access and custodianship of E his minor child. Our courts have set out three factors for consideration in deciding whether or not to allow execution pending appeal. These are:

1 The likelihood of irreparable harm being suffered by the applicant if leave to execute pending appeal is refused.

2 The likelihood of irreparable harm being suffered by the respondent if F leave to execute pending appeal is granted.

3 The prospects of success on appeal

The applicant is now based in England where she is employed as a physiotherapist. She has been there earlier. The opportunity for her to be with the child has arisen and has been recognised by this court after careful G consideration: see *Jere v Chitsunge* HB-48-02. The possibility of harm being suffered by both parties is indeed present. The question, however, is whether that harm is reparable. In the present case, the said harm should not only be confined to the applicant but should also have a bearing on the child who is in the centre of the dispute. I propose to deal with that point below.

H The likelihood of irreparable harm being suffered by the respondent if leave

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to execute pending appeal is granted should also be considered in relation to A the child. Then, of course, the question of success or failure of the appeal will in my view, crystallise itself as a result of the outcome of the two requirements *supra*.

As already intimated above, the applicant is based in England. The respondent's fear, which is quite normal, is that if the applicant takes the child away from B Zimbabwe his right of access to the child will be curbed. While this is true, it should also be accepted that separation or divorce of the parties shakes the equilibrium of their lives and as such life can never be the same, thereby necessitating the parties to adapt to changed circumstances. While the parties themselves can easily deal with their emotions and grief, the court's paramount consideration is the interest of the child. C

The interest of the child means, therefore, that the interest of the parents are secondary. The common practice is that, if all else is equal, especially if the child is young, the mother is likely to be given custody. The following in my view, is what the court should take into consideration in determining the interest of the child. The list is not exhaustive. D

1 the fitness or otherwise of the custodian parent

2 the age of the child

3 the sex of the child

4 the length of time the child has lived with either party or his or her relative

5 the degree of emotional stress which the child will suffer in the event of E the child being separated from the other parent

6 any risk of ill treatment by either party or member of his or her household.

In the present case, the applicant has the following factors in her favour:

(1) She has found a job and is therefore comparably comfortable.

(2) The child is very young and a girl. Because of her age and sex it is only F proper that during her tender age, it is the applicant who should look after her, being her natural bond. That bond is extremely necessary in both the normal mental and physical development of the child is to be achieved.

(3) The child has lived with the applicant's mother for a reasonably long time and therefore there is a bond which should not easily be terminated it is G likely to cause emotional stress on the child.

The respondent on the other hand has not had custody of the child before this issue came up. He is already married with a child. In as much as he, like most men, should prefer to bring up their children under one roof, it is not always possible as there is the problem of step-parenting. I make no determination as to the suitability or otherwise of the respondent's wife as a parent. That is how H

Cheda J

A far I can comment. The above factors wholly favour the interest of the child as opposed to that of the applicant.

If the mother, in the present case, is allowed to take the child to England, it can not be properly argued that her departure to England is solely for her selfish interest, as it were. The fact, that she is going to further her career is in fact in the best interest of the child: see *Nash v Nash* [1973] (2) All ER B 704 at 706B-C.

The respondent has vigorously opposed execution of the applicant's judgment on the basis of irreparable damage to him in the event of success of his appeal. Our law now places the onus of proof of such irreparable harm on the claimant and will sympathise with such claimant where the suspension sought is for a C judgment other than that sounding in money.

In *Santam Insurance Co Ltd v Paget (2)* 1981 ZLR 132 (G), Gubbay J as he then was stated at 134G-H:

> "As observed by Goldin J as he then was, in *Cohen v Cohen* (1) 1979 RLR 184 (GD); 1979 (3) SA 420 (R) at 423B-C.
>
> > D 'The court enjoys an inherent power, subject to such rules as there are, to control its own process. It may, therefore, in the execution of a wide discretion, stay use of its process of execution where real and substantial justice so demands: see also *Graham v Graham* 1950 (1) SA 655 (T) at 658. The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused him or, to express the E proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice'."

The learned judge went further and stated at p 136B:

> "I have already stressed that as a general rule execution will be allowed to issue where the judgment is for the payment of money (see *Geffen v Strand Motors (Pvt) Ltd* 1962 R&N 259 at 260H; 1962 (3) SA 62 (SR) F at 64A), but the court will, of course, exercise its discretion according to the circumstances of each particular case."

The court has inherent power to control its own process. It therefore, stands to reason that it has a discretion on the basis of real and substantial justice. The harm which the respondent envisages will result if his appeal succeeds is, in my view, curable by the enforcement of the order which the appeal court would G give. There is therefore no irreparable harm which can befall the respondent. On the other hand, the necessity to secure and protect the interests of the child is irreparable harm which can befall the applicant.

The stay of execution in our law also depends on the prospects of success of the appeal. Even if this court is not an appeal court, it is constrained to look H at the grounds of appeal. The respondent has vigorously argued for joint

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Cheda J

custodianship. This argument is untenable, as the parties now live oceans A apart as it were. If that ground is used, in my view, his chances of appeal will be nil.

In granting the order, Chiweshe J, in my view, canvassed all the relevant issues and I totally align myself with his decision. I find that the prospects of the respondent's success on appeal are very doubtful. The respondent on the B probabilities has failed to prove the possibility of irreparable harm to himself.

I accordingly, order as follows that:

1. The respondent be and is hereby ordered to surrender the passport of the minor child to the Deputy Sheriff upon demand, or within two days of the Deputy Sheriff making such demand. C
2. The Deputy Sheriff be and is hereby authorised and directed to demand, receive and/or collect the said passport from the respondent, and to deliver it to Coghlan and Welsh Legal Practitioners
3. The respondent shall pay the costs of this application. D

Coghlan & Welsh, applicant's legal practitioners

Sansole & Senda, respondent's legal practitioners

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Source:
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NYAMAINASHE v MINISTER OF TRANSPORT & COMMUNICATIONS & ANOR 2003 (1) ZLR 121 (H)

Citation	2003 (1) ZLR 121 (H)
Case No	Judgment No. HH-10-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	8 November 2002; 29 January 2003
Judgment	29 January 2003
Counsel	*J B Colegrave,* for the applicant *C Muchenga,* for the first respondent *N B Nagar,* for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Employment** — *contract — termination by way of abolition of office — need for Corporation to proceed in terms of relevant labour regulations*

Statutes — *Postal and Telecommunications Act [Chapter 12.05] — r 47(2), Posts and Telecommunications Pension Fund — Labour Act [Chapter 28:02] — applicability of these to applicant's situation*

Headnote

D The applicant had been employed on a fixed term contract by the PTC. When the PTC was "unbundled" into three separate companies, his post was purportedly abolished and his employment terminated. He challenged this termination.

Held, that the Act provided for the transfer of all employees to one or other E of the successor companies. There was no provision for abolition of office.

Held, further, that insofar as reliance was placed on the Regulations made under the Labour Relations Act, S1 371 of 1985 or S1 404 of 1990, there was no compliance with the provisions of either.

F *Held,* accordingly, that the applicant's contract had been unlawfully terminated.

Statutes and regulations referred to

Companies Act [*Chapter 24:03*]

Labour Act [*Chapter 28:01*]

G Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985

Labour Relations (Retrenchment) Regulations, 1990

Postal and Telecommunications Act [*Chapter 12:05*]

2003 (1) ZLR p122

Chinhengo J

Case information

J B Colegrave, for the applicant A

C Muchenga, for the first respondent

N B Nagar, for the second respondent

Judgment

Chinhengo J: The applicant was employed by the Posts and Telecommunications Corporation (hereinafter called "the PTC") before the B PTC was unbundled into three separate companies, Zimpost, Tel-One and Net-One. Tel-One (Pvt) Ltd, the second respondent, is therefore one of the successor companies of the former PTC. The applicant's contract of employment was terminated on 31 May 2001. In this application the applicant sought a declaration that his contract of employment was unlawfully terminated. He therefore prayed for an order that the respondents pay his salary and any C employment benefits due to him from "1 June 2001 to the date when applicant's contract of employment is lawfully terminated". He also claimed interest on the amounts due and for costs of suit.

The applicant was employed by the PTC in 1993. As at l June 1999 he had risen through the ranks to become the General Manager, Secretariat, of the PTC. His appointment as General Manager Secretariat was for a period of three years to D 30 June 2002. In terms of the applicant's contract of employment, Annexure A, it was envisaged that the PTC might be privatised. Clause 9 of the contract provided that

> "In the event of the Corporation being privatised during the period of this contract, the General Manager (applicant) shall not be entitled to any E special termination of service benefits. He/she shall, instead, be entitled to terminal benefits available to other members of staff in his/her position. Termination of the contract prior to the end of the contract shall be in accordance with the law of Zimbabwe".

In terms of the Postal and Telecommunications Act [*Chapter 12:05*] (Act No. 4 of 2000) (hereinafter called the Act), the Minister administering the Act F was empowered by s 106 of the Act to take steps under the Companies Act [*Chapter 24:03*] to secure the formation of one or more companies limited by shares as successor company or companies to the PTC. In terms of s 108 of the Act, the

Minister was empowered to fix a date on which the assets and liabilities of the PTC would be transferred to the successor companies as appropriate. Once the assets and liabilities of the PTC were transferred every G employee of the PTC was, in terms of s 111 (2) of the Act, to be transferred to one or other of the successor companies on terms not less favourable than those enjoyed by him immediately before his transfer. The Minister was empowered by s 111(3) of the Act to determine, before the date on which the employees were to be transferred who among the employees of the PTC were H

Chinhengo J

A not to be so transferred but to be transferred to the Postal and Telecommunications Authority established by s 3 of the Act. The applicant was not one of those referred to in s 111(3).

Section 112 of the Act provides as follows:

(1) Notwithstanding anything contained in the Posts and Telecommunications B Corporation Act [*Chapter 12:03*], the Minister may give the Board of the Corporation directions in writing in order to ensure the proper transfer of the assets and liabilities of the Corporation to the appropriate successor company, and the Board shall, without delay, comply with every such direction.

(2) Without derogation from subsection (1), directions given under that C subsection may provide for —

(a) the cessation of all or any functions of the Corporation and any person;

(b) the termination of any contract entered into between the Corporation and any person:

Provided that no such direction shall authorise the Corporation D to commit an unlawful breach of any such contract;

(c) …

(d) …"

On 25 June 2001, the Acting Secretary of the first respondent wrote a letter E to the Acting Chief Executive of the PTC advising that the Minister had approved "exit packages" for the applicant and other employees named in the letter. The exit packages were said to have been approved in terms of r 47 of the Posts and Telecommunications Pension Fund. The details of the package were given in the letter. This letter was availed to the applicant sometime in early May 2001. On 9 May 2001, the Acting Secretary of the first respondent F wrote to the applicant directly advising him of the abolition of the applicant's office because the PTC had been re-organised into three successor companies. In the relevant part of the letter reads:

> "Reference is made to the reorganisation of the Posts and Telecommunications Corporation into three successor companies. It had been established that as a result of this restructuring exercise your post is G now excess to requirements.
>
> Accordingly, the Minister of Transport and Communications, the Hon Dr S T Mombeshora, has approved that your office be abolished in terms of r 47 of the Posts and Telecommunications Pension Fund, and that you be offered the exit package detailed below."

Chinhengo J

The applicant's entitlements upon termination of his employment were again A detailed in this letter. The letter went on to invite the applicant to make any representations related to the exit package if he so wished, within 14 days. He was advised further that the date of termination of his employment was to be agreed between him and the PTC. This letter also said that it was cancelling and replacing the writer's earlier letter to the Acting Chief Executive dated 25 April 2001. B

On 30 May 2001, the Secretary of the first respondent, C. Katsande, sent another letter to the applicant. In the relevant part the letter reads:

> "Abolition of Office: Mr A M Nyamainashe
>
> Reference is made to the re-organisation of the Posts and Telecommunications Corporation into three successor companies. It has C been established that as a result of this restructuring your post is now excess to requirements. As you are aware your post was dissolved in the year 2000. On 9 May 2001, you were given an opportunity to make representations on the exit package proposed by the Corporation within 14 days. Given that the 14 days have expired and no submissions were received from yourself, the Ministry

has found it prudent to conclude the D matter on the basis of the Corporation's submissions and the dictates of natural justice.

Accordingly, the Minister of Transport and Communications, the Hon Dr S T Mombeshora, has approved that your office be abolished in terms of Rule 47 of the Posts and Telecommunications Pension Fund, and that you be offered the exit package detailed below: E

…

The effective date of termination of the contract is 31 May, 2001."

The applicant did not accept that it was right that his contract of employment should be terminated in this manner or at all. On 3 May 2001, he had written to the Secretary of the first respondent and explained why he was not making F any representations on the exit packages and generally expressing his unhappiness at the treatment he was receiving from the PTC.

In his founding affidavit, the applicant advanced two arguments as to why the termination of his contract of employment was unlawful. The first argument was that the Minister was not empowered to terminate the applicant's contract G other than in terms of the Act, in particular, s 111 to which I have already referred. The second argument was that if it is accepted that his contract was terminated by the former board of directors of the PTC, that board had acted in bad faith as it had no valid reason or other justification to abolish his post except perhaps a desire to victimise him. H

Chinhengo J

A The first respondent's position was that the applicant's post of General Manager, Secretariat, was abolished "in the year 2000" by the PTC board after an organisational restructuring exercise. It averred further that when the PTC board's term of office expired at the end of February 2000 the Minister had the task of merely advising the applicant that his post had been abolished and of proposing an exit package which he considered to be fair having regard to B r 47(2) of the PTC Pension Fund Rules.

The second respondent's position was that if the applicant's post had not been abolished and his contract of employment had not terminated as stated by the first respondent he would have been transferred to its employ. The second respondent averred that the applicant was not transferred to its employ because C his post had been abolished before any transfer of staff took place. The second respondent thus supported the Minister's averment that the applicant's post was abolished by the PTC board before its terms of office expired. It averred that because of that abolition it was not possible for applicant to have transferred to any of the successor companies. The second respondent accepted that it was its responsibility to finalise the applicant's claims against D the PTC. In para 5 of the opposing affidavit, the second respondent stated that:

> "In the light of the fact that the Board had prior to its dissolution approved the abolition of the applicant's post, it was not possible for applicant to transfer to a successor company. I deny that after the abolition of his post, the applicant ought to have been retrenched or transferred. The correct steps were to follow r 47 of the PTC Pension Fund Rules. Tel-One has E pursued the latter option and it appears Applicant is not happy with it."

Both respondents share the view that the applicant's post was abolished by the Board of the PTC before its dissolution and that the Minister merely implemented the earlier decision of the PTC Board. It seems to me that with these reasons by the respondents for their opposition to the relief sought by F the applicant it is not really necessary to deal with the applicant's second basis for challenging the termination of his contract. The only issue which has to be determined is whether the applicant's employment was lawfully terminated either in terms of the PTC Pension Fund Rules as averred by the respondents or otherwise. The position of the respondents is quite clear. It is that the applicant's contract of employment was terminated in terms of the PTC G Pension Fund Rules. The question is whether this was a lawful way of terminating the applicant's contract.

The law with regard to termination of contracts of employment is provided in regulations made under the Labour Act [*Chapter 28:01*]. It is contained in the Labour Relations (General Conditions of Employment) (Termination of H Employment) Regulations, 1985 (SI 371/85) and in the Labour Relations

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Chinhengo J

(Retrenchment) Regulations, 1990 (SI 404/90). In the particular case of A employees of the former PTC, the law with regard to their treatment is in s 111 of the Act. It seems to me that the Minster and even the PTC Board did not have regard at all to all these laws.

Statutory Instrument 371 of 85 provides that no employer may terminate the contract of employment of any of its employees without the approval or B consent of the Minister of Labour unless the employer proceeds in terms of a registered employment Code of Conduct or in terms of the provisions of a fixed term contract of employment upon its expiration. Statutory Instrument 404 of 1990 provides the circumstances and procedures in which employees may be retrenched. In s 111 the Act, as I have already stated, provides that all employees of the former PTC were to be transferred to one or other of the C successor companies. The provisions of the Act, of which s 111 is a part, came into operation on 1 September 2000, a long time before the Minister terminated the applicant's contract.

The regulations and the provisions of the Act which I have referred to take precedence over any internal company procedures for terminating contracts of D employment. In this case it is quite clear that the first respondent did not comply with SI 375 of 1985 or SI 404 of 1990. Thus whether or not the former PTC Board had abolished the applicant's post, the PTC or any successor company or authority would have had to comply with the provisions of one of the Statutory Instruments above. That was not done and as such the termination of applicant's contract could not have been valid. E

It is well worth quoting s 111 of the Act. It reads:

> "(1) In this section —
>
> 'excepted employee' means an employee of the Corporation referred to in subsection (3).
>
> (2) With effect from the transfer date every person, other than an F excepted employee, employed by the Corporation immediately before that date, shall be transferred to the service of the appropriate successor company on terms not less favourable than those enjoyed by him prior to his transfer,
>
> (3) The Minister shall, as soon as practicable after the fixed date, but not later than the transfer date, determine who among the employees of G the Corporation employed in the department known as the 'frequency management unit' are necessary for the performance of the functions of the Authority under this Act, and direct the Corporation or appropriate successor company as the case may be, to notify each such employee in writing accordingly. H

Chinhengo J

> (4) Until A such time as conditions of service are drawn up by the appropriate successor company and the Authority, as the case may be —
>
> (a) the terms and conditions of service applicable to employees of the Corporation shall continue to apply to every person transferred to the appropriate successor company as if every such person B were still in the service of the Corporation; and
>
> (b) every excepted employee shall with effect from the transfer date, be transferred on terms not less favourable than those enjoyed by him immediately prior to his transfer."

The position of all employees of the Corporation was secured by this C provision. The provision did not envisage the laying off of any employees upon the establishment of the successor companies. The letters written by the Acting Secretary and the Secretary of the first respondent indicate beyond any doubt that the applicant's contract was terminated because of the reorganisation of the PTC into three successor companies. In terms of s 111 of the Act the PTC had no option but to transfer the applicant to one of the successor D companies, Tel-One in this case.

I referred to and quoted s 112 of the Act because at the hearing counsel for the first and second respondents submitted that the Minister had acted in terms of that section. They had argued that s 112(2)(b) empowered the Minister to give directions terminating any contract entered into between the Corporation and any person and that that was what the Minister had done in respect of the E applicant. This was a completely misplaced argument and both counsel were correct in conceding later during the hearing that this was so. Section 112 is concerned with the Minister's directions which were intended to ensure the proper transfer of assets and liabilities of the PTC. Any directions which he could give under s 112(2)(a) or (b) would have related only to the transfer of F assets and liabilities referred to in subsection (1). The position of employees is covered by s 111 and not by s 112 of the Act.

To sum up, it must be noted:

(a) that the applicant's contract was not terminated in terms of any regulations made under the Labour Act. G

(b) The first respondent did not produce any credible evidence that the board of the PTC had abolished the applicant's post, and even if he had, that would still not have made the termination lawful as there was no compliance with the regulations made in terms of the Labour Act.

(c) The Act envisaged the continued employment of all PTC employees by the successor companies or by the Authority. There is no authority given H to anybody to terminate any of the employees' contracts or employment.

2003 (1) ZLR p128

Chinhengo J

It is therefore, quite clear that, whichever way it is viewed, the applicant's A contract was unlawfully terminated.

The applicant sought an order that he be paid his salary and benefits up to the time that his contract is lawfully terminated. That cannot be correct. His contract of employment was a fixed term contract. It was due to expire on 30 June 2002. His claim can only be for the period up to 30 June 2002. B The application largely succeeds however and I order that:

1. The respondents shall pay jointly and severally the one paying the other to be absolved, the applicant's full salary and benefits from 1 June 2001 to 30 June 2002.
2. The respondents shall, in terms of paragraph 1 hereof pay interest at the prescribed rate of interest on each salary or benefit (monetary benefit) C from the date when such salary or benefit became due to the date of payment in full.
3. The respondents shall pay in terms of paragraph 1 hereof the costs of suit. D

Gill, Godlonton & Gerrans, applicant's legal practitioners

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Source:
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SIBANDA & ANOR v PENTAVILLE INVESTMENTS (PVT) LTD & ORS 2003 (1) ZLR 129 (H)

2003 (1) ZLR p129

Citation	2003 (1) ZLR 129 (H)
Case No	Judgment No. HH-14-2003
Court	High Court, Harare
Judge	Makarau J
Heard	13 November 2002; 29 January 2003
Judgment	29 January 2003
Counsel	*R M Fitches*, for the applicant *C Selemani*, for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C **Contract** — *interpretation — severability — principles — one part of contract enforceable on its own — intention of parties — ascertainment of*

Land — *sectional title — registration of notarial agreement — transfer of undivided shares of land on which no building erected — transfer* D *permissible*

Headnote

The applicants bought a piece of land under a written agreement with the first respondent in terms of which they purchased title in an undivided share in land. They paid the purchase price in full. They also entered into an agreement for the construction of a housing unit on their undivided E share. The two agreements were embodied in the same written agreement, under different headings. In terms of the agreement, the first respondent was to transfer title in the undivided share in the land to the applicants within a reasonable time, provided the applicants had paid the purchase price in full and the final costs of construction of the housing unit had been secured. The agreed costs of construction were also paid. When the F applicants sought transfer, it was refused on the grounds that the full costs of construction could not be ascertained until construction was complete.

Held, that it is a matter of construction whether one part of a contract can be severed from the other. If the parts of the contract, shorn of one part, can stand and be enforceable on their own, then, generally, the contract can G be severed. The overriding consideration is the parties' intention.

Held, further, that the sale agreement of the undivided share of land could be severed from the construction agreement without affecting the meaning of either. This was so because the purchase price of the undivided share in the land was stipulated separately from the cost of the construction of

Makarau J

a housing unit on the land. Separate prices create a very strong presumption A in favour of severability.

Held, further, that undivided shares of land on which no building has yet been erected can be transferred provided the shares have been created by the registration of a notarial deed in terms of s 27 of the Deeds Registries Act [*Chapter 20:05*].

Held, further, that the sale of an undivided share in land, coupled with the B right of exclusive occupation, is no different from the sale of any other real right in land. The purchase of the real right is and can be complete before any dwelling is erected on the share.

Held, further, that the parties' intention, as inferred from the agreement, was for the applicants to separately purchase the land and pay for it in full and C then have the land developed. It was the further inferred intention of the parties that the respondent had to be fully paid for the construction of the housing unit or to have its such costs fully secured.

Cases cited

Attwood v Lamont [1920] 3 KB 571 D

Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd 1995 (2) SA 421 (A)

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

du Plooy v Sasol Bedryf (Edms) Bpk 1988 (1) SA 438 (A)

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

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

Vernon & Ors v Schoeman & Anor 1978 (2) SA 305 (D)

Vogel NO v Volkersz 1977 (1) SA 537 (T)

Legislation considered

Deeds Registries Act [*Chapter 20:05*], s 27(1)(a) F

Case information

R M Fitches, for the applicant

C Selemani, for the second respondent

Judgment

Makarau J: The concept of cluster homes on one piece of land in urban areas, held under sectional title, is now a part of the property scene in G Zimbabwe. The concept is founded on the common law principle of joint ownership, where two or more persons jointly own a piece of land in undivided shares, each share carrying with it an exclusive right to occupy the land.

The applicants, who are spouses, are desirous of being owners of property under this concept. In pursuit of their desire, they entered into a written H

Makarau J

A agreement with the first respondent in terms of which they purchased title in one such undivided share in land called Lot 599 Athlone Township, situate in the district of Salisbury. The purchase price of the undivided share in the land was agreed at $500 000, which they paid in full.

In addition to the agreement to purchase the land, the applicants also entered into an agreement for the construction of a housing unit on their undivided B share. The two agreements were embodied in the same written agreement, under different headings. The full cost of construction of the housing unit was put in the agreement at $3 500 000.

The second respondent brokered the agreement between the applicants and the first respondent, and some of the payments under the agreement were to be C made to it.

In terms of the agreement, the first respondent was to transfer title in the undivided share in the land to the applicants within a reasonable time, provided the applicants had paid the purchase price in full and the final costs of construction of the housing unit had been secured.

D By 11 December 2001, the applicants had paid not only the purchase price for the land in full but also the full costs of construction as stipulated in the agreement. On 19 December 2001, they received tender of transfer of the land from the first respondent's legal practitioners. They paid the necessary transfer fees, anticipating transfer. The first respondent's legal practitioners did not proceed with the transfer, citing the incomplete state of the housing E unit as the impediment. The applicants then filed this application for an order compelling the first respondent to pass transfer of the undivided share of the land to them.

In opposition, the first respondent denied that the applicants are entitled to the relief sought on the basis that the full cost of the construction of the housing F unit on the land had not been secured as it could only be ascertained after completion of construction. Since construction is still under way, transfer could not be effected.

The issue that falls for my determination is whether or not in terms of the agreement between the parties, the applicants are entitled to transfer of the land before the construction of the housing unit on the land is completed.

G It was argued on behalf of the applicants that notwithstanding the provisions of clause 6 of the agreement, which governs transfer, the two agreements between the parties are severable. In this vein, it was further argued that the agreement of sale could be enforced on its own without invoking the provisions relating to the construction agreement. The applicants have sought

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Makarau J

to argue that having fully paid for the undivided share in the land, they are now A entitled to transfer of that share.

I am inclined to agree with the applicants. It appears to me that a determination of this matter could lie in the determination of whether or not the written agreement between the applicants and the first respondent is a divisible contract. B

It is a settled position in our law that a contract may be severed in a proper case. So settled is the position at law that in *Middleton v Carr*, [1] Schreiner JA held at p 391 that:

> "there is no need to resort to the authorities to show that in a proper case the legal part of a contract may be treated as separate from the illegal part and be enforced." C

This principle was held in *Vernon & Ors v Schoeman & Anor* to be so firmly entrenched in our law that its correctness may hardly be questioned.

It would appear to me that the English courts have adopted the approach that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part D remaining. [3] The South African courts appear to have preferred the approach that seeks to have regard to the probable intention of the parties as it appears in, or can be inferred from, the terms of the contract as a whole. [4]

This rule on the severability of contracts has been of general application to save the legal provisions of a contract where the contract consists of several E provisions some of which are illegal and others are not. [5] While the rule has been developed mainly in cases where there is an illegality in the contract, the principle of severability has been extended to other cases where there is no illegality. Thus in the *Du Plooy* case, while recognising the general application of the principle in cases of illegality, the court applied the principle to hold that where clauses in an agreement were not so mutually dependent on each other F that a clause could not be severed from the rest of the contract, that clause could be severed. Severability has been applied in cases where the provisions

---

A of the contract are not illegal *per se* but are contrary to public policy. [6] In *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd supra*, the court dealt with a situation where the contract was not illegal or void but could not be performed due to supervening impossibility. The court in that case held that it was dealing with a situation of divisible performance, to which the principles governing severability of an illegal or void provisions applied.

B It is a matter of construction whether one part of a contract can be severed from the other. If the parts of the contract, shorn of one part, can stand and be enforceable on their own, then, generally, the contract could be severed. The overriding consideration in constructing a contract in this regard ought in my view, to be the intention of the parties when they entered into the contract. C Thus, where the parties clearly intended that the contract be read and enforced as one, even if the different parts of the contract can stand alone, the court should give effect to the clear intention of the parties. I am persuaded to adopt this approach, as it does not violate the principle that the court should be very slow to make a contract of the parties. Borrowing from the language used in the case of *Sasfin v Beukes supra*, it is my view that parties cannot enter into D a contract that they then submit for judicial trimming and pruning before it can be enforceable if the result of the trimming and pruning is far removed from what they intended in the first place.

Applying the above to the facts of the application before me, I am of the view that the sale agreement of the undivided share of land can be severed from the E construction agreement without affecting the meaning of either. This is so because the purchase price of the undivided share in the land is stipulated separately from the cost of the construction of a housing unit on the land. Separate prices create a very strong presumption in favour of severability [7]. The sale of the land can be complete on its own as a binding and valid contract. The sale of the share in the land is not suspended pending the construction of the F housing unit. (The respondent has sought to argue that it is the transfer of the land sold that is conditional upon the payment or security of the full amount of construction costs.)

Accepting that the sale of the land is unconditional and is valid and binding, it would appear that the applicants are entitled to the relief they seek as it is trite that the conclusion of a valid sale casts upon the seller the duty to deliver G the *merx* sold unless the contract provides to the contrary.

Makarau J

I have also examined the law relating to the transfer of undivided shares in land A to establish whether it provides that only those undivided shares, upon which the owner of the land has erected a dwelling, are transferable.

The law that governs sectional title, as it is commonly referred to, or, transfer of undivided shares in land, as it should correctly be referred to, is contained in ss 25 to 27 of the Deeds Registries Act [*Chapter 20.05*]. The relevant B section for the purposes of my inquiry is s 27 (1)(a), which provides as follows:

> "(1) Subject to the provisions of this section, if —
>
> (a) the owner of a piece of land in an urban area wishes to transfer to one or more persons an undivided share in the land coupled with an exclusive right of occupation; or C
>
> (b) …
>
> the owner or owners, as the case may be, shall register against the title to the land concerned a notarial deed which —
>
> (i) specifies the number of undivided shares created or to be created which will be coupled with an exclusive right of occupation; and D
>
> (ii) clearly indicates which buildings or portions of any building *erected or to be erected on the land concerned*, either with or without any area of ground, shall be subject to an exclusive right of occupation, and …" (emphasis is mine).

Thus it is clear from the above that the erection of buildings on the land concerned is not a prerequisite for the registration of a notarial agreement E against the title to the land creating the undivided shares in land, coupled with a right of exclusive occupation. The creation of the shares by registered notarial deed is the only prerequisite to the transfer of such shares in terms of the law. In other words, undivided shares of land on which no building has yet been erected can be transferred provided the shares have been created by the registration of a notarial deed in terms of s 27 of the Act. F

Section 27 further provides in s 27(4)(c) that the exclusive right of occupation that is coupled to an undivided share in land shall constitute a real right in the land concerned.

On the basis of the foregoing, I am of the view that the sale of an undivided share in land coupled with the right of exclusive occupation is no different G from the sale of any other real right in land. I am of the further view that the purchase of the real right is and can be complete before any dwelling is erected on the share. It is on this basis that I was inclined that to agree with the applicants that the two agreements between them and the first respondent can be severed and exist independently H

Makarau J

A I still have to proceed and determine whether the clear intention of the parties was that the entire agreement be read and enforced as one.

I read no such express intention in the agreement between the parties. I therefore have to infer the parties' intentions from the contract as a whole.

The contract between the parties involves two separate transactions with B distinct obligations on the part of the parties in respect of each. The price for the land is separately stipulated from the cost of constructing the housing unit.

Further, the cost of construction does not become due and payable to the respondent upon the conclusion of the agreement of sale, as does the purchase price. In terms of the agreement between the parties, the respondents are to draw down the amounts per stage of development. In the event that the C applicants fail to pay for any portion of the cost of construction, the respondent has the right to discontinue the construction work and claim damages from the applicants. The agreement does not give the respondent power to cancel the agreement of sale in the event that the purchaser fails to pay the costs of construction.

D I have been persuaded further by the provisions of the addendum to the agreement between the parties to infer that the probable intention of the parties was that ownership of the property could

pass before the final costs of construction were ascertained. The addendum provides that the applicants could mortgage the property to raise the costs of construction of the housing unit. It is common cause that a mortgage bond can only be registered against E title to a property owned buy the mortgagor. Thus the parties agreed that the applicants could take transfer of the land prior to the completion of the construction of the housing unit on the land.

Taking the above factors into account, I am of the view that the parties' intention, to be inferred from the agreement, is that they did not intend that the F agreement between them be read as indivisible. The obligations and performance under the contract of the parties in respect of each part of the agreement are not mutually dependent on each other. The applicants' performance in respect of each obligation is clear and a specific counter performance by the respondent can be allocated to each performance by the applicants. The applicants had to pay the purchase price of the land to complete the sale agreement. They have G to pay the full costs of construction or the respondent will stop the construction works. Further, using the test of the officious bystander, that well known character in contract law, if he were to pose the question whether or not the parties intended that the applicants would not own the land they had purchased before a housing unit was fully constructed on the land by the H respondent, in my view, the answer would clearly be: "No, of course not".

2003 (1) ZLR p136

Makarau J

The inferred intention of the parties was for the applicants to separately A purchase the land and pay for it in full and then have the land developed thereafter. It was the further inferred intention of the parties that the respondent had to be fully paid for the construction of the housing unit or to have such costs of such fully secured. I cannot infer an intention to suspend the passing of ownership in the land sold pending the completion of the construction works, the position advanced on behalf of the respondents. B

Having come to the conclusion that the contract between the parties is divisible, I will not determine the question whether or not the applicants have fulfilled the terms of the contract to entitle them to transfer. It is not necessary that I do so.

On the basis of the foregoing, I would find that the applicants are entitled to C an order compelling the first respondent to pass transfer of the undivided share in the land.

Accordingly, the application is granted and the following order is made:

1. The first respondent is to pass transfer of one undivided share to the applicants within 14 days of this order, failing which the Deputy Sheriff D is hereby authorised to sign all the relevant documents on behalf of the first respondent.
2. The first respondent shall bear the applicants' costs.

Madhani and Associates, applicants' legal practitioners E

Zamchiya Costa, first and second respondents' legal practitioners

1 1949 (2) SA 374 (A)
2 1978 (2) SA 3 p 05 (D)
3 *Attwood v Lamont* [1920] 3 KB 571
4 *Vogel NO v Volkersz* 1977 (1) SA 537 (T); *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A) and *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A).
5 *Du Plooy v Sasol Bedryf (Edms) Bpk* 1988 (1) SA 438 (A); *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd supra*.
6 See *Sasfin v Beukes supra*,
7 See *Collen v Rietfontein Engineering Works supra.*

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Source:
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S v MADEMBO & ANOR 2003 (1) ZLR 137 (H)

Citation	2003 (1) ZLR 137 (H)
Case No	Judgment No. HH-17-2003
Court	High Court, Harare
Judge	Chinhengo J & Paradza J
Heard	21 January 2003; 29 January 2003
Judgment	29 January 2003
Counsel	*W Zhangazha,* for the appellants *M Nemadire,* for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

Criminal procedure *(sentence) — general principles — factors affecting* C *sentence — mitigating factors — need for judicial officer to specify amount by which sentence has been reduced because of mitigating factor — value of goods stolen — inflation — effect of — need to compare value of goods by taking inflation into account*

Headnote

The applicants appealed against the sentence imposed by the Regional D Magistrates Court on the grounds that in passing sentence the magistrate had failed to take into certain factors into account and the resultant sentence imposed was so excessive it induced a sense of shock.

Held, that where a judicial officer has accepted any factor of mitigation he must clearly specify the amount by which he has reduced the sentence on account of that factor. In this way, he will be able to avoid the criticism E that he has not sufficiently taken into account any factor or factors of mitigation, and the appellate court or a reviewing or scrutinising judicial officer will be less inclined to decree, rather subjectively, that the original judicial officer erred.

Held, further, that where sentence is being assessed according to the value of F the goods involved, and a comparison is being made with sentences approved in earlier cases, it is necessary to take into account the effect of inflation so that a realistic comparison can be made.

Cases cited

S v Buka 1995 (2) ZLR 130 (S)

G *S v Chitofu* 1997 (1) ZLR 468 (H)

S v Dube 1996 (1) ZLR 77 (S)

S v Katsaura 1997 (2) ZLR 102 (H)

S v Munechawo 1998 (1) ZLR 129 (H)

S v Munukwa 2002 (1) ZLR 169 (H)

H *S v Sidat* 1997 (1) ZLR 487 (S)

Chinhengo J

S v Tendai & Anor (Juveniles) 1998 (2) ZLR 423 (H) A

S v Zaranyika 1995 (1) ZLR 270 (H)

Legislation referred to

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 358

Case information

W Zhangazha, for the appellants B

M Nemadire, for the respondent

Judgment

Chinhengo J: This is an appeal from the decision of the Regional Magistrates Court for the Eastern Division sitting at Harare. It is an appeal against sentence only. C

The appellants are forty-six and twenty-six years old respectively. On a date between March and September 2001, the appellants received from their employer and took into their possession certain goods described as follows:

> "84 DF 6 inch pieces; 95 DAF 7 inch pieces; 8 x 6½ inch blocks, 2 x 14 inch blocks; 8 x 10 inch concord linings; 2 sets 7 inch concord clutch facings; 2 sets of 8 inch concord clutch facings; 2 sets of 10 inch concord clutch facings; 2 sets of 9 inch concord clutch facings and 2 sets of 10 inch D woven clutch facings."

The appellants were under instructions to transport these goods from Harare and to deliver them to their employer's Mutare branch. The goods were valued at $100 000. Instead of delivering the goods to the Mutare branch, the E appellants sold them and converted the proceeds to their own use. The goods were, however, all recovered when this offence was discovered. The complainant did not suffer actual prejudice.

On these facts, the appellants were charged with the offence of theft by conversion. They pleaded guilty to the charge and they were each sentenced to forty-four months' imprisonment of which twelve months' imprisonment F was suspended for five years on condition that each of them did not, within that period, commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine.

The appellants appealed to this court on the grounds that in passing sentence the magistrate failed to take into account that all the property was recovered G and that he failed to consider all the factors of mitigation, with the result that the sentence which he imposed is so excessive that it induces a sense of shock. In the heads of argument filed on behalf of the appellants, an additional ground of appeal appears. It is that the magistrate did not give his reasons for sentence at the time that he passed the sentence. This was not one of the grounds of appeal in the notice of appeal. As such, this allegation was not put to the H

Chinhengo J

A magistrate so that he could comment on it. There are no sufficient facts on the record before me to show that the allegation has any basis. I will, therefore, disregard it as it does not really affect the decision which I must come to.

The appellants contended that the following were strong factors of mitigation which the magistrate failed to take into account or to which he did not attach sufficient weight: that the stolen property was all recovered; that the appellants B were first offenders; that they pleaded guilty to the charge; that they earned, very low salaries which were also disproportionate to their responsibility thereby creating a temptation to normally honest people; that they lost their employment; and that the value of the property was low having regard to the inflationary conditions in this country.

C The respondent conceded that the magistrate erred in two respects. Firstly, it conceded that the magistrate assessed his sentence on inaccurate facts such as the number of counts involved and on

the finding that the offence was planned. Secondly, it conceded that the magistrate failed to appreciate that the mitigating factors outweighed the aggravating factors. Overall, the respondent conceded that a custodial sentence was not warranted.

D The appellants applied for bail pending appeal. That application was dismissed on the grounds that they did not have a reasonable prospect of success on appeal. The record of proceedings does not indicate that they challenged this decision by appealing to a higher court.

Before accepting as valid the criticism levelled against the magistrate's E decision, I must record what the magistrate said in passing sentence. He said:

> "In assessing sentence, the court has taken into account that you are both first offenders and that you both pleaded guilty to the charge. The court has also taken into account what each of you has said in mitigation of sentence. Finally, the court has also taken into account that all the property valued at $100 000 was recovered and that you did not gain F anything from your criminal venture.
>
> However, you were both employed by the complainant in positions of trust. There is no doubt that you breached that trust and abused your positions. You stole from your trusting employer on various occasions. It cannot be said that you yielded to a sudden temptation. It clearly shows planning and determination to commit the offence. The plan was well G executed resulting in the complainant losing property valued at $100 000. It was only through a tip that this offence came to light. Usually, the courts are very reluctant to send first offenders to prison but where serious offences are committed even first offenders might find themselves in prison."

Chinhengo J

In their submissions in mitigation, the appellants stated that the first appellant A was married and had four children. He earned "about $4 000 per month". He had no savings and no valuable assets. He was the only person employed in his family and as such the only breadwinner. The second appellant said that he was single. He earned $3 800 per month. He had no savings nor valuable assets. His mother and five siblings were dependent on him because his father B was deceased. As I have noted, the magistrate said that he also took all these personal circumstances of the appellants into account in assessing the appropriate sentence.

Judicial officers have often been criticised for failing to take into account factors of mitigation in assessing sentence even where, as in this case, they said that they did so. In some instances, they have been criticised for failing to C accord due and appropriate weight to factors of mitigation. In other cases, they have been criticised for paying lip-service to those factors. In *S v Buka* 1995 (2) ZLR 130 (S), Ebrahim JA said that judicial officers do not always give sufficient weight to a plea of guilty. At 124G-135A, he said:

> "It is my view, however, that judicial officers do not always give sufficient D weight to where an accused person tenders a plea of guilty to a charge levelled against him. It is important not merely to pay lip service by repeating what one is expected to say when a plea of guilty has been tendered. One often reads in a judgment the following: 'I have taken into account that you have pleaded guilty, that you are a first offender and that you have expressed contrition'. It is not enough to repeat these phrases without giving due weight to the plea proffered. They are factors of E mitigation and judicial officers should take proper account of them."

The need to meaningfully take into account all mitigatory factors has been stressed in a number of decisions of the superior courts in this country: see also *S v Sidat* 1997 (1) ZLR 487 (S) at 492-493 and *S v Katsaura* 1997 (2) ZLR 102 (H). In the *Katsaura* case *supra,* Bartlett J was quite strong in his criticism F of judicial officers who pay lip service to mitigatory factors. He referred to the decisions in *Sidat* and *Buka supra* and said at 105D-F that:

> "It is my view that the magistrate did not give sufficient weight to the plea of guilty but fell into the trap so eloquently described by Ebrahim JA *supra*. I would go further than Ebrahim JA and state that this is a trap into which magistrates fall so often that it has become the rule rather than the G exception to become ensnared in it. I believe it is true to say, from the multitude of review matters which pass across my desk in the course of a year, that it is difficult to discern any meaningful difference between sentences imposed by magistrates when accused persons plead guilty as opposed to when they plead not guilty. It would accordingly seem fair to observe that there appears to be a definite reluctance on the part of H

Chinhengo J

A magistrates to give meaningful effect to the views expressed by Ebrahim JA and MacNally JA. This is unfortunate. It is time magistrates heeded the clear direction provided by the Supreme Court and gave appropriate weight to pleas of guilty. This is of particular importance when consideration is given to the overcrowded situation of Zimbabwe's prisons: see the Comments of Garwe J in *S v Chapanduka* HH-65-95 B at p 2."

The criticism levelled against magistrates in respect of whether or not they have taken into account, either at all or sufficiently, any mitigatory factors may be fair and unfair at the same time. It may be fair if one is able to show exactly how insufficiently the magistrate has taken into account those factors. It may be unfair, and I think it always is, where the magistrate has stated that he has C taken those factors into account but a judge, because of his loftier position, is able to decree, on the basis of the degree to which he thinks those factors should have been taken into account, that the magistrate did not do so. Judges routinely state that magistrates have not given sufficient or appropriate weight to one or other factor of mitigation. What is appropriate or sufficient is largely a subjective matter. To one judicial officer, appropriate or sufficient may mean D quite a different thing from what it may mean to another judicial officer. I am quite certain that when a judge of the High Court says of a magistrate that he has failed to give appropriate or sufficient weight to a factor of mitigation, a judge of the Supreme Court may equally say that the High Court judge did not give appropriate or sufficient weight to the same factor of mitigation despite E the fact that he has reduced the sentence imposed by the magistrate on account of that factor of mitigation.

The subjectivity which arises from the use of the words "appropriate" or "sufficient" is often taken advantage of by legal practitioners who appear for accused persons in an appeal. They also, like the magistrates and the judges repeat the same phrases, that is, "that the magistrate failed to give appropriate or sufficient weight to a factor of mitigation". A judicial officer who sits in an appeal against the decision on sentence by another judicial officer has the advantage that he can show, by reducing the sentence earlier imposed, how and by how much he has taken into account a given factor of mitigation. That advantage is not enjoyed by a judicial officer of a lower court.

G How then should judicial officers try to avoid the criticisms that are so often levelled against them in regard to the taking into account of certain factors of mitigation? The answer lies in the guidance that has been provided in a number of cases and, in particular, in *S v Munechawo* 1998 (1) ZLR 129 (H) where Devittie J said that a clear quantification of the discount given by the court to H a person who has pleaded guilty to a charge should be made or specified.

2003 (1) ZLR p142

Chinhengo J

At 135B-E, he said: A

"The pronouncement of a discount from an otherwise appropriate sentence merely serves to ensure that proper effect is given to the principle stated by Bartlett J in the *Matida* case *supra* . The policy considerations that have weighted in favour of the discount in England and Australia are even more compelling in this jurisiction given the greater scarcity of resources with which to service the administration of criminal justice. I would B summarise my conclusion in this way:

(a) considerations of public policy demand that recognition be given to a plea of guilty by reducing the sentence below the level appropriate to the facts of the offence;

(b) it is within the sentencing discretion of the court, should it so choose, C to give effect to the policy consideration by first selecting an appropriate sentence before reducing it by a specified amount on account of a plea of guilty;

(c) a bare plea of guilty usually justifies a discount in its own right; it is for the court to evaluate the weight to be given to that plea and no fixed discount can be prescribed. In some cases, the court may decide that no discount is justified." D

I respectfully agree with this approach where, on sentencing an accused person, a judicial officer takes into account a factor of mitigation such as a plea of guilty, or that the accused is a first or youthful offender or that the property has been recovered in whole or in part, or that the accused has already paid compensation to his victim and the judicial officer says he has done so, he E should be able to quantify the amount by which he has reduced the sentence on account of any one or more of these factors of mitigation.

Quantification of discounts of the sentence are often specified in cases where a juvenile is jointly sentenced with an adult. It is a general principle of our law that a juvenile or young person must not be punished in exactly the same way F as an adult: see *S v Tendai* & *Anor (Juveniles*)

1998 (2) ZLR 423 (H); *S v Munukwa* 2002 (1) 169 (H) and *S v Zaranyika* 1995 (1) ZLR 270 (H). In *Tendai supra*, Gillespie J commented in reference to *Zaranyika supra* at 429D as follows:

> "That judgment has been successful in ensuring that a necessary distinction is drawn in sentencing older juveniles and young adults as opposed to G more mature offenders. The success has been limited, however, to achieving only a reduction in the overall punishment."

The learned judge went on to suggest other ways of dealing with juvenile offers with which I agreed in *Munukwa*'s case *supra*.

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A Where a court is sentencing a juvenile or young person together with an adult, it is quite easy to see how youth as a factor of mitigation has been taken into account. The adult is, for example, given a custodial sentence, and the juvenile, if below 18 years of age, is sentenced to corporal punishment; or the adult is sentenced to a certain period of imprisonment and the young cooffender is sentenced to a half of that period, or some other proportion. In such B a case, a quantifiable discount of the sentence on account of a factor of mitigation is readily ascertainable. In *Munukwa*'s case *supra*, I had regard to the sentence imposed on an adult in *S v Dube* 1996 (1) ZLR 77 (S) where the facts were similar and I said at 175 C-F that:

> "The facts in the present case are quite similar to the facts in C *S v Dube* 1996 (1) ZLR 77 (S). In that case, the appellant, an adult male, had made a proposition to the complainant which was rejected. He had seized the complainant, thrown her to the ground and tried to remove her pants but he then got up and desisted from further attack because he discovered that she was menstruating. The Supreme Court set aside a sentence of imprisonment of three years and substituted it with one of imprisonment for three years of which one year was suspended for three years. It was held D that it was desirable to suspend a portion of the sentence because of the 'rehabilitative and salutary effect' of such a suspension. The court, it must be emphasised was dealing with an adult male. That distinguishes that case from the present case where a youthful offender is the subject … I consider that the age of the appellant, the absence of persistent violence in his conduct, the genuine contrition and that he is a first offender are E weighty factors in any judicious assessment of the appropriate sentence."

I then reduced the sentenced from one of three years' imprisonment of which 12 months were conditionally suspended to one of 24 months' imprisonment of which 12 months were suspended on condition of good behaviour and the remaining 12 months were suspended on condition that he performed 420 F hours of community service. Quite clearly I had, in what appeared to me to be similar facts to those in *Dube*'s case *supra,* to reduce the sentence substantially because a young person was the accused in *Munukwa*'s case *supra*. That reduction is readily quantifiable. It is implicit that had the accused in *Munukwa*'s case *supra* been an adult, I would in all probability have imposed the same or substantially the same sentence as in *Dube*'s case *supra*.

G In *S v Sidat supra*, the appellant had been sentenced on a charge of receiving stolen property knowing it to have been stolen to 42 months' imprisonment of which 24 months were conditionally suspended. The value of the property was $33 593.27 of which goods worth $4 493.42 were recovered. Before his trial, the appellant had re-paid $32 152.03 to the complainant. McNally JA at H 492H-493A, recognised the fact that the appellant had repaid the complainant

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Chinhengo J

a substantial sum to compensate him for his loss. He said: A

> "We usually suspend a significant portion of a prison sentence on condition of repayment. He has gone one stage better, by repaying. So he must benefit at least by the amount we would have suspended to induce him to repay. I bear in mind that I have remarked that offenders must not be allowed to buy themselves out of prison completely. But they must certainly be rewarded for making restitution. Otherwise, why should they B bother to do so?"

Again, this was an instance where the court made a quantifiable discount of sentence on account of a factor of mitigation.

It seems to me therefore that in order to avoid criticism that a judicial officer has not taken a factor of mitigation sufficiently into account, the judicial C officer must quantify the discount he gives on account of any or all factors of mitigation which are favourable to the accused person. This is not a novel idea, as I have shown above. Distinct and quantifiable discounts or reductions of sentences on

account of some factor are routinely given. Where, for instance, a judicial officer suspends a portion of the sentence on some condition in terms of s 358 of the Criminal Procedure and Evidence Act [*Chapter 8:02*] he D always specifies the amount by which the sentence has been reduced on account of that factor. Sentences which read:

> "36 months' imprisonment of which 12 months' imprisonment is suspended for three years on condition that the accused does not within that period commit any offence involving dishonesty for which he is sentenced to imprisonment." E

or

> "36 months' imprisonment of which 12 months' imprisonment is suspended on condition that the accused pays compensation in the sum of $X on or before (a given date)";

are routinely imposed. Apart from the recognised purposes for which such F sentences are imposed, such as deterrence and the reconciliation of offender and victim, such sentences clearly specify the amount by which the sentence has been reduced by on account of some factor which it was necessary to consider in imposing the sentence. In my view, therefore, in every case where a judicial officer has accepted any factor of mitigation he must, as stated in G *Munechawo* case *supra,* clearly specify the amount by which he has reduced the sentence on account of that factor. Where it is one factor of mitigation to be taken into account, the reduction so specified may be small. But where there are two or more such factors the reduction must progressively be greater. In all cases, however, the amount thereof must be specified. In this way, a judicial officer will be able to avoid the criticism that he has not sufficiently taken into H

Chinhengo J

A account any factor or factors of mitigation. In this way, the appellate court or a reviewing or scrutinising judicial officer, will be less inclined to decree, rather subjectively, that the other judicial officer erred. His task will be simply to determine whether there is any basis for giving a greater discount of the sentence.

B In the present case, the factors of mitigation are quite numerous. The appellants are first offenders who should, generally, be spared the rigours of a custodial sentence if that can be done. They pleaded guilty to the charge. The stolen property was all recovered. They lost their employment. They were in receipt of very low salaries. The value of the property stolen was low having regard to the inflationary economic situation in this country: see *Katsaura* C *supra*. A discount of the sentence can, therefore, be given and specified.

Before making the discount, I must first show how inflation has affected the value of our currency. In order to show the depreciation of the purchasing power of the Zimbabwe dollar over the past ten years, I will use a basic value of $100 000 of 1990 money. I will adjust this value progressively to 2002 by the average annual rate of inflation as determined from year on year official D inflation statistics issued by the Central Statistical Office. For the period 1990-1991, the average rate of inflation was 22.41 per cent. By the end of 1991 therefore, an amount of $100 000 had its purchasing value diminished by a figure determined as:

Amount E
1 + inflation rate
= 100 000
1 + 9,2245
= $81 669.

Adjusting this new value of $81 669 using the same formula one arrives at the F 1992 diminished purchasing power of $52 853. The final result as shown in the schedule below is that for the period 31 December 1990 to 31 December 2002 the purchasing power of the Zimbabwe dollar fell to $1 216. In other words, $100 000 of Zimbabwe money as at 31 December 2002 was the equivalent of $1 216 of 1990 money.

G Date	Average Inflation Rate	Value
31/12/90	Details not supplied	100 000
31/12/91	22,45	81 689

31/12/92	54,52	52 853
H 31/12/93	43,46	36 841

Chinhengo J

31/12/94	25,65	29 321 A
31/12/95	27,21	23 048
31/12/96	28,09	17 994
31/12/97	17,27	15 344
31/12/98	37,87	11 130 B
31/12/99	67,65	6 639
31/12/00	49,72	4 434
31/12/01	61,04	2 751
31/12/02	126,51	1 216

In the past, I have sought the co-operation of the Central Statistical Office on C these matters with little joy. If the figures which I have used in the schedule are incorrect in any respect, the fault is mine entirely as I had to do my own research. The schedule shows that if the appellants were to be punished in the same way as any accused who was punished in 1990 for a similar offence, the sentence to be imposed on the appellants should, everything being equal, be D the same punishment as any accused who stole $1 216 in 1990.

Adam J in *S v Chitofu* 1997 (1) ZLR 468 (H), referred to many cases in which comparable sentences were imposed. In that case, the learned judge refused to certify the proceedings as being in accordance with real and substantial justice where a sentence of four months' imprisonment for the theft in June 1996 of E irrigation pipes valued at $3 600 was imposed. He had regard to the many cases which he cited (*S v Mohammed* HB-71-88; *S v Mutengwe* S-179-90; *S v Mangwende* S-121-92; *S v Wabatagore* HH-253,89; *S v Jaya* HH-271-89; *S v Bandira* S-6-89; *S v Masvosve* HB-83-90; *S v Dube* HB-87-90 and *S v Hwemba* HH-16-98) where for theft from employers, or for theft by conversion of goods with values ranging between $2 300 and $4 000, the effective F sentences ranged between six and 10 months' imprisonment, the average effective sentence being eight months imprisonment. If the appellants in this case were sentenced about that time they would, for the theft by conversion of the goods within the same range of value, have been sentenced to an effective period of imprisonment of eight months. The comparative analysis which I have undertaken reveals, without any doubt, that the sentence imposed on the G appellants was so excessive as to induce a sense of shock: an effective 32 months' imprisonment compared to eight months in the other cases. The ravages of inflation show that the value of the goods which the appellants stole in 2001 was the equivalent of $2 751 in 1990. H

Chinhengo J

A Applying the principle in *Munechawo*'s case *supra*, on account of the factors of mitigation in this case, which in my view are strong and numerous, I would reduce the average sentence of an

effective period of eight months by about three months to result in an effective sentence of five months. This means that a sentence of 12 months' imprisonment of which seven months' imprisonment is suspended on condition of good behaviour would be appropriate. Most of B the cases referred to in *Chitofu*'s case *supra* were decided before community service was adopted as a desirable alternative punishment to imprisonment. Community service must generally be imposed where the offence is minor by reference to the effective sentence of imprisonment unless there is a good reason not to do so. In this case, I am of the view that the appellants' salaries C per month were low and they created a temptation to commit the offence. I am mindful that theft from an employer is an offence which is viewed very seriously because of the breach of trust involved. Nonetheless, on the particular facts of this case, I consider that the sentence of community service, viewed against the value of the goods which is low, the plea of guilty, the full recovery of the goods, the fact that the appellants are first offenders and their D family and personal circumstances, does not trivialise the offence which they committed. The need to discount the sentence on account of the mitigatory factors is supportive of the imposition of community service as a suitable punishment.

Accordingly, the appeal is allowed. The sentence is set aside and the following is substituted:

> E "Each: 12 months' imprisonment of which seven months is suspended for three years on condition that during that period the accused does not commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine. The remaining five months' imprisonment is suspended on condition that the accused performs 175 hours of community service at such institution and on such other F conditions as the trial magistrate may determine."

The matter is remitted to the magistrates court for the assessment of the appellants' suitability to perform community service and if they are found to be suitable the sentence above shall be imposed; otherwise, the sentence of imprisonment will stand.

G Paradza J concurred

Chinamasa Mudimu and Chinogwenya appellants' legal practitioners

H *Office of the Attorney-General*, respondent's legal practitioners

* *S v Matida & Ors* HH 180-97 — *Editor* H

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Source:
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MAHEMBE v MATAMBO 2003 (1) ZLR 148 (H)

Citation	2003 (1) ZLR 148 (H)
Case No	Judgment No. HB-13-2003
Court	High Court, Bulawayo
Judge	Cheda J
Heard	11 October 2002; 30 January 2003
Judgment	30 January 2003
Counsel	*J Nyarota,* for the applicant Respondent in default

Case Type Civil Application

Annotations Link to case annotations

Flynote

Costs — *legal practitioner and client scale — when such costs should be awarded — principles* C

Headnote

The applicant applied for, and was granted, a provisional order against the respondent. The respondent subsequently opposed the application and filed opposing papers. He failed to file his heads of argument and also failed to appear on the day of the hearing. The applicant prayed for D confirmation of the provisional order (which was granted) and asked for costs at a higher scale.

Held, that awards of legal practitioner and client costs not authorised by statute are made when, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court considers it just, by means of such an order, E to ensure more effectively than it can do by means of a judgment for party and party costs, that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Considerations include: dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings themselves; malicious conduct; vexatious proceedings; reckless proceedings; and frivolous proceedings. F

Cases cited

Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597

Case information

J Nyarota, for the applicant G

Respondent in default

Judgment

Cheda J: The applicant applied for and was granted a provisional order against respondent, which application was subsequently opposed by H

Cheda J

A respondent. The applicant and the respondent's brother, one Cleopas Chamunorwa Matambo entered into an agreement of sale for a bar, bottle store, grocery shop, grinding mill and a butchery, hereafter referred to as "the property". When the applicant went to take occupation he found that the respondent had locked the property thus preventing him from entering and doing business. In anticipation of occupation, the applicant had purchased a B lot of merchandise including perishables.

Attempts to have the respondent open the property failed, resulting in the applicant seeking alternative storage. The applicant then filed an urgent chamber application with this court, which was granted on 4 February 2002. The respondent filed opposing papers. The basis of the opposition was that his C brother Cleopas Matambo (who is not part of these proceedings) had been coerced into selling the property to the applicant and also that the respondent's brother had no authority to sell the said property, as it belonged to the family. The necessary papers were filed by both parties and the matter was then ready for hearing. The respondent, however, did not file his heads of argument and also failed to appear on the day of the hearing, which had been set down for D confirmation of the provisional order.

The applicant prayed for the confirmation of the provisional order which I duly confirmed. I reserved judgment on the question of costs as the applicant was asking for costs at a higher scale.

The general rule is that costs follow the event or put in another way, success carries costs. The rationale for this principle is E that the successful litigant should be indemnified from expenses which he incurred by reason of being unjustifiably compelled to either initiate or defend litigation. This rule should only be departed from where good grounds are shown to exist.

In the present case, the respondent, in his opposing affidavit, did not aver that such grounds existed. I am, however, constrained to examine the question of F costs at a higher scale as prayed for by the applicant. My understanding of this general rule is that it refers to costs at an ordinary scale, that is, party and party costs. Therefore, in order for a litigant to successfully claim costs on the attorney and client scale, which is punitive, he must show that the other party deserves to be punished for its behaviour. The court has a discretion in awarding costs at any scale provided that the party so applying proves to the G court that he indeed so deserves the costs at that scale. The leading authority as to attorney and client costs in South African law, which our courts have followed, is the celebrated case of *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607 where his Lordship Tindall JA stated:

Cheda J

> "The true explanation of awards of attorney and client costs not authorised A by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectively than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the B litigation."

Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a judicial decision against a genuine complaint. It is, therefore, essential that the courts only award such costs in situations where it is clear that the losing litigant was not genuine in the pursuance of a stand in the litigation process. Rubin L *Law of Costs in South Africa* Juta & C Co (1949) 190, classified the grounds upon which would the court be justified in awarding the costs as between attorney and client:

1. Dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings
2. Malicious conduct D
3. Vexatious proceedings
4. Reckless proceedings
5. Frivolous proceedings

In the present case, the applicant had a valid contract with the respondent's E brother, full payment had been made and transfer had been effected to the applicant. Despite all this knowledge, the respondent who, was not even party to that agreement, went further and opposed this application when he had in his possession documentary proof that the applicant was entitled to "the property". All the material averments in his affidavits were false. This, in my view, is a brazen abuse of our legal system which our courts should not F condone. In order to show its disapproval, the court must order appropriate costs against him. I therefore, find that the respondent acted in a vexatious manner and he had an intention to do so. The respondent's conduct justifies the applicant's prayer for costs at a higher scale and I accordingly order that the respondent pays costs at a punitive scale. G

Wilmot & Bennett, applicant's legal practitioners

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Source:
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MALAWUSI v MARUFU & ORS 2003 (1) ZLR 151 (S)

Citation	2003 (1) ZLR 151 (S)
Case No	Judgment No. S-1-2003
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Ziyambi JA
Heard	14 January 2003; 4 February 2003
Judgment	4 February 2003
Counsel	*F Girach*, for the appellant *O C Gutu*, for the first respondent No appearance for the remaining five respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administration of estates — *judicial sale of deceased's property — writ of* C *execution issued before death of deceased — sale not barred*

Practice and procedure — *execution — sale — judgment debtor dying — writ of execution issued before death — sale not barred*

Headnote

The first respondent had bought a property at a sale in execution conducted by the Sheriff. The writ of execution was issued in July 1999. The D judgment debtor died in February 2000. The sale in execution took place in May 2001. Letters of administration in respect of the deceased estate were granted in June 2001. The first respondent sought an order compelling the transfer to him of the property. The appellant, the executrix of the estate, opposed the application, arguing that by virtue of E s 44 of the Administration of Estates Act [*Chapter 6:01*], the writ of execution should not have been processed, and accordingly that the judicial sale should have been stayed after the death of the judgment debtor.

Held, that s 44 only bars suing out or obtaining a writ of execution after the death of the judgment debtor. It does not affect the continuation of the F process of execution where the writ was issued before the debtor's death. The writ in this case was issued more than seven months before the judgment debtor died, so the sale in execution in such circumstances was legal.

Legislation considered

G Administration of Estates Act [*Chapter 6:01*], s 44

Case information

F Girach, for the appellant

O C Gutu, for the first respondent

No appearance for the remaining five respondents

Sandura JA

Judgment

Sandura JA: This is an appeal against a judgment of the High Court which A ordered the appellant to transfer to the first respondent ("Marufu") her immovable property in Milton Park, Harare ("the property") which had been bought by Marufu at a public auction. The property had been mortgaged to the sixth respondent ("Beverley") by the appellant, who subsequently defaulted in paying the monthly instalments to Beverley. B

The factual background is as follows:

1. On 20 April 1999, Beverley instituted civil proceedings against the appellant claiming payment of the balance due in terms of the mortgage bond, and a judgment was subsequently granted in its favour.
2. On 15 July 1999, a writ of execution was issued at Beverley's instance, C and the property was subsequently attached.
3. On 13 January 2000, Ms Mahlunge ("Mahlunge"), then a partner in the second respondent ("Wintertons"), a law firm acting for Beverley, wrote to the third respondent ("the Sheriff") instructing him to sell the property by public auction.
4. On 20 February 2000, the appellant died. D
5. On 22 February 2001, the Sheriff wrote to Wintertons informing them that the property would be sold by public auction on 4 May 2001.
6. On 12 March 2001, Beverley wrote to Wintertons informing them that the arrears on the appellant's account as at that date were $17 467.71 and urging them to proceed with the sale in execution. The letter was copied E to the appellant, which would suggest that Beverley was not aware that the appellant had died.
7. On 9 April 2001, Mahlunge purportedly wrote to the Sheriff instructing him to cancel the sale. However, the letter does not form part of the record, and the Sheriff denied receiving it. F
8. On 4 May 2001, the property was sold by public auction. Marufu, who bid $3 000 000 for the property, was the highest bidder.
9. On 4 June 2001, the Sheriff declared Marufu the purchaser of the property.
10. On 8 June 2001, the Sheriff wrote to Wintertons advising them that he G had, on 4 June 2001, declared Marufu the purchaser of the property, and that if no objections were made to him in writing within fifteen days from the date of the declaration of the purchaser he would confirm the sale. The letter was copied to the fifth respondent ("the auctioneer"), Marufu and the appellant. H

Sandura JA

11. On A 12 June 2001, a Certificate of Executorship was issued to Margaret Malawusi ("the executrix") by the magistrate's court at Harare.
12. On 4 July 2001, the Sheriff, having received no objection to the confirmation of the sale of the property to Marufu, confirmed the sale.
13. On 6 July 2001, the Sheriff wrote to Wintertons informing them that as B no objection had been received the sale of the property to Marufu had been confirmed on 4 July 2001. The letter was copied to the auctioneer, the appellant and Marufu.
14. On 25 July 2001, Wintertons sent to Marufu a *pro forma* account indicating that the purchase price of $3 000 000 had been paid in full, and calling upon Marufu to pay the transfer fees of $222 622.50. C
15. On 27 July 2001, Wintertons submitted the documents relating to the transfer of the property to the Sheriff for his signature.
16. On 31 July 2001, Marufu paid the transfer fees of $222 622.50 to Wintertons.
17. On 24 August 2001, Mahlunge wrote to the Sheriff requesting him not D to confirm the sale. In that letter she stated that when she received the Sheriff's letter confirming the sale, and later received the instruction that Wintertons should attend to the transfer of the property, she overlooked the fact that on 9 April 2001 she had written to the Sheriff instructing him to cancel the sale. E
18. On 29 August 2001, the Sheriff wrote to Wintertons referring to their letter of 24 August 2001 and informing them that as they had cancelled the sale, which had already been confirmed,

they were obliged to refund to Marufu the auctioneer's commission of $13 929.00 which Marufu had already paid.

19. On 6 September 2001, Wintertons refunded to Marufu the transfer fee F of $222 622.50 by cheque. The cheque was accepted on a without prejudice basis by Marufu, who later sought legal advice and challenged the purported cancellation of the sale.

20. On 19 September 2001, the Sheriff, after carefully considering the matter, wrote to Wintertons informing them that he had changed his G mind and that as the sale had already been confirmed it could only be cancelled pursuant to a court order. In the circumstances, he instructed them to proceed with the transfer of the property to Marufu. In addition, he informed them that he had not received the letter dated 9 April 2001 instructing him to cancel the sale. H

21. On 26 October 2001, the Sheriff signed the relevant transfer documents.

Sandura JA

22. Finally, on 29 October 2001, Marufu filed a court application in the A High Court seeking an order compelling the appellant to attend to the registration of the transfer of the property to him. The application was opposed by the appellant, but was not opposed by the second, third, fourth, fifth and sixth respondents. However, the order sought was subsequently granted. Aggrieved by the result, the appellant appealed to this court. B

At the hearing of this appeal, it was submitted on behalf of the appellant, as set out in the appellant's heads of argument, that the learned judge in the court *a quo* had erred:

"1. in failing to take (into) account that Wintertons as the agent for the judgment creditor had instructed the Sheriff to cancel the sale; C

2. in holding that the sale was valid notwithstanding the prior death of the deceased (the appellant);

3. in finding that this was a case in which to exercise its discretion by ordering specific performance; and

4. by failing to hold that this was a proper case in terms of r 359 of the D Rules (of the High Court, 1971) (in which to hold) that the sale in execution should be set aside."

I shall consider the four grounds of criticism in turn.

The first ground, i.e. that the learned judge failed to take into account the fact that Wintertons had instructed the Sheriff to cancel the sale, has no merit. That is so because the appellant did not adduce any evidence to show that the letter E purportedly written on 9 April 2001 and instructing the Sheriff to cancel the sale was received by the Sheriff. The Sheriff denied receiving it, and nothing indicated that he had in fact received it.

In addition, what happened after 9 April 2001 is inconsistent with the letter having been sent to the Sheriff. F

In the first place, as already stated, on 8 June 2001, the Sheriff wrote to Wintertons advising them that he had, on 4 June 2001, declared Marufu the purchaser of the property, and that if no objections were made to him in writing within fifteen days from the date of the declaration of the purchaser he would confirm the sale. Wintertons did not object to the confirmation of the sale. G

Secondly, on 6 July 2001, the Sheriff wrote to Wintertons informing them that, having received no objection, he had confirmed the sale of the property to Marufu on 4 July 2001. Again, there was no protest from Wintertons.

Thirdly, on 25 July 2001 Wintertons sent to Marufu a *pro forma* account calling upon him to pay the transfer fee of $222 622.50, which was subsequently H

Sandura JA

A paid on 31 July 2001. If Wintertons had instructed the Sheriff to cancel the sale, they should not have called upon Marufu to pay the fee.

Fourthly, on 27 July 2001 Wintertons submitted the documents relating to the transfer of the property to the Sheriff for his signature. Again, if they had instructed the Sheriff to cancel the sale, they should not have sent the transfer documents to him requesting him to sign them.

B In my view, the events set out above are inconsistent with the allegation that the letter instructing the Sheriff to cancel the sale was sent to him. The explanation by Mahlunge that she had forgotten that she had sent the letter to the Sheriff instructing him to cancel the sale is unacceptable.

I now wish to deal with the second ground relied upon by counsel for the C appellant. It was submitted that the learned judge in the court *a quo* erred in holding that the sale was valid notwithstanding the fact that the appellant died before the sale was conducted.

What is in issue here is the interpretation of s 44 of the Administration of Estates Act [*Chapter 6:01*] ("the Act"). The section reads:

D "**44. Suspension of execution against deceased estate**

(1) No person who has obtained the judgment of any court against any deceased person in his lifetime, or against his executor in any suit or action commenced against such executor, or which, having been pending against the deceased at the time of his death, has thereafter been continued against the executor of such person, may sue out or obtain any process in E execution of any such judgment before the expiration of the period notified in the *Gazette* in manner in this Act provided.

(2) No such person as aforesaid shall sue out and obtain any process in execution of any such judgment as aforesaid within six months from the time when letters of administration have been granted to the executor against whom execution of such judgment is sought without first obtaining F an order from the Court or some Judge thereof for the issue of such process."

Mr *Girach*, who appeared for the appellant, submitted that the section affects not only the issuing of a writ of execution after the death of a judgment debtor, but also the continuation of the process of execution where the writ of G execution was issued before the death of the judgment debtor, as in the present case. In other words, he submitted that the appellant's death stopped the execution of the judgment granted in favour of Beverley. I respectfully disagree.

In my view, the section is clear and unambiguous. Subsection (1), in relevant H part, reads:

Sandura JA

"No person who has obtained the judgment of any court against any A deceased person in his lifetime … *may sue out or obtain any process in execution* of any such judgment …" (my emphasis).

Clearly, what is prohibited is suing out or obtaining a writ of execution after the death of the judgment debtor.

Subsection (2), in relevant part, reads: B

"No such person … shall *sue out and obtain any process in execution* of any such judgment … without first obtaining an order from the court or some Judge thereof *for the issue of such process*" (my emphasis).

Again, subs (2) makes it clear beyond doubt that what is affected is suing out and obtaining any process in execution of the judgment after the judgment debtor's death. In other words, what is affected is applying for and obtaining C the writ of execution after the debtor's death.

Neither subs (1) nor subs (2) affects the continuation of the process of execution where the writ was issued before the debtor's death, as was the position in the present case.

In this case, it was common cause that the writ of execution was issued on D 15 July 1999. The appellant (the judgment debtor) died on 20 February 2000. The property in question was sold by public auction on 4 May 2001 and the letters of administration were granted on 12 June 2001.

In the circumstances, there is no merit in the second ground relied upon by counsel for the appellant. E

I will now deal with the third and fourth grounds relied upon by counsel. These were that the learned judge should not have exercised his discretion and ordered specific performance, and that the sale ought to have been set aside in terms of r 359 of the High Court Rules, 1971.

In my view, the submission that the learned judge should not have ordered specific performance has no validity. Counsel for the appellant did not F indicate in what way the learned judge had improperly exercised his discretion. The fact that the amount owed by the appellant was small when compared to the value of the property sold by public auction is irrelevant.

Finally, rule 359 of the High Court Rules, 1971, in relevant part, reads as follows: G

"**359. Confirmation or setting aside of sale**

(1) Subject to this rule, any person who has an interest in a sale in terms of this Order may request the Sheriff to set it aside on the ground that —

(a) the sale was improperly conducted; or

(b) the property was sold for an unreasonably low price; H

or on any other ground.

Sandura JA

A (2) A request in terms of subrule (1) shall be in writing and lodged with the Sheriff within fifteen days from the date on which the highest bidder was declared to be the purchaser …

Provided that the *Sheriff may accept a request made after that fifteen day period but before the sale is confirmed*, if he is satisfied that there is good cause for the request being made late" (my emphasis).

B In this case, the sale was properly conducted and there is no allegation that the property was sold for an unreasonably low price. The sale was conducted on 4 May 2001 and Marufu was the highest bidder. On 4 June 2001, the Sheriff declared Marufu the purchaser of the property.

Subsequently, when the Sheriff did not receive any objection to the confirmation C of the sale he confirmed it on 4 July 2001. Thereafter, Marufu paid the purchase price of $3 000 000 and the transfer fee of $222 622.50. And on 26 October 2001, the Sheriff signed the transfer documents. No request to set aside the sale had been made in terms of r 359.

In the circumstances, there are no equities in favour of the appellant which would warrant the setting aside of the sale.

D The appeal is, therefore, dismissed with costs.

Cheda JA & Ziyambi JA concurred.

E *Scanlen & Holderness*, appellant's legal practitioners

Gutu & Chikowero, first respondent's legal practitioners

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Source:
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SMITH & ORS v ZIMBABWE ELECTRICITY SUPPLY AUTHORITY 2003 (1) ZLR 158 (H)

Citation	2003 (1) ZLR 158 (H)
Case No	Judgment No. HH-22-03
Court	High Court, Harare
Judge	Paradza J
Heard	27 September 2002; 12 February 2003
Judgment	12 February 2003
Counsel	*F Girach*, for the applicants *P Nherere*, for the respondent
Case Type	Civil application

Annotations No case annotations to date

Flynote

Contract — *breach — remedies — specific performance — discretion to* C *grant damages rather than specific performance — discretion not readily exercised*

Contract — *cancellation — mistake — offer made mistakenly — mistake not induced by fraud or representation by offeree — whether offeror may cancel contract after offer accepted by offeree* D

Headnote

The applicants occupied houses belonging to the respondent, a statutory body. The respondent offered to sell the houses to the applicants as part of a drive to divest itself of surplus assets. The applicants accepted the offers made to them and paid the asking price, together with the E necessary conveyancing fees and transfer duty. Before the houses could be transferred to the applicants, however, the respondent purported to cancel the sales on the ground that it had made "a big mistake" and that in fact the houses were needed for its operations. The applicants refused to accept the cancellation and sued for specific performance.

Held that since the offer was not induced by fraud or misrepresentation on F the part of the applicants, and since there was no material mistake which the applicants ought to have known about, the respondent was not entitled to rescind the contracts of sale. An offeror cannot escape liability arising out of a contract by proving that the offer he made was wrong, particularly if the offer has been accepted. G

Held, further, that while specific performance is a discretionary remedy, the discretion will not be readily exercised in favour of an award of damages as opposed to specific performance. Justice demands that those who enter into contracts should fulfil their obligations.

2003 (1) ZLR p159

Paradza J

Cases cited A

Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A)

Cohen v Shires, McHattie & King (1882) 1 SAR 41

Farmers' Co-op Soc (Reg) v Berry 1912 AD 343

Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd 1993 (1) ZLR 21 (H)

B *SAR&H v National Bank of SA Ltd* 1924 AD 704

Thompson v Pullinger (1894) 1 OR 301

University of Zimbabwe v Gudza 1996 (1) ZLR 249 (S)

Zimbabwe Posts &Telecommunications Workers Union v PTC & Anor HH-116-01

Case information

C *F Girach*, for the applicants

P Nherere, for the respondent

Judgment

Paradza J: This is an opposed application in which the applicants are D seeking an order compelling the respondent to effect transfer of certain houses which the applicants purchased from the respondent. Most of the facts that form the basis of this claim are common cause. Isaac Mupotsa, who swore to an affidavit on behalf of the respondent, confirms and agrees with the applicants'

version as to what happened leading to the purchase of the houses in issue. His affidavit deals mainly with an explanation of what he calls "a big E mistake".

The facts are as follows:

The applicants were at the material time, namely around September 2000, employees of the respondent. They were occupying certain houses belonging to the respondent by virtue of being respondent's employees. The houses are F located at Kariba. I am informed that the applicants are still in occupation of the houses. Sometime in the year 2000, the respondent, a statutory body created by the Electricity Act [*Chapter 13:05*], embarked on a process of commercialisation and "unbuilding", whatever that means. As part of that process the respondent decided to sell some of its assets which were considered to be unimportant for its operations.

G During that same year, the respondent's board of directors resolved to sell all the houses it owned to its employees who were sitting tenants. The houses it decided to sell were labelled "non-designated houses". The applicants received letters of offer to purchase the houses they were living in. A copy of the letter that was sent to the applicants was filed with the founding affidavit. It is not H necessary to quote the contents of the letter. It suffices to say that the letter

offered the person concerned "the right of first refusal" to purchase the A property for a specified amount. It also gave a time limit of three weeks within which that offer was to be accepted.

It is not in dispute that all the applicants accepted the offer within the stipulated time. They then proceeded to enter into a formal agreement of sale, a sample copy of which was also filed with the founding affidavit. B

Each agreement of sale, in its preamble, reads as follows:

"WHEREAS

A. The Seller is the registered owner of certain immovable property being certain piece of land situate in the district of Kariba called Stand …(hereinafter referred to as the 'Property') C

B. By resolution dated 18th August, 2000 the Board of the Seller resolved to dispose of the Seller's non-designated houses throughout the country by selling them to its employees;

C. In terms of Section 19 as read with paragraph 8 of the First Schedule in the Electricity Act (*Chapter 13:05*), the then Minister of Transport and Energy duly approved the said sale in its letter of consent dated D 13th September, 2000;

D. The Seller is desirous of selling the Property to the Purchaser who wishes to purchase the same from the Seller;

NOW THEREFORE…"

I want to emphasise the point that the agreements which were signed by the E parties proceeded on the basis of what the Electricity Act required in order to make such sales valid, namely the need for the seller to obtain Ministerial consent before proceeding with the sale. This aspect is not in issue. The issue, it would appear from the argument by Mr *Nherere*, for the respondent, is whether the Ministerial consent that was granted was in respect of the houses occupied by the applicants. The respondent's argument is that those houses F were not "non-designated houses" and therefore they were sold without the Minister's consent, making the sale null and void. I will deal with this argument later.

Having entered into the agreements of sale, the parties thereto proceeded to fulfil their respective obligations. In particular, the applicants made payments of the full purchase prices, and the respondent accordingly engaged legal G practitioners for the purposes of attending to the conveyancing of the properties. *Pro forma* invoices were sent to the applicants for payment of the conveyancing fees and stamp duty. The payments were accordingly effected. All the necessary papers were ready for lodging with the Registrar of Deeds. It was at this stage, when the conveyancers asked the respondent to sign the H

A power of attorney to pass transfer and the necessary declaration by the seller, that the respondent says it realised that it had made a mistake and that the houses were not supposed to be sold as

they were not to be classed as "nondesignated houses".

A resolution was passed by the Board of the respondent and approved by the executive chairman of the respondent "to withdraw the sale of Authority B houses in Kariba that should have been retained for operational purposes and reimburse the attached employees accordingly." Further, it was resolved, "that the sale of non-designated houses in Kariba should be withheld until the house disposal issues for houses that should be retained by the Authority, in that location had been cleared."

C What is of concern to me is that no explanation was given to the applicants of why this resolution was being passed. One can see from a document labelled "Internal Correspondence" which was annexed to the founding papers as Annexure "G", that the action taken by the Board was taken "in the interest of ZESA operations and that any inconvenience caused is sincerely regretted."

D Letters were then dispatched to the affected people including the applicants, that read as follows:

> "I refer to the cancellation of sale of operational designated houses as advised through the Station Manager in my memorandum dated the 6th September, 2001. In line with the said cancellation, the offer to you of House No —— is hereby cancelled —"

E A cheque refunding the amount paid as the purchase price was attached. I have taken note of the argument by the respondent to the effect that the whole exercise was a mistake. I must highlight, at this stage, that no such averment was made by the respondent in any of its correspondence. I also note that when the respondent wrote to the first applicant the letter of withdrawal of the sale, it purported to withdraw the offer for the sale of the house. I must point out F that this was long after the contract had been signed and the parties had performed their obligations. What was left to do was the formality, as is required by law, of passing transfer. I will deal with this aspect in detail later.

Subsequent to the purported cancellation of the sale, the legal practitioners also wrote letters to the applicants enclosing a refund cheque in respect of the G conveyancing costs and stamp duty that had been paid to them to enable transfer to be effected.

The applicants, in their wisdom, refused to accept the refund of the purchase price and the transfer costs. What happened thereafter was a legal wrangle between the legal practitioners acting for the two parties.

H As stated above, the abovementioned facts are not in dispute. What is clear,

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however, is that the respondent sought to avoid its obligations by making the A following averments. Firstly, the respondent says that they realised that "a big mistake" had been made in deciding to sell these houses to the applicants. In any case these houses, according to the respondent, were crucial for its operations and, therefore, a decision to sell them was not only "a terrible mistake" but also "scandalous". The argument goes on to say that in any case, B the consent granted by the Minister on 13 September 2000 related to "nondesignated houses". Since the houses concerned, situated in Kariba, were not "non-designated houses" the required Ministerial consent was lacking. That made the sale null and void.

During submissions by Mr *Nherere* I also sought to find out from him whether, at the relevant time when a resolution was passed by the Board of the C respondent in August 2000, it was known which houses in particular were to be regarded as designated and non-designated. He indicated that he could not answer that question as he had no instructions to that effect. I asked that question because I was concerned with knowing whether the classification of the houses at Kariba as designated was done *ex post facto*, that is after the sale had been concluded and upon realising the folly of selling the houses, or D whether the houses had already been listed as such before the sale was concluded. No effort was made on the papers before me to address that very important aspect. However, what I have decided from a reading of a copy of the resolution that was passed to rescind the sales which I have referred to above, is that not all houses at Kariba were to be regarded as designated. The E respondent seemed to want to impress it upon me that indeed all the houses at Kariba, by virtue of its location, were not to be sold. I refer in particular to paragraph 6 of the opposing affidavit by Isaac Farai Mapotsa on behalf of the respondent. It reads in part as follows:

> "— It was at this stage that a terrible mistake was made, that of offering the houses at Kariba to sitting tenants —." F

Paragraph 7 of that affidavit is important (see page 48 of record). It reads as follows:

> "7.The houses at Kariba are integral to the power station and should never have been offered to the applicants or anyone for that matter for the following reasons —." G

The effect of the reasons given by the respondent is clearly to say that no house in Kariba belonging to the respondent was to be sold. This would not only create a housing shortage but would bring hardship to respondent itself since it would be expected to have to create a new housing scheme for its staff or to house its staff in the nearby high density suburb or accommodate them at expensive hotels. In Annexure "G", which I have referred to above, it is made H

A quite clear that there are indeed other non-designated houses the sale of which has been put on hold pending the finalisation of this matter. I have already quoted in full the relevant resolution. In my view, therefore, the picture that has been painted by the respondent to make it appear that no house in Kariba was supposed to be sold is, to say the least, misleading to the extent of being incorrect.

B As regards the absence of Ministerial consent, I am satisfied that the Minister gave a blanket consent to cover all the houses that were, in the discretion of the Board and management of the respondent, to be labelled as "nondesignated". At the time the Minister gave his consent, no such classification in respect of these houses was in existence. If it was, I would have been C furnished with that list in the opposing papers. To me it is clear that it was an afterthought, that came up rather late after the sale of the houses, to classify the houses at Kariba as designated. From the papers before me that is the only conclusion I can come to, especially in the absence of any information that points to a mistake having been made. Even assuming that a mistake was indeed made by the respondent in selling houses that were designated houses, D as opposed to non-designated houses, I would find difficulty in finding in favour of the respondent. The issue is, can the respondent rely on a mistake of that nature in order to avoid the consequences of a contract that it entered into with the applicants?

To start with, it took an unreasonably long time for the respondent to discover E an error of that magnitude. The conveyancers who were attending to the transfer of the houses were advised of the error in early June 2001. This is clear from the respondent's opposing affidavit, para 9 at page 50. Nothing happened between then and September 2001, when the respondent eventually informed the applicants. No explanation is given as to why it took so long for this mistake to be discovered and eventually to be communicated to the applicants.

F The law on mistake which accompanies the formation of a contract is clear. It has been stated by textbook writers and in judgments of this jurisdiction, as well as other jurisdictions that have the same legal system.

Let me cite a very recent judgment of this court, namely a judgment of Blackie J in *Zimbabwe Posts & Telecommunications Workers Union v The* G *Posts & Telecommunications Corporation & Anor* HH-116-2001. The learned judge made reference to the judgment of Korsah JA in *University of Zimbabwe v Gudza* 1996 (1) ZLR 249 (S) Blackie J quoted from the headnote of the latter case as follows:

> "where an offeror mistakenly makes an offer that is accepted by the offeree, the offeror will only be able to rescind the contract if (a) the offer was H induced by fraudulent misrepresentation by the offeree; or (b) the mistake

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> was a material one and the offeree knew or ought to have known that the A offer had been made in error."

I have no doubt that there was no element of fraud, neither was there any misrepresentation made by the applicants. No such averment is apparent on the papers. There is also no basis for holding that there was a material mistake which the applicants ought to have known about. I have already ruled that there B was no mistake, particularly one that could be regarded as material. Even if a mistake was made, I do not believe it is the kind of mistake that the respondent can rely on to escape from the consequences of a contract that the respondent, without inducement, initiated and executed through to the end. In any case, an offerer cannot escape liability arising out of a contract

by saying and proving that the offer he made was wrong, particularly if that offer has been accepted: C see *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715, where Wessels JA had this to say:

> "The law does not concern itself with the workings of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, D where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement."

I find a lot of relevance and comfort in these words of the learned judge of appeal. These words were quoted with approval by Blackie J and Korsah JA in the cases I have referred to above. E

The history of the facts of this matter clearly manifest meeting of the minds for a period of time extending between August 2000 to September 2001. What is glaringly clear is that sometime between June 2001 and September 2001 the respondent had a "change of heart". It may be more appropriate to refer to it as a change of mind. The reasons for that change of mind become irrelevant if F the sanctity of contracts must be respected. To all involved, and even those not involved, it is clear that the parties went through a sale of the houses concerned and performed all the obligations that arose from the contract. A change of mind at that late hour by the respondent would not invite sympathy from anybody, particularly from these courts. Justice demands that those who enter into contracts are required to fulfil their obligations. Where for some reason G that cannot be achieved, it then becomes relevant to talk of an award of damages.

Argument was advanced by Mr *Nherere* that the remedy of specific performance is a discretionary remedy. Whether a court will or will not grant an order for specific performance depends on the facts of the case. While it may be correct H

Paradza J

A to say so, the law is quite emphatic that that discretion will not be easily exercised in favour of an award of damages as opposed to the remedy of specific performance. There is a wealth of case authority that started with Kotzé CJ's *dicta* in *Cohen v Shires, McHattie & King* (1882) 1 SAR 41. It was carried further by Innes JA in the then Southern Rhodesian case of *Farmers Co-operative Society (Reg) v Berry* 1912 AD 343. At p 350 this is what he B said:

> "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotzé CJ in *Thompson v Pullinger 'the right of a plaintiff to the specific performance of a contract where the defendant* C *is in a position to do so is beyond all doubt'."*

In *Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) Robinson J dealt at length with the factors that should be considered when deciding whether or not to grant an order of specific performance. After referring to *Cohen's* case *supra* and *Thompson v Pullinger* D (1894) 1 OR 301, the learned judge said that the right of a plaintiff to specific performance has been reaffirmed in a multitude of cases which he then mentioned at p 25. He then went on to refer with approval to the judgment of Hefer J in *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) wherein that judge held as follows. The plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of E precisely what he bound himself to do, or to claim damages for the breach. That right of choice a defendant does not enjoy. Although the court will, as far as possible, give effect to a plaintiff's choice to claim specific performance, it has a discretion to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*. That discretion must be exercised F judicially. Each case must be judged in the light of its own circumstances. At p 783 C-D Hefer JA said:

> "This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle (*Ex parte Neethling (supra* at 335). It is aimed at G preventing an injustice — for cases do arise where justice demands that a plaintiff be denied his right to performance — and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, e.g. if, in the particular circumstances, the order will operate unduly harshly on the defendant."

The respondent has not raised impossibility as a defence. It has merely claimed H that there was a "big" mistake. For the reasons set out above, I consider that

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Paradza J

that excuse does not invalidate the contract the respondent entered into with A the applicant. As Robinson J said in the *Nestlé* case, *supra*, at p 37 D-F:

> "I would wind up by saying that if the right of specific performance is to be shown to have real meaning to businessmen, then the loud and clear message to go out from the courts is : businessmen beware. If you fail to honour your contracts, then don't start crying if, because of your failure, B the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract. In other words, businessmen who wrongfully break their contracts must not think they can count on the courts, when the matter eventually comes before them, simply to make an award of damages in money, the value of which has probably fallen drastically compared to its value at the time of the breach. Businessmen at fault will therefore, in the absence of good grounds C showing why specific performance should not be decreed, find themselves ordered to perform their side of the bargain, no matter how costly that may turn out to be for them."

Accordingly an order requiring specific performance will be issued.

As regards costs, I consider that the respondent has made it necessary for the D applicants to approach the courts in order to enforce their rights without any good cause. Therefore, the applicants should be awarded costs on the higher scale.

It is ordered:

1. That Respondent signs all papers necessary for the transfer of the 56 E properties listed on the attached schedule to the persons appearing thereon, within ten days of the date of this order, failing which the Deputy Sheriff for Harare be and is hereby authorised to sign all necessary documentation to ensure that the transfer of the stands listed on the schedule is effected to the corresponding persons appearing thereon;
2. That the Respondent pay costs on a legal practitioner and client scale. F

Coghlan, Welsh & Guest, applicants' legal practitioners

Muzangaza & *Partners*, respondent's legal practitioners G

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/TSVANGIRAI v REGISTER-GENERAL & ANOR 2003 (1) ZLR 167 (H)

TSVANGIRAI v REGISTER-GENERAL & ANOR 2003 (1) ZLR 167 (H)

Citation	2003 (1) ZLR 167 (H)
Case No	Judgment No. HH-32-2003
Court	High Court, Harare
Judge	Guvava J
Heard	22 January 2003; 12 February 2003
Judgment	12 February 2003
Counsel	*A P de Bourbon SC*, for the applicant Mrs *Y Dondo*, for the respondents
Case Type	Opposed application

Annotations No case annotations to date

Flynote

Elections — *election petition — evidence — documents sought from Registrar-General — voters' roll relating to specific election — C Registrar- General obliged to supply on request by petitioner*

Practice and procedure — *discovery — purpose of — what documents a party is entitled to demand discovery of — further discovery — when may be demanded — when it might be concluded that further documents D exist — opposition to application — grounds for — privilege — correct procedure where privilege is asserted*

Headnote

The applicant was bringing an election petition arising out of the 2002 Presidential election. He brought three inter-related applications. The E first was for an order that the Registrar-General should make available for inspection the voters roll for the 2002 Presidential election and the ballot papers which were used in that election. This was opposed on the grounds that the documents had been sealed in accordance with s 78 of the Electoral Act [*Chapter 2:01*] and could not be opened without the authority of the court. In the second two applications he sought further F discovery, after some documents had been supplied by the respondents. The applications listed, without specifying, all documents and memoranda issued by the Registrar-General or from his office. These applications were opposed on the grounds that the application were as not sufficiently particular and that the documents were privileged.

Held, that s 78 of the Electoral Act does not apply to the voters roll, and that G the voters roll should be supplied.

Held, further, that the purpose of discovery is to ensure that no party to any proceedings is taken by surprise at trial as all documents relating to the matter between them would have been disclosed. A party is entitled to request that the other party disclose the nature of documents in his H possession as long as they are relevant to the dispute. All the documents

Guvava J

being sought must be relevant to the case being dealt with. The test for A relevance is extremely wide and includes not only documents which are directly relevant but also those that may indirectly assist the party seeking discovery. The applicant was entitled to request full and complete discovery by the respondents and the respondents were obliged to make full discovery.

Held, further, that where further discovery is sought, a discovery affidavit is B considered conclusive unless it can be shown: (a) from the discovery affidavit itself; or (b) from documents referred to in the discovery affidavit; or (c) from pleadings or admissions made by the party making the discovery affidavit; or (d) from the nature of the case and documents in issue that there are reasonable grounds for believing that the party has C other relevant documents in their possession or power. In the circumstances, and based on what had been stated by the respondents, the court could properly conclude that the respondents might very well have other documents in their possession which had not been discovered.

Held, further, that although the applicant had asked for "all directives", some of these could have been verbal. He was only entitled to documents, tapes D and correspondence, and the application should be amended to read "written directives".

Held, further, that where the respondent relied on privilege, he must state, on affidavit, that such documents, which he does not wish to make available for inspection, are privileged and must specify the ground upon which the claim for privilege is based. E

Cases cited

Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55

Durban City Council v Min of Justice 1966 (3) SA 529 (D) F

Federal Wine & Brandy Co v Kantor 1958 (4) SA 735 (E)

Rellams (Pty) Ltd v James Brown & Hamer Ltd 1983 (1) SA 556 (N)

Swissborough Diamond Mines (Pty) Ltd v Govt of RSA 1999 (2) SA 279 (T)

Legislation considered G

Electoral Act [*Chapter 2:01*], s 78

High Court Rules 1971(RGN 1047 of 1971), rr 160, 161, 162 and 165(2)

Case information

A P de Bourbon SC, for the applicant

Mrs *Y Dondo*, for the respondents H

Guvava J

Judgment

A **Guvava J:** These three applications were brought before this court, on an urgent basis, in terms of r 244 of the High Court Rules. As the applications were inter-related and were all in respect to the petition in the matter of *Tsvangirai v Mugabe Ors* HC 3616/2002 (the Petition), I decided to deal with the three matters at the same time. The parties were agreed that the matters were urgent as the Petition was due to be set down very soon and it was necessary B to dispose of these matters before the trial commenced. I therefore proceeded to deal with the matters as urgent applications.

Case No. HC 469/2003

The first matter was that of *Tsvangirai v Registrar-General of Elections* HC 469/2003. In this matter, the applicant sought an order that the respondent C makes available for inspection, by the applicant's legal practitioners, the voters roll for the 2002 Presidential election and the ballot papers which were used in that election plus costs of suit. The application was opposed by the respondent on the basis that the provisions of the Electoral Act [*Chapter 2:01*] did not allow him to open the requested documents without a court order, as they were sealed.

D The applicant, in making this application, relied on r 165(1) of the High Court Rules, which provides as follows:

> "**165 Failure to make discovery or permit inspection**
>
> (1) If a party fail to make discovery under this Order or, having been served with a notice under rule 164, fails to give notice of a time for E inspection or fails to permit inspection as required by that rule, the party desiring discovery or inspection may make a chamber application for an order compelling such discovery or inspection, and the judge may grant or refuse the order as he thinks is appropriate."

On 6 January 2003, the respondent was served with a notice in terms of r 164 F and failed, within the five days allowed by the rules, to give notice to the applicant specifying the time and place where the documents could be inspected. The respondent did not respond in any way to the applicant's request and the applicant decided to compel the respondent to comply with the request.

Mrs *Dondo,* on behalf of the respondent, submitted that the failure to comply G with the notice was not a deliberate disregard for the rules of the court but was an oversight on her part. She submitted that as the notice had been served together with other documents relating to the first respondent in the Petition, she had assumed, wrongly, that all the documents related to the first respondent only. It was her submission that she was totally unaware of the request until the urgent application was served upon them. It was upon this failure to H respond that the applicant launched this application.

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It was the respondent's submission that he was opposed to the granting of the A order sought on the basis that the provisions of s 78(5) of the Electoral Act were not complied with. It was Mrs *Dondo*'s submission that the voters roll and the ballot papers could not be made available for inspection as they had been sealed in accordance with s 78(2) of the Electoral Act which had been in pursuance to an order by Matika J in case No. HC 8657/02. It was her B submission that the documents could only

be made available for inspection upon an order being granted by this court allowing the respondent to open the sealed packets.

It was conceded by Mr *de Bourbon* that it would not be appropriate, at this stage, to seek an order to open the ballot papers which were sealed. He then amended the draft order so that it would relate only to the inspection of the C voters roll. In respect to the voters roll, it was his submission that the roll was not one of the documents covered by s 78 of the Electoral Act and should accordingly be made available for inspection.

Section 78(2) of the Electoral Act provides:

"(2) A constituency registrar shall not open any — D

(a) sealed packet containing —

(i) counterfoils of used and spoilt ballot papers; or

(ii) postal ballot papers and declarations of identity;

that has been delivered to him in terms of subsection (2) of section *sixty;* or E

(b) sealed packet containing documents referred to in subsection (1) or (2) of section *seventy;* or

(c) packet that has been re-sealed by him after examination in terms of paragraphy (d) of subsection (3) of section *seventy-two;* or

(d) sealed packet containing counted or rejected ballot papers;

while such packet remains in his custody." F

In terms of subs (5) of the same section, such packets may only be opened in accordance an order of this court.

Clearly, the section relates only to ballot papers, counterfoils of such ballot papers and documents relating to postal ballots. The provision does require that the voters roll be sealed in packets. If the voters roll was sealed by the G respondent, it can only be presumed that it was merely for the purpose of safeguarding the evidence and it may thus be properly opened and made available for inspection by the applicant without requiring the authority of the court. It was also apparent from the order of Matika J in the case of the *Registrar-General of Elections v Tsvangirai* HC 8657/02 that there was no order that the voters roll should be sealed. In my view, there appears to be no H

A legal basis for the respondent's opposition in respect to the voters roll and the applicant is therefore entitled to the order that he seeks.

Case Nos. HC 470/2003 and HC 471/2003

Facts

Turning to case Nos. HC 470/03 and 471/03, it was submitted, for the B applicant, that the applicant was seeking further discovery in accordance with r 162 of the High Court Rules against the Registrar-General and the Minister of Justice, Legal and Parliamentary Affairs, who are cited as the second and third respondents in the Petition. The background to these matters was that the respondents, in both matters, effected discovery in terms of the rules on C 30 October and 22 November 2002. The applicant was not satisfied that the respondents had effected full discovery and on 6 January 2003 served them with notices to inspect certain documents which had not been discovered. When the respondents failed to respond to the notices in the days specified, the applicant then launched these applications. The applicant listed various documents which he believes to be in the possession of the respondents, and D which, in his view, should have been discovered when the respondents effected discovery in October and November 2002. During the course of his submissions, Mr *de Bourbon* amended the draft order in respect to both matters as it became apparent that the applicant was seeking an order compelling further discovery of the documents and not inspection.

E It was the submission of the respondents, in both matters, that the applications were opposed on two grounds. Firstly, that the documents sought by the applicant had not been specified with any particular clarity, making it difficult for the respondents to determine what documents were to be discovered. It was the respondent's submission that the applicant was on a fishing expedition and did not really know whether or not such documents do in actual fact exist.

F Secondly, in respect to the various internal memoranda between the Minister of Justice, Legal and Parliamentary Affairs, his office and other persons, it was Mrs *Dondo*'s submission that these documents could not be discovered as they were privileged documents.

In respect to the first ground of opposition, it was conceded by the applicant G that he did not know whether or not the requested documents exist. It was, however, the applicant's contention that, due to the nature of the allegations in the Petition such documents should exist. The applicant also stated that the documents requested to be discovered, were relevant and material in relation to the petition. The applicant also argued that it was not necessary for him, for the purposes of discovery, to identify the precise document being sought to be H discovered provided he could provide a broad description of the documents.

Guvava J

In case No. HC 470/03, the documents which applicant requested to be further A discovered were as follows:

"1. All directives by the second respondent to constituency registrars and other relevant persons and bodies relating to the manner in which the registration of voters was to take place during the Presidential election in March 2002 including polling officers and/or relevant bodies. B

2. All records relating to the registration of voters from 10 January 2002 to 9 March 2002, including:

   2.1 All directives issued by the first respondent to constituency registrars, polling officers and other relevant persons and bodies relating to the manner in which the registration of voters was to take place during that period; C

   2.2 The details of the fixed and mobile registration centres set up to register new voters during that period;

   2.3 Details of all the registration books used during that period to register new voters, giving the range of serial numbers of the voters registration receipts contained in each of the registration D books;

   2.4 All voters' registration receipts in respect of serial Nos. 337689D to 739202C: see items 105.2 and 105.4 of the applicant's Supplementary Discovery Affidavit.

3. All directives issued by the second respondent to constituency E registrars, polling officers and other relevant persons and bodies relating to how the polling was to take place during the Presidential election in March 2002 and relating to polling hours, polling stations and polling dates.

4. All directives issued by the second respondent to constituency registrars, polling officers and other relevant persons and bodies as to how voting by postal ballot was to be conducted in the Presidential F election in March 2002.

5. All memoranda, documents and correspondence received by the second respondent in relation to the Presidential election from the first respondent, the third respondent and the fourth respondent, and from any other person and body. G

6. All memoranda, documents and correspondence relating to the manner in which polling stations were allocated in each constituency, including all correspondence with the Zimbabwe Republic Police and other State organs regarding such polling stations.

7. The voters' roll for each constituency in Zimbabwe used during the Presidential election in March 2002 marked off with the names and particulars of those who voted. H

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8. Counterfoils A of all ballot papers used during the Presidential election in March 2002.

9. All documents relating to the counting of the voters and the announcement of the results at the Presidential election in March 2002.

10. All written communication between the second respondent and B officials of the National Election Command Centre concerning the Presidential election in March 2002.

11. All accreditation certificates issued by the second respondent to all polling agents in terms of s 17(2) of the Electoral Regulations 1992 (SI 58 of 1992) as amended by SI 41F of 1992. C

12. All reports, information and advice relating to the registration of voters and the conduct of the Presidential election referred by the second respondent to the fourth respondent in terms of s 14(1)(b)(a) of the Electoral Act.

13. The full provisional list of results of the Presidential election in March 2002 as set out on pp 100-110 of the record handed to the fourth respondent by the second respondent, a copy of which was D subsequently given by the fourth respondent to representatives of the petitioner on Tuesday 12 March 2002. This list should include a breakdown of the votes cast at each of the polling stations in each of the constituencies."

And in case No. HC 471/03 the applicant requested that the following E documents be further discovered:

"1. All memoranda prepared by the third respondent and his office F relating to the use made of the provisions of s 158 of the Electoral Act [*Chapter 2:01*] in relation to the Presidential Electoral in March 2002;

2. All memoranda prepared by the third respondent and his office relating to the use made of the provisions of s 157 of the Electoral Act in relation to the Presidential election in March 2002;

3. All memoranda prepared by the third respondent and his office with regard to the amendments made to the Electoral Act in the General Laws Amendment Act (No. 2 of 2002) relating to the Presidential election in March 2002; G

4. All memoranda and other documents relating to the contents of the amendments made to the Electoral Act by the General Laws Amendment Act (No. 2 of 2002).

5. All memoranda prepared by the third respondent and his office with regard to the nullification of the General Laws Amendment Act by the Supreme Court and the re-introduction by way of Statutory Instruments H of much of the provisions previously contained in the said Act.

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6. All memoranda prepared by the third respondent and his office in A relation to the use made of the following Statutory Instruments published concerning the Presidential election in March 2002:
   (a) Electoral (Amendment) (Regulations 2002 (No. 10) (SI 8A of 2002);
   (b) Electoral (Amendment)Regulations 2002 (No. 11) (SI 17A of 2002); B
   (c) Electoral (Amendment) Regulations 2002 (No. 12 12) (SI 34 of 2002);
   (d) Electoral (Amendment) Regulations 2002 (No. 13) (SI 41B of 2002);
   (e) Electoral (Amendment) Regulations 2002 (No. 14) (SI 41F of C 2002).

7. All memoranda prepared by the third respondent and his office with regard to the failure to allow polling to take place on Monday 11 March 2002 throughout the country.

8. All written communications between the third respondent and his office and the first respondent and his office in relation to the D Presidential election in March 2002.

9. All written communications between the third respondent and his office and the second respondent and his office in relation to the Presidential election in March 2002.

10. All written communications between the third respondent and his E office and the second respondent and his office in relation to the Presidential election in March 2002.

11. All written communications between the third respondent and his office and the Zimbabwe Republic Police concerning the Presidential election in March 2002, including documents setting out the provisional and final results of the said Presidential election. F

12. All memoranda and documents made by the third respondent and his office concerning the work of the local observers and monitors who observed and monitored the Presidential election in March 2002.

13. All memoranda and documents by the third respondent and his office concerning the work of the international observers and monitors who observed and monitored the Presidential election in March 2002. G

14. All memoranda and documents between the third respondent and his office and the second and fourth respondent's offices concerning the manner in which voting by postal ballot was to be conducted in the Presidential election in March 2002." H

Guvava J

A **THE LAW RELATING TO DISCOVERY OF DOCUMENTS**

(a) *What must be discovered*

In order to determine whether or not the applicant is entitled to an order compelling the respondents to discover the above documents, it is necessary to examine the law relating to discovery. Order 24 of High Court Rules deals B with discovery of documents. It sets out in some detail what should be discovered, the effect of non-disclosure of documents further discovery of documents, inspection of documents and other related matters. The purpose of discovery is defined in Herbstein and Van Winsen in *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 582 as follows:

> "Discovery is a procedure whereby a party to an action *may discover what* C *documents relating to the matters in issue between them are in the possession of his opponent*. Generally speaking, he is entitled to have disclosed to him the nature of these documents and to inspect them and take copies of them" (emphasis is mine).

I am in total agreement with the learned authors that the purpose of discovery D is to ensure that no party to any proceedings is taken by surprise at trial as all documents relating to the matter between them would have been disclosed. It is also clear from the passage quoted above that a party is entitled to request that the other party disclose the nature of documents in their possession as long as they are relevant to the dispute between them. The requesting party need not know the form of the documentation or the content of such E documents. It is for the party who has been asked to effect discovery to swear on oath in an affidavit whether or not he does have such documents, whether he had them but no longer has them and whether they are protected in any way. The importance of discovery affidavits has been repeatedly stressed in the courts and particularly the need to discover *all* documents which are relevant to any matter between the parties. In *Durban City Council v Minister of Justice* F 1966 (3) SA 529 (D) at 531, it was held that discovery affidavits were very important documents in any trial and the party requesting discovery was entitled, in terms of the rules, to have full and complete discovery on oath.

According to Herbstein and Van Winsen *op cit* at p 592, *all documents relating to any matter in question in an action must be discovered* if at any G time they were in the possession or control of that party (emphasis is mine).

(b) *The test to be applied to determine the relevance of documents to be discovered*

The above paragraph from Herbstein and Van Winsen requires, in my view, that all the documents being sought be relevant to the case being dealt with. H The test for relevance was laid down by Brett LJ in *Compagnie Financière et*

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Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 as A follows:

> "It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his B adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."

This principle has been accepted and followed in a number of cases in South C Africa: see *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564; *Swissborough Diamond Mines (Pty) Ltd v Government of RSA* 1999 (2) SA 279 (T). The test for relevance from the above quotation appears to be extremely wide and includes not only documents which are directly relevant but also those that may indirectly assist the party seeking discovery. D This test in my view appears to be in conformity with the wording of r 160 of the High Court Rules which is crafted as follows:

> "A party to a cause or matter may require any other party thereto, by notice in writing, to make discovery on oath within twenty-four days of *all documents relating to any matter in question in such cause or matter which are or have* at any time, been in the possession or control of such E other party …" (emphasis is mine).

It is clear therefore, from the authorities cited that the applicant is entitled to request full and complete discovery by the respondents and the respondents are obliged to make full discovery.

(c) *Circumstances where further discovery may be sought* F

The applicant in making this application proceeded in terms of r 162 of the High Court Rules which relates to a request for further discovery where a party is not satisfied that there has been full

disclosure by the other party.

The question which arises in this case, however, is in what circumstances a court can compel further discovery of documents. In *Federal Wine and* G *Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749, it was held that a discovery affidavit is considered conclusive unless it can be shown from the discovery affidavit itself or from documents referred to in the discovery affidavit or from pleadings or admissions made by the party making the discovery affidavit or from the nature of the case and documents in issue that there are reasonable grounds for believing that the party has other relevant H

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A documents in their possession or power: see *Swissborough Diamond Mines v Government of the RSA supra* at 320.

In the two matters before me, most of the documents being sought are documents which would reasonably have been expected to exist when conducting an election. The Registrar-General in this matter has also admitted being in possession of some documents which are being requested. In his B opposing affidavit, the Registrar-General stated that he would discover the training manual for constituency registrars which had hitherto not been discovered but obviously should have been. Based on these factors, this court may properly conclude that the respondents may very well have other documents in their possession which had not been discovered. These documents, in my C view, would have to be discovered. It cannot therefore be said, in the circumstances of this case that the applicant is on a fishing expedition as had been submitted by the respondents. In any event, if indeed the respondents do not have any of the documents being sought, all that they must do is to state, in the affidavit, that such documents do not exist and were never in their possession. In doing so they would thus have complied with the order to effect D further discovery.

(d) *The need for identification of documents sought by the applicant*

The respondent has argued that it is difficult to ascertain what documents are being sought by the applicant from the schedule which was attached to the draft order in case No. HC 470/03. It appears to me that there is some merit in E this assertion as, in some instances, the request is vague and it would be impossible for the respondent to comply with. For instance, in paras 1, 2.1, 3 and 4 of the schedule which was filed by the applicant, the applicant seeks discovery of all directives issued by the second respondent to various persons. The request does not specify whether the directives were verbal or in writing. Where any directives were given verbally it would be difficult to effect F discovery as discovery relates only to documents, tapes and correspondence In *Rellamas (Pty) Ltd v James Brown & Hamer Ltd supra* at 560 the South. African courts, in interpreting r 35(3), which is similar to r 162 of the High Court Rules, held that although there was no basis for limiting the production of documents in terms of this rule to documents of a specified nature, there was need for documents which are being sought to be properly identified. This is G particularly important in view of the import of r 165(2) which allows a party to apply for dismissal of his opponent's case where an order compelling discovery has not been complied with. In my view, the request should therefore be for the sake of clarity, "any written directives" rather than for "all directives issued". I will thus amend those paragraphs accordingly.

H In respect to para 5 of the schedule, the request is crafted too widely as it

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requires discovery of memoranda, documents and correspondence received A from specified persons and also from "any other person and body". This, in my view, is too vague. There must be some identification with respect to the persons to whom the communication was made. Documents requested must be described in such a manner that they are identifiable otherwise it will be impossible for the respondent to comply with the order. The court too would B not be able to determine whether there has been compliance with its order, in the event that an application is thereafter made in terms of r 165.

In respect to paras 7 and 8, it is clear that these documents are the same items which were discovered by the respondent in his discovery affidavit and to which an order will be made in case No. HC 469/2003. They should accordingly not be subject to further discovery. C

In para 13, the applicant seeks the full provisional list of results of the Presidential election in March 2002. It is difficult to ascertain the basis upon which the applicant seeks further discovery of this document when it is conceded in the paragraph that the document is already in the possession of the applicant. The applicant further seeks that the respondent provides a D breakdown of the votes cast at each of the polling stations in each of the constituencies. The respondent objected to this request and in my view the objection was properly made. It is not the purpose of discovery to provide information to a party which has been synthesised. As already, stated the purpose of discovery is to make available documents in the possession of the party so that the requesting party can deal with the information as it deems fit, E including doing a breakdown of the information once it is in its possession. There is therefore no basis for compelling further discovery of a document which has already been made available and is in the possession of the applicant.

(e) *Whether the respondent is obliged to discover privileged documents* F

The respondents' second ground of opposition was in regard to the order sought in case No. HC 471/2003. The respondent submitted that all the documents being sought to be discovered, being memoranda between the respondent and his office to specified persons, were privileged and therefore could not be discovered.

In my view, the position taken by the respondent in this matter does not comply G with the rules. In terms of r 161, a party in effecting discovery must state separately —

> "(a) such documents in his possession or that of his agent other than the documents mentioned in para (b);
>
> (b) such document in respect of which he has a valid objection to produce; H

> A (c) such documents which he or his agent had but has not in his possession at the date of the affidavit."

Thus where the respondent is claiming that documents are privileged, he must disclose such documents in terms of para (b) of r 161 and specify the basis of his objection. According to Herbstein and Van Winsen *op cit,* the grounds of the claim to privilege must be clearly stated in the affidavit, unless they appear B from the nature of the documents themselves.

In this case, therefore the respondent must state, on affidavit, that such documents, which the respondent does not wish to avail for inspection are privileged and specify the ground upon which the claim for privilege is based.

Costs

C In relation to costs, the respondents argued that the applicant had filed three applications which were totally unnecessary as all three applications could have been dealt with in one application. The respondents therefore submitted that the applicant should be awarded costs for only one application in the event that they succeeded. The respondents argued further that litigation could have D been averted had the applicant followed up the notices served on the respondents with a letter or a phone call, particularly in view of the oversight by the respondents' legal practitioner. It was the respondents' view that the parties could have possibly discussed and resolved the matters without resorting to litigation.

The applicant submitted that the first matter filed under case No. HC 469/03 E was completely different from the other two matters and that it would not have been possible to deal with all three matters as one application. It was, however, conceded in respect to case No. HC 470/03 and HC 471/03 that they were substantively similar and that the only difference were the orders being sought, as one was against the Registrar-General and the other against the Minister for F Justice, Legal and Parliamentary Affairs and the content of the schedules to the orders were different. Mr *de Bourbon* was, however, adamant that as the notices requesting further discovery had been properly served there was no basis for penalising the applicants as there was no requirement in the Rules that the applicant follows up on a matter first before resorting to litigation.

In my view, the submissions by the respondents have some merit. Litigation G could have been averted, particularly in relation to the first matter where the documents had already been discovered and the applicant was merely exercising his right to inspect such documents. However, I am in agreement with the applicant that he was under no legal obligation to follow up the notice

with a phone call before resorting to litigation. The applicant has succeeded and is H entitled to his costs. In relation to the matters in case No. 470/03 and 471/03,

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I am of the view that they could have been married together to form one A application instead of two. Indeed, even in his submissions, counsel for applicant dealt with both matters together as the legal argument was the same. In my view, it is only appropriate that this court allows the applicant's costs only in relation to one case and not to both.

Accordingly, I make the following orders: B

Case No. HC 469/03

It is ordered that:

1. The respondent shall make available for inspection, by the applicant's legal practitioners in terms of Order 24 of the High Court Rules, the voters roll for the 2002 Presidential election, within five days of the date of C service of this order upon the respondent.
2. The respondent shall pay the applicant's costs of suit.

Case No. HC 470/2003

It is ordered that:

1. The respondent shall effect further discovery in terms of Order 24 of the D High Court Rules the documents set out in the schedule annexed hereto within five days of the date of service of this order upon the respondent.
2. The respondent pay the applicant's costs of suit.

Case No. HC 471/2003

It is ordered that: E

1. The respondent shall effect further discovery in terms of Order 24 of the High Court Rules the documents set out in the schedule annexed hereto within five days of the date of service of this order on the respondent.
2. That there be no order as to costs. F

Gill, Godlonton & Gerrans, applicant's legal practitioners

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

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SHATA & ANOR v MANASE NO & ANOR 2003 (1) ZLR 181 (H)

Citation	2003 (1) ZLR 181 (H)
Case No	Judgment No. HH-44-03
Court	High Court, Harare
Judge	Kamocha J
Heard	5 February 2003; 12 February 2003

Judgment 12 February 2003

Counsel *J S Mandizha*, for the applicants
W T Manase, for the first respondent
No appearance for the second respondent (The Registrar of Deeds)

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

C **Administration of estates** — *executor — delegation of functions — whether permitted — signing of documents to transfer estate property — may be delegated to another person*

Headnote

The applicants paid a law firm the price of a house which belonged to a deceased estate. The documents were signed by a clerk and a lawyer (not D the executor) in the law firm of which the executor was a partner. When the applicants sought to have the sale registered, the executor claimed that the sale was not valid, not having been authorised by him, and offered to return the sale price. It subsequently emerged that he had actually sold the property to another party for a higher price.

Held, that an executor may authorise some other person to carry out some or E all of his functions on his behalf. What an executor may not do is to abdicate his duties; he is not prohibited from delegating them. The executor had authorised the signing of both the agreement of sale and the deed of transfer by the individuals concerned. The Registrar of Deeds would be interdicted from transferring the property to the third party.

Case cited F

Bramwell & Lazar NNO v Laub 1978 (1) SA 380 (T)

Case information

J S Mandizha, for the applicants

W T Manase, for the first respondent

G No appearance for the second respondent (The Registrar of Deeds)

Judgment

Kamocha J: This is one of those typical double sales that have inundated the High Court these days. What happened was this. During the month of October 2002 advertisements were flighted in the print media about the sale H of a property known as stand number 108943 Salisbury Township also known

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Kamocha J

as number 45 Newmarch Road, Hillside, Harare. The house was part of a A deceased estate whose executor was a legal practitioner, Mr Wilson Tatenda Manase of Manase and Manase. Mr Manase was to handle the sale, although he delegated someone in the law firm to deal with the matter.

The applicants responded to the advertisement and made an offer for 20 million dollars which was accepted by the person delegated by Manase. A B memorandum of agreement of sale was signed by the applicant and Manase's delegate on 23 October 2002.

Clause 1 of the agreement of sale reads as follows:

"1. *Purchase Price and Terms of Payment*

The purchase price for the property is $20 000 000. 00 (twenty million C dollars). The purchaser shall pay a deposit of $10 000 000. 00 upon signing of this agreement and the balance shall be paid in 2 equal instalments starting on or before 30 November 2002 and on 11 December 2002."

The applicants honoured their obligation and paid $10 million on signing the agreement of sale and the balance of $10 million was paid in full on 18 D November 2002.

Thereafter the purchasers sought to have the property registered in their names. After a couple of visits to Manase and Manase they were informed that the surviving spouse was no longer interested in abiding by the contract because the prices of houses had sky-rocketed due to hyperinflation in the country. Attempts to see Mr Manase were without success. They had been E trying to see him from November 2002 until January 2003. At no stage were they told that the property was in fact being sold to a third party. Mr Manase appeared to be avoiding them. Eventually, they sought legal advice on 14 January 2003 and their legal practitioners addressed a letter to Manase and Manase. F

In response to that letter, Mr Manase, on 23 January 2003, took the stance that as the executor of the said estate he was not sanctioning the transaction. He asserted that all documents pertaining to any estate transaction had to be signed by the executor and not a clerk, as happened *in casu.* He stated that he was in the United States of America when the agreement was entered into and signed and went on to say that he did not approve the agreement and had not G even sanctioned it. Having made those assertions he then enclosed a cheque in the sum of $20 million and concluded that he did not want to keep the purchasers' money in his firm's trust account.

Mr *Manase* maintained that stance at the hearing of the application. He also put in issue the urgency of the matter, saying that the applicants knew that he H

Kamocha J

A was not approving of the sale as early as December, 2002. They, therefore, should have launched this application at that time. His argument is untenable in the light of the fact that at no stage did he inform the applicants that the property was being sold until 23 January 2003. He in fact was responsible for the delays that occurred since he avoided the applicants when they wanted to discuss the mater with him. Hence the matter does not cease to be urgent B because of the delays occasioned by him. The applicants only knew that the property was going to be sold after their receipt of the letter of 23 January 2003 to which they replied saying that if they did not receive written assurances by midday the next day, to the effect that the property would not be sold to a third party, they would be approaching the courts for redress. Having received no C joy they then instituted this application on a certificate of urgency. That, in my view, was the proper and correct thing to do.

That, however, had been overtaken by events unbeknown to the applicants. The house had already been sold to a third party known as Rutendo Musanhi. Mr Manase never disclosed this to the applicants. In his letter of 23 January 2003 he made no mention that the property had been sold and that transfer had D already taken place. He was clearly not candid with the applicants and their lawyers. His law firm prepared the deed of transfer and lodged it with the Registrar of Deeds on 19 December 2002. The next day, 20 December, the Registrar of Deeds signed the deed of transfer. Mr Manase cannot be heard to say, a month later, that he was not aware that the property had been sold and transfer taken place.

E Not only was he not candid with the applicants and their legal practitioners, but he was also not candid with the court itself. When he was presenting his argument he stated that Rutendo Musanhi, the new buyer, offered to buy the property for $30 million, which was acceptable to him. He then sold the property for that amount. The court directed him to produce the deed of F transfer, which was duly produced. It revealed that the whole of the purchase price amounting to $25 000 000. had been satisfactorily paid and secured. So the property was not sold for 30 million dollars after all.

As regards the argument that all documents pertaining to any estate transaction have to be signed by the executor and not a clerk, I am not with Mr Manase. In my view, an executor can authorise some other person to carry out some or G all of his functions on his behalf. In *Bramwell and Lazar NNO v Laub* 1978 (1) SA 380 (T) Colman J had this to say at 383H:

"It is a common practice, and a convenient one, for an executor to authorise his co-executor or some other person to carry out some or all of his functions on his behalf."

H The learned judge continued at p 384A and said:

Kamocha J

> "An executor, as I see the matter, may not appoint someone to act instead A of himself, so as to relieve himself of responsibility; but he may appoint someone, for whose acts he will be responsible, to act on his behalf, and that is what, in my judgment, the second plaintiff did in the present case."

What an executor is prohibited to do is abdication, not delegation. *In casu* Mr Manase delegated an officer in their law firm to act on his behalf so he is B responsible for the acts of his delegate. In any event, not only did Mr Manase authorise that particular official to sign the agreement of sale on his behalf but he also authorised another legal practitioner in their law firm, who was not a co-executor, to sign the deed of transfer on his behalf. He quite clearly was again not candid with the court when he made the submission that all documents pertaining to any estate transaction had to be signed by the C executor himself. His action which are contrary to his assertion confirm that it is a common practice for an executor to authorise some other person to carry out some or all of his functions on his behalf.

In conclusion I would grant a provisional order in these terms:

INTERIM RELIEF GRANTED D

Pending the determination of this matter, the applicants are granted the following relief:

That the second respondent be and is hereby interdicted, prohibited and restrained from transferring rights, title and interest in Stand No. 105943, Salisbury Township, situate in the district of Salisbury, measuring 1457 square metres, popularly known as No. 45 Newmarch Road, Hillside, Harare. E

Mandizha & Company, applicants' legal practitioners.

Manase & Manase, respondents' legal practitioners. F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/NYAMANDLOVU FARMERS ASSOCIATION v MINISTER OF LANDS, AGRICULTURE & RURAL RESETTLEMENT & ANOR 2003 (1) ZLR 185 (H)

NYAMANDLOVU FARMERS ASSOCIATION v MINISTER OF LANDS, AGRICULTURE & RURAL RESETTLEMENT & ANOR 2003 (1) ZLR 185 (H)

Citation	2003 (1) ZLR 185 (H)
Case No	Judgment No HB-19-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	5 September 2002; 13 February 2003
Judgment	13 February 2003
Counsel	*G S Wernberg*, with him *JKH Stirling*, for the applicant
Case Type	Civil application

Annotations Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 24 — no right vesting in High Court to determine constitutional issues — such issues must be referred to Supreme Court — who may bring application — only person affected by alleged* D *constitutional infringement has locus standi — no right vesting in association to bring application on behalf of its affected members*

Practice and procedure — *parties — locus standi — association representing members — not all members affected by matter in issue — need for association to show it was authorised to represent affected members*

Headnote

E Members of the applicant association, all farmers, had received notices under the Land Acquisition Act to leave their farms by a certain date. The association brought an application before the High Court, seeking an order that various sections of the Act were invalid by reason of being in conflict with several sections of the Declaration of Rights. The affected farmers did not file affidavits or provide other proof that the association F was authorised to act on their behalf, nor did the association aver such authorisation. Not all members of the association were affected by the receipt of notices.

Held, that the High Court does not have original jurisdiction to deal with constitutional cases. It can only grant interim relief pending referral to G the Supreme Court under s 24 of the Constitution. In such cases, the Supreme Court acts as a constitutional court.

Held, further, that the association itself was not affected by the receipt of notices of acquisition, and the matter was not a class action. Consequently, the association had no *locus standi* to bring the application. Only the H affected members themselves could do so.

2003 (1) ZLR p186

Ndou J

Cases cited A

Cabinet of the Transitional Gov for the Territory of South West Africa v Eins 1988 (3) SA 369 (A)

CCJP v A-G & Ors 1993 (1) ZLR 242 (S)

Connolly v Ferguson 1909 TS 195

Dalrymple & Ors v Colonial Treasurer 1910 TS 372

Krygkor Pensioenfonds v Smith 1993 (3) SA 459 (A) B

Law Soc of Zimbabwe v Min of Finance (A-G intervening) 1999 (2) ZLR 231 (S); 2000 (2) BCLR 226 (ZS)

Mandirwhe v Min of State 1986 (1) ZLR 1 (A); 1981 (1) SA 759 (ZA)

Marbury v Madison 5 US 137 (1803)

MDC & Anor v Chinamasa & Anor NNO 2001 (1) ZLR 69 (S) C

Muchero & Anor v A-G 2000 (2) ZLR 286 (S)

Patz v Greene & Co 1907 TS 427

Petho v Min of Home Affairs & Anor 2001 (2) ZLR 561 (H)

Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87

S v Chakwinya 1997 (1) ZLR 109 (H) D

S v Kusangaya 1998 (2) ZLR 10 (H)

S v Mavharamu 1998 (2) ZLR 341 (H)

S v Mbire 1997 (1) ZLR 579 (S)

Shifidi v Admin-General for South West Africa & Ors 1989 (4) SA 631(SWA)

United Parties v Min of Justice & Ors 1997 (2) ZLR 254 (S); 1998 (2) BCLR 224 (ZS) E

Wilson v Zondi 1967 (4) SA 713 (N)

Wood & Ors v Ondangwa Tribal Authority & Anor 1975 (2) SA 294 (A)

Wood & Anor, In re 1994 (2) ZLR 155 (S); 1995 (2) SA 191 (ZS) F

Legislation considered

Constitution of Zimbabwe 1980 s 24 (4)

Supreme Court Act [*Chapter 7:13*] s 3 (b) proviso (iii)

Case information

G S Wernberg, with him JKH Stirling, for the applicant G

Judgment

Ndou J: In this court, application, the applicant seeks an order in the following terms:

> "It is ordered that:
>
> That the amendments to sections 8, 9 and 10 of the Land Acquisition Act [*Chapter 20:10*] made in terms of the Land Acquisition Amendment Act H

Ndou J

> A No. 6 of 2002, be and are hereby declared to be invalid being in conflict with section 11, 16(1)(b), 16(1)(c), 16(1)(d), 18(5), 18(9) and 23(1) of the Constitution of Zimbabwe.
>
> That the orders issued by first respondent in terms of section 8 of the Land Acquisition Act [*Chapter 20:10*] as amended, be and are hereby declared to be invalid and of no force and effect.
>
> B That first respondent bears the costs of this application."

The application was served on the two respondents on 7 August 2002. The respondents did not file notice of opposition and opposing papers within ten days. They only filed these opposing papers on 3 September 2002. They did not even take the trouble of, at least, applying for condonation. A representative C of the respondents then appeared before me on 5 September 2002 and commenced addressing me on the merits. When it was pointed out that he was not properly before the court he did not attempt to move for postponement in order for the respondents to seek the court's indulgence. I think those assigned to legally represent the Government on litigation which is generated by the land reform programme should attach the same seriousness to it as the D Government itself does. *In casu*, the Government representation is far from being satisfactory for a Government programme that has resulted in enormous social and economic difficulties to the nation. Be that as it may, the salient facts of the case are that the applicant is suing in a representative capacity. It is representing the following members: Stunula Ranching (Pvt) Ltd, Christopher Mellish Jarret, Drury Wickman (Central Africa) (Pvt) Ltd, David Gerald Hunt, E William Michael Parry Wood, Dornoch Estate (Pvt) Ltd, Thoughtful Farming (Pvt) Ltd, Walter Versfeld Herbert, Junpor (Pvt) Ltd, J and B Querl Ranching (Pvt) Ltd, Yvonne Sharp and Oliver Anthony Sharp, Spring Grange Farm (Pvt) Ltd and Margaret Isobel Lewis.

The applicant is a body corporate with perpetual succession having an F existence apart from its members and which is capable of suing and being sued. All these members of the applicant received acquisition of land orders issued by the Minister of Lands, Agriculture and Rural Resettlement, i.e. the first respondent. In terms of these orders, they were obliged to vacate their farms by 10 August 2002 or within ninety days of the subsequent service of the orders on them.

G The applicant submits that ss 8, 9 and 10 of the Land Acquisition Act [*Chapter 20:10*] are unconstitutional and therefore invalid for five reasons stated in the following terms:

> "(a) Once a Preliminary Notice of Intention to Acquire Land is given to the farmers in terms of section 5 of the Act, the Acquiring Authority H may issue an order in terms of section 8 of the Act, and in terms of

Ndou J

section 8(2)(b) such order permits an Acquiring Authority in relation A to agricultural land required for resettlement purposes to exercise any right of ownership '… without undue interference to the living quarters of the owner or occupier of that land'.

Should a farmer grow a crop and then receive such an order the Acquiring Authority will have acquired ownership of his land and crop. Section 16(1)(b) of the Constitution of Zimbabwe requires the B 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 …'."

In view of the fact that the section 8 order requires no notice whatsoever, it is submitted that this is in conflict with the provisions of s 16(1)(b) of the Constitution: C

"(b) Section 9 of the Amendment Act introduces a criminal penalty for any owner or occupier who fails to stop occupying, holding or using the land acquired forty-five days after service on him of an order in terms of section 8. In respect of orders issued in terms of section 8 and served before 10 May 2000 when the amendment commenced, no D criminal sanction existed. Thus the stated retroactive effect of the legislation now has the result that such farmers have committed an offence even though at the time when the section 8 order was issued no criminal sanction existed. Section 18(5) of the Constitution provides that "No person shall be held to be guilty of a criminal offence on account of any act of omission that did not, at the time it took place, constitute an offence …" E

Thus, it is submitted that section 9 of the Land Acquisition Act as amended is in conflict with s 18(5) of the Constitution:

"(c) The issue and service of the order in terms of section 8 of the Land Acquisition Act as amended effectively deprives the owner of his ownership of his land without any hearing, which offends the *audi* F *alteram partem* rule, a fundamental principle of natural justice that a person must be given a fair opportunity of presenting his case before any action can be taken against him. Section 16(1)(d) of the Constitution requires the Acquiring Authority, if the acquisition is contested, to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the G acquisition. Thus, the physical acquisition of land in terms of an order in terms of section 8, without the Acquiring Authority seeking and obtaining confirmation of the acquisition is in conflict with section 16(1)(d) of the Constitution.

(d) The deprivation of ownership of land by the issue and service of an order in terms of section 8 without any hearing to determine the H

Ndou J

A owner's right, it is submitted, is in conflict with section 18(9) of the Constitution which provides that; '… every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations'; B

(e) The Government stated policy is that the land reform programme is designed to take land from white farmers and give it to indigenous blacks. Thus, the issue and service of orders in terms of section 8 is selectively applied on racial criteria. It is submitted that this is in conflict with section 11 of the Constitution which protects the fundamental rights of a person, and section 23(1) of the Constitution C which protects a person against discrimination on the grounds of race."

I specifically requested further submissions from the applicant in respect of two issues, *viz*: (a) whether the applicant has the requisite jurisdiction i.e. the *locus standi in judicio* to obtain redress under section 24(1) of the Constitution; and (b) whether the High Court has jurisdiction to entertain constitutional D applications in terms of section 24(4).

In respect of the former query, the applicant produced its constitution in support of its case. It does not seem that the constitution takes its case any further in this regard. In respect of the latter query, the applicant responded in the following terms:

E "We submit that in terms of section 13 of the High Court Act [*Chapter 7:06*] the High Court has full original civil jurisdiction over all persons and over all matters within Zimbabwe. Section 24(2) of the Constitution of Zimbabwe provides that, in any proceedings in the High Court where the question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, if so requested by any F party to the proceedings, refer the question to the Supreme Court unless in his opinion, the raising of the question is merely frivolous or vexatious. In the present case, the application is unopposed and the applicant has not requested the honourable judge to refer the matter to the Supreme Court, and therefore the matter may be determined in the High Court."

The determination of this matter lies in the enforcement of protective provisions G as provided for in s 24 of the Constitution. Section 24 states:

> "(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other H action with respect to the same matter which is lawfully available, that

> person (or that other person) may, subject to the provisions of A subsection (3), apply to the Supreme Court for redress.
>
> (2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court, unless, in his opinion, the raising of the question is B merely frivolous or vexatious.
>
> (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 application for the determination of that question shall lie to the Supreme C Court under subsection (1).
>
> (4) The Supreme Court shall have original jurisdiction —
>
> (a) to hear and determine any application made by any person pursuant to subsection (1) or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious; and D
>
> (b) to determine any question arising in the case of any person which is referred to it pursuant to subsection (2);
>
> and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:
>
> Provided that the Supreme Court may decline to exercise its powers under E this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of this Constitution or under any other law."

DOES THE HIGH COURT HAVE POWERS TO GIVE REMEDIES TO PROTECT CONSTITUTIONAL RIGHTS IN TERMS OF S 24(4) OF THE CONSTITUTION? F

A similar provision to s 24(4) which pertains to the Supreme Court is not made in respect of the High Court. In the circumstances, does the High Court have jurisdiction to determine a constitutional matter? Gillespie J remarked that it does: see *S v Chakwinya* 1997 (1) ZLR 109 (H) at 115 and *S v Mavharamu* 1998 (2) ZLR 341 (H) at 351. Devittie J also held that it does. In *S v Kusangaya* G 1998 (2) ZLR 10 (H) at 13, the learned judge stated:

> "I am satisfied that where rights enshrined in the Constitution are breached, this court has jurisdiction to grant an appropriate remedy. In my view, the provisions of the Constitution which provide for reference to the Supreme Court of constitutional questions merely provide a procedural mechanism whereby constitutional matters may be raised by the lower courts for H

> A decision by the Supreme Court. The inherent jurisdiction of the High Court is not thereby affected."

Gillespie J in *S v Chakwinya supra* held that s 24(4) specifically mentions the Supreme Court "*ex abundante cautela* and lest otherwise it be thought that the Supreme Court, a court of appellate jurisdiction, has no original jurisdiction pertaining to the point at issue. *Ubi ius, ibi remedium*; and the remedy for the B accused here lies in the inherent jurisdiction of this court to regulate its own proceedings and to protect the rights of those coming before it. The court has a common law power to put a stop to any wrong that has been done to an accused person in the name of the law".

This interpretation of s 24(4) by the two learned judges appeared to have been C overruled by the Supreme Court in *S v Mbire* 1997 (1) ZLR 579 (S). In this case, Gubbay CJ on p 581 B as follows:

> "It is only the Supreme Court that is empowered to make such an order under the authority of section 24(4) of the Constitution when the application or referral comes before it pursuant to subsection (1) or (2)."

It appears to me that by using the reasoning of the learned judges in the D *Chakwinya* case *supra* and *Kusangaya* case *supra*, this court may deal with constitutional matters and grant relief on the basis of this court's inherent jurisdiction. The general rule is that superior courts, differing in this respect from the inferior courts, have an inherent jurisdiction to make orders, unlimited as to amount, in respect of matters that come before them: see E *Connolly v Ferguson* 1909 TS 195 at 198 and *Civil Practice of the Supreme Court of South Africa* 4 ed by Van Winsen, Cilliers and Loots at p 37. This general fundamental principle of inherent jurisdiction is, however, subject to derogation. Only in exceptional cases will the court exercise its inherent jurisdiction to follow procedures not regulated by the ordinary law of procedure: see *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) at 469G F J. *In casu,* the question is whether the Supreme Court has exclusive jurisdiction to make s 24 orders. Put in another way, does a High Court have concurrent jurisdiction to give an order in terms of s 24 by virtue of its inherent jurisdiction? By way of comparison, in South Africa only the constitutional court has the power to declare Acts of Parliament unconstitutional and accordingly invalid. In our case, it is clear that our Supreme Court sits as a G constitutional court. When it does so, its composition is prescribed. It is only when it is so composed that it is in a position to deal with constitutional matters. In my view, reference to the Supreme Court in s 24 is consistent with the latter sitting as a constitutional court. With respect to Gillespie and Devittie JJ reference to the Supreme Court alone in s 24 is a deliberate H limitation of the inherent jurisdiction of the High Court. It is consistent with

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Ndou J

making constitutional matters the domain of the Supreme Court sitting as a A constitutional court. Section 24 does not mention the Supreme Court *ex abundante cautela*. It does so by design. Neither is it a procedural mechanism. The jurisdiction of this court in constitutional matters is deliberately limited thereby. This is consistent with the creation of a special dispensation to deal with constitutional matters as envinced by the fact that these matters are B considered so fundamental that they can only be considered by the highest court in the country exercising original jurisdiction. When the matter ends up in the Supreme Court, there is provision for a special composition to deal with it. When the Supreme Court is faced with a constitutional issue, the Chief Justice, or the Minister of Justice, Legal & Parliamentary Affairs may direct that the court will not be duly constituted unless it consists of at least five C judges. If such a direction is given, not less than three of the five judges must be substantive rather than acting judges of the Supreme Court: see s 3(b) proviso (iii) of the Supreme Court Act [*Chapter 7:13*]. The number of Supreme Court judges who may determine such constitutional matters is, with respect to the two learned judges, specially designed to emphasise their fundamental nature. D

It seems to me that there would be no logical explanation for creating such a special dispensation to deal with constitutional issues when one judge of the High Court enjoys concurrent jurisdiction (via the "inherent jurisdiction" principle) with the Supreme Court sitting as a constitutional court. The dictum by Gubbay CJ in the *Mbire* case *supra* has to be understood in this context. E In the circumstances, I hold that this court can only grant interim relief pending the reference to the Supreme Court, in terms of the constitutional matters raised by the applicant. A s 24 order is a distinct legal redress established by the Constitution itself, to have important constitutional issues decided directly by the Supreme Court without protracted litigation.

In *Mandirwhe v Minister of State* 1981 (1) SA 759 (ZA) at 764, Baron JA F stated:

> "The purpose of section 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the [Supreme Court] without protracted litigation."

Ndou J

A In such circumstances, the objective of s 24 is to provide a mechanism for speedy enforcement of constitutional rights. According to Gubbay CJ in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (S) at 250, s 24(1):

> "enjoins the Supreme Court to examine challenged legislation, or a particular practice or action authorised by a state organ, in order to determine whether or not it infringes one of the entrenched fundamental rights and freedoms of the individual. The Supreme Court is empowered to measure the effect of the enactment or action against the particular guarantee it is claimed it offends. Clearly it has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights and, particularly, where there is no other judicial procedure available by which the breach can be prevented."

In *Movement for Democratic Change & Anor v Chinamasa & Anor* 2001 (1) ZLR 69 (S), Gubbay CJ stated at 76:

> "The purpose of section 24(1) is to afford every person the opportunity to obtain expeditious redress, even where it is alleged that the Declaration of Rights is *likely* to be contravened. The ability of a representative to allege a contravention in relation to a detained person underlines recognition that certain applications brought under section 24(1) require to be dealt with as matters of urgency. Secondly, the principle that a litigant should exhaust domestic remedies before approaching the courts, unless there are good reasons for not doing so, is of no application to the present situation."

Section 24 envisages a situation in which the constitutional issue is referred to the Supreme Court before a determination and not after, otherwise it would mean that the Supreme Court would not be deciding on the question at first instance: see *Muchero & Anor v Attorney General* 2000 (2) ZLR 286 (S) at 288. Reference to the Supreme Court in s 24 should be understood in this context. We are after all dealing here with the problem of majoritarianism in constitutional law. The counter, majoritarian character of judicial review has raised a lot of controversy in the academic arena because the unaccountable nature of judicial invalidation of statutes is not easily reconciled with democratic tradition: see article by Philip Zyberberg in the *McGill Law Journal* 1992. This probably, *inter alia*, explains why such constitutional matters enjoy the status of being determined by the Supreme Court at first instance. Further, the Supreme Court, in constitutional matters, renders its decisions largely in declaratory form. The court normally confines itself, however, to declaring laws null and void or incompatible with some particular provision of the Constitution. Limiting constitutional matters to the highest

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court is consistent with the situations in those jurisdictions where there are specialised constitutional courts like South Africa and Germany. In America, although the Supreme Court actively declared the right of the judiciary to review acts of the other branches of Government, in fact the judiciary has been reluctant to find statutes, and especially federal statutes, unconstitutional. Perhaps it is a consciousness of the nature and purpose of democracy. Until the Judiciary Act 1875 which, by statute, explicitly gave the right to the lower federal courts, the lower federal courts did not exercise such right: see also *Marbury v Madison* 5 US 137 (1803).

LOCUS STANDI IN JUDICIO **OF THE APPLICANT**

It is important to determine whether the applicant has *locus standi* to bring this application. As previously stated, the applicant is suing in a representative capacity. It is common cause that the Land Acquisition Act orders forming the subject matter of the application were not served on the applicant. Individual orders were served on different farms as outlined above. The founding affidavit was deposed to by the chairman of the applicant. The relevant section reads:

> "6. The applicant is aware that the following association members have received orders issued by first respondent in terms of section 8 of the Act …
>
> Copies of orders attached (Annexure 'A' to 'JJ')."

There are no supporting affidavits from those served with the orders confirming that they are indeed members of the applicant and that they authorised the applicant to act on their behalf. Neither is this a class action pursuant to the provisions of the Class Actions Act [*Chapter 8:17*] It is trite that the capacity to participate in legal proceedings is technically described by the phrase *locus standi in iudicio*. Such right to sue or liability to be sued depends in the first place on capacity. Persons who are wanting in that capacity cannot be parties to any civil action unless that want of capacity has been remedial. In all cases, an applicant must allege sufficient facts in his founding affidavit to indicate that he has the necessary *locus standi* to institute proceedings: see *Introduction to South African Law and Legal Theory* 2 ed at p 1196 by W J Hosten, A B Edwards, F Bosman and J

Church; *Wilson v Zondi* 1967 (4) SA 713 (N) at 713 and *Petho v Minister of Home Affairs and the Registrar-General of* G *Citizenship* 2001 (2) ZLR 561 (H) at 565.

A person who approaches the court for relief must at least have an interest in the sense of being personally adversely affected by the wrong alleged: see *Patz v Greene & Co* 1907 TS 427 at 433-5; *Dalrymple & Ors v Colonial Treasurer* 1910 TS 372 at 386; *Wood & Ors v Ondangwa Tribal Authority & Anor* 1975 H

2003 (1) ZLR p195

Ndou J

A (2) SA 294 (A); *Shifidi v Administrator-General for South West Africa & Ors* 1989 (4) SA 631 (SWA); *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 and *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 389.

In constitutional matters, a person will not have *locus standi* under s 24(1), B except in respect of detained persons unless he is able to allege that a provision of the Declaration of Rights has been, is being or is likely to be, contravened in respect of him: see *Constitutional Law of Zimbabwe* by Greg Linington at p 231 para 1.7.2.2 and In Re *Wood and Hansard* 1994 (2) ZLR 155 (S); 1995 (2) SA 191 (ZS) at 195. Section 24 is contained in Chapter III of the Constitution and is therefore part of the Declaration of Rights. In *United* C *Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S); 1998 (2) BCLR 224 (ZS) at p 227, Gubbay CJ stated:

> "Section 24(1) affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must D be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law."

See also *Law Society of Zimbabwe v Minister of Finance*; *Mollat v Minister of Finance (Attorney-General Intervening)* 1999 (2) ZLR 231 (S); 2000 (2) BCLR 226 (ZS). In America, constitutional cases only come before courts if there is really controversy. The courts in no instance issue advisory opinions.

E *In casu*, the provisions in issue affect the rights and interests of the individual farms or farmers served with the land acquisition notices. The applicant, as a legal *persona*, is not affected by the said provisions. Further, it appears that not all its members are affected. Those affected have not authorised the applicant to act on their behalf. If they did so, there is no document filed to F prove this fact. Even the applicant's own founding affidavit does not contain an averment of such authorisation by the affected farmers. It seems, at least from the papers filed, that the applicant decided on its own to institute these proceedings when it became "aware" that some of its members were served notices by the first respondent. As alluded to above, there is an exception to the application of the *locus standi* rule requiring that a person who approaches G the court be personally adversely affected by the wrong complained of and be entitled to claim only relief which is in that person's own interest. This exception is in terms of the Class Actions Act [*Chapter 8:17*]. This exception is of no application to the facts of this case.

As pointed out above, the applicant is an association of farmers, whose H members, though not necessarily all of them, are recipients of the s 8 orders.

2003 (1) ZLR p196

Ndou J

It is they, and not the applicant itself, who have the right to challenge the A constitutionality of s 8.

In the circumstances, I find that the applicant does not have the necessary legal standing to bring this constitutional matter. I, accordingly, dismiss the application. There is no order as to costs. B

Coghlan & Welsh, applicant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/RUTUNGA & ORS v CHIREDZI TOWN COUNCIL & ANOR 2003 (1) ZLR 197 (S)

RUTUNGA & ORS v CHIREDZI TOWN COUNCIL & ANOR 2003 (1) ZLR 197 (S)

Citation	2003 (1) ZLR 197 (S)
Case No	Judgment No. S-117-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	5 September 2002; 18 February 2003
Judgment	18 February 2003
Counsel	*C Selemani*, for the appellants *J Dondo*, for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Employment** — *contract — termination — urban council employees — council entitled to proceed under Urban Councils Act [Chapter 29:15] — no requirement to suspend employee before dismissing him — misconduct — collective job action – applicability of Labour Relations Act [Chapter 28:01] to determining whether such action had occurred*

Headnote

D The appellants, all employees of the respondent council, were suspended from work following a demonstration held by the appellants, who had grievances in connection with their employment. The council suspended them, pending an application to the Ministry of Labour to terminate their employment. When the council realised that it could act in terms of E s 141(2)(b) of the Urban Councils Act [*Chapter 29:15*] instead of the labour regulations, it summarily dismissed the appellants. The appellants sought the setting aside of their suspension and reinstatement to their jobs. They claimed that the demonstration did not amount to unlawful industrial action, because proper notice had been duly given to the F Council. However, no evidence of such notice was tendered.

Held, that s 141(2)(b) of the Urban Councils Act does not require that there be a suspension prior to dismissal, nor does it prohibit the dismissal of a worker who, before that dismissal, happened to have been on suspension. There was no need to "lift" the suspension of the appellants before summarily dismissing them in terms of the Urban Councils Act.

G *Held*, further, that in view of the definition of "collective job action" in the Labour Relations Act [*Chapter 28:01*], it was difficult to see how the appellants' demonstration, which was designed to persuade the council to accede to their demands, could be distinguished from collective job action. The requisite notice not having been given, the job action H constituted misconduct justifying their dismissal.

Gwaunza JA

Case cited A

Cole Chandler Agencies (Pvt) Ltd v Twenty-five named Employees S-161-98

Legislation considered

Labour Relations Act [*Chapter 28:01*], s 2 B

Urban Councils Act [*Chapter 29:15*], s 141(2)(b)

Case information

C Selemani, for the appellants

J Dondo, for the respondents

Judgment

Gwaunza JA: The appellants were first suspended, and then dismissed, C from their jobs with the first respondent. This followed what the first respondent regarded as unlawful collective job action taken by the appellants on 29 and 31 May 2000.

During the period between their suspension and dismissal the appellants filed D an application with the High Court for an order: (i) setting aside the letters of suspension served on them and (ii) reinstating them to their jobs without loss of salary or benefits. They also claimed costs against the respondents.

The High Court having dismissed their application with costs, the appellants now appeal against that decision.

The background to the dispute is as follows. E

The appellants were employed by the first respondent, which was a part of the Chiredzi Rural District Council until 1 April 2000. With effect from that date, and by virtue of Proclamation No. 3 of 2000 (SI 59 of 2000), the first respondent was established as a Town Council under the provisions of the Urban Councils Act [*Chapter 29:15*]. The Town Council's affairs have since F that date been run by five commissioners pursuant to Proclamation No. 2 of 2000 and SI 60 of 2000.

I shall refer to the first respondent as the "Council".

At the time that the Council was separated from the Chiredzi Rural District Council, there was tension between the parties arising from the appellants' G dissatisfaction with their salaries, and the alleged ill-treatment of them by the Council's administration officer, one Elias Chingoma.

Although this is disputed by the Council, and the appellants have not produced a copy thereof, the appellants aver they wrote a letter dated 4 April 2000 to the Council, indicating their intention to go on collective job action if these two grievances were not addressed. The appellants assert that the H

A threatened collective job action was averted following negotiations that resulted in the Council undertaking to increase the salaries of the workers and to investigate the grievance concerning the administration officer. According to the appellants, when this latter grievance remained unresolved, they, on 26 May 2000, wrote a letter to the Council, which read in part as follows:

> "Workers are requesting for the stepping down of the A/SEO (Chingoma) B from this post, failure to that workers are to go on a peaceful demonstration on 29 May 2000."

Significantly this letter did not make any reference to the alleged earlier communication of 4 April 2000. It has thus not been possible to establish whether the threatened peaceful demonstration was to be held on the strength C of that communication or notice.

Be that as it may, and whether one calls it a peaceful demonstration, as the appellants do, or unlawful collective job action, as the respondents do, the appellants, acting in pursuance of their letter of 26 May 2000, duly withdrew their labour for a few hours on 29 May 2000. They assert that as a result of this action they were later that day verbally suspended, with immediate effect.

D Neither side has, however, indicated whether, following upon this suspension, the appellants stayed away from work for the rest of that day and the next, i.e. 29 and 30 May 2000.

Although the appellants dispute authoring a further letter to the Council dated 31 May 2000, threatening to withdraw their labour from 8.30 am of the same E day, it is not in dispute that some gathering of the workers took place on that day. The appellants insist the workers had simply gathered to receive their May salaries, while the Council charges that the workers engaged in another unlawful collective job action. The appellants do, in fact, challenge the latter assertion on the technical ground that since they had been suspended from their jobs with effect from 29 May 2000, they could not, on 31 May 2000, have F properly gone on any collective job action, lawful or otherwise. I will revert to this issue later.

The Council did indeed address a letter to individual appellants, dated 1 June 2000, which for various reasons I find pertinent to reproduce:

> *"RE: SUSPENSION WITHOUT PAY PENDING DISMISSAL: CHIREDZI* G *TOWN COUNCIL WORKERS*
>
> The commissioners appointed in terms of section 90 of the Urban Councils Act [*Chapter 29:15*] to run the affairs of Chiredzi Town hereby have resolved to suspend you without pay pending their application to H dismiss you to the Ministry of Public Service, Labour and Social Welfare.

Gwaunza JA

> The reason and decision for suspending you without pay pending dismissal A has been taken following your participation in illegal demonstrations on Monday 29/05/2000 and Wednesday 31/05/2000. Thus you willingly absented yourself from work without any reasonable cause resulting in the Council losing one-and-a-half hours and four hours of production respectively. The action resultantly is tantamount to insubordination, hence (the) commissioners' decision to take the above stated action *with* B *effect from Monday 29/05/2000.*
>
> Application for your dismissal has already been submitted to the Ministry of Public Service, Labour and Social Welfare." (the emphasis is my own)

The Council also took other action. It duly wrote to the Ministry of Public Service, Labour and Social Welfare for permission to dismiss the striking C workers, but withdrew the letter a few days later, on 6 June 2000, upon realising that the authority sought from the Ministry of Public Service, Labour and Social Welfare was not necessary as the matter could be dealt with in terms of the Urban Councils Act [*Chapter 29:15*]. The Council then commissioned a labour relations officer to conduct a full investigation into the demonstrations. It was the labour relations officer's finding that the work stoppages of 29 and D 31 May 2000 constituted unlawful collective job action for want of compliance with the provisions of s 104 of the Labour Relations Act [*Chapter 28:01*].

The appellants aver that on 5 June 2000 another labour relations officer, a Mr Mutero, held meetings with representatives from both sides, after which he made a determination to the effect that the demonstrations were a E constitutional matter, and that consequently the suspensions of the appellants were null and void.

I am not persuaded this is a correct representation of that event. I agree with the learned trial judge that the labour relations officer, Mr Mutero, could not have made a determination that the suspension of the appellants was invalid, nor ordered the Council to reinstate them. As correctly observed by the learned F trial judge, had the labour relations officer determined the matter in terms of s 93 of the Labour Relations Act, he would have given his determination in writing or filed an affidavit to support the appellants' assertion. No such document was submitted.

While awaiting the outcome of the labour relations officer's investigations, G and upon being served with the High Court application the appellants had filed on 16 June 2000, the Council conducted its own investigations. It invited all those workers who had been suspended to attend a hearing to be conducted on 19, 20 and 21 June 2000. Some of the workers attended the hearings while others did not. It is averred that those who did not attend the hearings were of the view that the matter had now been taken out of the Council's hands, since H

Gwaunza JA

A the application which is the subject matter of this appeal had already been filed with the High Court.

After the hearings, the Council resolved to reinstate thirty-six of the one hundred and twenty-six appellants originally suspended. It went on to dismiss the remaining ninety, who are the present appellants. The Council was satisfied, in deciding to take this action, that the thirty-six reinstated employees B had either not taken part in the industrial action or had been coerced through peer and other pressure to participate in it.

I agree with the learned trial judge that in this process the probabilities were evenly balanced, that peer pressure was brought to bear on the workers who, after participating in it, later disassociated themselves from the collective job C action, and that the same workers who disassociated themselves from the action did so when they were promised reinstatement. This, however, does not alter the fact that the number of applicants, now appellants, was effectively reduced to ninety.

In dismissing the ninety appellants, the Council intimated in its letter of D dismissal that, having satisfied itself that the collective job action in question was unlawful having regard to the provisions of subss (2) and (3) of s 104 of the Labour Relations Act, it was now dismissing the workers "summarily" with effect from the date of their suspension. The Council indicated this was in accordance with s 141(2)(b) of the Urban Councils Act. It indicated further that the workers' engagement in unlawful collective job action constituted an E act of misconduct that "in law" justified their discharge without notice.

Even though the summary dismissal had the effect of superseding the affected workers' suspension, they persisted with their application for the setting aside of their suspension. That action elicited the following comments from the learned trial judge:

> F "The relief which the applicants herein seek is that the suspension letters be declared null and void. It must be emphasised that the applicants persisted in seeking this relief well after the 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 one challenging their dismissal.
>
> G By persisting with this application the impression is created, and rightly so, that the applicants are relying 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."

Gwaunza JA

I agree with the learned trial judge. The correctness of his sentiments, as A expressed in the second paragraph, is borne out by the appellants' contention that their suspension was not "proper" since there was nothing in the record indicating that they had been suspended in terms of the Urban Councils Act. They contend as follows in their heads of argument:

> "The mere fact that the [first] respondent ended up withdrawing the B application it had made to the Ministry of Public Service, Labour and Social Welfare is clear testimony that [the first] respondent conceded not to have complied with the mandatory provisions of the Urban Councils Act in seeking to suspend the appellants from employment. Having conceded that these suspensions were not in terms of the Urban Councils Act, [the first] respondent should simply have lifted these suspensions, C reinstated the appellants and then sought to suspend them again in terms of the Urban Councils Act. (See *Standard Chartered Bank v Matsika* 1996 (1) ZLR 123 at 133)."

I find no merit in this reasoning.

As correctly contended for the first respondent, s 141(2)(b) of the Urban Councils Act does not require that there be a suspension prior to dismissal. D Nor can one read into that section an injunction against the dismissal of a worker who, prior to that dismissal, happened to have been on suspension. I am satisfied that there was no need to "lift" the suspension of the appellants before summarily dismissing them in terms of the Urban Councils Act. The letters of suspension sent to the appellants stated clearly that the Council had resolved to suspend the workers concerned, pending *an application to dismiss* E *them, to the Ministry of Public Service, Labour and Social Welfare.* The authority that was to be sought from the Ministry of Public Service, Labour and Social Welfare was to *dismiss* the appellants not suspend them. The suspension was to remain effective until the authority referred to had been obtained. The realisation that such authority was not necessary, and the F subsequent withdrawal of the application for it, could not of itself have affected the suspension. Nor did it preclude the taking of other appropriate action by the Council in lieu of that originally and mistakenly intended, as long as such action could properly inform the decision of whether or not to dismiss the appellants. The action that the Council took was to conduct investigations through its own officials' agency and that of a labour relations G officer, Ms Sithole. Having satisfied itself on the

unlawfulness of the appellants' action, the Council proceeded to summarily dismiss the appellants in terms of s 141(2)(b) of the Urban Councils Act. That section gives a council the right to discharge an employee other than a senior official "summarily on the ground of misconduct, dishonesty, negligence or on any other ground that would in law justify discharge without notice". H

2003 (1) ZLR p203

Gwaunza JA

A The appellants' ground of appeal that challenges their suspension on the basis that it was done contrary to s 141 of the Urban Councils Act must, therefore, fail.

The appellants challenged their suspension on another ground, that is, that the peaceful demonstration of 29 May 2000 did not constitute collective job action, lawful or otherwise. They do not deny that the demonstration was B resorted to as a means of forcing the Council to dismiss from employment one of its senior officials. Having made this concession, it is, in my view, difficult to see how the appellants can distinguish the action they took from collective job action. This is particularly so when regard is had to the following definition of such action, as contained in the Labour Relations Act:

> C "an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment and includes strike, boycott, lock-out, sit-in or other concerted action".

The appellants not only took the action they did in order to persuade the Council to accede to their demand that a senior official be dismissed, they also, in the process, withdrew their labour for a few hours on that day.

D Having determined that the action taken by the appellants on 29 May 2000 amounted to collective job action, what is to be determined is whether or not it amounted to conduct justifying the action that the Council took, or was unlawful.

Interpreted in terms of s 141(2)(b) of the Urban Councils Act, there can be E little doubt that the action taken by the appellants on 29 May 2000 amounted to misconduct. The appellants withdrew their labour for a couple of hours without permission. In addition, those among them engaged in work within the essential services acted in direct contravention of s 104(3) of the Labour Relations Act. Essential services are defined to include health, hospital or ambulance services, as well as supply and distribution of water. It is significant F that the appellants in their answering affidavit did not dispute that many of them were engaged in essential services.

The denial that many of the appellants were engaged in essential services was made rather late in the day and from the bar, so to speak, by counsel for the appellants, Mr *Selemani*. The impropriety of such a submission hardly needs G mentioning.

In the light of such unlawful conduct, the Council cannot be faulted for having decided to take disciplinary action against the appellants.

The ground of appeal that the action taken by the appellants on 29 May 2000 did not amount to misconduct justifying the action taken by the Council must, H therefore, also fail.

2003 (1) ZLR p204

Gwaunza JA

The appellants submit that even if interpreted in terms of s 104 of the Labour A Relations Act, the action taken by them did not amount to unlawful collective job action, since such action was preceded by proper notice duly given to the respondents. It should be mentioned here that the application of the Labour Relations Act's definition of collective job action to the case at hand is, in my view, proper. As correctly contended for the first respondent, s 3 of the Labour B Relations Act provides that the Act shall apply to all employees except those whose conditions of employment are otherwise provided for by and under the Constitution of Zimbabwe. The appellants' conditions of employment were not provided for under the Constitution. Collective job action in terms of the Labour Relations Act can either be lawful or unlawful. Among the reasons that it may be unlawful is that inadequate or no notice of the intention to embark C on such action was given to the employer.

It is contended for the respondents that no such notice was given. On their part, the appellants, while alluding to a notice to go on collective job action having been given by them on 4 April 2000, submitted neither a copy of the letter nor any other proof of it having been written, much less received by the Council. The existence of this letter would have been useful in determining – D

(i) whether or not the appellants had given proper notice to the Council of their intention to go on collective job action, as required by s 104 of the Labour Relations Act; and

(ii) whether, despite the undertaking to resolve the wages dispute, which was later not honoured, that notice remained good for the purposes of E the alleged unlawful job action.

In the latter respect, the appellants relied on the test enunciated in *Cole Chandler Agencies (Pvt) Ltd v Twenty-Five Named Employees* S-161-98 to contend that a fresh notice of the collective job action was not necessary since the collective job action was based on the same issues for which notice had F been duly given previously. They contend that because the grievance concerning their alleged ill-treatment by the senior Council official had not been addressed despite assurances that it would be attended to, it should be found that the demonstration of 29 May 2000, to the extent that it was regarded as unlawful collective job action, was carried out on the strength of the notice earlier given on 4 April 2000. G

I am not persuaded by that argument, given the circumstances *in casu*. What distinguishes the authority cited from the case at hand is that *in casu* the existence and service of the original notice is disputed. The appellants have not helped matters by failing to produce a copy of such notice. H

Gwaunza JA

A In the light of the Council's denial of the existence of the letter, the appellants have failed to prove, as indeed the learned trial judge found, that fourteen days notice to embark on a collective job action, as required by s 104(2) of the Labour Relations Act, was given.

The Council's determination that because, among other grounds, no such B notice was given, the collective job action was unlawful cannot, under these circumstances, be faulted. As correctly stated by the learned trial judge, it was not for the court to decide whether or not the Council was entitled to rely on the Labour Relations Act for that determination when it was, in the final analysis, taking action pursuant to the Urban Councils Act. It sufficed that the Council properly considered that the collective job action was illegal, and C acted accordingly.

This ground of appeal must, likewise, fail.

Two issues invite comment.

The first issue relates to the dispute of fact concerning whether or not the appellants demonstrated unlawfully on 31 May 2000. The learned trial judge D was satisfied that the appellants did indeed withdraw their labour on 31 May 2000. He dismissed as "a lame and technical excuse *ex post facto*" the contention by the appellants that they could not, technically speaking, have embarked on a collective job action on that day as they were on suspension following upon a verbal notification to that effect on 29 May 2000.

I am not persuaded that the appellants' contentions are as devoid of merit as E the learned trial judge seems to suggest. The letters of suspension sent to all the striking workers by the Council, dated 1 June 2000, clearly stated that the suspension of the workers concerned was with effect from 29 May 2000. The reference to that date would seem to support the assertion by the appellants that the Council had responded to the demonstration of 29 May 2000 by F suspending those workers suspected of having taken part in the demonstration, with immediate effect.

What is, however, not clear, because none of the parties made any averments in that respect, was whether or not the appellants reported for work for the rest of 29 and on 30 May 2000. If they did not report for work, the inference can safely be drawn that they took the verbal suspension seriously. If they did G report for work, then two things can be assumed – firstly, that they ignored the verbal warning and, secondly, that the first respondent condoned such disregard of the suspension. It is only in the latter event that the appellants could properly be said to have engaged on a collective job action on 31 May 2000. If indeed they did not work for the rest of 29 and the whole of 30 May H 2000, their argument that they could, technically, not have engaged in a

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Gwaunza JA

collective job action when they were on suspension has some merit. In the A absence of evidence concerning whether or not the appellants reported for work after the alleged verbal suspension, I am not persuaded this dispute of fact could be resolved on the papers before the court. It is for this

reason that I have been careful in this judgment not to refer to the action of 31 May 2000 as justifying the suspension of the appellants from their jobs. B

This has, however, not affected my final determination of this matter since I am satisfied that, on its own, the action taken on 29 May 2000 by the appellants was unlawful and merited disciplinary action on the part of the Council.

The second issue relates to the relief sought in the application in the court *a quo* and in this appeal. The appellants chose to persist with their claim for C the setting aside of their suspension, irrespective of the fact that by the time the matter was heard they had already been dismissed. I have determined, as did the learned trial judge, that the suspension of the appellants was lawful. The appellants, as correctly contended for the first respondent, have really not challenged their dismissal beyond asserting that such dismissal was null and D void *ab initio* because it followed a defective suspension, that is, one effected in terms of the Labour Relations Regulations. I have already indicated I find no merit in this argument. As has already been said, s 141 of the Urban Councils Act, in terms of which the appellants were dismissed, does not require that the summary dismissal be preceded by suspension of the worker concerned. Effectively, therefore, the appellants have not challenged the E procedure adopted by the first respondent to dismiss them in terms of s 141 of the Urban Councils Act.

In the light of the foregoing, I am satisfied that the suspension of the appellants from their jobs was justified and properly effected. The appeal must accordingly fail. F

I therefore make the following order —

> "The appeal is dismissed with costs".

Sandura JA Cheda JA concurred G

Muzenda & Maganga, appellants' legal practitioners

Bere Brothers, respondents' legal practitioners

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Source:
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SHAGELOK CHEMICALS (PVT) LTD v INTERNATIONAL FINANCE CORP & ORS 2003 (1) ZLR 207 (S)

Citation	2003 (1) ZLR 207 (S)
Case No	Judgment No. S-124-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Gwaunza JA
Heard	23 September 2002; 20 February 2003
Judgment	20 February 2003
Counsel	*O Ziweni*, for the appellant *A P de Bourbon SC,* for the first and second respondents
Case Type	Civil appeal

Annotations No case annotations to date

Flynote

C **Company law** — *winding up — company unable to pay its debts — how ability to pay debts to be assessed*

Company law — *winding up — discretion of court to refuse winding-up order of company unable to pay its debts — extent of discretion*

Headnote

The court has a discretion to refuse to winding-up order even where a D company is unable to pay its debts, but it is a narrow one and is not to be exercised where the creditor applying for winding-up may have been partly responsible for the company's predicament but there are other substantial creditors waiting for payment of their debts.

For purpose of deciding whether or not a company should be deemed unable E to pay its debts for the purposes of s 205 of the Companies Act [*Chapter 23:04*], it has been the courts' approach to consider a debtor's ability to pay its debts as and when they are due, as the best proof of its solvency. Conversely, failure to pay its debts is strong proof of the debtor's insolvency.

Cases cited F

Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd 1999 (2) ZLR 410 (H)

Legislation considered

Companies Act [*Chapter 24:03*], s 205

Case information

G *O Ziweni*, for the appellant

A P de Bourbon SC, for the first and second respondents

Judgment

Gwaunza JA: On 23 August 2000, the High Court granted a provisional H winding up order in respect of the appellant, with the third respondent being

Gwaunza JA

appointed provisional liquidator. Confirmation of the provisional order was A delayed due to a number of developments, among which was an unopposed application by the appellant for a provisional order placing itself under judicial management. The latter order was discharged on the same day that the provisional winding-up order was eventually confirmed, i.e. on 28 June 2001. The appellant now appeals against that confirmation order. B

The facts of the matter are largely common cause. The real dispute is whether, given those facts, the court *a quo* should have confirmed the provisional winding-up order, or as contended for the appellant, it should have issued an order placing the appellant under judicial management in terms of s 299 and 300 of the Companies Act [*Chapter 24:03*].

The first respondent is an international financier operating from Harare, while C the second respondent is a development bank incorporated in terms of the Zimbabwe Development Bank Act [*Chapter 24:14*].

The appellant is a company registered according to Zimbabwean law, and operates from Kadoma. Its main business is the manufacture of a chemical called sodium silicate, which is used as a flotation agent in water treatment, D manufacturing of soaps and detergents and pigment manufacture. It is asserted for the appellant that it is the sole manufacturer of sodium silicate in the country.

After a study conducted by the first respondent in 1996 concluded that the project to manufacture sodium silicate was technically feasible and the market viable, the first respondent invested in the project to the tune of US$864 000 E in loans while the second respondent did the same in an amount of US$779 000. Using the then applicable exchange rate of US$1 = Z$38 and with interest and other charges, the appellant, as of 16 June 2000, owed the first respondent over Z$47 million and the second respondent over Z$44 million. These loans were secured in favour of the respondents by F mortgage bonds registered over the appellant's immovable property and in the case of each respondent by a notarial covering bond registered in respect of the appellant's movable property.

Although the appellant charged that some of the debts that the respondents were calling in were not yet due and that the loan owed to the second respondent should have been calculated as at 30 September 2000, (not 30 G June) it is not in dispute that the appellant owed substantial amounts of money to the respondents. While the respondents aver the appellant's total liabilities in relation to them came to Z$92 216 257,27 the appellant concedes to Z$84 978 372,22 being the total owed to the respondents.

The appellant also had other creditors. One of them, Zimchem, had at the time H

A the application was filed, succeeded in having the appellant's immovable property attached. The sale in execution had, however, been postponed upon the appellant's undertaking to pay $200 000,00 weekly to Zimchem.

The parties' calculations of the appellant's liabilities *vis-à-vis* its assets reflect incompatible results. Supporting their assertions with documentary evidence the respondents charge that the appellant's total assets, both movable B and immovable, are worth $4 984 000, which value they calculated was exceeded by its total liabilities by some Z$87 million. The appellant, on the other hand, denies its assets are exceeded by its liabilities and quotes the amount of Z$103 162 190 as the total value of its assets. This would, by the appellant's calculations, exceed its total liabilities by some Z$18 million. The C appellant's calculations include on the credit side the value of its movable assets ($251 290) and immovable property ($102 081 700,00) as well as Z$829 200,00 which it said is owed to it by debtors. These figures are disputed by the respondents, who aver firstly that all amounts advanced had fallen due upon the appellant's failure to service its loans, and secondly that even by the appellant's own calculations, the total owed to the respondents and other D creditors by the appellant had ballooned to over Z$142 million leaving a debit balance of over Z$40 million. I can find no meaningful challenge from the appellant to this serious charge. According to the respondents, the appellant had not made any payments to its creditors for over two years. A report compiled by Kudenga & Co, Chartered Accountants, states that the company's financial statements showed that the company had incurred a net loss of E $51 350 61,65 for the year ended 31 December 1998.

The appellant does not deny it has serious viability problems. It blames its poor business performance and consequent failure to service its debts firstly on factors to do with the economic conditions prevailing in the country, (devaluation of the dollar, shortage of diesel and electricity etc), secondly on F certain conduct on the part of both respondents and, thirdly, on financial mismanagement.

The first respondent is blamed for stopping the appellant's managing director, Sipho Mhlanga ("Mhlanga"), from procuring a plant for the business from a United Kingdom based company, and referring him, instead, to a United States of America company from which the appellant had then obtained the plant. G Unlike with the first plant, Mhlanga did not have the opportunity to first inspect the United States of America plant. It is not in dispute that the plant failed to perform to expectations and that following complaints from the appellant the supplier acknowledged that the plant was indeed defective. The supplier offered to, and did, pay US$14 000 as compensation. The appellant H was of the view that this amount was way too inadequate, (since it was

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considering US$1.3 million) and indicated it would institute legal action A against the supplier for damages. According to the appellant the poor performance of the plant was exacerbated by the lack of adequate spares and an operational manual or detailed instructions on how to operate some of its

various components, such as the furnace. The appellant's technicians, who lacked the requisite expertise to operate the machinery without the manual, B were therefore forced to teach themselves how to operate it. As Mhlanga admits, this may have resulted in the technicians unwittingly damaging some of the plant's parts. The evidence before the court includes detailed accounts of the many defects of the plant, the spares required for its different parts and what such spares, and the requisite repairs would cost. The amounts run into millions of dollars. C

The appellant accuses the second respondent (an accusation that, in my view, was successfully refuted) of acting contrary to an understanding reached between the parties, that all sales proceeds generated by the appellant would be channelled through the second respondent to enable it to assist the appellant with its cash and capital management. D

The appellant alleges that the second respondent, instead, liquidated the foreign currency channelled through it in this way, at rates fixed by itself and proceeded to "wrongfully" pay itself and other creditors of the appellant without consulting it. This, it is averred for the appellant, had a damaging effect on the appellant's viability.

The appellant attributes its problems to a number of other factors that I do not E consider it necessary to set out. Suffice it to say that from the foregoing, it is evident that the appellant is under no illusions as to the serious predicament it finds itself in, whatever its true cause. All this, however, does not alter the fact that the appellant owes millions of dollars to its creditors, has failed to service its debts and has not shown how it will manage to repay them. F

It is evident that the directors, shareholders and creditors of the appellant have, separately and together since the problems started, considered many different options for rescuing the appellant from its financial doldrums. These efforts were inspired by the conviction that the appellant had the potential to be viable under the right conditions. These efforts by and large came to naught. The appellant continued to experience viability problems. The two respondents G called in the total outstanding amounts and threatened legal action. Mhlanga, as guarantor of the loan, was also threatened with legal action.

The legal action taken by the two respondents was an application for the winding up of the appellant and the appointment of a provisional liquidator. They contended that the appellant's liabilities exceeded its assets by some H

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A $87 million dollars, that the appellant was no longer capable of trading itself out of its debts and that it was, therefore, and for all intents and purposes, insolvent. The respondents contended, further, that an organised and orderly programme of winding up of the respondent would benefit all creditors.

It is pertinent to note here that before the provisional order was confirmed, the learned judge in the court *a quo* requested a review and report from the B provisional liquidator, L.G. Neely ("Neely"), with respect to the appellant's ability to continue as a viable concern. This was in the light of the appellant's opposition to the application, and its contention that the appropriate order should be one for the appointment of a judicial manager.

In his first report the provisional liquidator listed a number of problems faced C by the appellant both operational and financial. He noted in his findings:

> "Those problems resulted in Shagelok incurring significant operating losses amounting to approximately $87 million over a three year period, showing Shagelok to be an extremely unprofitable entity. This is in spite of its apparent monopoly on the local supply of sodium silicate to the local market and a large potential profitable market."

D He also noted that the company had net liabilities of some $50 million. He concluded that under the right conditions and providing that all the considerations for recovery specified in this report were satisfactorily addressed, the appellant "could become" a viable entity. Neely however cautioned that while it might appear to give the creditors a glimmer of hope, judicial E management might leave them in a worse position subsequently than that which liquidation could offer them "presently."

The appellant vehemently opposed the application for its liquidation. Mhlanga asserted that the appellant was on the road to recovery, had started to produce in bulk, and had secured reputable

customers who had placed orders, showing that there was a ready market for its product. He also submitted documentary F evidence showing the appellant's actual and potential foreign currency earnings, even though, according him these earnings had been "adversely affected" because local banks would liquidate them at their own rates, usually below market rates. Mhlanga added, however, that this situation was due to change dramatically because the appellant could now open its own foreign currency account. He cited future rather than current events as indications of G the appellant's potential viability. Based on these future happenings Mhlanga projected (i) "that in a year or two" at the most, the appellant would have paid off its debts; (ii) that after five months it would have paid off the debt owed to Zimchem and be able to make "substantial" payments to its creditors, and (iii) that after two months, that is, October and November 2000, it would be H able to start paying off its major debts from payments expected from customers

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Gwaunza JA

who had placed certain orders with the appellant. There are no indications in A these projections that major and necessary running expenses had been taken into account, for instance, the cost of repairing the many defects said to exist in the plant, the cost of spare parts and the cost of adequately training its technicians in the proper use of the plant. The evidence before the court shows that the appellant failed to live up to these projections B

In confirming the provisional order of liquidation the learned trial judge had this to say:

> "I also agree with Mr *Gijima* that there is nothing in the proposals mentioned in the reports as to how to deal with the continued operations of Shagelok in order to make it a viable entity. It is clear to me that in order to become a viable entity, substantial amounts of money would have to be C invested in the company.
>
> There is nothing in the papers to show how and when the applicants who are owed substantial amounts by Shagelok will be paid. Shagelok's obligations are increasing dramatically every month because of the interest charges that are being incurred and the depreciation in the value of the Zimbabwe Dollar. The applicants should have been paid long ago. D They are still waiting for their money. It was clear that if the provisional order is not confirmed, the applicants will have to wait for a long time for the repayments which are owing to them. In my view, it is not right for the court to make them wait so long before they are repaid. The debts are outstanding and have been due for a long time."

Given the background outlined above I agree with the learned trial judge's E assessment.

All that the appellant does is speculate on the potential for its viability, based on the fulfillment of certain conditionalities. It has not demonstrated any concrete trend towards its recovery. To the contrary, there is a lot of evidence before the court to show that the appellant continued to incur great losses, F failed to service its loans and had a working capital shortage. The appellant places considerable reliance on the draft business plan for the year 2001, and, in particular, the projected cash flows for the 2001, 2002 and 2003, that were prepared by Mr Madondo, the judicial manager. According to that plan the appellant, if given the opportunity, could operate profitably and be very viable. One of the opportunities referred to was the implementation of an operations G agreement between a company called Gibous Chemicals (Pvt) Ltd ("Gibous") and the appellant, and brokered by Madondo. In terms of that agreement, the appellant was to process all raw materials delivered to it by Gibous in return for a production fee of $5 000 per tonne, that would enable the appellant to service its major debts at the rate of $3.5 million per month. The agreement was to last for an initial period of five years and would be renewed for another five H

Gwaunza JA

A at the instance of Gibous. The business plan and cash flow projections were based on this agreement.

In his second report, which followed an analysis of the business plan submitted by Madondo, Neely made the observation, in my view valid, that Madondo's calculation of expected receipts, or income, for the three years in B question was based on the assumption that the plant would operate at full capacity, since no allowance was made for spillage, shrinkage or plant inefficiencies. As is evident from the evidence before the court, these were real problems which, according to various assessments, had dogged the plant. According to Neely, the business plan therefore included maximum revenue achievable by the plant, with a minimum of expenditure. That these projections C

are unrealistic is shown by the fact that, while varying in their estimates of the actual cost of rehabilitating the plant to viable levels, the parties are agreed that the exercise would entail considerable capital outlay.

Having attacked the business plan on a number of other grounds, among which was the fact that it projected a year on year increase of 25 per cent for expenses in an environment where inflation was rising at 51 per cent at the time of his D report, rendering it economically unviable, Neely concluded the agreement was not in the best interest of the creditors of the company and should not be implemented. Taking this together with his finding that the judicial manager had incurred a loss for the three-month period ended January 2001, of over Z$4 million, Neely also advised that he had no option but to draw the conclusion E that the provisional liquidation order should be confirmed.

Mr *de Bourbon,* for the respondents, correctly observes that the projected cash flow, in terms of which the appellant was to be able to make monthly repayments of its debts of $3.5 million, was to be contrasted with the reality that a loss of over $4 million was in fact incurred in the first three months.

The issue that has to be determined, given this contrast, is whether the court F *a quo* was correct to order that the company be wound up rather than be placed under judicial management. It is important to stress the difference in effect between liquidation and judicial management of a company. In the former case secured creditors are paid out of the proceeds from the disposal of the assets over which security is held, while preferent creditors are paid out of other G assets in order of preference. Concurrent creditors then share anything left over on a *pro rata* basis. In the case of judicial management the control and management of the company is placed in the hands of a judicial manager. During the period of judicial management, all actions, proceedings and executions of process against the company are stayed. The expectation is that during judicial management, conditions are created that would enable the H company to pay off its debts. There would thus be no immediate payment of

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such debts and where the judicial manager fails to turn the fortunes of the A company around, the creditors would, in effect, have been made to unnecessarily wait for their payments.

Mr *Ziweni*, for the appellant, gives more specific grounds for the appellant's opposition to liquidation: firstly, that the appellant's inability to pay its debts was temporary and that the consequence of winding up would be seriously B disproportionate in its prejudicial effect upon the appellant company. Secondly, Mr *Ziweni* contends that the court should not place reliance on the respondents' assessment of the appellant's solvency since they did not have access to its books of account. Thirdly, Mr *Ziweni* cites s 205(b) of the Companies' Act [*Chapter* 24:03] which provides as follows:

> "A company shall be deemed to be unable to pay its debts — C
>
> (a) …
>
> (b) if the execution of other process issued on a judgment, decree or order of any competent court in favour of a creditor against the company is returned … with the endorsement that no assets could be found to satisfy the debt or that the assets found were insufficient to do so;" D

He contends in this respect that *in casu,* the appellant had not failed to satisfy any writ and that the respondents have not procured any judgment for the sums claimed.

There is little in the evidence before the court to support the contention that the appellant's inability to pay its debts was only temporary. On the evidence of Mhlanga himself, the company experienced viability problems right from E the outset, stemming largely from the many defects of the plant sourced through a reference from the first respondent, the lack of expertise within the appellant to operate certain parts of the plant without a manual and inadequate spare parts. Both the supplier of the plant and those who subsequently undertook inspections thereof reported major defects requiring millions of F dollars to rectify. Thereafter or alongside this problem other viability problems presented themselves, resulting in the company incurring huge losses. These included unfavourable economic conditions in the country, shortage of diesel and electricity, the devaluation of the dollar and, on the appellant's part and as indicated in Madondo's business plan, lack of strong financial management skills. In addition to this, and again as stated in Madondo's plan, the company G from the beginning faced a "serious shortage" of working capital, thereby greatly undermining its

operations. I do not recall any evidence in the record before the court, suggesting there ever was a time when the company realised comfortable profit margins. What is significant is that many options for revitalizing the performance of the appellant were considered but yielded no positive results. To suggest, against this background, as Mr *Ziweni* does, that H

A the appellant's problems were only temporary is clearly to go against the weight of the evidence that is before the court.

While the appellant may entertain the sincere hope that its fortunes can be turned around, and has adopted certain measures it considered would lead to the achievement of that goal, there is no doubt that such efforts have had very little, if any, impact. As the learned trial judge correctly observed, the B appellant's obligations are increasing dramatically every month because of interest and other charges that are being incurred. The argument that the consequence of winding-up would be seriously disproportionate in its prejudicial effect upon the appellant therefore finds little support from the evidence that is before the court.

C The evidence placed before the court to show that the appellant is in serious financial problems, has failed to pay its debts and does not seem to have immediate prospects of recovery did not come only from the respondents. In addition to what the appellant itself concedes in this respect, there is, as already shown, other evidence not necessarily flowing from its books of accounts, that leave little doubt in anyone's mind about the seriousness of the D appellant's financial and operational problems. Madondo, in any case, showed in his business plan that the appellant incurred a loss of over $4 million during the first three months of his judicial management of it. I, therefore, find no merit in Mr *Ziweni's* contention that no reliance should be put on the respondents' assessment of the appellant's insolvency because they E did not have sight of its books of account.

Section 205(b) of the Companies Act, cited by Mr *Ziweni*, does indeed provide that one indication of a company being unable to pay its debts would be a *nulla bona* return following an attempt to attach the company's property in satisfaction of a judgment against it, of a competent court. Mr *Ziweni,* however, omitted to mention that paragraph (c) of the same section provides F for another indication, as follows:

> "(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

G I find this provision to be relevant to the case at hand. No one, even the appellant itself, disputes that it is unable to pay its debts, that such debts are substantial and run into millions of dollars and, more importantly, that for it to have any chance of recovery, other substantial amounts would have to be applied towards refurbishment of the plant, not to mention the generation of fresh working capital. KGPM Chartered Accountants indicate in their report H that $50 million would be required for this purpose. Taken together, these

contingent and prospective liabilities of the appellant are a strong indication A of its inability to pay its debts.

Mr *de Bourbon,* for the respondents, makes the pertinent observation that it has, for a long time, been the approach of the courts to consider a debtor's ability to pay its debts as and when they are due, as the best proof of its solvency. Conversely, failure to pay one's debts, as has happened with the B appellant, is strong proof of the debtor's insolvency.

Mr *Ziweni* advances a number of other arguments to support the appellant's call for judicial management and not liquidation. He makes much of Neely's failure to prepare a detailed report, as requested by the court *a quo*, as to whether the appellant should be liquidated or placed under judicial management. While Neely may have failed, in his first two reports to categorically state that C liquidation rather than judicial management would be the best cause of action to take under the circumstances, the tone of the reports leave little doubt that was the inevitable conclusion. He, in any case, put matters beyond any doubt when in his third and final report, which was considered

by the court *a quo,* he stated he had no option but to draw the conclusion that the provisional D liquidation order should be confirmed.

It is contended further for the appellant that, following upon Neely's first report, the appellant should be given the opportunity to address the issues catalogued in that report and that this can only be done if it was allowed to be regenerated under judicial management. Reference has already been made to the weaknesses in the business plan that Madondo drew up, and in terms of E which he intended to operate in his endeavour to get the appellant to trade itself out of its financial difficulties. These weaknesses were borne out by the substantial loss – albeit understated, according to the respondents – that Madondo himself recorded in the first three months that he was the judicial manager. When these shortcomings are taken together with the unsuccessful F efforts taken by the appellant to revitalise its operations, the conclusion is inevitable that the appellant has failed to place before the court evidence that suggests that it is capable, on its own or under judicial management, of being converted from a loss making enterprise to an economically viable one. As correctly contended for the respondents, the effect of an order for judicial management in the face of overwhelming evidence of the appellant's inability G to trade profitably would be to prevent the respondents from receiving early payment of what is due to them.

Both counsel make reference to s 300(a) of the Companies Act, which provides that:

> "The court may grant a provisional judicial management order in respect of a company — H

Gwaunza JA

> (a) … if A it appears to the court —
>
> (i) that by reason of mismanagement or any other cause the company is unable to pay its debts …; *and,*
>
> (ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; *and*
>
> (iii) that B it would be just and equitable to do so;" (my emphasis)

In casu mismanagement on the part of the appellant is blamed only in part for its financial woes, most of the blame being placed on other factors and agents. Even were the appellant's problems attributable only to mismanagement I am not satisfied, given all that has been said, that there would have been a C reasonable possibility of the appellant becoming a viable enterprise. Nor, in my view would it have been fair and equitable to place the appellant under judicial management when the effect would have been to make its creditors wait longer than they had already done for their money. The debts owed continued to mount due to interest and other charges.

One other matter calls for comment.

D The appellant, as already said, placed part of the blame for the predicament it finds itself in, on the first respondent. It seeks to rely on the principle that a liquidation order will not be granted where the court is satisfied that the applicant (for the order) is to blame in this way. Both Mr *Ziweni* and Mr *de Bourbon* rely on *Croc-Ostrich Breeders of* E *Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410 (H*)* to, respectively, support and dispute the applicability of this principle to the circumstances of this case. Both counsel correctly contend, as the learned judge in that case did, that the court has the discretion to refuse to order liquidation notwithstanding the proven existence of grounds for liquidation. The learned judge went on to say at pp 414 G-415B:

> F "The discretion is regarded as a narrow one. (*Service Trade Supplies (Pvt) Ltd v Dasco & Sons (Pty) Ltd* 1962 (3) SA 424 (T) at 428. Narrow in the sense that a creditor is entitled to a winding-up *ex debito justitiae save in exceptional circumstances (Cf Tuckers Land and Development Corporation (Pvt) Ltd v Soja (Pty) Ltd* 1980 (3) SA 253 (W) at 257C; *Pillay & Anor v Liquidators, Union & Rhodesian Wholesale Ltd* 1927 SR 136 at 153). G The essence of the discretion is a decision as to whether to withhold relief objective grounds for the granting of which have been exhibited. The factors to be considered in any case do not differ depending on the grounds advanced for winding-up. The discretion is a judicial value judgment to be made on all the relevant factors (*Henochsberg op cit* H 582)." (my emphasis)

Gwaunza JA

The appellant charges that there is *mala fides* on the part of the first A respondent. It is argued for the appellant that this *mala fides* is demonstrated by the fact that, after prevailing upon Mhlanga to abandon the order he had made for a plant in the United Kingdom, and to place the order with its

contact in the United States of America, the first respondent went on to apply for the appellant's liquidation well knowing that much of its trouble stemmed from the defective plant.

I am not persuaded that this, *per se,* establishes *mala fides* on the first respondent. The appellant does not allege that the appellant, with full knowledge that the plant sourced through its contact in the United States of America was defective, nevertheless went on to recommend to the appellant's Mr Mhlanga that he should order it. Nor does the appellant allege that the first respondent had done so with the specific intention of ruining the appellant financially and applying for its liquidation. Indeed, had that been its intention, it would not have invested so heavily in the appellant, nor gone to the trouble of adopting different options to rescue the appellant from its troubles. Without these allegations, it cannot be said that the first respondent bore primary responsibility for the predicament the appellant finds itself in, nor that by that token special circumstances existed for denying the liquidation order sought.

Even had the first respondent been to blame, the point is, in my view, well made that it was, in any case, not the only creditor of the appellants. Apart from the second respondent, which successfully disproved the allegation that it had breached the agreement between the parties to receive payments and structure repayments to creditors on behalf of the appellant, Mhlanga himself was owed several million dollars, as indeed were other creditors not party to these proceedings. The appellant would, therefore, in any case have had difficulties in evading an order for its liquidation.

I find, in the final analysis, that the appellant is so deeply mired in debt, and has such serious viability problems that — even by its own admission — it would take a number of years (and only under the best of conditions,) for it to recover, if ever. The conditions that the appellant suggested would have been conducive to this recovery have either failed to survive close scrutiny (e.g. the business plan and the Gibous agreement upon which it is based) or have failed to materialise (e.g. anticipated profits from the substantial orders said to have been received).

In view of the foregoing, I find the decision of the court *a quo* to have been justified. The appeal must accordingly fail.

It is in the premises ordered as follows:

> "The appeal is dismissed with costs."

Gwaunza JA

Chidyausiku CJ and Cheda JA concurred

Ziweni and Company, appellant's legal practitioners

Sawyer & Mkushi, first and second respondents' legal practitioners

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MANHANDO v MTETWA & ANOR 2003 (1) ZLR 220 (H)

Citation	2003 (1) ZLR 220 (H)
Case No	Judgment No. HH-25-2003
Court	High Court, Harare
Judge	Hungwe J

Heard 20 September 2001; 26 February 2003

Judgment 26 February 2003

Counsel *H Simpson*, for the plaintiff
W J Mutero, for the defendants

Case Type Civil action

Annotations No case annotations to date

Flynote

Legal practitioner — *conduct and ethics — trust account — monies held in trust account — conveyancer holding deposit on price of house pending* C *transfer — paying deposit to seller before transfer — conveyancer liable to buyer for loss*

Headnote

The plaintiff had entered into a contract to buy a house from the first defendant, and had paid nearly 50 per cent of the purchase price to the D defendant's legal practitioners, pending transfer. There was litigation about the house preventing transfer, and the sale was cancelled. Nonetheless, the legal practitioner, instead of keeping the money in a trust account, paid it to the first defendant. The plaintiff sought the return of the money from the first defendant and the legal practitioner.

Held, that for a conveyancer to release a deposit to a seller paid by a buyer E before transfer is effected in favour of a buyer is an act attendant with the utmost hazard. The position of the conveyancer was a fiduciary one requiring the utmost good faith. The conveyancer was liable to the buyer. In addition, a legal practitioner who ignores a specific request which, if it had been complied with, was intended to safeguard the rights of a client ought to be visited with costs on a higher scale. F

Case cited

De Villiers v James 1996 (2) ZLR 597 (S)

Case information

H Simpson, for the plaintiff

W J Mutero, for the defendants G

Judgment

Hungwe J: At the beginning of the trial, the first defendant had indicated his willingness to consent to judgment on condition he is allowed to pay it off in three months. This condition was rejected by the plaintiff's counsel. The matter proceeded to trial. H

Hungwe J

A The plaintiff issued summons against the defendants claiming a refund of $1 000 000 together with interest as well as costs. This claim arose out of the following facts which are admitted to be common cause.

The plaintiff and the first defendant entered into an agreement of sale of an immovable property at stand No. 14040 Salisbury Township known as No. 7 Dove Crescent, Vainona, Borrowdale, Harare for a total of $2 200 000. B A deposit of $1 000 000 was payable by the plaintiff as a deposit. The deposit was to be held by second defendant * for and on behalf of the plaintiff pending transfer in

favour of the plaintiff. The second respondent was to invest the deposit in an interest bearing account pending the transfer. The second defendant did not hold the deposit in its trust account but paid it over to the C first defendant notwithstanding that no transfer had taken place. As it turned out there was litigation over the property. That prevented the transfer from taking place. On learning of the litigation, the plaintiff cancelled the agreement and claimed a refund of his deposit.

The first defendant has virtually abandoned his defence to the claim by tendering payment of the sum claimed. In the premises the matter proceeded D to trial in respect of the second defendants who mentioned that they are not jointly and severally liable to make this refund.

The second defendant, through its principal partner, has denied liability on the basis that there was nothing in the agreement of sale between the parties that obliged it to hold on to the deposit pending transfer of the property. Mr *Ziweni* E denied that the agreement of sale was crafted by his company, although this agreement appeared to favour his firm and enjoined both the seller and buyer to pay the fees for its drawing. It was under the cover of his firm.

Mr *Ziweni* relied on the fact that it was the parties themselves who had agreed as to the methods of payment and therefore as he was merely acting in terms of the parties' wishes he could not be held liable for the payment of the deposit F to the seller, before transfer had been effected.

In terms of the Agreement of Sale, Ziweni and Company were appointed by both parties to act as the conveyancers to transfer the property from the seller to the buyer.

Having accepted that role, as agent of both parties the second defendant was G a trustee of the funds. It became a stake holder with an interest in the funds. Mr *Ziweni* knew the reasons why this money had been paid, i.e. purchase of an immovable property. It normally would be paid once transfer had been

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effected. The position of the defendant was therefore a fiduciary one requiring A the utmost good faith: see *De Villiers v James* 1996 (2) ZLR 597 (S).

For a conveyancer to release a deposit to a seller paid by a buyer before transfer is effected in favour of a buyer is an act attendant with the utmost hazard.

Had Mr *Ziweni* acted more diligently, it is safe to say the plaintiff would not have found himself both out of pocket and without a roof over his head. This B is exactly the mischief that led to the requirement of payments against transfer.

I am unable to agree with Mr *Ziweni* that his firm was perfectly entitled to act in the way it did. It was not. It acted prejudicially to its principals.

The firm is jointly and severally liable for the loss suffered by the plaintiff. I have been asked to award costs on the higher scale *de bonis propriis*, on the C basis that Mr *Ziweni* as a legal practitioner, must have known better. There is substance in that submission. A legal practitioner who ignores a specific request which, if it had been complied with, was intended to safeguard the rights of a client, ought to be visited with costs on a higher scale. It is because of his attitude that the plaintiff suffered irreparable loss. I will award costs against Mr *Ziweni de bonis propriss* on a higher scale. D

Manase and Manase, plaintiff's legal practitioners

Ziweni & Partners, second defendant's legal practitioners

* The firm of legal practitioners acting for the first defendant — *Editor*

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Source:
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ROBERTS v AIR ZIMBABWE CORPORATION 2003 (1) ZLR 223 (H)

Citation	2003 (1) ZLR 223 (H)
Case No	Judgment No. HH-28-03
Court	High Court, Harare
Judge	Hungwe J
Heard	15 November 2000; 26 February 2003
Judgment	26 February 2003
Counsel	*F Mutamangira*, for the plaintiff *F Girach,* for the defendant
Case Type	Stated case
Annotations	No case annotations to date

Flynote

Aviation — *air carrier — liability — lost baggage — liability governed by* C *Warsaw Convention*

Headnote

The liability of an air carrier in respect of lost baggage is governed, and limited, by the provisions of the Warsaw Convention, which are incorporated as part of the law of Zimbabwe by the Carriage by Air Act [*Chapter 13:04*]. In the absence of a special contract, an air carrier is D liable to the sums stipulated by the Convention.

Legislation considered

Carriage by Air Act [*Chapter 13:04*] ss 3, 7(2)

Case information

E *F Mutamangira*, for the plaintiff

F Girach, for the defendant

Judgment

Hungwe J: The plaintiff was a passenger aboard Flight UM 176 from Harare to London on 9 September 1997. He had luggage. The defendant airline was to convey the luggage together with the plaintiff to London.

F When the plaintiff got to London, he failed to get his luggage. It was lost. Plaintiff accepted payment of $4 694.28 from the defendant. He sued for UK£3 068 and Z$368 550 for the lost luggage and loss of earnings.

At the pre-trial conference stage, it was agreed that the following question be placed before the court as a stated case.

G 1. Is the contract between the parties governed by the Carriage by Air Act [*Chapter 13:04*]?

In his heads of argument, Mr *Mutamangira* argued that in terms of s 7(2) of the Carriage by Air Act [*Chapter 13:04*], the court has a discretion when adjudicating in claims brought to enforce liability which is limited by Article 22 of the Warsaw Convention. The limitation imposed by Article 22 H of the Convention is a guide but not a strict limitation, as such a limitation is

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Hungwe J

qualified by the use of the words "just and equitable" in subs (2). So he argued. A There is no substance in this argument. It is clearly misplaced and misdirected. To begin with, the use of the words "just and equitable" in s 7(2) are restricted to the procedural options open to a court where there is a possibility of a carrier facing a multiplicity of suits, either in Zimbabwe or elsewhere.

Secondly, the Act itself is clear and unambiguous in its limitation of liability. B Section 7(1) states:

> "It is hereby declared that the limitations on liability in Article 22 of the Convention apply whatever the nature of the proceedings by which liability may be enforced and that in particular —
>
> (a) those limitations apply where proceedings are brought by a wrongdoer to obtain a contribution from another wrongdoer; and C
>
> (b) the limitation for each passenger in paragraph (1) of that Article applies to the aggregate liability of the carrier in all proceedings which may be brought against him in Zimbabwe together with any proceedings brought against him outside Zimbabwe."

For the defendant, Mr *Girach* argued that the golden rule of interpretation, D which is that a court is bound to give effect to the express provisions of a statute, must be applied unless that leads to ambiguity. It would lead to an absurdity if that same provision were to be read as implying that where justice and equity required it, a court could make an award greater than the limitation allowed.

I agree. A perusal of the Act is revealing. E

The preamble of the Act reads:

> "An Act to enable effect to be given to the Warsaw Convention of 1929, as amended by the Hague Protocol of 1955, concerning international carriage by air …"

By s 3 of the Act the Convention was adopted as domestic law of Zimbabwe. F The purpose of the Convention, among other things, is to limit the liability of air carriers. Article 22 expressly limits the liability of a carrier by air. It is unequivocal. The plaintiff did not argue otherwise. In terms of Article 22, the only circumstance where a carrier by air is liable to a higher limit is where, by special contract, that carrier has agreed to be so bound. The plaintiff has not G alleged the existence of any such special contract. There would be little purpose served by this Act if it were possible to claim an amount higher than the prescribed limit. This is an international convention. Zimbabwe is a signatory to it. Zimbabwe is obliged to apply the letter and spirit of the convention.

In the circumstances, the answer to the stated case is that the contract between H

Hungwe J

A the parties is governed by the 1929 Warsaw Convention as amended by the Hague Protocol of 1944 as adopted into domestic law by the Carriage by Air Act [*Chapter 13:04*].

It is ordered that the plaintiff is to pay the costs of this application.

B *Mudambanuki and Associates*, applicant's legal practitioners

Rainor Robinson, defendant's legal practitioners

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Source:
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ROWLAND ELECTRO ENGINEERING (PVT) LTD v ZIMBABWE BANKING CORPORATION LTD 2003 (1) ZLR 226 (H)

Citation	2003 (1) ZLR 226 (H)
Case No	Judgment No. HH-36-2003
Court	High Court, Harare
Judge	Guvava J
Heard	17 January 2003; 26 February 2003
Judgment	26 February 2003
Counsel	*Z Samushonga*, for the applicant *A P de Bourbon SC*, for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Bank — *account — right of bank to terminate account with customer — notice* C *which must be given — must be reasonable notice*

Practice and procedure — *interdict — application for final order — what applicant must show — need to establish clear right of action*

Headnote

The applicant sought an order compelling the respondent bank to keep open D the applicant's accounts with the bank. The bank had given the applicant 28 days to close its accounts. The applicant had obtained an interim interdict and sought a final order.

Held, that a bank is entitled to close an account on reasonable notice to an account holder. In the circumstances, 28 days' notice was reasonable. In any event, in terms of the contract between the parties, the bank could E close the accounts at any time.

Held, further, that when seeking a final order for an interdict, an applicant must show that he has a clear right of action; that there is no alternative remedy; that he will suffer irreparable harm; and that the balance of convenience lies with him. In this case, the applicant had not established F a clear right, and there was the alternative remedy of an action for damages.

Cases cited

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

Flame Lily Invstm Co (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor G 1980 ZLR 378 (G)

Nienaber v Stuckey 1946 AD 1049

Philips Electrical (Pvt) Ltd v Gwanzura 1988 (2) ZLR 117 (H)

Case information

Z Samushonga, for the applicant

A P de Bourbon SC, for the respondent H

Guvava J

Judgment

A **Guvava J:** The applicant in this matter obtained from this court on 16 August 2002, a provisional order which provided as follows:

> "1. That the respondent be and is hereby ordered to keep the applicant's bank account with all of the respondent's branches operational until 31 March 2003.
>
> 2. That the respondent is ordered to pay the costs of this application on B an attorney and client scale.
>
> INTERIM RELIEF GRANTED
>
> That pending the final determination of this matter, the respondent is to keep all the applicant's bank accounts with all of the respondent's branches open and applicant should transact normal banking transactions C therefrom."

The facts upon which this order was granted are basically common cause and may be summarised as follows. The applicant is the holder of various accounts with Zimbabwe Banking Corporation Ltd (Zimbank) and has been an account holder with Zimbank for over 15 years. On 3 July 2002, the applicant was served with a letter by the respondent in which the respondent terminated the D banking relationship with the applicant with immediate effect. No reasons were given by Zimbank for terminating the accounts. A further letter was sent to the applicant by the respondent giving the applicant until 31 July 2002 to close its accounts.

The applicant approached this court by way of an urgent chamber application E seeking an interdict against the closure of its accounts with Zimbank. The applicant argued that it ran a massive operation as a *bureau de change* which involved millions of dollars all over the country. It was the applicant's submission that the closure of its accounts would lead to loss of business profit in an amount of $1.5 million to $2 million per day. As such, its accounts could not be closed without adequate notice.

F Before dealing with the merits of this matter, I note that from the terms of the order the interim relief which was granted and the final order which is sought are, substantially, the same. As this has the effect of granting a final order, by way of interim relief, it has been stated in various judgments that the proper approach in such matters is to proceed by way of court application: see *Econet* G *(Pvt) Ltd v Minister of Information* 1997 (1) ZLR 342 (H). This approach was however not followed in this matter and it is now before me for confirmation of the order after being set down by the respondent. Failure to follow this approach gives unfair advantage to a litigant who obtains a final order without having to establish the necessary proof required. As in this case, the applicant had already obtained the relief which it was seeking when it was granted the H provisional order, it thereafter did not pursue the confirmation of the order and

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Guvava J

this application was only set down at the behest of the respondent who had A been aggrieved by the interim relief granted. It is for these reasons that legal practitioners should strive to comply with the approach set out in the judgment cited above.

Two legal issues fall for determination by this court in deciding whether to confirm or discharge the provisional order. The first issue is whether the B respondent was entitled to terminate the applicant's bank accounts and facilities, and the second issue is whether the applicant has established, on a balance of probabilities, that it is entitled to the mandatory interdict which it seeks.

In respect to the first issue, it is clear that a bank has the right to terminate its relationship with a customer and this is confirmed by various authorities. C In Malan on *Bills of Exchange, Cheques and Promissory Notes* 2ed at p 372, the learned author states:

> "The bank and customer contract is a consensual agreement that can be terminated in the same way as other consensual contracts … It can also be terminated unilaterally by either of the parties. A customer can D terminate summarily, but the bank must give reasonable notice of termination. The reasonableness of the notice is determined by the circumstances of each case and by the nature of the account."

See also *Paget's Law of Banking* by Maurice Megrah and FR Ryder.

The only issue in this case therefore, appears to be whether or not the applicant was given reasonable notice by the applicant to terminate its bank accounts. E

In this case, the applicant was given 28 days notice to enable it to close and transfer its accounts to another bank. The applicant has not, in its papers addressed the question of what is a reasonable time, neither has it explained why it would require 8 months to transfer its accounts to another bank. The respondent has submitted that 28 days was a reasonable period of notice for the applicant to move his accounts to another bank. F

In my view, the period of notice given by the respondent was reasonable given the relationship between a banker and a customer. The relationship of banker and customer is one which requires the utmost trust for it to exist. The circumstances of this case indicate that the trust had been broken. The applicant in this case had alleged that the respondent had fraudulently G withdrawn $28 445 150 from its accounts. This was being disputed by the respondent. The respondent in the circumstances would understandably not wish to continue doing business with the applicant because of the pending allegations. It is also noteworthy that due to computerisation most banks in the country take less than seven days to process an application to open a bank account. With the type of transactions which the applicant was operating any H

Guvava J

A bank would have been happy to conduct business with it and the transition to another bank should have been fairly smooth. The notice period of 28 days would therefore, in my view, be more than adequate taking into account these factors. From the papers before me, I find no basis in holding that the respondent did not give adequate notice to the applicant to relocate its accounts to another bank and therefore was entitled to close the bank B accounts.

With respect to the facilities which were available to the applicant, it is clear that in terms of the agreement which was signed between the parties dated 24 May 2001 relating to banking facilities, the respondent reserved the right to cancel the facilities at any time. Paragraphs 10 and 11 of the agreement states:

> C "10.Facilities may be terminated by the Bank by notice to the effect either forthwith or from any subsequent date stated in that notice, in which event the facilities in question are cancelled and any liability to the bank becomes payable:
>
> (a) Immediately if the facilities are terminated forthwith.
>
> (b) Otherwise, on the date(s) stated in that notice.
>
> D 11. The facilities are subject to the Bank's usual terms and conditions and the Bank reserves the right to amend, review or cancel the facilities depending on the conduct of the account or if the circumstances in its discretion so warrant. The Bank therefore reserves the right to dishonour drawings in such circumstances without prior reference."

E The applicant conceded in his affidavit that the respondent could cancel the applicant's facilities at any time. The concession in my view was properly made as the parties had entered into a contractual relationship which allowed the respondent to terminate the facilities without giving notice and without giving any reasons for its decision. From the provisions of the agreement, the facilities could be cancelled entirely at the discretion of the respondent. F Clearly, therefore, the respondent was entitled to terminate both the applicant's accounts and facilities and did so in accordance with the law as adequate notice was given.

The second question which arises in this matter is whether this court has the right to impose on the respondent obligations to undertake banking facilities for a particular person in circumstances where the bank has properly terminated G its relationship with the person concerned. In my view, no such right exists, as this would be tantamount to the court forcing the parties to continue with a contractual relationship where one of the parties clearly does not wish to do so and has properly terminated the relationship in terms of the contract between the parties. This, in my view, is contrary to the very basic principles H of contract.

Guvava J

Even if I am wrong in this regard and the court could so interfere, it would still A be bound by the legal principles which apply to the granting of an interdict.

In order to grant an interim interdict, a court must be satisfied that all the requisites have been met. These have been set out in various judgments of this court as follows:

1. whether the applicant has established a *prima facie* right; B
2. whether the applicant has an alternative remedy;
3. whether the applicant will suffer irreparable harm; and
4. whether the balance of convenience lies with the applicant.

See *Flame Lily Investment Co (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor* 378 (G) 1980 ZLR 388 and *Econet (Pvt) Ltd v Minister of Information supra*. C

However, for the granting of a final interdict, as is being sought in this matter, the applicant must show not a *prima facie* right but that it has a clear right of action against the respondent: see *Philips Electrical (Pvt) Ltd v Gwanzura* 1988 (2) ZLR 117 (H).

It is apparent that the principles which have to be established for the granting D of an interim interdict and for a final order are essentially the same, save for the requirement that in a final order the applicant must establish, not a *prima facie* right, but a clear right of action against the respondent. This onus clearly lies on the applicant and in order to discharge this onus he must, "satisfy the court on the admitted or undisputed facts by the same balance of probabilities as is required in every civil suit, of the facts necessary for the success in his E application": see *Nienaber v Stuckey* 1946 AD 1049 at 1054. From the facts in this matter, the applicant has not established that it has a clear right against the respondent, particularly in view of the clear entitlement of the respondent to terminate any accounts and facilities of the applicant.

The applicant has also failed to establish that it does not have an alternative F remedy as it could properly sue for damages against the respondent. The damages can be quantified as the applicant states in his founding affidavit that closure of its accounts would translate to loss of profit of $1.5m to $2m daily. In my view, an action for damages if successful, would provide adequate relief to the applicant. A claim for damages obviously also answers the issue of whether or not the applicant would suffer irreparable harm in the event that the G interdict was not confirmed as there is no basis for an assumption that the respondent would not be able to pay in the event that it is sued for damages and a court finds the respondent liable. Having found that the applicant has failed to establish, on a balance of probabilities three of the criteria for the granting of an interdict, there can be no basis for confirming such an order. H

Guvava J

A Accordingly, the provisional order which was granted on 16 August 2002 be and is hereby discharged. The applicant shall pay the costs of suit.

Wabatagore & Company, applicant's legal practitioners

Gill, Godlonton Gerrans, respondent's legal practitioners

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Source:
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REGISTER-GENERAL v TODD 2003 (1) ZLR 232 (S)

Citation	2003 (1) ZLR 232 (S)
Case No	Judgment No. S-4-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	21 January 2003; 27 February 2003
Judgment	27 February 2003
Counsel	*S J Chihambakwe,* for the appellant *B W Elliot,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Constitutional law — *citizenship — person a citizen of another country* C *— requirement to renounce that citizenship in order to remain a citizen of Zimbabwe — person born in Zimbabwe to parents who were born in New Zealand — such person a citizen of New Zealand and required to renounce that citizenship.*

Evidence — *foreign statute — court interpreting such statute.* D

Headnote

The respondent was born in Zimbabwe to parents who were born in New Zealand. The appellant claimed that because she had failed to renounce her New Zealand citizenship she ceased to E be a citizen of Zimbabwe.

Held, that in terms of the New Zealand legislation, the respondent was a citizen of New Zealand and had to renounce that citizenship in order to remain a citizen of Zimbabwe.

Held, further, that although she had not renounced her New Zealand citizenship by the date set out in the Citizenship Act, as amended, she had instituted proceedings two days before that date, and this suspended the requirement to renounce by the given date. The court allowed her two days from the announcement of judgment to renounce New Zealand F citizenship or lose her Zimbabwe citizenship.

Legislation considered

Zimbabwean legislation

Citizenship of Zimbabwe Act [*Chapter 4:01*], s 9 (1) & (7) G

Citizenship of Zimbabwe Amendment Act, 2001 (No. 12 of 2001),

Citizenship of Zimbabwe (Renunciation of Foreign Citizenship) Regulations 2001 (SI 217 of 2001)

Malaba JA

A *Foreign legislation*

New Zealand

British Nationality and New Zealand Citizenship Act 1948, ss 3, 16 (1) (a) & (2), & 21

Citizenship Act 1977, ss 13 (2) & 15

B Citizenship Amendment Act 2000, s 4

Citizenship Amendment Act (No 2) 2001, s 10

Case information

S J Chihambakwe, for the appellant

B W Elliot, for the respondent

Judgment

C **Malaba JA:** This is an appeal from a judgment of the High Court dated 7 May 2002 declaring that the respondent was a citizen of Zimbabwe and directing the appellant to renew her Zimbabwe passport within fourteen days of the submission by her of an application for such renewal. The appellant was ordered to pay the costs of the application which had been made by the D respondent.

The facts of the case are these. The respondent was born in the then Southern Rhodesia on 18 March 1943. Her parents, Sir Reginald Stephen Garfield Todd and Lady Jean Grace Isabel Todd, were born in New Zealand on 13 July 1908 and 3 April 1911 respectively. They were citizens of New Zealand who came to this country as missionaries in 1943 and settled at E Dadaya Mission where the respondent was born. She became a citizen of Zimbabwe by birth.

On 1 December 1984 the Citizenship of Zimbabwe Act [*Chapter 4:01*] ("the Act") came into operation. The Act provided in s 9(1) that no citizen of Zimbabwe who was of full age and sound mind was entitled to be a citizen F of a foreign country. It was provided in s 9(7), as amended by s 3 of the Citizenship of Zimbabwe Amendment Act No 12 of 2001, that:

> "A citizen of Zimbabwe of full age who —
>
> (a) at the date of commencement of the Citizenship of Zimbabwe Amendment Act, 2001, is also a citizen of a foreign country; or G
>
> (b) …
>
> shall cease to be a citizen of Zimbabwe six months after that date unless, 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."

Malaba JA

The form in which the declaration confirming the renunciation of the citizenship A of the foreign country was to be made was prescribed in the Citizenship of Zimbabwe (Renunciation of Foreign Citizenship) Regulations 2001 (SI 217/ 01). The date of commencement of the Citizenship of Zimbabwe Amendment Act was 6 July 2001 and the period of six months thereafter was to expire on 6 January 2002. B

It so happened that on a date not disclosed in the papers but before 6 January 2002, the respondent submitted an application to the appellant through the Bulawayo Office for the renewal of her Zimbabwe passport. The appellant, through his officers, refused to renew the passport, alleging that the respondent was a citizen of New Zealand by descent and demanded that she should renounce the foreign citizenship before her Zimbabwe passport could be C renewed. The respondent vehemently denied that she was a citizen of New Zealand by descent, arguing that she could not renounce what she did not possess.

On 4 January 2002 the respondent made an application to the High Court, in which she cited the appellant as the first respondent and the Minister of Home D Affairs as the second respondent. The relief sought against the respondent and the Minister of Home Affairs jointly and severally was an order to the effect that:

> "1. The provisions of s 7 of the Citizenship of Zimbabwe Act [*Chapter 4:01*], as amended by s 3 of the Citizenship of Zimbabwe Amendment Act (No 12/2001) do not apply to the applicant. E
>
> 2. Consequently, the provisions of the Citizenship of Zimbabwe (Renunciation of Foreign Citizenship) Regulations 2001 (Statutory Instrument 217/2001) do not apply to the applicant and the applicant is not obliged to comply with the said Regulations.
>
> 3. The applicant is a citizen of Zimbabwe and will, after 6 January 2002, automatically remain a citizen of Zimbabwe. F
>
> ACCORDINGLY IT IS ORDERED THAT:

1. The respondents shall continue to recognise the applicant as a citizen of Zimbabwe after 6 January 2002 and afford her the rights and protection as a citizen of Zimbabwe.
2. The first respondent shall renew the applicant's Zimbabwe passport G within fourteen days of the submission of an application by the applicant for such renewal.
3. The respondents shall pay the applicant's costs of suit."

The founding affidavit deposed to by the respondent in support of her application shows that she strongly objected to being told that she was a H

Malaba JA

A citizen of New Zealand by descent. She said she had never claimed citizenship of that country and had no intention of doing so in future. She declared that she has always been a Zimbabwean citizen who had fought for human rights and the liberation of her country. She said it was demeaning of her personally and a compromise of her Zimbabwean citizenship to be required to fill in a form declaring that she had renounced citizenship of a foreign country when B she had never become its citizen. It was her contention that what she had acquired by virtue of her birth to parents who were citizens of New Zealand was a mere claim to New Zealand citizenship. She said that s 9(7) of the Act did not apply to a citizen of Zimbabwe with a claim to citizenship of a foreign country.

C The notice of opposition filed on behalf of the appellant and the Minister of Home Affairs indicated that they both opposed the application. It was stated therein that the affidavit deposed to by the appellant was on behalf of both of them. The appellant did not deny in the opposing affidavit that the application by the respondent for the renewal of her Zimbabwe passport was refused on the ground that she was a citizen of New Zealand by descent. He insisted that D the respondent was a citizen of New Zealand by descent and that she was required to effectively renounce the citizenship of that foreign country before her Zimbabwe passport could be renewed. He said he was merely enforcing the law of the land.

The application and the relief sought show that two issues were placed before E the court *a quo* for determination. The first issue was whether or not the respondent was a citizen of New Zealand by descent at the date of commencement of the Citizenship of Zimbabwe Amendment Act, that is to say, 6 July 2001. The second was whether or not the refusal by the appellant to renew the respondent's Zimbabwe passport was lawful.

I take the first issue. The learned judge could not grant or dismiss the F application for the declaratory orders sought by the respondent without first deciding whether or not she was a citizen of New Zealand by descent. The learned judge did not, however, call for the production of the relevant statutes of New Zealand for examination and decision on the question of whether the respondent was a citizen of New Zealand by descent. She accepted the respondent's *ipse dixit* that she was not a citizen of New Zealand by descent.

G One would have expected the learned judge to grant the respondent the relief she had applied for once she found that she was not a holder of New Zealand citizenship by descent. The judgment shows that the declaration she made was that the respondent was a citizen of Zimbabwe. That was a misdirection on the part of the learned judge because the respondent's Zimbabwe citizenship *per*

Malaba JA

se was not in issue. What was in issue was whether she held the citizenship A of New Zealand.

In the light of the misdirection by the court *a quo*, we have to answer the question whether the respondent was a citizen of New Zealand at the date of commencement of the Citizenship of Zimbabwe Amendment Act 2001.

The British Nationality and New Zealand Citizenship Act 1948 ("the 1948 B Act"), which came into effect on 1 January 1949, provides the answer. Section 16 provided that:

> "(1) A person who was a British subject immediately before the date of the commencement of this Act shall on that date become a New Zealand citizen if he possesses any of the following qualifications, that is to say — C
>
> (a) that he was born within the territories comprised at the commencement of this Act in New Zealand and would have been a New Zealand citizen if section six of this Act had been in force at the time of

his birth;

(b) …

(c) …

(2) A person who was a British subject immediately before the commencement of this Act shall on that date become a New Zealand citizen if at the time of his birth his father was a British subject and possessed either of the qualifications specified in paragraphs (a) and (b) of the last preceding subsection."

Section six, which is referred to in s 16, was to the effect that every person born in New Zealand after the commencement of the 1948 Act became a New Zealand citizen by birth.

Section 3 of the 1948 Act defined a "British subject" as:

> "1. Every person who under this Act is a New Zealand citizen or who under any enactment for the time being in force in any country mentioned in subsection three of this section is a citizen of that country."

Amongst the countries mentioned in subs (3) of s 3 of the 1948 Act was "Southern Rhodesia".

At the time of her birth, the respondent's father was a British subject so she too became a British subject because she was born in "Southern Rhodesia". Her father was also a citizen of New Zealand in addition to being a British subject. As she was born of a British subject who was a citizen of New Zealand the respondent automatically became a citizen of New Zealand by descent in terms of s 16(2) of the 1948 Act. Citizenship of New Zealand by descent was

Malaba JA

conferred upon the respondent by operation of law. She did not have to take any steps to claim it. The only step she could have taken was the renunciation of that citizenship.

Section 21 of the 1948 Act gave the respondent the right, on attainment of full age, to make a declaration in the prescribed manner, renouncing her citizenship of New Zealand by descent. It is, however, clear from the averments in the founding affidavit that the respondent did not renounce her citizenship of New Zealand by descent.

The 1948 Act was amended by the Citizenship Act of 1977 ("the 1977 Act"). Section 13(2) of the 1977 Act protected the respondent's citizenship of New Zealand by descent, in that it provided that a person who, by virtue of the 1948 Act, was immediately before its commencement a New Zealand citizen by descent was to be deemed to be a New Zealand citizen by descent.

The respondent had a right under s 15 of the 1977 Act to renounce the citizenship of New Zealand by descent. She did not exercise that right.

New Zealand passed the Citizenship Amendment Act 2000 ("the 2000 Act"), which provided in s 4 that the citizenship of any New Zealand citizen by descent that had lapsed before its commencement was reinstated with effect from the time it lapsed. There is no evidence at all of the respondent's citizenship of New Zealand by descent having lapsed at any time before the commencement of the 2000 Act. Even if it had lapsed, the citizenship was reinstated.

New Zealand also passed the Citizenship Amendment Act (No 2) 2001 ("the 2001 Act"), which again provided in s 10 that the citizenship of any New Zealand citizen by descent which had lapsed before its commencement was reinstated with effect from the time it lapsed. It is clear that there has been a deliberate policy to protect the citizenship of New Zealand acquired by descent automatically by the first generation born outside New Zealand.

It is also clear from the relevant statutes of New Zealand that the appellant was correct when he alleged that the respondent was a citizen of New Zealand by descent at the date of commencement of the Citizenship of Zimbabwe Amendment Act 2001.

The learned judge should have found in favour of the appellant on the question whether or not the respondent was a citizen of New Zealand by descent. She should have dismissed the application in respect of the declaratory order sought.

The appeal must succeed on the question of whether or not the respondent was a citizen of New Zealand by descent at the date of commencement of the Citizenship of Zimbabwe Amendment Act, 2001. The order of the court *a quo*

Malaba JA

declaring the respondent a citizen of Zimbabwe has to be set aside. A

I must add a word about the order the appellant is seeking in the event of being successful in this appeal. He prays that the order of the court *a quo* be set aside and substituted with an order that:

> "1. The applicant lost Zimbabwean citizenship by operation of law as she failed to renounce her New Zealand citizenship in terms of s 9 of the B Zimbabwe Citizenship Act. Accordingly the applicant is not entitled to a Zimbabwean passport."

This court is unable to grant to the appellant the order declaring that the respondent lost her Zimbabwe citizenship. The situation being considered is that which existed at the time the respondent made the application to the High Court for the determination of her rights under the Citizenship of Zimbabwe C Act. She made the application two days before the expiry of the period within which she was required to have effectively renounced her New Zealand citizenship by descent. The period could not have expired whilst the court was considering the application.

In my view, the institution of the proceedings had the effect of stopping the D running of the period of renunciation of the respondent's foreign citizenship pending the final resolution of the issues raised by the application. At the time the application was made, the respondent had not lost her Zimbabwe citizenship because the expiry of the period of six months from the date of commencement of the Citizenship of Zimbabwe Amendment Act, 2001, which would have brought about the loss of her Zimbabwe citizenship, had not occurred. E Consequently, the respondent has two days from the date this judgment is handed down within which to effectively renounce her New Zealand citizenship by descent if she is desirous of retaining her Zimbabwe citizenship.

I turn now to consider the question of the lawfulness of the appellant's refusal to renew the respondent's Zimbabwe passport. A Zimbabwe passport is F ordinarily issued to a citizen of Zimbabwe. At the time the appellant refused to renew the respondent's passport she was a citizen of Zimbabwe. She would only have lost her Zimbabwe citizenship after the expiry of the six-month period on 6 January 2002 without her having effectively renounced the New Zealand citizenship and submitting the relevant renunciation of foreign citizenship declaration form. G

As a citizen of Zimbabwe the respondent was entitled to a Zimbabwe passport. The refusal to renew her Zimbabwe passport on the ground that she also held New Zealand citizenship by descent which she had not renounced, when in fact the period within which she was required to do so had not expired, was unlawful. The learned judge was correct in deciding that the respondent was entitled to a Zimbabwe passport. She is entitled to that passport until she loses H

Malaba JA

A Zimbabwe citizenship in terms of s 9(7) of the Act. As the respondent has two days within which to effectively renounce her New Zealand citizenship by descent and retain her Zimbabwe citizenship, this court cannot grant the appellant the order that she is not entitled to a Zimbabwe passport.

It must follow that the appeal against that part of the court *a quo's* order directing the appellant to renew the respondent's Zimbabwe passport must B fail. We were told in the course of the hearing of the appeal that the appellant has complied with the order. That was the proper thing to do in the circumstances.

For the avoidance of doubt, the respondent has two days, from the handing down of this judgment, within which to renounce her New Zealand citizenship in accordance with the New Zealand Citizenship Act. In the event of her C failure to do so, she will lose her Zimbabwean citizenship by operation of the law.

The following conclusion is reached:

The appeal succeeds with costs in respect of the question whether the respondent is a citizen of New Zealand by descent. The order of the court D *a quo* declaring the respondent a citizen of Zimbabwe is set aside and in its place is substituted the following:

> "The application for an order that the provisions of s 9(7) of the Citizenship of Zimbabwe Act [*Chapter 4:01*] as amended and the Citizenship of Zimbabwe (Renunciation of Foreign Citizenship) Regulations, 2001 (Statutory Instrument 217/2001) do not apply to the applicant and that she E was automatically to remain a citizen of Zimbabwe after 6 January 2002 is dismissed with costs."

The appeal against the order directing the appellant to renew the respondent's Zimbabwe passport is dismissed with costs.

F Chidyausiku CJ and Ziyambi JA concurred

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

Gill, Godlonton & Gerrans, respondent's legal practitioners

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Source:
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DE MONTILLE v DE MONTILLE 2003 (1) ZLR 240 (H)

Citation	2003 (1) ZLR 240 (H)
Case No	Judgment No. HB-20-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	6 February 2003; 27 February 2003
Judgment	27 February 2003
Counsel	*J James*, for the applicant *Ms N Ncube*, for the respondent
Case Type	Urgent civil application
Annotations	Link to case annotations

Flynote

Family law — *child — interests of — paramountcy of — balancing of* C *interests of parents and those of child — emigration of mother with young child against wishes of father — factors to be considered*

Headnote

The applicant wished to emigrate to Australia, taking her three-year-old son with her. She obtained an order from the High Court directing the child's D father, from whom the applicant was separated, to sign the necessary forms to obtain a passport for the child. He noted an appeal against the order on the grounds that he had an unusually close relationship with his son and that the applicant had not made adequate arrangements for his care in Australia. The applicant sought to have the order executed pending appeal on the ground that the respondent had noted the appeal E solely in order to delay her son's emigration. The evidence indicated that the respondent himself was preparing to emigrate to Australia.

Held that in such cases the interests of the minor are always the decisive factor; this is called the welfare principle in England. In balancing the claims and interests of the father with the interests

of the child, the court F has to be careful not to let parental claims and interests overshadow the child's interests. Claims of parenthood are relevant only in so far as they indicate what is best for the child.

Held, further, that in cases of this kind 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 into account the child's need for stability and continuity, G not only in relationships with parents, but also in physical surroundings, school, friends and, above all, brothers and sisters.

Held, further, that the courts will not readily deprive the mother of lawful custody without good cause; in this regard the mother enjoys a built-in advantage. H

Ndou J

A *Held*, further, that in the light of the welfare principle there were no prospects of success on appeal. This was one of the exceptional cases where execution of the order pending appeal was merited.

Cases cited

Allan v Allan 1959 (1) R & N 499 (SR); 1959 (3) SA 473 (SR)

B *B v B (Custody of Children)* [1985] FLR 166

C, re (a minor)(custody of child) (1980) 2 FLR 163

Fortune v Fortune 1955 (3) SA 348 (A)

J & Anor v C & Ors [1970] AC 668; [1969] 1 All ER 788 (HL)

Kuperman v Posen 2001 (1) ZLR 208 (H)

C *Menasche v Menasche* 1966 (1) PH B9 (C)

More v Richardson 1974 (2) RLR 16 (G)

Nugent v Nugent 1978 RLR 66 (G)

S v Bezuidenhout 1971 (4) SA 32 (T)

September v Karriem 1959 (3) SA 687 (C)

Short v Naisby 1955 (3) SA 572 (D)

D *W v W* 1981 ZLR 243 (A)

W, re (a minor)(custody) (1982) 4 FLR 492

Case information

J James, for the applicant

Ms N Ncube, for the respondent

E [*The judgment has been altered to remove references to the name of the child whose passport application was at issue in the proceedings*.]

Judgment

Ndou J: On 23 January 2003 Cheda J ruled in favour of the applicant in F HB-6-03 (HC 2794/02) in the following terms:

> "1.That the first respondent be and is hereby directed to sign section 5 of the application for a passport for [his child], birth entry 08-2025594D 00, within two days of this order.
>
> 2. That the first respondent be and is hereby ordered and directed to sign G section 69 of the applicant's application for a student (temporary) visa pertaining to Australia within two days of the date of this order.
>
> 3. In the event that the first respondent fails to sign the aforesaid documents in paragraphs 1 and 2 within two days of the date of this order, that the Deputy Sheriff, Bulawayo be and hereby is directed and ordered and authorised to sign the aforesaid documents on behalf of the first H respondent.

Ndou J

4. That the first respondent pays the costs of this application on a legal A practitioner and client scale."

The matter was placed before me by the consent of the parties and my brother judge, who should have dealt with the application.

The full facts of the matter appear from HB-6-03. Briefly, the parties are married to each and the said marriage still subsists, although it is falling apart B as evinced by the divorce proceedings that have commenced. During the happier times in their matrimony, they decided to go and settle in Australia. Preparations for their emigration culminated in the respondent obtaining a five-year Australian visa. He subsequently travelled to Australia. Their happy and mutual emigration was, unfortunately, not to be. Their matrimonial bliss came to an abrupt end, resulting in a separation. During the separation, the C applicant made her own arrangements to go to Australia with their son for a initial period of a year. She enrolled herself at Queensland University of Technology for a B. Ed degree one-year in-service training. She registered as a teacher in Australia and obtained a part time job as a lecturer. She secured a child-care service for their son at Kevin Grave Child Care Centre. She D secured accommodation with a friend, with two other friends offering her alternative accommodation in the event of her first choice accommodation not materialising. The respondent did not seem to approve these arrangements. Although he initially seemed to co-operate, after he had in his possession the child's passport problems developed, resulting in the application before Cheda J. The respondent has lodged an appeal against the above mentioned E order by Cheda J with the effect that the operation of the said order is suspended. This is what brought about the urgent application before me. The objective of this application is to ensure the execution of the order of Cheda J pending appeal. The applicant submits that the appeal was lodged *mala fide* in order to delay the emigration of the applicant and the child. Ms *Ncube*, for the respondent, has no qualms with the relief that the latter facilitates that the F child obtains another passport but objects to his removal from Zimbabwe. The main thrust of the appeal is twofold. First, the respondent submits that there is an unusually close father-son relationship between him and the child. Second, that the applicant has not made adequate arrangements for child's settlement in Australia. By failing to take these factors into consideration (and other factors articulated in the notice of appeal) the respondent alleges G misdirection on the part of the learned judges's order. These objections centre around parental responsibility.

It is trite that this court has the common law power to look after the interest of all minors and, if necessary, to interfere with exercise of parental power. The interests of the minor in such matters are always the decisive factor: see H

Ndou J

A *Fortune v Fortune* 1955 (3) SA 348 (A); *Short v Naisby* 1955 (3) SA 572 (D); *September v Karriem* 1959 (3) SA 687 (C) and *W v W* 1981 ZLR 243 (A). This is called the welfare principle in England. But how does one balance the wishes and claims of the father, as is the case *in casu,* with the welfare of the child?

B In Zimbabwe, the attitude of the courts is that they will not readily deprive the mother of lawful custody without good cause being shown: see *More v Richardson* 1974 (2) RLR 16 (G) and also *Nugent v Nugent* 1978 RLR 66 (G). This attitude *prima facie* favours the applicant's case. The mother enjoys built-in advantage: see *Re W (a Minor) (Custody)* (1982) 4 FLR 492. As alluded to above, the respondent's concern is the intended removal of the child C from Zimbabwe. He argues that it is not in the best interests of the child to go to Australia without adequate prior arrangements. Reading through the various documents filed and averments by the parties, it seems that, initially, it was both parties' intention to move to Australia with the minor. The respondent now has second thoughts about the move and has made passionate pleas to avoid his separation from the minor. He dwelt more on his parental D claims. The court has to be careful not to let such parental claims and interests overshadow the interest of the child. The question is one of relative weight to be given to the wishes and claims of the natural father against those of the minor. In the English decision of *J & Anor v C & Ors* [1970] AC 668; [1969] 1 All ER 788 (HL) it was held that this involves a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices E and other circumstances, are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. This suggests that the claims of parenthood are only relevant in so far as they indicate what will be best for the child.

The respondent's greatest fear seems to be that applicant will not return the F child in the event that he is awarded custody in the pending matrimonial matter. It may be necessary to obtain suitable assurances or safeguards to ensure the return of the child. The nature of assurance or safeguard required will obviously depend on the circumstances of each case: for example, see *Menasche v Menasche* 1966 (1) PH B9 (C); *Allan v Allan* 1959 (1) R&N 499 (SR); 1959 (3) SA 473 (SR) at 476 and *The Law of Access to Children* by I G D Schafer at pages 88 – 89. *In casu,* it seems to me that such fear is attended to in three main ways. First, the matrimonial case which in this jurisdiction may be used to provide the assurance that the child will be returned to Zimbabwe: see *S v Bezuidenhout* 1971 (4) SA 32 (T). Second, the facts reveal that the applicant has a house in Bulawayo, which, if need be, may be used as H security: see the *Menasche* case *supra*. Third, the respondent himself has

prepared to emigrate to Australia by August 2003. He has a visa and the A requisite authority to reside in Australia. He has a valid ticket to Australia. Had it not been for the separation, he had planned to emigrate to Australia with the applicant and the child.

The respondent also criticises the day-care arrangement that the applicant made for the child. This arrangement should be seen in context. This is a half B day arrangement when the applicant is teaching. On the issue of day-care I am impressed by what Brenda M Hoggett stated in *Parents and Children: The Law of Parental Responsibility* 4 ed p160:

> "To many, day care, outside the home is the next best thing. With a good child-minder or nursery, the child can build and retain a close relationship with his parents and family,while receiving the care, company and C stimulation he needs. It can also be a valuable way of relieving stress in the home, or redressing material or social disadvantage."

The child is aged three years and some months. In cases of this kind, 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 into account the child's need for stability D and continuity, not only in relationships with parents, but also in physical surroundings, school, friends and above all brothers and sisters: see *Re C (A Minor) (Custody of Child*) (1980) 2 F L R 163 and *B v B (Custody of Children*) [1985] F L R 166.

I have dealt extensively with these principles on the question of minors in order to apply these principles in the determination of the prospects of success E of appeal.

I believe that even on appeal the welfare principle will determine the fate of the appeal. On page 6 of the cyclostyled judgment Cheda J determined that the applicant was a custodian parent of the child in terms of s 5 of the Guardianship of Minors Act [*Chapter 5:08*]. From the facts this finding cannot be disputed. F The learned judge rightly pointed out that the respondent himself intended to emigrate to Australia and in furtherance of this objective he sought and indeed obtained a five-year Australian visa and has visited that country on an explorative basis. The respondent did not take the learned judge into his confidence on his current plans. On page 7 the learned judge applied the welfare principle and stated as follows: G

> "The interest of the child takes precedence over those of its parents. In making a determination the courts should be guided by the arrangements and facilities each parent has made for the child. Applicant has shown that she has secured accommodation for herself and the child, a day-care centre for the child and teaching post, all these in my view are in the interest of the welfare of the child. Against that is the first respondent who H

> A is a safari operator and/or conservationist whose core business is interaction (*sic*) with the bush in most cases."

On page 5 the learned judge appreciated "the time honoured principle by our courts that children should not be disturbed from their accustomed environment unless that it is shown that it is [in] the best interest of the children to do so." He made reference to the judgment of Chatikobo J in B *Kuperman v Posen* 2001 (1) ZLR 208 (H). He carefully distinguished the facts of this case from those in the *Kuperman* case *(supra*). He weighed the circumstances of the custodian mother against those of the non-custodian father of this child who is just over three years old but still under four years. Children of this age, in my view, will not be greatly affected by the movement to another country

like older children. On the one hand, the custodian mother produced a detailed plan of her C intended emigration, supported by documentary evidence. She was open and candid with the court on exactly what her emigration entails. On the other hand, the non-custodian father seems content with the criticism of the mother's arrangements. He does not give the court a candid explanation of his own plans. It is common cause he intended to emigrate to Australia and took D steps in that direction. He does not tell the court whether he has abandoned these plans, and if so why. If that is not the case, he does not say what he intends to do in Zimbabwe and how his circumstances will accord with the best interests of the child. He was very emotional or passionate about his bond to this child. That bond is not necessarily in the best interest of the child. He did not indicate in his evidence how he would deal with the situation of the child E of such a tender age in light of the nature of his employment.

Coming to the specific grounds of appeal, my observations are the following. First, the learned judge deliberately ordered the respondent to sign section 5 of the application for a passport. From his judgment, he obviously appreciated that the effect of the order is removal of the child from the jurisdiction of the F court and physical access of the non-custodian father. He gave his reasons for doing so. In this regard he cannot be faulted on appeal as he apparently applied the welfare principle correctly. There are no prospects of success on the first ground. Second, the learned judge actually found that the respondent had lost the child's passport. The respondent prefers to say he misplaced it. Be that as it may, it was only produced by the respondent after the order. This tends to G support the learned judge's finding that such loss or misplacement was not *bona fide* on the part of the respondent. Third, the learned judge took into consideration the respondent's objection to the arrangements by the applicant. The order was made after hearing both parties and there is no misdirection. Fourth, the learned judge took into account the respondent's objection and H nevertheless ruled in favour of the applicant and ordered him to sign the

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application for student permit. The nature of this application renders the A ground of appeal against the award of costs at an enhanced or punitive scale unnecessary to consider at this stage.

I find that, from the foregoing, there are no prospects of success on appeal. This is one of the exceptional case where execution of the order pending appeal is merited. I, accordingly, grant the application in terms of the draft. B

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

Lazarus & Sarif, respondent's legal practitioners

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ANABAS SERVICES (PVT) LTD v MINISTRY OF HEALTH & ORS 2003 (1) ZLR 247 (H)

Citation	2003 (1) ZLR 247 (H)
Case No	Judgment No. HB-21-2003
Court	High Court, Bulawayo
Judge	Ndou J
Heard	7 February 2003; 27 February 2003

Judgment 27 February 2003

Counsel Miss *H M Moyo,* for the applicant
S Mazibisa, for the first and third respondent
N Mazibuko, for the second respondent

Case Type Civil action

Annotations No case annotations to date

Flynote

C **Practice and procedure** — *parties — joinder of — joinder by order of court — when court can exercise power to order joinder mero motu — necessary party with a direct and substantial interest in the order which the court might make — Ministry of Health — Minister should be cited — improper to cite the Ministry — State Procurement Board — whether may be cited in its own name*

Headnote

D The applicant company brought an action against the Ministry of Health and the State Procurement Board after its cleaning contract at Mpilo Hospital in Bulawayo was cancelled at extremely short notice. Although the original written agreement had expired, the applicant had not stopped rendering the cleaning services, and the parties to the written agreement E went on as if the agreement had been extended or renewed without the arrangement being reduced to writing as required by the initial contract.

The Ministry of Health sought to rectify the situation by inviting tenders for the cleaning services that the applicant was providing. The applicant submitted its tender and was subsequently informed by the Superintendent F of Mpilo Hospital of the decision of the State Procurement Board, and given three days notice to cease operations so that the second respondent (a cleaning company) could assume the duty. The respondents took the point *in limine* that the application was defective due to wrong citation of the parties, and the court held that it was necessary to resolve the preliminary issues regarding joinder and citation of parties.

G *Held*, that the initial contract and the purported tacit renewal were effected through the Superintendent of Mpilo Hospital and it was the Superintendent's office that wrote the letter of termination. Although the Superintendent was acting as an agent of the Minister of Health, all the acts in respect of the contract were carried out through her office. The H circumstances of the case were such that it was essential to join the Mpilo

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Hospital Superintendent as a party because she had a direct and substantial A interest in the order which the court might make in the matter.

Held, further, that where such an interest becomes apparent the court has no discretion and cannot allow the matter to proceed without joinder or judicial notice of the proceedings to that party.

Held, further, that the court has inherent or common law jurisdiction to order joinder in such a case and may exercise such power *mero motu.* B

Held, further, that it was improper to cite the Ministry of Health and that the Minster should be cited instead. As this was an urgent application, however, it was not necessary to notify the Minister.

Held, further, that it was proper for the applicant to cite the State Procurement Board as a respondent, the Board being a body corporate under the Act C that created it.

Held, further, that the proceedings should be stayed until the questions of the non-joinder of the Superintendent of Mpilo Hospital and the citation of the Minister of Health had been properly attended to.

Cases cited D

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)

Bekker v Meyring, Bekker's Exor (1844) 2 Menz 436

Erasmus v Fourwill Motors (Edms) Bpk 1975 (4) SA 57 (T)

Gibson & Anor v Sanders 1915 EDL 174

Harding v Basson & Anor 1995 (4) SA 499 (C)

Langa Union Co v Luderitz Bay Cannery 1944 SWA 6 E

Ngcwase & Anor v Terblanche NO & Ors 1977 (3) SA 796 (A)

Peacock v Marley 1934 AD 1

SA Steel Eqpt Co (Pty) Ltd & Ors v Lurelk (Pvt) Ltd 1951 (4) SA 167 (T)

Toekies Butchery (Edms) Bpk en Andere v Stassen 1974 (4) SA 771 (T)

Legislation referred to F

High Court Rules 1971(RGN 1047 of 1971), Order 5A rr 43A and 43B

State Liabilities Act [*Chapter 8:14*] ss 3, 4, 6 and 7

Procurement Act [*Chapter 21:14*] s 4

Case information

Miss *H M Moyo,* for the applicant G

S Mazibisa, for the first and third respondent

N Mazibuko, for the second respondent

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Judgment

A **Ndou J:** The applicant seeks a provisional order in the following terms:

"**Terms of final order sought**

(1) That the contract between the applicant and the first respondent for the rendering of cleaning services at Mpilo Hospital be and is hereby deemed valid and operational until its expiry on 23 July 2003. B

(2) That first respondent be and is hereby ordered and directed to forthwith reinstate the applicant's cleaning services contract at Mpilo Hospital with effect from 1 February 2003 until such time as the said contract is terminated lawfully.

(3) The first respondent be and is hereby interdicted and barred from entering into a cleaning services contract with second respondent or any C other supplier of such services at Mpilo Hospital during the duration of the applicant's contract with the first respondent, and if the parties have already entered a contract, that such contract be declared null and void and of no force and effect.

(4) The second respondent be and is hereby barred and interdicted from rendering any cleaning services at Mpilo Hospital or from interfering D with the applicant's operations during the duration of the applicant's contract with the first respondent.

(5) That the third respondent be and is hereby ordered to comply with the provisions of section 22(3) of the Procurement Regulations SI 171 of 2002 in relation to the applicant.

(6) That the respondents pay the costs of the application.

E **Interim Relief**

(a) That the contract between the applicant and the first respondent for the rendering of cleaning services at Mpilo Hospital be and is (*sic*) hereby deemed valid and operational until its expiry on 23 July 2003.

(b) That the first respondent be and is hereby ordered and directed to forthwith reinstate the applicant's cleaning services contract at F Mpilo Hospital with effect from 1 February 2003 until such time as (*sic*) the said contract is terminated lawfully.

(c) The first respondent be and is hereby interdicted and barred from entering into a cleaning services contract with the second respondent or any other supplier of such services at Mpilo Hospital during the duration of the applicant's contract with the first respondent, as (*sic*) G that such contract be declared null and void and of no force and effect.

(d) The second respondent be and is hereby barred and interdicted from rendering any cleaning services at Mpilo Hospital or from interfering with the applicant's operations during the duration of the applicant's contract with the first respondent.

Ndou J

Service of order A

That this order be served and on the first respondent at c/o The medical Superintendent, Mpilo Hospital and on the second respondent at No. 3 Main Street, Bulawayo and on the third respondent at Harare."

The salient facts of this matter are that the applicant company was formed in 1999 by former employees of the Ministry of Health who were based at Mpilo B Hospital. At that stage, the Ministry of Health had decided to retrench general workers who were mainly employed to clean the hospital. Government policy at the time was that the retrenchees would form their own company and then tender their services to their erstwhile employers. It was also government policy that the applicant company would be given preference when awarding the tenders. This affirmative action operated in favour of the applicant, as it C was awarded the cleaning services tender at Mpilo Hospital. The resultant written agreement was for a period of 12 months. This written agreement terminated pursuant to clause 3 on 1 August 2000. This is so because this clause specifically states:

"3. **Period of the agreement**

Subject to the provisions of clauses 15 and 16 hereunder, this agreement D shall be for a period of 12 months (*sic*) commencing on 1 August 199 (*sic*) and upon the expiration of the said period shall terminate unless it is extended by written agreement of the parties."

Clause 15 requires that any variation to the agreement "shall be agreed to by the parties and reduced to in writing". Clause 16 provides that the agreement E may be terminated by either party giving to the other not less than three calendar months' notice in writing. From these terms, it is apparent that the written agreement expired on 1 August 2000. The applicant did not, however, stop rendering the cleaning services. In fact, the parties to the written agreement went on as if the agreement had been extended or renewed until 27 January 2003. This is strange bearing in mind that huge sums of public funds F were involved. Payment was being made from the fiscus without a written agreement. Be that as it may, in May 2002 the Ministry of Health decided to follow the proper tender route. The cleaning services that the applicant was providing at Mpilo were advertised in the media. The applicant naturally submitted its tender. The applicant was advised by the Superintendent, Mpilo G Hospital, by letter dated 27 January 2003, of the outcome of the State Procurement Board. I think it necessary to quote this letter in some detail.

The letter was addressed to the applicant in the following words:

"This procuring entity is advised by the Board that PBR 0913 of 5 September 2002 awarded the above tender to Nyekile One Penny Half Penny at a price of $40 635 600. To date, Mpilo Central Hospital and the said H

Ndou J

A Nyekile One Penny Half Penny have not entered into a formal contract and that formality has to be implemented without further delay, failing which, continued service from you would be in breach of the procurement regulations.

It is against this background that I have to advise that you cease operations with effect from after duty on 31 January 2003 for Nyekile One Penny B Half Penny to assume cleaning services on 1 February 2003."

The letter emanated from the office of the Medical Superintendent, Mpilo Hospital. It seems that the latter was aware of the award of the tender to the second respondent because on 23 September 2002 she had "appealed" against the award of the tender. The main thrust of her appeal or objection was based on the fact that their local Mpilo Hospital Procurement Tender Committee had C recommended the applicant. This being a mere recommendation it obviously did not bind the State Procurement Board. In the exercise of its powers, the latter did not go along with the recommendations of Mpilo Hospital Procurement Tender Committee and instead awarded the second recommended company. If this is done in accordance with the regulations governing the exercise of

the D State Procurement Board's powers, there is nothing wrong with that. Most of the details in the appeal are characterised by the discrediting of the second respondent and vigorous campaigning for the applicant.

For the record, the applicant comprises 180 employees. I agree that it was expecting too much of the applicant to give it three days' notice to cease operations.

E The applicant's case is that the agreement has been tacitly renewed or extended every twelve months since August 2000 by allowing the applicant to continue to provide cleaning services and paying for the said services. It is submitted by the applicant that the tacit agreement should be construed according to the terms embodied in the original written agreement. The F applicant submits that the first respondent is estopped from evicting it in such circumstances.

The first and third respondents submit that the application is defective on account of failure to comply with the provisions of the State Liabilities Act [*Chapter 8:14*] and Order 5(A) of the rules which deal with the institution of proceedings against the state. They further took issue with citation of the G Ministry as opposed to the Minister of Health, and the State Procurement Board as opposed to the responsible Minister, namely, of Finance. The State Procurement Board, the submission goes, is not a legal entity outside the parent Ministry. They also submit that the matter is not urgent as the applicant can always sue for damages as an alternative. The second respondent challenges

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Ndou J

the basis of the alleged renewal of the contract in light of express provisions A against tacit extension.

Before dealing with the merits of the application, I think it is important and necessary to first resolve the point *in limine* raised by the respondents. The preliminary issues centre around the citation and joinder of parties. From the facts, it is clear that the initial contract was signed by Mpilo Hospital B Superintendent and the applicant. The purported tacit renewal was also effected through the same Superintendent. Although the latter was acting as an agent of the Minister of Health, all the acts in respect of the contract were carried out through her office. It is the Superintendent's office that wrote the letter of the purported termination. The circumstances of this case are such that it is essential to join the Mpilo Hospital Superintendent as a party because of C the interest she has in the matter. Further, her interest in the matter is evinced by the appeal that I have alluded to above. When such an interest becomes apparent this court has no discretion and cannot allow the matter to proceed without joinder or judicial notice of the proceedings to that party: see Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed by Van Winsen, Cilliers and 165. The Mpilo Hospital Superitendent D must be joined as a necessary party because she has a direct and substantial interest in the order that this court might make in these proceedings: see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Toekies Butchery (Edms) Bpk en Andere v Stassen* 1974 (4) SA 771 (T); *Erasmus v Fourwill Motors (Edms) Bpk* 1975 (4) SA 57 (T); *Harding* v E *Basson & Anor* 1995 (4) SA 499 (C).

This court has inherent or common-law jurisdiction to order joinder in such a case and may exercise such power *mero motu*: see *SA Steel Equipment Co (Pty) Ltd & Ors v Lurelk* 1951 (4) SA 167 (T); *Ngcwase & Ano v Terblanche NO & Ors* 1977 (3) SA 796 (A) at 806H, *Harding v Basson* case *supra* at 501D-E, *Toekies Butchery* case *supra*, and *Amalgamated Engineering Union* F *v Minister of Labour* case *supra*. *In casu*, I am satisfied that the Mpilo Hospital Superintendent is a necessary party and, therefore, must be joined.

The next issue is one of citation. Order 5A r 43A and 43B and of the State Liabilities Act *supra* are relevant in respect of the citation of the first and third respondents. In respect of the first respondent, the proceedings should have G been taken against the Minister of Health as opposed to the Ministry: see ss 3 and 4 of the State Liabilities Act *supra*. The applicant did not comply with the requirements of s 6 of the State Liabilities Act as it did not notify the Minister of Health of its intention to bring the proceedings. As this is an urgent application, s 6 will not apply if I determine that application is indeed urgent: see the exemption provided for in s 7(c). As regards the citation of the State H

Ndou J

A Procurement Board, I do not agree with the respondents that the Board should not have been cited. Firstly, the administration of the Procurement Act [*Chapter 21:14*] has been assigned to the Vice-President, and not the Minister of Finance. Secondly, in terms of s 4 of the Procurement Act, the State Procurement Board is a body corporate capable of suing and being sued in its own name. In the circumstances, there is nothing wrong in citing the State B Procurement Board in its own name.

From my foregoing findings, it is clear that there is a non-joinder of the Superintendent of Mpilo Hospital who is a necessary party. Further, the Minister of Health should be cited as opposed to the Ministry. As this is an urgent application, there is no need to notify the said Minister in terms of s 6 C of the State Liabilities Act. The applicant is exempted from such notice by the provisions of s 7(c).

For the Superintendent of Mpilo Hospital to apply to be added as a party, she can only do so by way of a court application. In this case, however, she has not applied to be joined. I have already alluded to the fact that this court has inherent or common-law jurisdiction to do so. This court, however, further has D this wide power in terms of Order 13 r 87(2)(b) which provides:

> "(2) At any stage of the proceedings in any cause or matter, the court may on such terms as it thinks just and either of its own motion or on application —
>
> (a) order any person who has been improperly or unnecessarily made a E party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
>
> (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the course or matter may be effectually and completely determined and adjudicated upon, to be added as a party;
>
> F but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

The issue of non-joinder is merely dilatory and as such must be taken *in initio litis* before issue is joined: see *Bekker v Meyring, Bekker's Executor* (1844) 2 Menz 436 and *Gibson & Anor v Sanders* 1915 EDL 174. I think that the question of citing the Ministry instead of the Minister should be dealt with in G a similar way.

In my view, the interests of the case demand that I do not dismiss the application, but instead, stay the proceedings until the questions of the nonjoinder of the Superintendent of Mpilo Hospital and the citation of the Minister of Health are properly attended to. This will also afford the applicant H an opportunity to think through the relief sought and the parties from whom

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Ndou J

such relief is sought: see *Peacock v Marley* 1934 AD 1 and *Langa Union Co* A *v Luderitz Bay Cannery* 1944 SWA 6.

I accordingly set aside the summons and stay the proceedings for the applicant to take remedial steps as outlined in the preceding paragraph. Costs shall be costs in the cause.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners B

Civil Division of the Attorney-General's Office, first and third respondents' legal practitioners

Calderwood, Bryce Hendrie & Partners, second respondent's legal practitioners C

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S v NORTJE 2003 (1) ZLR 255 (H)

Citation	2003 (1) ZLR 255 (H)
Case No	Judgment No. HB-23-03
Court	High Court, Bulawayo
Judge	Chiweshe J & Ndou J
Heard	21 October 2002; 27 February 2003
Judgment	27 February 2003
Counsel	***, for the appellant ***, for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

C **Criminal law** — *common law crimes — culpable homicide — motoring case — child pedestrian — nature of driver's duty of care when aware of presence of child on or near road*

Headnote

The standard of care required of a driver who sees children ahead of him is much higher than that ordinarily required of a driver approaching adult D pedestrians. It is not an excuse to say that the child pedestrian acted irrationally, unexpectedly or unreasonably. Children will by nature act irrationally. It is the duty of the prudent driver to anticipate such behaviour and take such steps as may be necessary to avoid accidents. Once a motorist becomes aware of the presence of a child on or near the road ahead of him, it is incumbent upon him to prepare for any E eventuality, given that children are prone to sudden and unpredictable behaviour. The motorist then has a duty to ensure that he has anticipated that kind of behaviour and must be prepared if need be to stop.

Cases cited

F *S v Duri* 1989 (3) ZLR 111 (S)

S v Ferreira 1992 (1) ZLR 93 (S)

Case information

***, for the appellant

***, for the respondent

Judgment

G **Chiweshe J:** The appellant was charged in the magistrates court with culpable homicide, it being alleged that on 6 October 1997 she was driving a Mazda 323 registration number 591-543F along the Bulawayo-Gwanda Road, Kensington, Bulawayo and negligently caused the death of H Ntandolwenkosi Ncube. She was charged in the alternative with negligent

Chiweshe J

driving, in contravention of s 52(2) of the Road Traffic Act [*Chapter 13:11*]. A

She pleaded not guilty but was nonetheless convicted on the main charge. She was sentenced to a fine of $2000 or, in default of payment, four months' imprisonment. In addition, she was prohibited from driving all classes of motor vehicles for a period of three months. She appeals against conviction only. B

The outline of the State case was to the following effect. On 6 October 1997 at about 16.30 hours, the appellant was driving southwards along the Bulawayo – Gwanda Road. At the relevant time she was on that stretch of the road that passes through the Kensington area, Bulawayo. The deceased, who resided at Plot 91 along the same road, was crossing the same road from his residence heading in a westerly direction when he was struck by the appellant's vehicle. C He was thrown about 12 metres away from the point of impact. As a result of the accident the deceased sustained head injuries. He died as a result of those injuries.

There are three lanes along that portion of the road. The appellant was driving on the side of the road which has two lanes going in the direction she was D travelling. The collision took place in the third lane which is the lane used by traffic travelling in the opposite direction. It was alleged the appellant had been negligent in one or more of the following respects:

(a) she was travelling at a speed which was excessive in the circumstances.

(b) She failed to stop or act reasonably when an accident or collision seemed E imminent.

(c) She failed to exercise a high degree of care called for from a driver who sees children in the road in front of her.

The appellant's defence outline read as follows:

> "1. …
>
> 2. … F
>
> 3. The accused will say she was using the inner lane before the accident.
>
> 4. That as she approached, the deceased looked at her car and was standing by the roadside giving the accused the impression he was giving way to her.
>
> 5. That she hooted at the deceased to ensure he noticed her presence. G
>
> 6. That when she was close the child *unexpectedly* bolted across the road.
>
> 7. The accused will say in an effort to avoid the accident she changed her gears downwards at the same time braking and swerving into the right lane." (my emphasis) H

Chiweshe J

A There were no eyewitnesses to this accident. The police witnesses only attended the scene in the aftermath. To that extent the appellant's version of what transpired must be accepted.

It is clear that the deceased's behaviour was unexpected and that the applicant took such evasive action as would be expected of a reasonable driver caught up in the situation that the applicant describes. If the deceased party had been B an adult, the appellant might well have been entitled to an acquittal.

However, the standard of care required of a driver who sees children ahead of her is much higher than that ordinarily required of a driver approaching adult pedestrians. It is not an excuse to raise as a defence that the child pedestrian acted irrationally, unexpectedly or unreasonably, the point being that children C will by nature act irrationally. It is the duty of the prudent driver to anticipate such behaviour and take such steps as may be necessary to avoid calamities such as the present. In *S v Ferreira* 1992 (1) ZLR 93 (S) at 95E Gubbay CJ held that:

> "Children should not be credited with the same mature intelligence and presence of mind as grown up people. A motorist must anticipate that a D child on or just next to the road may unexpectedly decide to run across oblivious of danger. He must keep his vehicle under such control as to be able to suddenly pull up if a child starts to cross the line of his route. He must prepare himself for such an eventuality. It has been aptly remarked that children are 'as wide as the road' and are liable to get into the way of a motorist without any overt warning."

E In the case of the *S v Duri* 1989 (3) ZLR 111 (S) at 113 McNally JA observed:

> "Children have a propensity for impulsive and sometimes irrational action and therefore greater care is demanded towards them than is otherwise necessary."

The gist of the appellant's argument in this appeal is that she took all F reasonable steps to avoid the accident. Thus she contends under para 2.4 of her heads of argument as follows:

> "The appellant's evidence was that she not only slowed down, braked and moved into the lane of on coming traffic in order to avoid an accident due to the deceased's sudden behaviour, but also that she drove with her lights on and that she sounded her horn before the child had entered the road. G Clearly appellant made every effort to ensure that not only every precaution was taken in order to avoid a collision with the child but also to ensure that the child had clear visibility of the motor vehicle and was fully aware that she was on the road."

That the appellant did all these things may not be in dispute. The question is H having done all that, does she pass the test set down in *Ferreira's* case *supra*?

2003 (1) ZLR p258

Chiweshe J

I should think not. To me the essence of the test boils down to the following A effect. Once a motorist becomes aware of the presence of a child on or near the road ahead of him, it is incumbent upon him to prepare for any eventuality, given that children are prone to sudden and unpredictable behaviour. The motorist then has a duty to ensure that he has anticipated that kind of behaviour and must be prepared if need be to stop. In the event that a collision occurs it B is not sufficient for the motorist to say that he slowed down, hooted, braked and did all those things that persons in appellant's shoes are wont to do. The duty of care required is much higher than that.

In the present case the appellant was driving through what has been described as a semi rural area. There are homesteads on both sides of that stretch of the road. She would have been on the look out for pedestrians and stray animals. C The road is wide and tarred. The weather was fine and visibility was good. She says she saw the deceased standing on the verge of the road to her left. The child had not suddenly entered the road then. She was able to slow down to a speed of 70 kilometres per hour. She had her lights on and had hooted to warn the deceased of her presence on the road. Thus far the appellant seemed to be in control of the situation. She however allowed herself to be in a situation D where it had become necessary to apply emergency brakes and swerve onto the path of oncoming traffic in an attempt to avoid the deceased who had suddenly entered the road. Regrettably her efforts in this regard went to naught when she struck the deceased. She had not anticipated the deceased would run into the road. She should have, as children are known to be impulsive. If she had E warned herself of the possibility of that kind of behaviour on the part of the deceased, she would have slowed down much further than the 70km/h she was doing and prepared to stop if needs be. Her failure to do so in situations where the standard of care required is very high constitutes negligence. Her actions taken as a whole point to one conclusion — that she was travelling at an excessive speed in the circumstances. Contrary to her argument, skid marks F measuring eleven paces are in my view indicative of a speed on the high side.

In my view therefore the trial magistrate did not misdirect himself in arriving at the decision that he did. Accordingly the appeal against conviction is dismissed in its entirety. G

Ndou J concurred

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S v RUTURI 2003 (1) ZLR 259 (H)

2003 (1) ZLR p259

Citation 2003 (1) ZLR 259 (H)

Case No Judgment No. HH-31-03

Court	High Court, Harare
Judge	Makarau J
Heard	20 February 2003; 28 February 2003
Judgment	28 February 2003
Counsel	*G Chikumbirike*, for the appellant *J Jagada*, for the respondent
Case Type	Bail appeal
Annotations	No case annotations to date

Flynote

C **Criminal procedure** — *bail — appeal — to High Court against decision of magistrate — nature of appeal — whether High Court can substitute its own discretion for that of magistrate — whether High Court can receive additional evidence on appeal*

Headnote

The appellant, who was facing charges of fraud or theft, was refused bail by D a magistrate. He appealed to the High Court against the refusal in terms of s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Held that the appeal was an appeal in the wide sense, meaning that the High Court could exercise and substitute its own discretion on the same facts that were presented in the lower court. The court therefore did not have to find a misdirection on the part of the magistrate before exercising its E discretion in the matter.

Quaere whether in such an appeal the court could accept or even call for additional evidence to buttress either of the cases that were made before the magistrate.

Cases cited F

Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S)

S v Chikumbirike 1986 (2) ZLR 145 (S)

Legislation considered

G Criminal Procedure and Evidence Act [*Chapter 9:07*], s 121

Case information

G Chikumbirike, for the appellant

J Jagada, for the respondent

Makarau J

Judgment

Makarau J: The appellant and one Nicholas Border Musona (who is not A appealing in the matter before me) appeared before the magistrates court on 3 February facing allegations of fraud, alternatively, theft. At the hearing, it was alleged against the accused that during the course of their employment with the First National Building Society as managing director and financial director

respectively, the two, without lawful authority, issued cheques from B the funds of the building society for their personal uses to the tune of $958 651 946,56.

The appellant and his co-accused were placed on remand on the basis of the above allegations. They then applied for bail. The application was dismissed. The ruling of the magistrate in denying bail is brief and reads as follows:

> "In considering the submissions made by both the state and the defence in C their application for bail, it is the court's view that if the accused are granted bail, there is a likelihood that they abscond considering the amount involved which is close to a billion and also the fact that they are internationally connected. As such, bail is refused."

The appellant noted an appeal against this denial of bail. A day after the appeal was noted, a further application for bail was made before the magistrates court D on the grounds that there were changed circumstances in the matter. The alleged change in circumstances appears to have been the contents of the review report compiled by KPMG on the balance sheet of the First National Building Society, showing how the sum of $958 651 946,56 was arrived at. The further application for bail was also dismissed. The magistrate was of the E view that there were no changed circumstances in the matter.

In his notice of appeal, the appellant alleges that the magistrate misdirected herself in three main respects. Firstly, there was no evidence before her that the appellant was "internationally connected". Secondly, she should not have denied bail on the sole basis that the appellant is facing a serious charge. Finally, the appellant alleges that the magistrate ought to have considered the F appellant's application separately from that of his co-accused.

It is apparent from the papers before me that the appeal was noted against the first refusal of bail. Nothing turns on the issue that a further bail application was made while the appeal before me was pending. Other than highlighting that this was the sequence of events, *Mr. Jagada* , properly in my view, did not G take issue with the procedure adopted by the appellant in this matter. It is a matter of procedural correctness that the appeal before me can only be against the magistrate's refusal to grant bail on 4 February 2003. No appeal was noted against the second refusal and no grounds have been advanced as showing the incorrectness of that decision. In essence, the second refusal of bail is of no practical effect to these proceedings. H

Makarau J

A It has been argued before me on behalf of the appellant that in deciding this matter, I am exercising my narrow appellate jurisdiction. As such, the argument proceeds, I must first find a misdirection on the part of the magistrate before I can be at large to consider the matter and substitute my own discretion for that of the magistrate. Mr *Chikumbirike* was quite clear in his submissions that, if I were to find as proven, any one of the misdirections alleged by the B appellant, I am then at large to use my own discretion in the matter and proceed to determine the application as if I were the magistrate.

What is being suggested by *Mr Chikumbirike* is the approach that the Supreme Court adopts when considering an appeal from the High Court. (See *S v Chikumbirike* 1986 (2) ZLR 145 (S)).

C The procedure when the High Court considers an appeal from the magistrates court appears to me to be somewhat different. The difference was recognised by Gubbay CJ in *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S). Commenting on the powers of the Supreme Court when considering an appeal from the High Court, the learned judge referred in passing to the powers of the High Court when considering an appeal from the magistrates court at page D 252E as follows:

> "While the Judge President, in considering the appeal, was at liberty to substitute his own discretion for that of the magistrate on facts placed before the latter, the present appeal is one in the narrow sense. The powers of this court are, therefore, largely limited. In the absence of an irregularity or misdirection, this court has to be persuaded that the manner in which E the Judge President exercised his discretion was so unreasonable as to vitiate the decision reached."

In this *dictum*, the learned judge appears to be suggesting that an appeal before the High Court is not an appeal in the narrow sense. He appears to suggest that it is an appeal in the wide sense, meaning that the appellate court exercises and F substitutes its own discretion on the same facts that were presented to the lower court. He however did not proceed as far as to say that it is a hearing of the bail application *de novo.*

The same point is in my view, implied in the comments by the author John Reid Rowland in his book *Criminal Procedure in Zimbabwe* in section 6-14 when he notes that in an appeal in terms of s121 of the Code, a judge may make such G order as seems just in the circumstances of the case. No mention is made of the fact that a judge has to find a misdirection on the part of the court *a quo* before exercising his or her discretion in the matter. Again, the author does not proceed to say the hearing of the appeal before a judge in such circumstances is a hearing of the application *de novo.*

H It thus appears to me settled that, in considering the appeal before me, I need

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Makarau J

not find a misdirection on the part of the magistrate before I exercise my A discretion in the matter. What is not made clear in the authorities I have cited above is whether or not in exercising that discretion, I am at liberty to receive or call for additional evidence to buttress either of the cases that were made before the magistrate.

The issue under discussion is important in the present application in that B attached to the respondent's response to the appeal, are two affidavits, whose contents were not before the magistrate who denied the appellant bail. The issue arises as to whether or not the two affidavits are properly before me and whether or not I can rely on their contents in arriving at my decision.

It appears to me that in the proper exercise of one's discretion, one may, in a proper case and without prejudicing any one of the parties, accept or even call C for additional evidence and submissions. I, however, express no firm view on the issue. In the matter before me, it is my considered opinion that the appeal may be resolved without admitting the two affidavits tendered by the respondent. I have resolved not to admit the affidavits as to do so may work an injustice to the appellant since the affidavits were filed as a direct answer to one of the D grounds of appeal raised by the appellant (that there was insufficient evidence before the magistrate). I will proceed to exercise my discretion on the facts that were before the magistrate.

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

Chikumbirike & Associates, appellant's legal practitioners E

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/RETRENCHED EMPLOYEES OF NATIONAL BREWERIES LTD v NATIONAL BREWERIES LTD & ANOR 2003 (1) ZLR 263 (S)

RETRENCHED EMPLOYEES OF NATIONAL BREWERIES LTD v NATIONAL BREWERIES LTD & ANOR 2003 (1) ZLR 263 (S)

Citation	2003 (1) ZLR 263 (S)
Case No	Judgment No. S-121-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwanuza AJA
Heard	24 September 2002; 6 March 2003
Judgment	6 March 2003

Counsel *H Zhou,* for the appellant
P Nherere, for the first respondent
No appearance for the second respondent

Case Type Civil Appeal

Annotations No case annotations to date

Flynote

Employment — *contract — termination — retrenchment — procedures not followed — employees being offered and accepting voluntary redundancy package if they resigned — unlawfulness of retrenchment irrelevant*

Headnote

D The first respondent wished to retrench the appellant and various former employees. Retrenchment proceedings were instituted but the correct procedures were not followed. However, each affected employee was offered a redundancy package if he resigned. They all did so. The appellant brought an application to have the retrenchment declared unlawful.

E *Held per* Cheda JA & Gwanzura AJA, Sandura JA dissenting that it was not open to the appellant to claim that he was retrenched unlawfully. He tendered his resignation from the first respondent freely and collected his package. That ended his employment with the first respondent.

Cases cited F

Prosser & Ors v Zimbabwe Iron and Steel Company HH-201-93

Martin v MBS Fastenings (Glynwed) Distribution Ltd [1983] IRLR 198

Mutare Board and Paper Mills (Pvt) Ltd v Kodzanai 2000 (1) ZLR 641 (S)

Legislation considered G

Labour Relations (General Conditions of Employment)(Termination of Employment) Regulations 1985 (SI 371 of 1985), s 2(1)(b)

Labour Relations (Retrenchment) Regulations, 1990 (SI 404 of 1990), s 10

Cheda JA

Case information

H Zhou, for the appellant A

P Nherere, for the first respondent

No appearance for the second respondent

Judgment

Cheda JA Although several grounds of appeal were given in the notice of appeal, at the hearing of this appeal the parties agreed that the grounds fell B under the following two heads:

1. Whether there is one or more retrenchees before the court.
2 Whether the retrenchment was lawful.

Mr *Zhou*, for the appellants, conceded that he could not challenge the decision on which retrenchee is before the court. C

The issue of the representation of the parties was dealt with in detail by the court *a quo* in its judgment of 5 September 2001.

In his founding affidavit Nathan Mudondo ("Mudondo") said he was bringing the application for and on behalf of the employees of the first respondent who were retrenched at the end of April 1999. He attached a list of the employees D concerned whom he said appointed him to make the affidavit on their behalf. He said he was also bringing the action in his capacity as chairman of the workers' committee which represented the employees concerned in the run up to the purported retrenchment.

There is not even a single supporting affidavit from any of the employees concerned. It is just his word to that effect. This is certainly insufficient. There E should be a proper mandate to represent parties in an action of this nature.

The trial court pointed out that even under the provisions of rule 89 of the High Court Rules, 1971, he should produce evidence to establish his claim that he is properly authorised to represent the parties concerned. This is very essential, especially where the authority to represent another party is challenged, F as in this case. In addition, the court must be satisfied that such party authorised the other to represent it, as an order for costs could be made against the losing party, including the party that is represented.

In challenging Mudondo's authority, the first respondent points out that the employees accepted their packages and left, while others actually retired. This makes it even more important for Mudondo to prove his mandate. He has not G done so. How could the two people who have retired authorise him to represent them in challenging the retrenchment which is not applicable to them? There should have been affidavits from each employee, even brief ones; as stated by Bartlett J in *Prosser & Ors v Zimbabwe Iron and Steel Company* HH-201-93.

I should point out that this is different from a class action, and that even in a H

A class action one cannot just allege that he or she has been authorised by others to represent them. The authority to represent others will have been given by a judge in a court application.

In the absence of proof, the court *a quo* was correct in holding that only Mudondo was before the court.

B Turning now to the retrenchment, it has been submitted that the first respondent unlawfully retrenched the employees concerned.

The Labour Relations (Retrenchment) Regulations, 1990 (SI 404 of 1990) ("the Regulations") set out the procedure to be followed when retrenching employees. "Retrench" is defined in the Regulations as follows:

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

The Regulations then set out the steps to be followed. I understand retrenchment to be a move taken by an employer against the employees and discussed with D the various organs referred to before it is effected.

In this case, it is clear that the steps set out in the Regulations were not followed.

The workers did not leave employment according to the above arrangement. In fact, where there is retrenchment, the consent of the employee or employees E is not the controlling factor. What is important is to follow the procedure laid down and obtain the necessary authority, because while an attempt to reach agreement with the employees concerned should be made, the retrenchment does not depend on their consent or refusal.

The Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 0f 1985), provides as follows:

> F "**Termination of contract of employment**
>
> 2(1) No employer shall, summarily or otherwise, terminate a contract of employment with an employee unless —
>
> (a) …
>
> (b) he and the employee mutually agree, in writing, to the termination G of contract; or …".

This is a completely different situation from retrenchment. In other words, if an employer and an employee decide and agree to part, for whatever reasons, and the agreement is in writing, then retrenchment procedures fall away. There is no need to go through the steps laid down for retrenchment. There is no need H to obtain the authority of the various organs referred to, including the Minister

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Cheda JA

of Public Service, Labour and Social Welfare. In this matter the Minister's A authority was given.

According to the papers, this is what happened in this case. Even if initially the employer intended to retrench but failed to follow the laid down procedures, once the employees concerned decided to resign, the need to follow the retrenchment steps fell away. The employees concerned made written B applications for voluntary resignation. The matter had been discussed at meetings. Circulars had been distributed to them. They were made aware of how the packages were to be calculated. They were represented at the meetings held. Mudondo attended the various meetings.

The documents that were signed by the employees concerned stated as follows: C

> "I (name) acknowledge receipt of your memorandum of 19 February 1999, which I have read and understood. I therefore wish to be considered for voluntary retrenchment on the Voluntary Retrenchment Package offered by the Company.
>
> Subject to the acceptance of my application by Management, I hereby D freely tender my resignation from National Breweries with effect from 1 May 1999."

Mudondo signed a similar document, opting for the resignation and citing medical grounds.

In my view, this is exactly the situation referred to in the Regulations contained in SI 371 of 1985. The resignation became effective once the E employer accepted or granted the application by the appellant for resignation.

I do not consider it open to Mudondo in such a situation to turn around and claim that he was retrenched unlawfully. He tendered his resignation from the first respondent freely, as stated in the document, and collected his package. That ended his employment with the first respondent. F

There was certainly no basis for appealing on the ground that the retrenchment was unlawful. Otherwise, the appeal was based on a point that was conceded.

The court *a quo* conceded that the employer did not follow the retrenchment procedure. In other words, if the employees were retrenched, the retrenchment would have been held to be unlawful. G

However, the court pointed out, and determined the matter on the basis, that the employees concerned resigned.

I find no merit in the appeal and it is dismissed with costs.

Gwaunza AJA concurred H

Cheda JA

Judgment

A **Sandura JA:** I have read the judgment prepared by Cheda JA but respectfully disagree with it. In this matter, an application by the appellants for an order setting aside their retrenchment by the first respondent was dismissed with costs by the High Court.

The background facts are as follows. At the relevant time the appellants were employees of the first respondent ("Natbrew"). On 19 January 1999 Natbrew's B managing director ("Nhete") issued a memorandum to all Natbrew employees, informing them that because of the prevailing economic situation in the country the company would be restructured and some of the employees would be retrenched.

A month later, on 19 February 1999, Nhete issued another memorandum, C advising the employees of the progress in the restructuring exercise, and informing them that those employees who were not accommodated in the new structure were being offered a voluntary retrenchment package in order to minimise the adverse effects of losing their jobs. The details of the package were set out in

a document annexed to the memorandum, and payment of the package was to be made on 30 April 1999 when the employees in question D were to be retrenched.

Thereafter, on 23 February 1999, a meeting was held at Kadoma to clarify various issues pertaining to the voluntary retrenchment package and the restructuring exercise. The meeting was attended by the members of Natbrew's national workers committee and national salaried staff committee. Various E concerns over the retrenchment package were expressed but the chairman did not deal with them because he said that the purpose of the meeting was to clarify issues, and not to add to or delete anything from the package.

Subsequently, about three hundred and sixty-eight employees (including the appellants) who had not been accommodated in the new structure, and whose employment was to be terminated on 30 April 1999, were asked to apply for F a voluntary retrenchment package by completing an application form, which was in the form of a letter prepared by Natbrew. The application form, in relevant part, is set out below:

> "Dear Sir,
>
> APPLICATION FOR VOLUNTARY RETRENCHMENT
>
> "I, … acknowledge receipt of your memorandum of 19 February, 1999, which I have read and fully understood. I therefore wish to be considered for voluntary retrenchment on the Voluntary Retrenchment Package offered by the Company.

Cheda JA

> Subject to the acceptance of my application by Management, I hereby A freely tender my resignation from National Breweries with effect from 1 May 1999.
>
> Yours faithfully,
>
> ..... B
>
> Approved/Declined by Management."

After completing the application forms and submitting them to Natbrew, the appellants consulted their lawyer who, on 30 April 1999, wrote to Nhete informing him that the purported retrenchment was a nullity because the C Labour Relations (Retrenchment) Regulations, 1990, published in SI 404 of 1990, ("the Regulations") had not been complied with. The letter, in relevant part, reads as follows:

> "We are … instructed that despite your memorandum referring to a voluntary retrenchment scheme, the reality on the ground has in fact been different as your organisation unilaterally proceeded to draw (up) a list of D the reorganised structure which excluded those employees you wished to discard. … In effect, you proceeded to compulsorily retrench the affected employees by excluding them from the company structure without their consent and without following the laid down procedures relating to compulsory retrenchment. …
>
> We are instructed that the employees have already completed the forms E provided by yourselves but as no formal acceptance has been provided by the company, there is yet to be a formal contract and it is the employees' wish that consideration of the forms be suspended pending negotiations on the outstanding issues.
>
> Should your organisation seek to proceed without taking into account our F client's sentiments as set out above, it is their intention to accept whatever packages you will offer on a without prejudice basis whilst compliance with the Regulations governing compulsory retrenchment is sought …".

The above letter did not provoke an immediate response from Nhete. Nevertheless, the reply eventually came from Natbrew's lawyer in a letter dated 9 June 1999. The letter, in relevant part, reads as follows: G

> "… we advise that our client offered packages to those employees who had been identified as being redundant and who were prepared to accept firstly their redundancy and secondly the packages offered.
>
> All the employees who accepted packages —
>
> 1. made written applications for voluntary retrenchment pursuant to the offer made by our client. H

Cheda JA

> 2. The A applications were considered by our client and all of them were approved in writing.
> 3. The employees in writing expressed their acceptance of the packages. …"

In the circumstances, Natbrew was of the view that the appellants had been retrenched in terms of the law. Consequently, the appellants filed a court B application in the High Court against Natbrew and the Minister of Public Service, Labour and Social Welfare ("the Minister"), in his capacity as the Minister responsible for the administration of the Labour Relations Act [*Chapter 28:01*] ("the Act"), seeking the following order:

> "1. That the retrenchment of the employees set out in Annexure 'A' be C and is hereby set aside.
> 2. That the respondents pay the costs of this application."

When the application was heard, the learned judge in the court *a quo* identified the following as the issues for determination:

> "(a) whether or not condonation should be granted for filing of this application out of time; D
> (b) whether or not the applicant (i.e. Nathan Mudondo) can represent the other applicants in terms of Rule 89 of the High Court Rules;
> (c) whether or not the applicants were retrenched in accordance with the provisions of the Labour Relations (Retrenchment) Regulations, SI 404/90. … If not, did they resign from employment?".

E The first issue was determined in favour of the appellants, and the delay in filing the application was condoned. This is not an issue in this appeal.

The second issue was determined in favour of the respondents, and the learned judge ruled that the only applicant properly before him was Nathan Mudondo. Although the appellants indicated in their notice of appeal that this ruling F would be challenged, their counsel in this court conceded the correctness of the learned judge's ruling. It is, therefore, not an issue in this appeal, and consequently there is only one appellant before us.

The third issue was determined in favour of the appellant, in that the learned judge ruled that the purported retrenchment was null and void because the Regulations had not been complied with. However, notwithstanding that G finding, the learned judge dismissed the application with costs on the ground that, in his view, the appellant had resigned from his job. Aggrieved by that decision, the appellant appealed to this court.

The main issue in this appeal is whether the appellant resigned from his job or was retrenched. If what happened was a retrenchment, then, as the learned

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judge correctly found, the retrenchment was a nullity, and the learned judge A ought to have granted the order sought.

However, before determining that issue, I would like to deal with two matters. The first concerns the meaning or meanings of "resign" and "retrench"; and the second is the purpose of the Regulations.

Although the word "resign" is not defined in the Act or Regulations, the B *Concise Oxford Dictionary of Current English* 8 ed, gives several meanings of the word. In my view, the most appropriate meaning in the context of the present appeal is: "give up office, one's employment, etcetera". It goes without saying that the resignation must be voluntary and not due to pressure exerted by the employer on the employee.

The word "retrench" is defined in the Regulations as follows: C

> "'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, re-organising the undertaking in which the employee is or was employed, or for similar reasons".

I now wish to state the purpose of the Regulations. The Regulations were made D by the Minister in terms of s 17(1) of the Act for the purpose of affording protection to employees by regulating and restricting the circumstances in which employers may retrench their employees.

In this regard, s 10 of the Regulations provides that any retrenchment of an employee which does not comply with the Regulations will be a nullity. It reads: E

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

In view of the purpose of the Regulations, if what the employer wants to do F is to retrench his employee or employees he is obliged to follow the procedure set out in the Regulations. He cannot circumvent that procedure by resorting to some other device.

That issue came before this Court in *Mutare Board and Paper Mills (Pvt) Ltd v Kodzanai* 2000 (1) ZLR 641 (S). The facts of that case and this Court's G decision in the matter are accurately stated in the headnote, which reads as follows:

> "The management of the appellant company decided that it had to reduce its workforce. This decision was considered to be necessary as a costcutting measure that was essential to maintain the financial viability of the company. It decided that it would reduce the workforce by retiring all H

Cheda JA

> A its male employees who were 55 years of age, or over. The respondent, along with several other employees of the appellant, was compulsorily retired after reaching the age of 55 years. The rules of the pension fund provided that normal retirement was at the age of 65, but an employee could elect to retire early or be retired at the employer's instance. The respondent argued that what was being effected was retrenchment and B the procedures applicable to retrenchment should have been followed.
>
> *Held*, that even though an employer might have the right under the pension fund regulations to terminate employment, if the object and effect of termination is to retrench, then the regulations governing retrenchment must be complied with. An employer who wants to retrench employees cannot defeat the essential purpose of the retrenchment regulations by C purporting to terminate the contracts of workers by requiring them to take early retirement under the pension fund rules.
>
> *Held*, further, that it was clear that retrenchment was the object in the present case. This was shown by the fact that the employer suddenly and simultaneously required large numbers of employees of the same class by D age to proceed on early retirement, and the fact that the reason given for this step was the need to reduce the strength of the workforce."

In the present case, Natbrew made it clear right from the beginning of the exercise that it intended retrenching some of its employees. That point was made in the two memoranda issued by Nhete and which were addressed to all Natbrew employees. It was also made at the meetings which were held for the E purpose of explaining the voluntary retrenchment exercise and the retrenchment package being offered. In the circumstances, the termination of the appellant's employment should have been in terms of the Regulations.

However, the learned judge found that the appellant had resigned from his job, and dismissed the appellant's application on that basis. He said the following:

> F "The applicant signed Annexure 'L' (the application for voluntary retrenchment). In my view, the Regulations do not render null and void a resignation from employment by an employee in consideration of a package which, in essence, is what the applicant did. He consulted a legal practitioner before signing the document. He must have been advised by his legal practitioner that the retrenchment was a nullity by reason of the G retrenchment exercise's failure to comply with s 3 of the Regulations. With this knowledge he signed a document which explicitly states he was voluntarily resigning from the first respondent with effect from 1 May 1999 in consideration of the payment of a package."

In my view, the learned judge erred in finding that the applicant signed the application for voluntary retrenchment after consulting a legal practitioner. H Quite clearly, that was not the case. As can be seen from the letter to Nhete

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Cheda JA

written by the appellant's lawyers on 30 April 1999, which I have already set A out in this judgment, the appellant signed the application for voluntary retrenchment before consulting his lawyer. In that letter the appellant's lawyer said:

> "We are instructed that the employees have already completed the forms provided by yourselves …". B

The forms referred to were the applications for voluntary retrenchment.

However, the major error was the finding by the learned judge that by signing the document in question the appellant had in fact resigned as opposed to being retrenched.

What happened in this matter was not really in dispute. It was in fact set out in Natbrew's opposing affidavit as follows: C

> "… those employees who had been rendered redundant through the creation of the new structure had an option either to apply for a voluntary retrenchment package or to contest the retrenchment exercise in accordance with the relevant regulations. …"

In addition, it was common cause that a decision had been taken by Natbrew D that those employees who had been identified as no longer needed by the company, and the appellant was one of them, were to be retrenched on 30 April 1999, whether they liked it or not. That decision was taken long before the appellant signed the document in question "applying" for the voluntary retrenchment package and tendering his resignation. Quite clearly, the document was a smokescreen designed to disguise Natbrew's unlawful retrenchment E exercise.

In the circumstances, when the appellant was offered a retrenchment package, what in effect he was being told was: "If you do not accept the package and tender your resignation, you will, nevertheless, be retrenched on 30 April 1999". In my view, this is akin to being told: "If you do not resign, you will F be dismissed on 30 April 1999".

In considering whether the appellant resigned or was retrenched, the issue to determine is whether the contract of employment was terminated by the appellant or by Natbrew. As Sir John Donaldson, M.R. stated in *Martin v MBS Fastenings (Glynwed) Distribution Ltd* [1983] IRLR (Industrial Relations Law Reports) 198, when the matter came before the Court of Appeal: G

> "The Industrial Tribunal had to make up its mind whether, on the evidence, the reality of the situation was that the employer terminated Mr Martin's employment or that Mr Martin did. Plainly the fact that Mr Martin signed a letter of resignation is a factor and an important factor in reaching a conclusion on this issue, but it cannot be conclusive. … whatever the H

Cheda JA

> A respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, 'Who really terminated the contract of employment?'."

See *Labour Law: Cases and Materials* by Benedictus and Bercusson at pp 301-2.

B Similar opinions have been expressed by a number of authors of textbooks on labour law.

Robert Upex has this to say at p 35 of *Termination of Employment* 2 ed:

> "A resignation will be treated as a dismissal if the employee is invited to resign and it is made clear to him that, unless he does so, he will be C dismissed."

Similarly, Selwyn says the following at p 272 of *Law of Employment* 7 ed:

> "The fact that the employer invited the employee to resign may, however, constitute a dismissal, for the alternative may be expressed or implicit in the request. In *Robertson v Securicor Transport Ltd* [1972] IRLR 70, the applicant had broken a company rule by signing for a container which had D not been received. When this was discovered, he was given the alternative of resigning or being dismissed, and he chose the respectable course. It was held that he had been dismissed nonetheless."

I find the above authorities very persuasive and, therefore, intend to apply the principles set out therein in the determination of this appeal.

E Applying these principles to the facts of the present case, there can be no doubt that the appellant's contract of employment was terminated by Natbrew and not by the appellant. That is so because when the appellant was offered the retrenchment package and asked to resign, it was made clear to him that if he did not accept the package and resign, he would, nevertheless, be retrenched on 30 April 1999, as the decision had already been made.

F Consequently, as the termination of the appellant's contract of employment was not in accordance with the Regulations, it was a nullity and the learned judge ought to have granted the order sought.

In line with this Court's decision in *Mutare Board and Paper Mills (Pvt) Ltd v Kodzanai*, *supra*, it follows that the other employees unlawfully retrenched G by Natbrew when the appellant was retrenched, and who are not parties to these proceedings, should obtain the same relief as the appellant.

In the circumstances, I would have made the following order —

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

Cheda JA

"The application is granted with costs".

Kantor & Immerman, appellant's legal practitioners

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

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Source:
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S v MALUNJWA 2003 (1) ZLR 275 (H)

Citation	2003 (1) ZLR 275 (H)
Case No	Judgment No. HB-34-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	24 January 2003; 6 March 2003
Judgment	6 March 2003
Counsel	*C.T. Hikwa,* for the applicant *Mrs M Cheda,* for the respondent
Case Type	Bail Application
Annotations	No case annotations to date

Flynote

Criminal procedure — *bail — factors affecting whether bail should be* C *refused — seriousness of offence — risk of accused absconding — interference with evidence — need for State to substantiate allegation*

Headnote

In bail applications the court has to strike a balance between the interest of society (that the applicant should stand trial and there should be no D interference with the administration of justice) and the liberty of an accused person (who pending the outcome of his trial is presumed to be innocent). The likelihood of a lengthy prison term being imposed (i.e. the seriousness of the offence) is a factor to be taken into account in assessing the risk of absconding. Where it has been shown that the accused has interfered with evidence, the court is justified in denying E him bail. The court should, however, not refuse bail on the bare assertion of the State; there must be enough reason for such a conclusion. In other words, grounds for refusal of bail should be reasonably substantiated

Cases cited

F *A-G, Zimbabwe v Phiri* 1988 (2) SA 696 (ZHC); 1987 (2) ZLR 33 (H)

Mbele v Prokureur-Generaal, Transvaal 1966 (2) PH H272 (T)

R v McCarthy 1906 TS (2) 657

S v Aitken (2) 1992 (2) ZLR 463 (S)

S v Chiadzwa 1988 (2) ZLR 19 (S)

S v Ho 1979 (3) SA 734 (W)

G *S v Hudson* 1980 (4) SA 145 (D)

S v Hussey 1991 (2) ZLR 187 (S)

S v Maharaj 1976 (3) SA 205 (D)

S v Maratera S-93-91

S v Mhlawli & Ors 1963 (3) SA 795 (C)

H *S v Murambiwa* S-62-92

Ndou J

S v Ndhlovu 2001 (2) ZLR 261 (H) A

S v Sahumani HB-91-84

Case information

C.T. Hikwa, for the applicant

Mrs M Cheda, for the respondent

Judgment

Ndou J: The appellant applied for bail pending trial before a Bulawayo B magistrate on 26 November 2002, and the latter dismissed the application. He now appeals against such dismissal. The appellant is facing two charges of theft by conversion and another charge of contravening section 3(1)(a)(I) as read with section 15(2)(e) of the Prevention of Corruption Act [*Chapter 9:16*]. It is alleged that between 8 January 2002 and 31 July 2002 in Bulawayo, the C appellant, who then was a Detective Inspector, was part of a team of Zimbabwe Republic Police detectives assigned to look for suspects Khulekani Ncube, Ngoneni Mafu, and Sidingumuzi Sibanda. The latter were being sought in connection with an armed robbery that occurred at the Johannesburg International Airport, South Africa, on 27 December 2001, where cash and D jewellery worth ZAR117 million were stolen. In the course of his duties, it is alleged, the appellant, on or about 8 February 2002, recovered Z$950 000 suspected to be proceeds from the robbery, from Thabile Dube of number B 214 Njube who is the aunt of one of the suspects. The appellant allegedly converted the said amount to his own use. On 6 February 2002 the appellant recovered Z$3 million, suspected to be proceeds from the robbery, from one E Sithembiso Dube, who is suspect Sidingumuzi's mother. He allegedly converted part of that amount, i.e. around Z$936 500, to his own use. In July 2002 the appellant allegedly made several calls to suspect Sidingumuzi and his sister Ntokozo Sibanda, soliciting for a bribe of US$15 000 in order not to arrest Sidingumuzi for the South African armed robbery case.

In the court *a quo,* the appellant was content with limiting his application to F oral submissions by his legal practitioner. He did not file an affidavit in support of his application. Procedurally, there is nothing wrong with that. In *S v Ndhlovu* 2001 (2) ZLR 261 (H) at 268C I referred to what Diemont J said in *S v Nichas* 1977 (1) SA 257 (C):

> "It is a notorious fact that in a majority of cases *ex parte* statements are G made both by the defence and by the public prosecutor who intimates what the police objections are. There are no formalities, no evidence is led, no affidavits are placed before the court and the record is so meagre that there may be little or nothing to place before the Superior Courts if the matter is taken on appeal. This easy-going procedure has both advantages and drawbacks." H

Ndou J

A This approach by the appellant, however, impacts on the quality of the evidence in support of the application. This is so in such cases, where the other party decides to call *viva voce* evidence in opposing the application.

Approach

The approach in this matter is whether the magistrate misdirected herself when B she refused the appellant bail. I need to emphasise this aspect because the matter was argued as if I am hearing the bail as a court of first instance. The appeal should be directed at the judgment of the court *a quo*. It is the findings of the court *a quo* that the appellant should attack. From her judgment, the learned trial magistrate made a positive finding on the credibility of the sole witness who testified, the investigating officer, Chief Superintendent Nyathi. C This finding, in my view, is unassailable. In any event, the appellant does not seem to challenge such a finding on the demeanor of Officer Nyathi. Such a positive finding does not necessarily mean that the appellant should have been refused bail. That decision is for the court to make after weighing all the facts at its disposal. It seems to me that the learned trial magistrate arrived at her decision on the basis of risk of abscondment and interference with the D administration of justice. I propose to examine each of these findings to determine whether or not there were misdirections. The primary question for determination by the court *a quo* was whether the appellant will stand trial or abscond. Of equal importance was whether he will influence the fairness of the trial by intimidating or influencing witnesses or tampering with evidence. It is E trite that in bail applications the court has to strike a balance between the interest of society (the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused person (who pending the outcome of his trial is presumed to be innocent) – see *Attorney-General, Zimbabwe v Phiri* 1988 (2) SA 696 (ZHC), 1987 (2) ZLR 33 (H); *R v McCarthy* 1906 TS (2) 657; *S v Mhlawli & Ors* 1963, (3) SA 795 (C) at 796B; F *S v Hussey* 1991 (2) ZLR 187 (S) and *S v Aitken* (2) 1992 (2) ZLR 463 (S)

Risk of Abscondment

There are factors which may, either on their own or on a cumulative basis, assist the court in making a proper assessment of the risk. The court *a quo* G referred to the seriousness of the offences as a source of inducement to abscond on the part of the appellant. *In casu,* the appellant was a Detective Inspector who is alleged to have stolen sums of money recovered during the course of his duties. In the first count the stolen amount is Z$950 000 and in the second count Z$936 500. On the third count he is alleged to have corruptly H tried to solicit a bribe of US$15 000 from a person who he knew was wanted

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Ndou J

for a very serious crime of armed robbery committed outside our jurisdiction. A Each of these three offences would attract imprisonment if the appellant is convicted. Cumulatively they would attract a very lengthy term of imprisonment. By virtue of his position and experience in the police force the appellant is obviously aware of these possible consequences. In the circumstances, the court *a quo* did not misdirect itself in this regard. On its own, this factor, in B the circumstances of this case, would not justify refusal of bail. It seems to me that the court *a quo* took it cumulatively with other factors as evidenced by the remark on page 3 of the judgment.

> "The *other reason* was the seriousness of the offence." (emphasis is mine)

The likelihood of a lengthy prison term being imposed (i.e. seriousness of the offence) is a factor to be taken into account in assessing the risk of abscondment C – see *S v Hudson* 1980 (4) SA 145 (D); *S v Ho* 1979 (3) SA 734 (W) and *S v Ndhlovu (supra)*. There is no misdirection in the court *a quo's* finding that the offences are serious and that this may likely be inducement to abscondment on the part of appellant. This is one of the factors taken into account in refusal of bail. D

Interference with the administration of justice

The court *a quo* found that the likelihood of interference with evidence by the appellant was high. It also found that there had already been attempts to do so. It was found that the appellant works with

most of the witnesses who were his subordinates. The court *a quo* also found that there was evidence of interference E with the administration of justice attributable to the appellant. First, in respect of the arrest and subsequent release of supsect Sidingumuzi's mother (the learned trial magistrate erroneously refers to Sidingani). Second, the disappearance of Ntokozo. In the circumstances, the court *a quo*, after making reference to *S v Maratera* S- 93-91, held that it has been shown that there had already been attempts (page 2) to interfere with evidence. I agree that it is trite F that where it has been shown that the accused had interfered with evidence, a court is justified in denying him bail – see also *S v Chiadzwa* 1988 (2) ZLR 19 (S); *S v Murambiwa* S- 62-92; *S v Maharaj* 1976 (3) SA 205 (D). The court should, however, not refuse bail on the bare assertion of the State, there must be enough reason for such a conclusion – see *Sahumani v S* HB-91-84 and *S v Hussey (supra)*. In other words, grounds for refusal of bail should be G reasonably substantiated – see *Mbele v Prokureur-Generaal, Transvaal* 1966 (2) PH H272 (T). The court *a quo* did not misdirect itself in this regard.

As I am unable to find any misdirection on the part of the court *a quo* I cannot interfere with its determination. The court *a quo* took into account the cumulative effect of the above two factors and arrived at a decision that the H

Ndou J

A appellant is not a suitable candidate for bail *at that stage*. The said finding is unassailable and the appeal must therefore fail.

I accordingly dismiss the appeal against the magistrate's decision to deny the appellant bail.

B *Mabhikwa, Hikwa & Nyathi* appellant's legal practitioners

Criminal Division of the Attorney-General's Office respondent's legal practitioners

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Source:
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NICOLLE v MINISTER OF LANDS & ANOR 2003 (1) ZLR 280 (H)

Citation	2003 (1) ZLR 280 (H)
Case No	Judgment No. HH-34-03
Court	High Court, Harare
Judge	Garwe JP
Heard	24 January 2003; 7 March 2003
Judgment	7 March 2003
Counsel	*A P de Bourbon SC*, for the applicant *Mr N Mutsonziwa*, for the first respondent *Mr JP Mutizwa*, for the second respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Land — *acquisition — notice of — validity — depends on validity of* C *preliminary notice of intention to acquire land*

Practice and procedure — *parties — judge of the High Court — action against — need to apply for leave before instituting proceedings — procedure to be followed*

Headnote

The applicant owned and operated a farm. The Minister of Lands issued a D preliminary notice of intention to acquire the land in terms of s 5 of the Land Acquisition Act [*Chapter 20:10*]. The notice was not served on the bondholder as required by s 5(1) of the Act. A notice of acquisition in terms of s 8 of the Act was nonetheless then issued. Subsequently, a further notice in terms of s 8 was issued and served on the bondholder. E The land was allocated by the Minister to the second respondent, a judge of the High Court. The farmer owner sought to remove the judge. He did so by way of an urgent application, without first obtaining leave to sue the judge.

Held, that leave must be sought first before proceedings for substantive relief are filed against a judge. The applicant applying for such leave must F provide a proper basis upon which such leave should be granted. This might entail disclosing the basis upon which the judge in question should be made answerable. Only in the event of leave being granted could the applicant then properly file civil proceedings seeking specified relief against the judge.

Held, further, that the preliminary notice of acquisition was bad, and the G notice under s 8 was therefore a nullity. It should be treated as though it never existed.

Held, further, that if the applicant wished to challenge the validity of the subsequent notice, he should bring an action against the Minister, not against the judge, whose rights and interest in the property had been H acquired through the Minister.

2003 (1) ZLR p281

Garwe JP

Cases cited A

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

Mugwebie v Seed Co Ltd & Anor 2000 (1) ZLR 93 (S)

Tengwe Ests v Min of Lands 2002 (2) ZLR 137 (H)

Legislation considered B

High Court Rules 1971 (RGN 1047 of 1971), rr 18 & 229C

Land Acquisition Act [*Chapter 20:10*], ss 5, 8(1) & 9(2)

Case information

A P de Bourbon SC, for the applicant

C *MrN Mutsonziwa*, for the first respondent

MrJP Mutizwa, for the second respondent

Judgment

Garwe JP: In this application, the applicant seeks the leave of this court to institute proceedings against the second respondent and for an order (1) that he (i.e. the applicant) shall not be precluded from occupying, holding or using D the land in question for farming operations and (2) that the respondent removes all his equipment from the farm within 78 hours of the order and further that he and all persons claiming right through him be evicted from the farm.

The farm in question, Lot 1 of Gwina in the Lomagundi District has been listed E for acquisition, although in the relevant notices it has not been correctly described. Indeed the applicant admits this in para 3 of his founding affidavit. The first respondent, during submissions, advised that the property was once known as Lot 1 of Gwina of Loverdale Estate but at a later stage was subdivided. The property registered in the name of the applicant is only part of the original estate. The applicant's property was further demarcated F following the notice of acquisition issued by the first respondent and a portion was allocated to the second respondent. This explains why only a portion of 375 hectares forms the subject of the present proceedings.

There are two preliminary matters I need to deal with. The first is that in terms of r 18 of the High Court Rules, 1971, no civil process of the court may be sued out against the President or against any of the judges of the High Court without G the leave of the court granted on court application being made for that purpose. Contrary to this provision, this application was filed as a chamber application. The result was that the respondents were not called upon to file any opposing papers. The submission by Mr *de Bourbon* that as no response has been filed by either respondent, the respondents should be treated as being in default is H therefore not tenable. It is not tenable because it was the applicant who

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employed the wrong procedure, resulting in a situation where the respondents A were not called upon to file notices of opposition with the court. The respondents had to make oral submissions at the hearing of the urgent application.

Having considered all the facts of this matter, I have reached the conclusion that the failure to follow the correct procedure is one I can condone. In terms B of r 4(c) I have the power to condone a departure from any of the provisions of the rules. Moreover in terms of r 229C the fact that an applicant has instituted proceedings by court application instead of chamber application, or *vice versa,* shall not in itself be a ground for dismissing the application unless there is evidence some interested party has or may have been prejudiced and such prejudice cannot be remedied by directions for the service of the C application on that party. Accordingly I condone the failure by the applicant to follow the laid-down procedure.

The second issue relates to the combined nature of the application. It is not in dispute that the application for leave to cite the second respondent has been combined with a further application on the merits and in which interim relief D is sought.

The purpose of r 18 is clearly to protect or shield judges from vexatious litigation instituted against them in the very same court where they preside. Litigation can be instituted purely to embarrass a particular judge. The intention of r 18 is to ensure that that does not happen, unless leave is granted first. Rule 18 is, so to speak, a sifting mechanism. The intention clearly is that E leave must be sought first before proceedings for the substantive relief are filed. Obviously the applicant applying for such leave must provide a proper basis upon which such leave should be granted. This might entail disclosing the basis upon which the judge in question should be made answerable. Only in the event of such leave being granted would the applicant then properly file civil proceedings seeking certain relief against the judge. F

This is not what has happened in the present case. Rather than confine the application to one seeking leave of the court to cite the judge, the applicant has in addition dealt with the merits of the case against the judge and in the draft order seeks an order that he (i.e. the applicant) remains in occupation and that the judge (the second respondent) be ordered to remove all his equipment and G that he and all persons claiming through him be evicted.

This I find most unacceptable. The procedure adopted in this case renders nugatory the provisions of r 18. Clearly a situation such as the present cannot be allowed. The possibility of prejudice to a judge cannot be discounted if a party is allowed to seek leave and simultaneously institute civil proceedings H

A against a judge as has happened in this case. This is not the kind of departure that should be condoned. For that reason I will dismiss, for want of procedure, paras 2, 3 and 4 of the interim

relief sought by the applicant. In saying so however it should be pointed out that the facts disclosed by the applicant will be considered in order to determine whether or not such leave should be granted.

B The facts which are common cause or at least not seriously in dispute are as follows. The farm has been listed for acquisition three times. The notices in terms of s 5 were not served on the bondholder. A notice in terms of s 8 of the Land Acquisition Act [*Chapter 20:10*] was signed by the first respondent on 4 April 2002 and served on the applicant on 7 April 2002. On 30 June 2002 C the second respondent was offered a subdivision of the applicant's farm which he accepted. On 6 May 2002 the first respondent had applied to the Administrative Court for an order confirming acquisition of the property. This was opposed by the applicant on 24 May 2002. On 9 September 2002, the applicant filed an urgent chamber application seeking certain relief against the Minister of Lands, Agriculture and Rural resettlement, the Minister of Justice, D Legal and Parliamentary Affairs and the Attorney-General of Zimbabwe. A provisional order was granted on 12 September 2002. The relevant portion of the interim order granted by consent reads:

> "Pending final determination of this matter, the acquisition order issued by 1st respondent *on 4 April 2002* in respect of Lot 1 of Gwina shall not preclude the applicant from occupying, holding or using the land including E all improvements thereon or from undertaking farming operations." (the emphasis is mine)

On 17 December 2002 a further notice in terms of s 8 was signed by the first respondent and served on the applicant on 24 December 2002. The second respondent moved onto the farm on 22 December 2002. On a date not F disclosed during the hearing the first respondent re-served the notice in terms of s 5 of the Act on the bondholder. On 23 January 2003 the first respondent withdrew the confirmation proceedings before the Administrative Court.

The Land Acquisition Act has been amended on a number of occasions. For purposes of this application, the applicable provisions of the Act are the following: G

(a) In terms of s 5 where an acquiring authority intends to compulsorily acquire land, he shall, *inter alia,* serve on the owner of the land and the holder of any other registered real right in that land a notice in terms of that section (s 5(1)).

(b) The fact that a preliminary notice is not served on the holder of any real H right in the land to be acquired at the same time it is served on the owner

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of the land shall not render the preliminary notice invalid as long as it is A served on such holder *inter alia,* not less than 30 days before a notice of acquisition in terms of section 8(1) is made (s 5(9)(c) as amended by Act 10 of 2002)

(c) Where an order made in terms of s 8(1) in relation to any agricultural land required for resettlement purposes is or becomes invalid by reason of the B failure (a) to serve a preliminary notice on the owner of any registered real right in the land or to apply to the Administrative Court for an order confirming the acquisition within thirty days after the coming into force of the order or for any other reason whatsoever, the service on the owner or occupier of the land of a subsequent order in substitution for the invalid order after the expiry of 90 days from the date of service of the invalid C order shall constitute notice in writing to the owner or occupier to cease to occupy, hold, or use that land and his living quarters seven days after the service of the subsequent order on the owner or occupier and if he fails to do so, he shall be guilty of an offence (s 9(2) as amended by Act 10 of 2002).

The issue that arises at this stage is the legal status of the notice of acquisition D issued under s 8 on 4 April 2002 and served on 7 April 2002. It is not in dispute that at the time the notice was served no preliminary notice of acquisition had been served on the bondholder.

This court has previously held that the failure by an acquiring authority to serve the preliminary notice of acquisition on the holder of a registered real E right renders the preliminary notice invalid: *Tengwe Estates v Minister of Lands, Agriculture and Rural Resettlement* 2002 (2) ZLR 137 (H)

A notice issued in terms of s 8(1) of the Act depends for its validity on the legality of the preliminary notice of acquisition. If the preliminary notice of acquisition is null and void, so too is the notice of acquisition in terms of F s 8(1). Indeed the Land Acquisition Amendment (No. 2) Act, 2002 (No. 10 of 2002) accepts this to be the position. That amendment provides in s 9(2) that where an order made in terms of s 8(1) is or becomes invalid by reason *inter alia* of the failure to serve a

preliminary notice on the owner of any registered real right in the land or for any reason whatsoever, a further notice in terms of s 8(1) may be served and shall constitute notice to the owner or occupier to G cease to occupy, hold or use that land after the period indicated. That same amendment provides that the preliminary notice is not rendered invalid as long as it is served not less than 30 days before the making of an order in terms of s 8(1).

2003 (1) ZLR p285

Garwe JP

A The position in law therefore is that the notice of acquisition issued on 4 April 2002 and served on 7 April 2002 was and is null and void because of the failure to serve the preliminary notice on the bondholder. That this is the law in this country there can be no doubt. As Lord Denning put it in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172:

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

C See also *Mugwebie v Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S)

What this means is that the acquisition order issued on 4 April 2002 must be treated as if it never existed.

It was submitted during the hearing by the first respondent that the preliminary notice was thereafter served on the bondholder. A further notice of acquisition in substitution of the invalid one was then issued on 17 December 2002 and D served on 24 December 2002. The latter submission is common cause.

The current position therefore is that the notice of acquisition dated 4 April 2002 is invalid. It must as I have already said be treated as if it never existed. What now exists is the notice of acquisition issued on 17 December 2002. Indeed on 23 January 2003 the first respondent, presumably out of caution, E withdrew the application for an order authorising the acquisition before the Administrative Court.

In the result, the interim order made by Omerjee J on 12 September 2002 has been overtaken by events. That order provided that pending the final determination of the matter, the acquisition order issued on 4 April 2002 was not to preclude the applicant from occupying, holding or using the land. That order was F based on an order of acquisition that was null and void.

There is accordingly no question of the second respondent being in contempt of that order. Without in any way suggesting what the applicant needs to do next, it is obvious that the notice issued on 17 December is currently in operation. Indeed, in terms of the Land Acquisition Amendment (No. 2) Act G (No. 10 of 2002), the applicant was required, in terms of s 9(2) to cease to occupy, hold, or use that land and his living quarters on that land seven days after the date of service of the subsequent order. If my interpretation of the law is correct, then at the time the present application was filed, the applicant had no right to be on the farm. Put another way, he had no *locus standi* to institute H civil proceedings on the basis that he was entitled to remain in occupation.

2003 (1) ZLR p286

Garwe JP

The real dispute, it appears, is between the applicant and the acquiring A authority. The dispute is not between the applicant and the second respondent, whose rights and interest in the property have been acquired through the first respondent. If, as was contended, the second notice is now invalid by virtue of the failure to confirm the acquisition in terms of s 7, this is a matter between the applicant and the first respondent and should be determined separately. It does not involve the second respondent. It B is not even known whether as a matter of fact no application to confirm the acquisition has been filed with the Administrative Court.

I have already indicated that the application for interim relief in respect of paras 2, 3 and 4 will be dismissed for want of correct procedure.

In the result, it be and is hereby ordered as follows: C

1. That the application for leave to sue the second respondent be and is hereby dismissed.
2. That the application for other temporary relief be and is hereby dismissed.

3. That the applicant is to bear the costs of this application. D

Stumbles & Rowe, applicant's legal practitioners.

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

Chihambakwe & Mutizwa, second respondent's legal practitioners. E

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PASALK & ANOR v KUZORA & ORS 2003 (1) ZLR 287 (S)

Citation	2003 (1) ZLR 287 (S)
Case No	Judgment No. S-5-03
Court	Supreme Court, Harare
Judge	Ziyambi JA, Malaba JA & Gwaunza JA
Heard	3 February 2003; 10 March 2003
Judgment	10 March 2003
Counsel	*L Mazonde*, for the appellants *D Foroma*, for the first respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administration of estates — *Master of the High Court — decision by — how* C *may be challenged by heir — not competent for heir to bring action in terms of s 113 of Administration of Estates Act [Chapter 6:01] — matter should be brought on review*

Costs — *de bonis propriis — legal practitioner — may be ordered for failure to advise clients correctly*

D **Legal practitioner** — *conduct and ethics — duty to advise clients correctly — penalty for failure to do so*

Practice and procedure — *application — for review — decision of Master relating to winding up of estate — not competent for heirs to bring application under s 113 of the Administration of Estates Act [Chapter 6:01] — matter should be brought on review in terms of High Court Rules*

E **Review** — *application – decision of Master relating to winding up of estate — not competent for heirs to bring application under s 113 of the Administration of Estates Act [Chapter 6:01] — matter should be brought on review in terms of High Court Rules*

Headnote

F The appellants were dissatisfied with a decision of the Master of the High Court relating to the winding up of their late father's estate. The Master had awarded a house belonging to the deceased to the first respondent, who had lived with the deceased for the last thirteen years of

his life in an unregistered customary law union. Their legal practitioner brought an application to the High Court to set the Master's decision aside. The G practitioner purported to act in terms of s 113 of the Administration of Estates Act [*Chapter 6:01*].

Held, that the appellants had no *locus standi* to bring proceedings under that section, which allowed the executor and the Master to state a case for determination by a judge. The matter should have been brought on review H in terms of the High Court Rules. However, the papers that were filed did

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not comply with the requirements of r 257, as they did not state the A grounds of review.

Held, further, that the appellants' legal practitioner clearly did not apply his mind to the issues involved. Practitioners have been warned time and again to exercise more care in the presentation of review applications. Where they fail to do so, or where they have failed in their duty to advise B their clients correctly, they risk not only being non-suited but ordered to pay costs *de bonis propriis*.

Cases cited

Art Printers Ltd v Regional Hearing Officer & Anor HH-168-87

Hall v Dir of Civil Aviation HH-38-89 C

Min of Labour & Ors v P E N Tpt (Pvt) Ltd 1989 (1) ZLR 293 (S)

Mtetwa v Moyo & Anor HH-222-89

Legislation considered

Administration of Estates Act [*Chapter 6:01*], s 113 D

Case information

L Mazonde, for the appellants

D Foroma, for the first respondent

Judgment

Ziyambi JA: This is another instance in which a legal practitioner has done a disservice to his clients.

The background facts are as follows. The appellants are major children of the E late Detliev Pasalk who died in 1995. Prior to the distribution of the estate, three vehicles forming part of the deceased estate were given to the appellants as part of their inheritance, it being the understanding of the executor, that the appellants were the only heirs to the deceased estate.

Then in 1998, the first respondent, who had lived with the deceased from 1982 F until his death in an unregistered customary union, obtained an order from the High Court declaring her a partner in a universal partnership between herself and the late Detliev Pasalk and ruling that she was entitled to one half of the joint estate acquired by them from 1982 until the date of his death. The second respondent then sought directions from the Master of the High Court who directed the distribution as per his letter which reads in part as follows: G

> "The essence of Chinhengo J's judgment is that we put together the values of both movable and immovable properties, divide the total by two, this will give us Adella Kuzora's 50 per cent which should not come into this estate. H

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A Put simply:

Value of immovable property	$ 474 500
Add value of movables	$ 645 440

Add value of movables	$ 645 440	
Total	$1 119 940	
B 50 per cent to Adella Kuzora	$1 119 940	÷ 2
=	$ 559 970	

I take note of the fact that the 3 vehicles, namely the Mercedes Benz, Isuzu Trooper and Nissan Pick Up Truck were requested and made available to the two Pasalk children namely Karl and Elizabeth. In the same vein, Adella has always had possession and occupation of the house. The said C house is valued at $474 500. I therefore, rule that it is only fair that Adella be allowed to take the immovable property as part of her 50 percent share plus other movable assets of her choice from the list as provided by Tony West.

Having said that I now turn to the distribution in the estate of late Detliev Pasalk. Karl and Elizabeth have already accessed and used the motor D vehicles. In other words they have already accessed part of their inheritance. Therefore, the vehicles which were made available to Karl and Elizabeth are awarded to them as part of their inheritance subject of course to the satisfaction of the maintenance claim by Adella Kuzora and her children.

As regards the Mubayira, Hatcliff and Mufakose properties, I note that Chinhengo J made a finding in his judgment that there was no basis upon E which the said properties could be brought into the estate. I find no reason why I should entertain the same issue that has already been decided by the High Court.

Finally and in brief, the following is directed:

(a) That the values placed on the movables and immovable properties by F Tony West Real Estate be accepted for purposes of winding up this estate.

(b) That the immovable property Lot 232A Highlands be awarded to Adella Kuzora as part of her 50 per cent share holding in the Universal Partnership.

(c) That the 3 motor vehicles namely Isuzu Trooper, Nissan Truck and G Mercedes Benz be taken as part of the estate of Detliev Pasalk but for purposes of distribution of this estate, the said vehicles are regarded as having been awarded to Karl and Elizabeth.

Any other assets that do not form part of Adella's 50 per cent in the Universal Partnership should be brought to account with values as at the H date of death."

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The appellants, aggrieved by the award of the house to the first respondent as A her half share of the property, filed a court application to the High Court seeking that the Master's decision be set aside and that the appellants be registered as "joint undivided owners with the first respondent of the immovable property."

The founding affidavit was deposed to by a legal practitioner who stated that B he is a senior partner in the firm of legal practitioners which represents the appellants and that he was authorised to attest the affidavit "and make application to this Honourable Court for a review of the decision of the Master on a point of law in terms of s 113 of the Administration of Estates Act [*Chapter 6:01*]". This section provides:

> "Whenever any difference of opinion upon a question of law arises C between the executor and the Master in the distribution of an estate and a minor is interested in the decision of that question, the Master and the executor may state a case in writing for determination by a judge of the High Court in chambers, and the determination of the judge shall be binding upon the Master and the executor, without prejudice to the rights of other persons interested in the distribution: D
>
> Provided that the judge may refer the matter to the High Court for argument."

It will be noted that it is the Master and the executor who are given standing to approach a judge of the High Court in chambers where they disagree upon a question of law. Further, the section applies where a minor is interested in E the decision of that question of law. The legal practitioner clearly did not apply his mind to the issues involved. Even a cursory reading of the section quoted above would have revealed to him that the appellants did not fall within the ambit of that section. In short, his clients had no *locus standi* to approach the court in terms of the section. If, then, he was minded

to seek a review in terms of the High Court Rules, it was incumbent on him to comply with the F requirements of the rules relating to reviews.

Rule 257 of the High Court Rules, 1971 ('the Rules') provides as follows:

> "**257. Contents of notice of motion**
>
> The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected G and the exact relief prayed for."

No grounds of review were stated in the court application or in the founding affidavit. The deponent (the legal practitioner) described the first respondent as an intestate heir to the deceased estate, having been declared a "universal heir", and requested the court to apply the "law of intestacy by finding that the H

Ziyambi JA

A respondent is entitled to a 50 per cent award of the assets in the deceased estate". The first respondent was in fact declared a partner (not an heir) in the universal partnership. Her customary union with the late Pasalk not having been registered, she could not inherit from his estate on intestacy.

In supplementary heads of argument filed with the consent of the court, the appellants advanced a totally different argument, namely, that the issue was B the dissolution of the partnership and that the Master had acted unlawfully in distributing the estate before the partnership was dissolved. Paragraphs 4 and 5 of the appellants' supplementary heads of argument submitted to the High Court read as follows:

> "4. It is respectfully submitted that the basis of the application is that the C third respondent acted contrary to law when he allocated a house to the first respondent. By reason of that misdirection at law, it is respectfully submitted that the decision of the third respondent is not only tainted with illegality in that the Master was guilty of an error in law, but was also irrational in the sense that it is so outrageous in its defiance of logic or of accepted standards that no sensible person D who had applied his mind to the question to be decided could have arrived at it: see *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (S) at 20B-C; *Tapfumaneyi v Cotton Co of Zimbabwe & Ors* S-140-97.
>
> 5. What was involved *in casu* was dissolution of a partnership by death. The authorities are clear:
>
> > E 'On dissolution the partners (and, in the case of death, the executor of the deceased partner's estate) have a right to wind up the partnership affairs… No partner has the right to retain possession of any of the partnership assets, nor to dispossess copartners or partnership property'."

It is not surprising, then, that in the court *a quo* the respondent successfully F took the point, *in limine*, that the application was fatally defective for want of compliance with r 257 of the Rules, in that no grounds of review had been averred by the appellants in their founding affidavit. Indeed, it is clear that the deponent to the founding affidavit had no appreciation whatsoever of the fact that he was dealing with the dissolution of a partnership. The learned Judge found that the averments in the founding affidavit were "totally divorced" from G those in the supplementary heads of argument. A belated request, by counsel who appeared for the appellants at the hearing, for condonation of his instructing legal practitioner's failure to comply with the rules, found no favour with the learned Judge who gave, at p 57 of the record, her reason for H declining the request:

Ziyambi JA

> "The basis of asking the applicant to clearly state the basis upon which he A seeks a review of any proceedings is to enable the respondents to be in a position to answer adequately to the issues raised and the court to determine the basis of the challenge. Clearly, this was not done in this case.
>
> In my view, the court cannot in these circumstances condone the noncompliance of the rules." B

This was an exercise by the trial court of its discretion conferred on it by r 4C of the Rules which provides as follows:

> "4C. The court or a judge may, in relation to any particular case before it or him, as the case may be —
>
> (a) direct, authorise or condone a departure from any provision of C these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that

the departure is required in the interests of justice;"

The learned judge, having given consideration to the matter, was of the view that this was not a case where she could condone the departure from the rules.

It is trite that this court will not interfere with the exercise by a trial court of D its discretion unless it is satisfied that the manner in which the discretion was exercised was so unreasonable as to vitiate the decision reached.

The appellants submitted, in their heads of argument before this court, that this was an injudicious exercise of the learned Judge's discretion entitling this court to interfere with the decision arrived at. I do not agree. It is not for the E respondent, or the court, to study the affidavits carefully in order to determine what case the respondent is to answer. The grounds of review must be clearly and shortly stated, and, in my view, this must be in the court application itself or at the commencement of the founding affidavit. Rule 257, before it was amended, required those grounds to be contained in the notice of motion which is indicative of the intention of the draftsman that the grounds of review F must be readily apparent at the commencement of the application: see r 257 of the High Court Rules 1971).

This court has time and time again cautioned legal practitioners to exercise more care in the presentation of review applications: see *Minister of Labour & Ors v PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) at 296; *Mtetwa* v G *Moyo & Anor* HH-222-89; *Hall v Director of Civil Aviation* HH-38-89; *Art Printers Ltd v Regional Hearing Officer & Anor* HH-168-87.

Legal practitioners are warned that they risk not only being non-suited but also being ordered to pay costs *de bonis propriis* in cases where they have failed, as in this case, in their duty to advise their clients correctly or in the correct presentation of applications to the courts to the detriment of their clients. H

Ziyambi JA

A Mr *Mazonde*, who appeared for the appellants, confessed his difficulty in supporting the appeal. This is understandable in view of its obvious lack of merit.

Accordingly, the appeal is dismissed with costs.

B Malaba JA & Gwaunza JA concurred.

Coghlan, Welsh & Guest, appellants' legal practitioners

Saywer & Mkushi, first respondent's legal practitioners

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LIQUIDATORS, TIRZAH (PVT) LTD & OTHER COMPANIES v MERCHANT BANK OF CENTRAL AFRICA LTD & ORS 2003 (1) ZLR 294 (S)

Citation	2003 (1) ZLR 294 (S)
Case No	Judgment No. S-123-02
Court	Supreme Court, Harare
Judge	Ziyambi JA, Malaba JA & Gwaunza JA

Heard 30 September 2002; 10 March 2003

Judgment 10 March 2003

Counsel *C W Jordaan SC*, with him *E W W Morris*, for the appellants
A P de Bourbon SC, for the respondents

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Contract — *cession — validity — cession splitting debt among several cessionaries — when valid — challenge to validity of cession — who may raise question of validity — interpretation of contract — whether a pledge or security* D

Headnote

The four appellant companies were part of a group of eight companies owned by one man and his family. In 1993, all but one of the appellant companies ceded their book debts to first two respondents as security for monies advanced to the companies. In 1995, the four appellant companies ceded all their book debts to the respondent financial institutions, as a E group, in consideration of monies advanced to them. When the appellant companies went into liquidation, the liquidators collected the debts but refused to hand them to the respondents in terms of the cessions. The respondents sought a declaratory order as to the validity and enforceability of the cessions, as well as an order for immediate payment to them by the appellants of the monies collected. The High Court upheld their F application.

The appellants argued that the cessions were invalid, as they amounted to a splitting of the debts. Alternatively, they argued that the deeds were void for vagueness, saying that it was not clear from the wording of the cessions whether the deeds constitute an out-and-out cession or cessions of a pledge. The respondents contended that even if there was a splitting G and such was impermissible at law, it would render the cession unenforceable as opposed to invalid, in that the debtor could consent to it at a later date. In any event, the debtors, having paid the debts, had waived their right to raise the question of the validity of the cessions and this could not now be raised by the appellants as representatives of the cedents against the respondents. H

Ziyambi JA

A *Held*, that assuming there was a splitting of the debts, the cession could, at the instance of the debtor who proves that he is prejudiced by the cession, be declared invalid and unenforceable. The test is not the potential prejudice apparent at the time of grant of the cession but whether the cession does result in prejudice to the debtor. The debtors had not raised the issue of invalidity but, on the contrary, had made payment of the debts B and been discharged from liability.

Held, further, that it was clear that the companies intended to effect a cession of pledge only. The transaction as a whole showed, by inference, this to be the intention of the parties. The transactions were accordingly not void for vagueness.

C *Held*, further, that as to who may enforce the cessions, in the normal course of things it is the applicant who secures the order who is entitled to enforce it. In this case a departure from the norm had not been shown to be justified and, the deeds having been found to be valid, each of the respondents as joint cessionary was in a position to enforce the whole debt.

Cases cited D

Anglo-African Shipping Co (Rhodesia) (Pvt) Ltd v Baddeley & Anor 1977 (1) RLR 259 (G)

Evins v Shield Ins Co Ltd 1980 (2) SA 814 (A)

Kotsopoulos v Bilardi 1970 (2) SA 391 (C)

E *Mountain Lodge Hotel (1979) (Pvt) Ltd v McLoughlin* 1983 (2) ZLR 238 (S)

Segal & Anor v Segal & Ors 1977 (3) SA 247 (C)

Twiggs v Millman NO & Anor 1994 (1) SA 458 (C)

Case information

C W Jordaan SC, with him *E W W Morris*, for the appellants

F *A P de Bourbon SC*, for the respondents

Judgment

Ziyambi JA: The appellants are liquidators of four companies ("the companies") which are part of a group of eight companies, the entire shareholding of which was owned by one man and his family.

G In 1993, the companies, with the exception of PB Shoes (Pvt) Ltd, in consideration of certain loans of monies advanced to them, ceded all their book debts to the first and second respondents ("Merchant Bank" and "Syfrets"). As security for the monies advanced to them two notarial deeds were executed.

H In 1995, the same three companies, now joined by P B Shoes (Pvt) Ltd, ceded

all their book debts to the three respondents ("the banks") in consideration for A sums of money lent to them and totalling 70 million dollars ("the capital debt").

The companies later went into liquidation and the appellants collected the debts covered by the cessions from the debtors and banked them. The respondents requested payment thereof in terms of the cessions but were met B with resistance from the appellants. An application was therefore filed in the High Court by the respondents who sought a declaratory order as to the validity and enforceability of the cessions as well as an order for immediate payment to them by the appellants of the monies collected. A special order of costs was sought against the respondents for filing an affidavit which, it was alleged, contained argumentative and irrelevant material. The order for C immediate payment was not persisted in at the trial and the High Court's judgment is concerned with the declaratory order as well as the question of costs.

The High Court found the cessions to be valid and enforceable and ordered the costs to be the costs in liquidation, declining to make a special order of costs D against the respondents. The appellants now appeal to this court against the whole judgment of the High Court.

Mr *Jordaan*, for the appellants, maintained in his argument before us that the deeds were invalid and therefore unenforceable. His argument went like this:

In the 1993 cessions, the same debts were ceded separately to Merchant Bank and Syfrets. This amounted to a splitting of the debts, which is not permissible E in law without the consent of the debtors. The 1995 cession purported to cede all the book debts of the companies, and that included the debts covered by the 1993 cessions. This amounted to a further splitting of the debts without the consent of the debtors. The appellants also took the view that the provision in the cession that the respondents should rank *pari passu* amounted to a F splitting of the debts to various individuals, which was also impermissible in law without the consent of the debtors. The cessions were therefore invalid and therefore void *ab initio*.

The respondents, however, while not conceding that there was a splitting of the debts, contend that even if there was a splitting and such was impermissible at law, it would render the cession unenforceable as opposed to invalid in that G the debtor could consent to it at a later date. Further, the debtors, having paid the debts, had waived their right to raise the question of the validity of the cessions and this could not now be raised by the appellants as representatives of the cedents against the respondents.

Ziyambi JA

A **THE 1993 CESSIONS**

These were made simultaneously and in separate documents to Merchant Bank and Syfrets. In each deed the "cedents … agreed to cede … by way of pledge up to the total amount secured by this Deed all their book debts which may hereafter be owing to them by their debtors".

B It would appear, therefore, that the same debts were ceded separately to two different creditors. *Prima facie*, there was the possibility that the cessions could have resulted in the debtors' position being made more burdensome by being, for example, faced with separate actions from the respondents and that the consent of the debtors to the cessions was therefore necessary: see *Mountain Lodge Hotel (1979) (Pvt) Ltd v McLoughlin* 1983 (2) ZLR 238 (S) C at 246C; *Anglo-African Shipping Co (Rhodesia) (Pvt) Ltd v Baddeley & Anor* 1977 (1) RLR 259 (G).

However, I do not agree with the submission that such a possibility of prejudice to the debtors would, in the absence of consent to the cessions by the debtors, render the cessions void *ab initio*. Rather, I take the view that such a cession could, at the instance of the debtor who proves that he is prejudiced D by the cession, be declared invalid and unenforceable. Thus the test is not the potential prejudice apparent at the time of grant of the cession but whether the cession does result in prejudice to the debtor. I find support for this view in the following passage from *Anglo-African Shipping Co (Rhodesia) (Pvt) Ltd v Baddeley & Anor supra*. At 264H-265C, Goldin J (as he then was) remarked:

> E "… whenever a cession of an entire debt *does* result in prejudice to the debtor the cession will not be effective. Where a creditor sues for a *pro rata* share of the debt only, or where under cession *in securitatem debiti* the cessionary only becomes entitled to enforce his security by the payment of portion of the debt ceded to him, this would amount to a splitting of a debt without the consent of a debtor and would be F unenforceable. Any claim for a portion of the debt, even where the whole debt was ceded, would assume the character of and be subject to the rule governing a cession of part of a debt.
>
> Any debtor whose entire indebtedness has been ceded to co-creditors jointly and severally without his consent is therefore always *entitled to raise the question of prejudice of such a cession and may thereby render* G *the cession invalid and unenforceable: s*ee and compare Schreiner J in *Spies v Hansford and Hansford Ltd supra* at p 9 and Corbett J in *Kotsopoulos v Bilardi, supra* at p 397" (my emphasis).

A factor which militates against the contrary view advanced by the appellants is that the debtors could, if they chose to, give their consent to the already H effected cessions: see *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A)

Ziyambi JA

at 827C where Trollip JA said: A

> "Ordinarily, a creditor cannot divide and separate or split such a right of action or debt without the consent of the debtor: see *Spies v Hansford & Hansford Ltd* 1940 TPD 1; *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 275F-G. The reason is the possibility that it may render the debtor's position more burdensome by causing him prejudice, hardship, or inconvenience (see the *Spies* case at 8-9). In so far as (the) respondent's B consent was required for what (the) appellant did, *it is manifest that such consent was tacitly given. That is to be inferred from the following. At no stage did (the) respondent offer the slightest objection or opposition to such separation or splitting of the right of action or debt*" (my emphasis).

See also *Twiggs v Millman NO & Anor* 1994 (1) SA 458 (C) at 462C-F. C

The debtors have not raised the issue of invalidity but, on the contrary, have made payment of the debts and been discharged from liability. They can, in view of the payment of the debts without demur, be taken to have waived their right to contest the validity of the cessions. Their position has not been shown to be prejudiced by the cessions. It is therefore, in these circumstances, not open to the appellants to take the issue of invalidity for want of consent. D Accordingly, the cessions were correctly declared to be valid.

THE 1995 CESSION

With regard to the 1995 cession, the learned judge found it to be a valid composite cession to "the banks". In that he was, in my view, correct. However, he was silent regarding the contention by the appellants (the respondents in E the lower court) that the debts ceded to the banks included those

already ceded to Merchant Bank and Syfrets in 1993, and that accordingly the cession was invalid by virtue of the fact that there was a splitting which was impermissible at law without the debtors' consent.

Whether there is a splitting of a debt or debts is a fact which is to be ascertained by looking at the intention of the parties: see *Segal & Anor v Segal & Ors* 1977 (3) SA 247 (C) at 252G-H. F

The respondents state it was never their intention to split the debts or to put any additional burden on the debtors. This would appear to find support in the fact that, in the 1995 cession, the cessionary is the group referred to as "the banks" and the capital debt is the total sum owing by the companies to the G banks, inclusive of the sums secured by the 1993 cessions. Further, it would appear to be the position that the debts which were the subject of the 1993 cessions were, so to speak, embodied in the composite cession of 1995 with the resultant effect that all the book debts of the companies were ceded to the banks. There was, therefore, no question of any prejudice to the debtors.

In any event, the debtors have discharged in full their liability in respect of the H

Ziyambi JA

A debts which were the subject of the cession. As in the case of the 1993 cessions, it is not now open to the appellants to raise the question of the invalidity of the cessions on the ground of prejudice to the debtors.

The appellants further contended, in the alternative, that the deeds were void for vagueness. They submitted that it is not clear from the wording of the cessions whether the deeds constitute an out-and-out cession or cessions of B a pledge. In any event, they argued, the 1993 cessions exceed the authority given to the Appearer to effect the cessions. Both errors, they submitted, rendered the cessions void. The learned judge in the court *a quo* had this to say:

> "I accept that '(if) an agreement is couched in such wide terms that it is not clear that the parties intended a pledge or out and out security, the C agreement should be regarded as void for vagueness': see Scott *The Law of Pledge* 2 ed p 252.
>
> However, the following passage from the same learned author on the same page is of assistance in determining both points raised by the liquidators:
>
> > 'It is not always easy to determine the intention of the parties. This is particularly so where the following words are encountered in a deed of D cession: "I hereby cede, transfer, assign and pledge as continuing covering security all my right, title and interest in". In such an instance, it is not possible to determine the intention of the parties from the cession itself and the transaction as a whole should therefore be scrutinised. The words "as security" indicate that the parties intend to effect a cession *in securitatem debiti* and not an ordinary cession, but from the rest of the E words it is not clear whether they intended the cession to be in the nature of a pledge or an out and out security cession … If the parties intended to effect an out and out cession, there are certain modifications which they will have to bring into effect by agreement. These are a *pactum fiduciae*, an agreement against further cession, and an agreement too that the cessionary himself will not institute action before the cedent's debt F is due. If the parties use the words cede and pledge, but the above agreements are not included in their transaction, I think the inference may be drawn that they intended to create a pledge.'
>
> Scott *supra* 252.
>
> In this case, it is clear that the companies intended to effect a cession of pledge only. The transaction as a whole shows, by inference, this to be the G intention of the parties. The preamble to the deeds state this to be the intention. The deed do not contain a *pactum fiduciae*, an agreement that the cessionary will not institute action before the cedent's debt is due. The deeds are therefore not void for vagueness. What was intended and what may be inferred as having been effected is a cession of a pledge.
>
> The rule, which enables one to find the parties' true intention from vague H wording in a cession, can also be used to find that intention from

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Ziyambi JA

> contradictory wording in that cession. The statement by the declarer to the A 1993 cessions that he was ceding all the companies' debts is contrary to his authorisation. It is also contrary to the expressed intention set out in the preamble. I do not think that that contradiction renders the cession void. The true intention of the parties can be gleaned from the surrounding circumstances. The resolutions of

authorisation, the preambles to the deeds and the remainder of the deeds clearly indicate an intention to cede B a pledge of book debts. What has occurred in the declaration of cession is an error by the draftsman of the cession and the declarer to it. Whatever might be the position in respect of an affected third party, as between the parties to the cession, the claim of the cessionary is restricted to that of a pledge of book debts."

The above accords with my own views on the matter. It is my conclusion, then, C that the learned judge therefore correctly found the 1995 cession to be valid and enforceable.

The appellants argue that, in any event, the cedents had received no value from the respondents, the capital sum having been advanced to Tirzah which had no book debts. This argument has, in my view, no substance, as in each of the D deeds of cession the cedents acknowledged having received the money as a consideration for which the cession was given to the respondents and in each deed the liability of the cedents was expressed to be joint and several. The 1995 cession provided:

"AND THE APPEARER DECLARED THAT WHEREAS:

(a) The Cedents have been granted and may from time to time be granted E certain banking facilities by… 'the Banks'."

The 1993 cessions contained similar clauses.

Finally, the appellants submitted that Syfrets and Zimbank have no *locus standi* to bring this application, as their rights under the deeds of cession were ceded, between September 1996 and 1997 (the exact dates are not clear from F the copies of the deeds filed of record) to a company called Climax which was not a party to this application. They submitted that the re-cession by Climax to these two respondents, for the purposes of the court application, was invalid in that it was not accompanied by a re-cession of the securities which were ceded, by them, to Climax.

The learned judge found that even if this were the case, it did not affect the G standing of Merchant Bank to bring the application, since it was the validity and enforceability of the cessions which were in issue – not who was to enforce them. In this regard, the trial court erred as it was called upon to declare that the cessions were not only valid and enforceable but enforceable "at the instance of the applicants". H

Ziyambi JA

A I agree that the issue of the cessions to Climax does not affect the question of the validity of the cessions, but for different reasons as will appear below. As to who may enforce the cessions, in the normal course of things it is the applicant who secures the order who is entitled to enforce it. In this case, a departure from the norm has not been shown to be justified and, the deeds having been found to be valid, each of the respondents as joint cessionary is B in a position to enforce the whole debt: see *Anglo African Shipping Company (Rhodesia) (Pvt) Ltd v Baddeley & Anor supra* at 264A: see also *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 397 where Corbett J (as he then was) stated as follows:

"This being, in general, the character of a debt owed to co-creditors jointly C and severally, there is much to be said for the view that the cession of a debt to two or more persons jointly and severally does not amount to a splitting of the debt and does not impose additional burdens or duties upon the debtor; and that, therefore, it may be validly effected without the consent of the debtor. The only point which arises is whether each cocreditor is entitled to claim and sue for a *pro rata* share of the debt only, thus creating a multiplicity of claims and actions. It may well be that in D such a case the court would take the view that, inasmuch as each cocreditor was entitled to claim the whole debt, action to recover a mere *pro rata* share would amount to an improper splitting of a single claim and would disallow this procedure under its general power to prevent an abuse of the process of the court …"

E I now deal with the issue of the cessions to Climax. It raises the question whether Syfrets and Zimbank could lawfully cede their rights under the composite cession to Climax as they purported to do. One would have to look to the terms of the deed of cession and the surrounding circumstances in order to determine the intention of the parties and it seems to me, having regard to the terms of the 1995 deed of cession, that they could not do so. The debts were F ceded to a group of cessionaries referred to as "the Banks". It is "the Banks" which alone were given the right, in terms of the deed of cession, to "cede, assign or make over to any person or persons … the whole or any part of its rights under this Deed". It is "the Banks" which alone were given the power to institute proceedings for the recovery of "any amount due under a debt ceded or to be ceded in terms

hereof"; and, in my view, it is "the Banks" alone G which could, in terms of the deed of cession, cede to Climax its rights under the Deed.

Indeed, Mr *Jordaan* submitted in his heads of argument that "cession by one of the co- creditors to a third party … [could] … only be effected with the consent of his co-creditors".

H No such consent was obtained. Therefore, the cessions to Climax were invalid

Ziyambi JA

and unenforceable and did not affect the right of the banks to bring this A application.

COSTS

The question of costs is for the discretion of the trial judge. The learned judge gave reasons for the order which he made. The power of this court to interfere B is limited to a finding that there was an improper exercise by the trial judge of his discretion. This allegation was not made, nor is any impropriety apparent on the record. Accordingly, this court is unable to interfere with the order of the court *a quo* as to costs.

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

Malaba JA and Gwaunza JA concurred.

Joel Pincus, Konson & Wolhuter, appellants' legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners D

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Source:
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REGISTRAR-GENERAL OF ELECTIONS v TSVANGIRAI 2003 (1) ZLR 303 (H)

Citation	2003 (1) ZLR 303 (H)
Case No	Judgment No. HH-37-03
Court	High Court of Zimbabwe
Judge	Mavangira J
Heard	11 March 2003; 12 March 2003
Judgment	12 March 2003
Counsel	*L Matanda-Moyo,* for the applicant *AP de Bourbon SC,* for the respondent *T Hussein,* for the applicant for joinder
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Practice and procedure** — *order — interlocutory order — variation — when may be varied — need for new facts to be shown before interlocutory order may be varied*

Headnote

The respondent, who had instituted an election petition challenging the result of the 2002 presidential election, obtained an interlocutory order directing D the Registrar-General to make available for inspection, within five days, the voters' roll used in that election. Ten days after the five-day period had expired, the Registrar-General applied for an order postponing the inspection for a further two weeks and allowing the inspection to be carried out over seven months. He alleged he had insufficient funds to E bring the election materials to Harare for inspection. He also claimed that for the rolls to be inspected, presiding officers of polling stations, constituency registrars and representatives of political parties would all have to be present.

Held, that orders, even interlocutory orders, will not be lightly altered, particularly in the absence of fresh facts. In this case, the Registrar- F General had placed no fresh facts before the court — his alleged lack of funds had been dealt with a previous judgment given against him — and he had not indicated what steps he had taken to ensure the presence of presiding officers and other officials at the inspection. He had given no sound or cogent reasons for the application for postponement.

Case cited G

Sayprint Textile (Pvt) Ltd & Anor v Girdlestone 1983 (2) ZLR 322 (H)

Case information

L Matanda-Moyo, for the applicant

AP de Bourbon SC, for the respondent

H *T Hussein,* for the applicant for joinder

Mavangira J

Judgment

Mavangira J: This is an urgent chamber application, in which applicant A seeks the following order that:

"1. The inspection programme be and is hereby postponed and to commence on 24 March 2003.

2. The rest of the inspection programme to be altered accordingly"

together with an order that costs be costs in the cause. B

This application is made pursuant to the order by Guvava J in case HC 469/2003 in which the following order was made:

"IT IS ORDERED:

1. That the respondent shall make available for inspection by the applicant's legal practitioners in terms of Order 24 of the High Court C Rules, the voters roll for the 2002 Presidential Election, within five days of the date of service of this order upon the respondent."

The applicant in case HC 469/2003 is the respondent in the present proceedings whilst the respondent is the applicant in the present proceedings.

This urgent chamber application was filed with the court on 10 March 2003. It was set down for hearing on 11 March 2003 in chambers. At the onset of the D proceedings in chambers, Mr *Hussein* indicated that he was the legal representative for the first respondent in the principal matter, that is the Presidential Election petition, being case HC 3616/02. He indicated that he was applying for his client, that is, the first respondent in case HC 3616/02, to be joined as one of the applicants in this matter. E

[*The learned judge then dealt with the arguments advanced by the legal practitioners in regard to the application for joinder. Since, ultimately, the practitioners for the applicant and the respondent indicated that they had no objection to Mr Hussein being present when the voters' rolls were inspected, their arguments and the learned judge's remarks regarding them have been omitted from this report.* F

The learned judge then continued:]

The present application is one of several interlocutory applications made pursuant to the filing of the main Presidential Election Petition, case HC 3616/02. The other previous applications are sufficiently outlined in Gowora J's judgment in case HC 10273/02. I do not consider it necessary to G repeat the same here. It is necessary however, to state herein that after the order by Guvava J in case HC 469/03, the applicant made an urgent chamber application before this court on 27 February 2003 in case HC 1788/2003 seeking directions in terms of Order 23 of the High Court Rules. The applicant's counsel stated that this was made because the applicant was unaware of how to give effect to Guvava J's order. That application in case HC H

Mavangira J

A 1788/2003 was dismissed with costs by Matika J on 4 March 2003 who directed compliance with the order by Guvava J as granted.

Service of Guvava J's order on the applicant was effected on 21 February 2003. Thus the applicant was to make the voters' roll available for inspection by the applicant's legal practitioners, within five days of 21 February 2003, that is by 28 February 2003. The applicant's counsel submitted that when Matika J B dismissed the application for directions on 4 March 2003, it *then* became imperative for the applicant to comply with Guvava J's order. The running of the five days in Guvava J's order was interrupted by the making of the application for directions and the counting of five days, therefore, starts again anew from the date of Matika J's order, that is, 4 March 2003.

C I will deal with the effect of that submission in my findings.

The applicant's counsel also submitted that the applicant's application has been misconstrued as it is not an application to vary Guvava J's order. It is an application for postponement.

It was submitted by the applicant's counsel that for the inspection to take D place, presiding officers, constituency registrars and political parties' representatives must all be present. The constituency registrars are all available and in place and ready for the inspection. The presiding officers, who are mainly drawn from the teaching profession, are not presently available. It had been assumed that they would be available but it only became apparent on Friday 7 March 2003 that that would not be possible. They need to be given E two weeks' notice. No explanation was given as to what was done from the date of Guvava J's order to 7 March 2003. No explanation was given as to what efforts if any had been made to make the representatives of other political parties aware of the order granted by Guvava J. It was submitted that need for the presence of the presiding officers was occasioned by the fact that they had sealed the ballot boxes and they must therefore unseal them. The necessity of F the presence of representatives of political parties appears to be based on the need for transparency.

The respondent's counsel submitted that the instant application is frivolous and vexatious as all it amounts to is an effort by the applicant to avoid the respondent having access to the voters' rolls and that this court cannot and G does not have the power to extend the five-day period imposed in case HC 469/ 2003, in other words, alter Guvava J's order, the applicant not having shown that the grounds for variation exist. He cited in this regard *Sayprint Textile (Pvt) Ltd & Anor v Girdlestone* 1983 (2) ZLR 322 (H) in which reference is made to *Bell v Bell* 1908 TS 887, the benchmark decision for guidance in such H matters, that is, variation of an interlocutory order.

Mavangira J

The respondent's counsel also submitted that the applicant has not complied A with the law nor with a previous court order, both requiring him to bring all the relevant election material to Harare. Further, the applicant's plea of poverty has already been dismissed as irrelevant by Gowora J in case HC 10273/02.

With regard to the applicant for joinder made by Mr *Hussein* on behalf of the B first respondent in the main Presidential Election Petition, I understand the parties' counsel's further submissions made after the court sought clarification of the relief sought, to be the effect that there is no dispute. In other words, the respondent has no objection to the presence of Mr *Hussein* or other legal representatives during the inspection of the voters' rolls which will be made available to the respondent by the applicant or his officers; as long as there is C no hindrance to the carrying out of the inspection by the respondent's representatives. Mr *Hussein* on his part has no objection to the inspection of the voters' rolls by the respondent. He however would like to be present when the ballot boxes are unsealed and the voters' rolls are made available to the respondent's representatives. Thus there has been and there is no bar to Mr *Hussein'*s or other representatives being present at such inspection. He is D clearly an interested party and should be allowed to be present.

It is in my view important that the nature of the order by Guvava J is clearly understood. To me, the order merely requires the applicant to produce the Voters' roll for inspection by the legal practitioners for the respondent. This arises from the applicant's discovery of the said Voters' roll as part of the E evidence to be relied upon in the main case HC 3616/02.

Secondly, the court is not concerned with the minute details of how this is done.

To emphasise the above, the respondent is not seeking unfettered access to material other than the voters' roll. What is to be made available is the voters F roll. It is appreciated that the applicant is the custodian of other voting material which does not form part of the order and to which the order does not relate. Thus, any concern of unfettered access by anyone does not arise on a simple reading of Guvava J's order.

As already stated above, there is in effect no objection to the presence of Mr *Hussein* at the places and times when the voters' roll is made available to G the respondent's legal practitioners. Should he wish himself or his duly appointed representatives to have the same voters' roll made available to them for purposes of examination, they may request such of the applicant, who it is expected will comply. H

2003 (1) ZLR p307

Mavangira J

A With regard to the main urgent chamber application presently before me, I reiterate that the order by Guvava J is clear and simple. It requires the applicant in these proceedings to make available for inspection by the respondent's legal practitioners, in terms of Order 24 of the High Court Rules, 1971, the voters' roll for the Presidential Election within five days of the date of service of the order on the applicant. The order was made on 12 February 2003. It was served B on the applicant on 21 February 2003.

In *Sayprint Textile (Pvt) Ltd & Anor v Girdlestone* 1983 (2) ZLR 322 at 326 Squires J stated:

> "In Bell's case *supra,* which seems to contain such guidance as there is, Innes CJ said at 894:
>
> > C 'Courts will not lightly vary their own orders, even though they may be of an interlocutory character. And the cases in which such orders will be altered in the absence of fresh facts cannot be numerous.'
>
> There were such fresh facts in *Bell*'s case and in *Meyer'*s case. [*]"

No fresh facts which were not before Guvava J or were unknown to the D applicant at the time have been placed before me. What has been made is the submission in one breath, that because the applicant failed to secure funding from Treasury, it is difficult for the applicant to comply with Guvava J's order as he has not been able to bring all the election materials to Harare. In the next breath, it has been submitted that by supplying the programme attached to the applicant's papers, the applicant is in fact complying with the order as he is E making the voters' roll available and the respondent must comply with that programme.

As submitted by the respondent's counsel, the issue of the applicant's failure to secure funds has already been dealt with by this court in case HC 10273/02 in which Gowora J at page 4 of her cyclostyled judgment found:

> F "The transmission of papers to Harare, is not in my view, a function outside the ambit of the applicant's functions, such that a specific request for funds should be made to Treasury. It is an administrative function which is part and parcel of and ancillary to the election process for which the applicant should have provided for at the time of holding elections."

If the applicant is correct in his submission that presiding officers must also G be present at the inspection, it has not been shown to the court what steps he took since 21 February when the order was served on him to secure and ensure their presence. There is no explanation as to why it was only on Friday 7 March 2003 that this matter was raised for the first time.

2003 (1) ZLR p308

Mavangira J

This is particularly significant when regard is had to the fact that compliance A with the order in question was to be effected by 28 February 2003. In my view, the conduct of the applicant reveals an element of tardiness, a lack of willingness to give effect to court orders granted in this matter. No sound or cogent reasons have been given for the application for postponement. It cannot be granted simply because it has been sought. The application for postponement B is accordingly refused. I am fortified in my decision by the fact that the applicant has produced a programme beginning 10 March 2003 to 21 October 2003 for the purposes of inspection of the voters' roll. This is a process and not an event, which spans a period of seven months. The making available of the voters' roll for inspection is essentially a straightforward matter. The applicant must do so. The application for postponement is accordingly C dismissed. The time limits as stipulated on the order by Guvava J have not been complied with. That must be a matter of concern. The postponement is premised on the perceived need by the applicant to marshall the presiding officers. The applicant is the custodian of the voters rolls and what is simply sought is to make the voters' rolls available for inspection. Clearly, he does not need to gather this large array of presiding officers to make the voters' rolls D available. He is competent to make the voters' rolls available himself.

In the result, it is ordered as follows:

IT IS ORDERED:

1. That the application for joinder is hereby dismissed. The legal practitioner or his duly appointed representative for the first respondent in case HC E 3616 is at liberty to be present at any such inspection of the voters roll.
2. The costs in respect of that application are to be borne by the applicant for joinder.
3. The application for postponement is dismissed with costs. F

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

Gill, Godlonton and Gerrans, respondent's legal practitioners

Hussein Ranchhod & Co., for the applicant for joinder G

* *Meyer v Meyer* 1948 (1) SA 484 (T) — *Editor*.

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Source:
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S v MOYO 2003 (1) ZLR 309 (H)

2003 (1) ZLR p309

Citation 2003 (1) ZLR 309 (H)

Case No Judgment No. HH-43-03

Court High Court, Harare

Judge	Makarau J & Karwi J
Heard	6 February 2003; 12 March 2003
Judgment	12 March 2003
Counsel	** *Ndlovu*, for the appellant Mrs ** *Ziyambi*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law — *common law crimes — fraud — misrepresentation — need* C *to show that accused made a misrepresentation — accused filling in form claiming assistance but omitting parts of form which set out basis for such claim – not a misrepresentation*

Headnote

The appellant was convicted of fraud. It was alleged that, with intent to defraud, she had misrepresented to the relevant vetting officers that she D was a "war veteran", as defined in the War Veterans Act [*Chapter 11:15*] and had participated in the war of liberation in Mozambique. In terms of the Act, to be regarded as a war veteran, the person involved must have undergone military training *and* have participated consistently and persistently in the liberation struggle. She had claimed a gratuity and E pension for such participation. She filled in a form, indicating when and where she had undergone military training, but left blank the section dealing with the details of her participation in the struggle. In spite of this she was accepted by the vetting officers as having been a war veteran.

Held, that she should not have been convicted of fraud. She did not make the misrepresentation alleged – that she was a war veteran. She merely F presented certain information upon which the vetting officers pronounced her a war veteran. If any misrepresentation was made, it was made by the vetting officers. Although she could have been charged with a contravention of s 24(b) of the Act, the State had chosen not to do so, and a verdict of contravening that section could not be substituted, even though her counsel agreed that would have been the right course.

Legislation considered G

War Veterans Act [*Chapter 11:15*], s 2

Case information

** *Ndlovu*, for the appellant

H Mrs ** *Ziyambi*, for the respondent

2003 (1) ZLR p310

Makarau J

Judgment

Makarau J: The appellant appeared before a magistrates court facing A one count of fraud. It was alleged against her that on 30 October 1997, at ZANU-PF offices in Kwekwe, the appellant, with intent to defraud, misrepresented to the Zimbabwe National Liberation War Veterans vetting members ("the vetting officers"), that she was a war veteran and had participated in the war of liberation in Mozambique. As a result of that misrepresentation, B the appellant was regarded as a war veteran and was entitled to a gratuity in the sum of $50 000 and thereafter, a monthly pension in the sum of $2 000, thereby causing prejudice in the sum of $56 000.

Prior to pleading to the charge, the appellant raised an exception to the charge. She was of the view that a charge of fraud in the circumstances of her case was improper. She was of the further view that she should have been charged with C contravening s 24(b) of the War Veterans Act [*Chapter 11:15*]. The section provides that:

> "24 (a) …
>
> (b) Any person who obtains or attempts to obtain assistance to which he is not entitled knowing that he is not entitled to it shall D be guilty of an offence."

The exception was dismissed and the trial proceeded on the fraud charge to which the appellant pleaded not guilty. After trial, she was convicted. She was sentenced to four years' imprisonment, one of which was suspended on condition of good behaviour.

The appellant appealed against both conviction and sentence. Against E conviction, the appellant alleged *in limine* that the trial magistrate erred in finding that fraud was the proper charge in the circumstances of the matter. She alleged in the main that fraud had not been proved beyond reasonable doubt. Regarding sentence, the appellant was of the view that the sentence imposed by the trial magistrate was so severe as to induce a sense of shock, in light of F the fact that the War Veterans Act provides for a penalty of $500 or six months' imprisonment.

The first issue that falls for determination is whether or not the trial magistrate erred in dismissing the exception by the appellant. The main ground advanced by the appellant in support of the contention that the trial magistrate erred in accepting that fraud was the proper charge in the matter is that the War G Veterans Act provides for a similar offence and the statutory offence supersedes the common law offence of fraud.

In my view, there is nothing in the wording of s 24 of the Act that suggests that the legislature intended the offence created by that section to supersede the common law offence of fraud. As such, both offences are to me, competent, H

Makarau J

A depending on the facts of the case before the court. As correctly submitted by Mrs *Ziyambi*, the State in all criminal proceedings is *dominus litis* and has a discretion as to which charge to prefer against the accused. It is, however, prudent practice for prosecutors to charge the one offence in the main and the other in the alternative, to avoid a situation like the one that occurred in this matter as I shall detail hereunder.

B It is common cause that for the State to prove that the appellant misrepresented to the vetting officers that she was a war veteran, the State had to rely on the definition of "war veteran" as provided for in the Act. The term "war veteran" can have various meanings in ordinary parlance. As somewhat humorously put by the trial magistrate in his judgment:

> C "Now war veteran is defined for the purposes of the Act. It's not going to be colloquial war veteran or what we perceive to be a war veteran. Its specific to the Act. One who falls outside the definition is not a war veteran, no matter how much how one may want to be a war veteran."

It was necessary to put the term in a specific context for it to found a charge of fraud. The context in which it was put was that of the Act as the appellant D had allegedly misrepresented to the vetting officers that she was a "war veteran" for the purposes of accessing the financial assistance provided for under the Act.

In my view, the fact that the State had to rely on the definition of the term "war veteran" as given in the Act to prove its alleged fraud, should have sounded the E first warning bells to the prosecution to charge the appellant with the statutory offence in the alternative. Specific statutes creating specific offences are generally meant to cater for specific instances that may not be covered by the common law offences. It is presumed that the legislature is aware of the common law when it enacts statutes and is supplementing the common law by creating additional offences.

F Section 2 of the Act defines a war veteran as meaning:

> "any person who underwent military training and participated consistently and persistently in the liberation struggle which occurred in Zimbabwe and in neighbouring countries between the 1st June 1962 and the 29th February, 1980, in connection with the bringing about of Zimbabwe Independence on 18th April, 1980".

G It is apparent from this definition that for one to be regarded as a "war veteran" for the purposes of the Act, one must have undergone military training *and* must have participated consistently and persistently in the liberation struggle. I may also add at this stage, that for one to be passed by the vetting officers as a war veteran, one must have represented to them that one is possessed of both H qualifications, if I may use the term loosely.

2003 (1) ZLR p312

Makarau J

The evidence that the State relied on to found the alleged misrepresentation A on the part of the appellant is a form that the appellant filled in 1997 and submitted to the vetting officers. On the form, the appellant indicated that she underwent military training at Samakweza Camp between 1979 and 1980. She further indicated that she underwent both guerilla warfare and regular warfare training. B

In respect of her operational development, she was required to fill in the section starting at para 21 of the form, to para 25. Under this section, she had to indicate her point of entry into Zimbabwe (presumably at the commencement of her participation in the struggle), the name of her detachment, the name of her commander and any sectors, up to 4, in which she was deployed and her sector commanders, the name of her head of department during the struggle C and the name of her "provincial" in the field.

In regard to point of entry, the appellant wrote the word "Manyene". She did not supply any information regarding the name of her detachment, her commanders, any sectors where she was deployed and her section commanders or head of department during the struggle. In other words, she left blank the D spaces where she was supposed to fill in this information. She then deleted the entire section dealing with operational development and running from para 21 to para 25 by running two crossing lines across the section.

On the basis of the above and other information supplied by the appellant on the form, the appellant was passed as a war veteran by the vetting officer and was declared entitled to assistance under the Act. E

It is clear from the foregoing that the appellant should not have been passed as a war veteran by the vetting officers. This is so because her form did not contain any information showing that she had consistently and persistently participated in the struggle. She not only left that entire section blank (other than one entry relating to her point of entry into Zimbabwe), but actually F crossed it out as if it did not apply in her case. In the absence of this information, the appellant is not a "war veteran" in terms of the Act and the vetting officers should have rejected her form for the purposes of the Act. However, although relevant to my inquiry, the issue of what the vetting officers should or should not have done in the circumstances is not the issue that is before me for determination. G

The basis of the charge of fraud against the appellant is the allegation that the appellant misrepresented to the vetting officers that she was a war veteran. This allegation cannot be supported by the evidence as demonstrated above. The appellant merely furnished the vetting officers with an incomplete form upon which the vetting officer passed her as a war veteran. That the vetting H

2003 (1) ZLR p313

Makarau J

A officers did not thoroughly do their work can hardly be the basis of criminal liability on the appellant's part. When the issue of the blank and crossed out section of exhibit 1 was pointed out to Mrs *Ziyambi*, she graciously, and properly in my view, conceded that the charge of fraud cannot stand against the appellant. The appellant did not misrepresent as alleged. She merely presented certain information upon which the vetting officers pronounced her B a war veteran. If any misrepresentation was made, it was made by the vetting officers.

On the basis of the foregoing, I would quash the conviction of the appellant on the fraud charge.

One other issue remains. It is whether or not there is any other verdict that can C be passed in the circumstances of this case. This issue arises from the fact that the appellant is clearly not a war veteran in terms of the Act. I have already laid a basis for my belief in that regard. She did not participate in the struggle as provided for in the Act. The appellant clearly obtained assistance

meant for war veterans while knowing that she was not entitled to it. She thus committed an offence in terms of s 24(b) of the Act.

D The issue that I have to determine is whether on appeal I can substitute a conviction of contravening s 24 of the Act as the verdict. Both Mr *Ndlovu* and Mrs *Ziyambi* are agreed that I can. I am not convinced that I can.

The appellant was charged with the common law offence of fraud. The evidence before the court is that she did commit another offence, contravening E s 24(b) of the War Veterans Act. This statutory offence is not a competent verdict on a charge of fraud.

The State did not see it fit to charge the appellant with a contravention of the Act in the alternative. I know of no law that allows me, even with the consent of the appellant, to substitute a conviction for a common law offence with a statutory offence where the F statutory offence was not charged in the alternative.

In the result, I would make the following order:

The conviction and sentence of the appellant are hereby quashed and set aside.

Karwi J concurred.

G *Muzenda &Partners,* appellant's legal practitioners

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

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S v SHARIWA 2003 (1) ZLR 314 (H)

Citation	2003 (1) ZLR 314 (H)
Case No	Judgment No. HB-37-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	13 March 2003
Judgment	13 March 2003
Counsel	Details not supplied
Case Type	Criminal Review
Annotations	Link to case annotations

Flynote

Criminal procedure (sentence) — *general principles of sentencing — need for meaningful investigation — need to consider community service in* C *appropriate cases*

Criminal procedure — *submission of records for review or scrutiny — dilatoriness defeats purpose of ss 57(1) and 58(1) of Magistrates Court Act [Chapter 7:10]*

Headnote

A first offender aged 20 stole a chicken. He was sentenced, on a plea of guilty, D to eight months' imprisonment.

Held, after an extensive review of relevant cases, that the sentence was excessive. Delay in submitting the papers for review made it impossible to do justice. The immediate release of the accused was ordered. E

Cases cited

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R v Defu GS 10-66

R v Ndhlovu 1967 (2) SA 230 (R)

R v Taurayi 1963 (3) SA 109 (R)

S v Benetti 1975 (3) SA 603 (T) F

S v Chinyama HH-199-98

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

S v Dualvani 1978 (2) PH, H 176 (O)

S v Dube HH-67-95

S v Foss 1980 (4) SA 102 (C) G

S v Gaus; Mukete; Petrus; Teodor 1980 (3) SA 770 (SWA)

S v Groenemeyer 1974 (2) SA 542 (C)

S v Gumbo 1995 (1) ZLR 163 (H)

S v Harington 1988 (2) ZLR 344 (S)

S v Joseph 1969 (4) SA 27 (N)

S v Kashiri HH-174-94 H

Ndou J

A *S v Kazingizi* HH-402-88

S v Kumalo 1973 (3) SA 697 (A)

S v Mahati 1988 (1) ZLR 190 (H)

S v Mangena HH-28-99

S v Manwere 1972 (2) RLR 139 (A)

S v Manhondo HH-186-01

B *S v Maponga* HH-276-84

S v Matanhire HH 146-82

S v Moyo 1984 (1) ZLR 74 (H)

S v Mudzimba HH-150-87

S v Mugauri HH-154-99

S v Muratu HH-383-86

C *S v Mutetwa* HH-373-87

S v Muziki 1973 (2) RLR 158 (G)

S v Ndlovu 1994 (1) ZLR 290 (S)

S v Ngulube 2002 (1) ZLR 316 (H)

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D *S v Roux* 1975 (3) SA 190 (A)

S v Santana HH-110-94

S v Sikunyane 1994 (1) SACR (TL)

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S v Sparks 1972 (3) SA 396 (A)

S v Tarume HH-146-99

E *S v V* 1972 (3) SA 611 (A)

S v van der Westhuizen 1974 (4) SA 61 (C)

S v Williams 1973 (4) SA 248 (C)

S v Wilson HH-125-94

S v Zinn 1969 (2) SA 537 (A)

Judgment

F **Ndou J:** The accused was convicted by a Provincial Magistrate, Gweru at Shurugwi Circuit Court of theft of stock and sentenced to undergo eight months' imprisonment. No part of the sentence was suspended. Nothing turns on the conviction. The learned scrutinising Regional Magistrate, Central G Division, is concerned about the appropriateness of the sentence imposed. He holds the view that the sentence is disturbingly severe. I agree with his opinion, and I have, with the concurrence of my brother Judge Chiweshe, ordered the immediate release of the accused. The reasons for doing so are now provided in this judgment.

H I agree with the view of the learned scrutinising Regional Magistrate that the

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sentence imposed by the learned trial magistrate induces a sense of shock and A ignores the basic sentencing principles.

The salient facts of this matter are that the accused is a young first offender aged 20 years. He stole a chicken on Sunday 16 June 2002 at around 2200 hours from a chicken run. The chickens made a noise as a sign of disapproval of the accused's actions. This awakened the complainant who made a valiant B attempt to stop the theft. The accused fled with the stolen chicken. He pleaded guilty and was convicted. He was not represented by a lawyer. The meagre mitigation extracted from the accused is:

> "I am aged 20 years. Not married. No children. No assets of value."

BASIC ELEMENTS OF SENTENCING C

It is obvious that the learned trial magistrate sentenced a youthful first offender to a custodial sentence on scant pre-sentence information. This sentence cuts across the face of decided cases of the superior courts. This is an intuitive approach to sentencing. I had occasion to criticise this approach in my cyclostyled judgment in *S v Ngulube* 2002 (1) ZLR 316 (H) at 316 C where I stated: D

> "The decision on sentence must be made on a rational and informed basis. This is an example of intuitive approach to sentencing. This approach has drawn criticism from academics in the legal fraternity e.g. R Graser in an article entitled *Sentencing as a Rational Process* (in *Crime Punishment and Correction*) journal of June 1975 26 at 30 cited and criticised the approach as crafted by United States of America Appeal Judge, Irving E Kaufman in the following terms:

> 'The experienced judge, like any good craftsman, does the right thing without constant awareness of his motivations. He may call it a "feel of sentencing.'
>
> There is certainly no room for such instinctive sentencing in our jurisdiction. F It is trite that our courts have over the years followed the rational approach to sentencing. In this approach, the sentencing judicial officer determines the limits set by the legislature as far as the type and quantum of punishment is concerned and then within this, the limits set by the culpability of the offender. He then carefully considers the differing purposes of punishment and, if they conflict, rationally balances them G against each other, according to each its due in the final sentence he imposes."

In other words, the sentencing court must always strive to find a punishment which will fit both the crime and the offender. The basic triad of sentencing was admirably crafted by Holmes JA in the often quoted statement from the case of *S v Sparks* 1972 (3) SA 396 (A) at p 410H where the learned judge held H

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A that, "punishment should fit the criminal as well as the crime, be fair to the state and to the accused and be blended with a measure of mercy."

See also *S v Kumalo* 1973 (3) SA 697 (A); *S v Moyo* 1984 (1) ZLR 74 (H) and *S v Manwere* 1972 (2) RLR 139 (A).

The convicted person should not be visited with punishment to the point of B being broken. This is what has happened *in casu*. Whatever the gravity of the crime and the interests of society, the most important factors in determining the sentence are the person, and the character and circumstances of the crime: see *S v Dualvani* 1978 (2) PH, H 176 (O). The determination of an equitable quantum of punishment must chiefly bear a relationship to the moral blameworthiness of the offender. However, there can be no injustice where in C the weighing of offence, offender and the interests of society, more weight is attached to one or another of these, unless there is over emphasis of one which leads to disregard of the other: see *Punishment: An Introduction to Principles* by M A Rabie and S A Strauss, 3 ed at pp 224-225 and *S v Gaus; Mukete; Petrus; Teodor* 1980 (3) SA 770 (SWA). The court should not be over influenced by the seriousness of the type of the offence and fail to pay D sufficient attention to other factors which are of no less importance in the actual case before the court *S v Foss* 1980 (4) SA 102 (C) at 104B. The overemphasis of a wrongdoer's crimes and the under-estimation of his person constitutes a misdirection which justifies the substitution of the sentence: *S v Zinn* 1969 (2) SA 537 (A).

E The courts have emphasised that justice should be tempered with mercy. In *S v V* 1972 (3) SA 611 (A) at 614, Holmes JA stated:

> "The element of mercy, a hallmark of a civilised and enlightened administration, should not be overlooked, lest the court be in danger of reducing itself to the plane of the criminal … True mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal or F permissive tolerance. It is an element of justice itself."

See also *S v Groenemeyer* 1974 (2) SA 542 (C) and *S v van der Westhuizen* 1974 (4) SA 61 (C). In the words of Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 862F, mercy *eschews insensitive censoriousness* in sentencing a fellow mortal, and so avoids severity in anger.

G In *S v Roux* 1975 (3) SA 190 (A), Rumpff CJ stated that, in determining an appropriate sentence, the trial court must consider the personal circumstances of the accused, the nature of offence and the interests of society. If the trial court upon due consideration of these three basic elements finds that a lenient punishment will be suitable, the court should impose a lenient sentence. Youthfulness might be such an indication. As alluded to above, youthfulness H is a relevant factor *in casu.*

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In light of these basic elements of sentencing, it is essential that magistrates A equip themselves with sufficient and meaningful pre-sentencing information in order to come up with suitable punishment. In *S v Maxaku*; *S v Williams* 1973 (4) SA 248 (C) at 256C, Steyn J emphasised that sentencing is a distinct and separate stage in the criminal process. The learned judge stated:

> "It must be remembered that it is sanctions which ultimately sustain the B system of criminal justice. It little avails the court to determine guilt or innocence in accordance with long established principles of

fairness and then to leave the assessment of penalty to a hazardous guess based on no or inadequate information."

See also *R v Taurayi* 1963 (3) SA 109 (R); *Mbuyase & Ors v R* 1939 (2) PH H 159 (N); *S v Joseph* 1969 (4) SA 27 (N) and *Guide to Sentencing in* C *Zimbabwe* by G Feltoe pp 1-2. In *S v Maponga* HH-276-84, Reynolds J on p 6 of his cyclostyled judgment stated:

"Turning to his second contention, however, which is to the effect that the magistrate's failure to consider factors relevant to sentence amounted to a gross irregularity, there is far more room for criticism of the magistrate's court proceedings. Here, as in every criminal trial, it is vitally necessary D for the magistrate to be fully informed of all factors relevant to sentence before attempting to assess an appropriate penalty. It is simply not possible for any judicial officer to determine a fitting punishment unless he is apprised of all the facts of the case, including the personal circumstances of the accused. In the present case the magistrate appears to have made no inquiry as to what factors led up to the commission of the E offence, and it seems doubtful that he afforded the accused the opportunity of explaining matters either … To pass sentence in the dark, as it were, to my mind constitutes a gross irregularity within the meaning of s 27 of the High Court of Zimbabwe Act 29 of 1981. Certainly, to rely only on the perfunctory inquiry that was made here could result in grave prejudice to the accused. In my view, it is important that magistrates must not regard F the procedure provided in s 255 (now s 271) of the Criminal Procedure and Evidence Act [*Chapter 59*] as a warrant to hasten pell-mell through cases. Indeed, this form of trial is so truncated, and the possibility of error, as a result, is so great, magistrates should be at particular pains, and should exercise every caution to avoid injustices occurring: see Mavis Zindonda AD 15-79." G

In casu, the trial magistrate decided this matter upon the minimum of presentencing information. In the circumstances, the picture of the case was so incomplete that it cried out for further investigation and elucidation. As the accused was not represented by a legal practitioner the trial magistrate was enjoined to ensure that factors of mitigation were fully canvasses because such accused himself will often be ignorant about what sort of things are salient and H

A may influence the court to impose a less severe sentence. The trial magistrate should have offered some guidance in this regard. Without such guidance the accused was hindered in his endeavour to adduce sufficient and meaningful information to enable the trial court to assess sentence humanely and meaningfully, and to reach a decision on punishment based on fairness and proportion. The basic elements of sentencing, as pointed out above, cannot, B therefore, be achieved. One would expect a provincial magistrate, or every magistrate for that matter, to be familiar with these basic elements of sentencing.

IMPRISONMENT AS LAST RESORT

Imprisonment, originally a mere matter of detention until a debt is paid or trial C determined, has now become the most usual punishment for most crimes, except for minor offences for which non-custodial sentences are imposed. This is so because despite the various associations of benevolent men and women and experts in penology, no practicable alternative has worked in most jurisdictions. In our jurisdiction, there has been a paradigm shift. Firstly, over the years our superior courts have emphasised that a sentence of imprisonment D is a severe and rigorous form of punishment, which should be imposed only as a last resort and where no other form of punishment will do. Secondly, there have been concerted efforts to shift from the more traditional methods dealing with crime and the offender towards a more restorative form of justice that takes into account the interests of both society and the victim, i.e. community E service (discussed hereunder).

Before I deal with these new approaches, I find it necessary to share a relevant statement attributed to Sir Winston Churchill, 1923. I, unfortunately can no longer lay my hands on the original text where I got it from but he is reported to have stated:

F "The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted, criminal against the state a constant heart searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts towards the G discovery of curative treatments; unfailing faith that there is treasure, if you can only find it, in the heart of every man."

The trial magistrate in this case did not impose imprisonment as a last resort. She seems to have a misplaced faith that offenders are like putty that can be remoulded at will by benevolent intentions

of imprisonment. The approach of H our courts over the years has been that imprisonment should be used sparingly

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and only where no other punishment is appropriate. A number of decisions of A the superior courts show that they have consistently called for a parsimonious use of imprisonment as a form of punishment: see *R v Ndhlovu* 1967 (2) SA 230 (R); *R v Defu* GS 10-66; *S v Muziki* 1973 (2) RLR 158 (G); *S v Mudzimba* HH-150-87; *S v Mutetwa* HH-373-87; *S v Kazingizi* HH-402-88; *S v Matanhire* HH 146-82; *S v Benetti* 1975 (3) SA 603 (T); *S v Muratu* HH-383 B - 86; *S v Kashiri* HH-174-94; *S v Gumbo* 1995 (1) ZLR 163 (H); *S v Sithole* HH- 50-95; *S v Sikunyane* 1994 (1) SACR (TL); *S v Chinyama* HH-199-98; *S v Mangena* HH-28-99; *S v Tarume* HH-146-99 and *S v Mugauri* HH-154-99. All these cases, and many more, emphasise that imprisonment is a severe and rigorous form of punishment which should be imposed only as a last resort and where no other form of punishment will do. Professor G Feltoe in *A Guide* C *to Sentencing in Zimbabwe* 2 ed at pp 28-29 stated:

> "Because of the drastic nature of imprisonment as a punishment and the deleterious effect stemming from locking persons up in prison, the courts have emphasised time and again that this punishment should be used most sparingly and should only be used where there is no punishment of a less serious nature which can be employed … This call went largely unanswered D until after independence. Since then, and especially over the last two years, judges have concertedly stressed that imprisonment must be used with restraint. If an offender is gaoled for a short period it has no rehabilitative effect on him, and he becomes a burden to the state for the period he is in prison. If his social and economic life is disrupted, he may thereafter continue to be a burden upon the community, and the social and E economic disruption of his life is a very probable consequence of going to prison."

GENERAL DETERRENCE

When asked to comment on her severe sentence the learned trial magistrate stated: F

> "When I sentenced him I was aware of the value and age of the offender and took that into consideration when I passed the sentence. My intention was to make this sentence a deterrence to other offenders because it is improbable for complainants to spend the whole day looking after their chicken (*sic*)."

The learned trial magistrate evidently over-emphasised deterrence. The use of G the words "a deterrence to other offenders" is an indication that the learned trial magistrate had in mind the concept of general prevention. General prevention is justified in that it is calculated to prevent people in general from committing crimes, in other words to keep people law abiding. People are thus restrained from committing crimes by the threat of punishment rather than by the imposition of punishment. The idea here is that man, being a rational H

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A creature, would refrain from the commission of crimes if he should know that the unpleasant consequences of punishment will follow the commission of certain acts. It is thus the inhibiting effect of the threat of punishment, or of the imposition of punishment on others, which should cause man to think twice. This restraint is referred to as psychological coercion. It is worth noting that the success of general deterrence is dependent to a large degree upon the B publicity of the threat. It is the publicity and not punishment which deters in this regard: see *Punishment: An Introduction to Principles supra* at pp 89-93. It has been frequently stated, by academics, that the success of general deterrence is more dependent upon the relative degree of certainty that punishment will follow the commission of a crime, than upon the severity of the penalty: see *Driver Behaviour and Legal Sanctions: A Study of Deterrence* C by Cramton, 1969 (67) *Michigan Law Review* pp 421-454 and *Deterrence: The Legal Threat in Crime Control* (1973) by Zimning and Hawkins. *In casu*, the learned trial magistrate did the opposite, she used severity of sentence, and not relative degree of certainty that punishment will follow, as her basis for general deterrence. Generally, the trial magistrate overlooked the personal D circumstances of the accused before her, and concentrated on would-be similar offenders. This is misdirection. In this regard, I refer to the case of *S v Khan* HH-86-86 wherein Mfalila J stated:

> "While general considerations with regard to deterrence have a place in the sentencing process, they are not the dominant factor. The dominant factor is the accused before the court who should be treated as an

individual E rather than as a member of a criminal fraternity who collectively are determined to destroy society."

See also *S v Harington* 1988 (2) ZLR 344 (S) and *S v Mahati* 1988 (1) ZLR 190 (H). In *Contemporary Punishment*, Gerber and McAnany (1972) stated, "The prevention of crimes as a goal of society is not ultimately achieved by F either crass fear or huge detention centres but by a successful communication of disapproval." It is often the fear of being branded with a social stigma rather than the fear of punishment itself which prevents persons from committing crimes i.e. the socialisation process keeps more people law abiding than the police and subsequent imprisonment. *In casu*, the dominant factor in the mind of the trial magistrate was deterrence and not the youthful offender before her. G In her apparent obsession with general prevention, she overlooked the young man before her. This was a misdirection on her part. In any event, general deterrence should be considered in the context of the kinds of crime, kinds of persons and kinds of societies. In this regard, in *In Punishment: For and Against* (1971) at p 15, the learned author, Middendorff commented:

"The effectiveness of all forms of deterrence is directly connected with the H structure of a given society. The smaller or closer a society is, the better

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deterrence can work. Group intimidation is the foundation of deterrence. A The more distant people are from the group, the smaller the influence of deterrence."

In *General Preventive Effects* at p 959, author Andenaes remarked;

"In a small, slowly changing community the informal social pressures are strong enough to stimulate a large measure of conformity without the aid B of penal laws. In an expanding urbanised society with a large degree of mobility this social control is weakened, and the mechanism of legal control assumes a far more basic role."

SUITABILITY OF COMMUNITY SERVICE

Community service is appropriate in cases of first offenders convicted of nonserious offences. As alluded to above, the basic principle is that first C offenders, especially young ones like the accused *in casu*, should as far as possible be kept out of prison. Community service is one way of ensuring that this objective is achieved. Our courts have, over the years emphasised the need to adopt this holistic approach to sentencing in that it punishes the offender, it causes the offender to pay reparation by way of rendering services to the D community, and integrates the offender into the society: see *S v Ndlovu* 1994 (1) ZLR 290 (S), *S v Sithole* HH-50-95; *S v Dube* HH-67-95; *S v Wilson* HH- 125-94; *S v Santana* HH-110-94 and *S v Gumbo* 1995 (1) ZLR 163 (H). *In casu*, when asked by the learned scrutinising Regional Magistrate whether she considered imposing community service, the trial magistrate responded in the following terms: E

"I did not carry out the inquiry into community service because I wanted the accused to spend that period in jail. I did take into consideration that these days it is not easy to keep these chickens."

This approach flies across the face of guidelines by the National Committee on Community Service and case law. It is trite that community service should F be considered in all cases warranting an effective prison sentence of 24 months or less (12 months or less at the time these cases were decided upon). *In casu*, the sentence imposed is eight months imprisonment and yet the trial magistrate did not even consider community service. This is a clear disregard of the precedents of this court: see *S v Tigere* HH-225-93; *S v Nyamukapa* HH- 108-94; *S v Chikomo* HH-107-94; *S v Tiriboyi* HH-166-94; *S v Mumvuri* HH G - 106-94; *S v Wilson supra*, *S v Gumbo supra*. The accused, *in casu*, is unsophisticated and was not represented by a legal practitioner. In such circumstances, it is essential for the trial magistrate to canvass the issue of community service with him. This was not done. This was a misdirection. In the *Gumbo* case *supra*, Bartlett J remarked at 166 B: H

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A "There is nothing in the magistrate's reasons for sentence to indicate that the option of community service was considered... It is particularly important that magistrates give active consideration to the new concept of community service."

In *S v Antonio & Ors* 1998 (2) ZLR 64 (H) at 68 G, Chinhengo J rightly observed:

> "In the first three cases, no reasons were given as to why community service was not at all considered. In failing to do so, the magistrates concerned clearly misdirected themselves."

In *S v Chinzenze & Ors* 1998 (1) ZLR 470 (H), Garwe J (as he then was) emphasised that the trial court should carry out a full enquiry, not only as to the accused's means, but also his general suitability for community service. From the tone of her response, the trial magistrate seems to be one of those judicial officers who begrudgingly consider the option of community service. If my observation is correct, then what Smith J stated in *S v Msindo & Anor* HH-207-94 should be repeated here:

> "I am distressed at the magistrate's approach to sentence in these two cases. He says that he suspended the sentence in both cases on condition the accused performed community service because that is a fashionable sentence these days. In determining the appropriate sentence to be imposed in each case, the magistrate should consider carefully the gravity of the offence committed and the circumstances of the accused. He should not merely impose a sentence which is considered to be 'fashionable'. One of the reasons for introducing the concept of community service was to protect first offenders from falling under the influence of hardened criminals by keeping them out of prison."

This is a typical case where the trial court should have considered the option of community service. By failing to do so, the trial magistrate committed an elementary error which one would not normally associate with judicial officers at the level of provincial magistrate. The consequences of such error unfortunately constituted a serious misdirection.

DILATORINESS ON SUBMISSION OF MATTERS FOR REVIEW OF SCRUTINY

Justice delayed is justice denied. This statement is all too familiar to the ears of lawyers. In this case, the accused was convicted on 8 November 2002. The review cover was typed on 15 November 2002. The trial magistrate only signed the review cover on 30 November 2002. The record of the proceedings was received by the scrutinising Regional Magistrate on 2 December 2002. The scrutinising Regional Magistrate promptly sent the record back with a query. He deliberately stated in his minute: "May I have an urgent reply in view of

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possible prejudice occasioned to the accused." This remark did not shake the judicial conscience of the trial magistrate. She only responded on 24 January 2003 and signed and dispatched the response on 27 January 2003. All this time, the accused was in custody. It did not occur to the learned trial magistrate that she had to explain the overall dilatoriness on her part. Such delays have, unfortunately, reached disturbing proportions in terms of both frequency and length of time. In cases, as in this one, where an accused person is in prison, the delays invariably result in injustice being occasioned thereby. Review and scrutiny records and resultant correspondence are not being treated with the urgency they deserve. There was here a complete disregard of the spirit of the provisions of ss 57(1) and 58(1) of the Magistrates Court Act [*Chapter 7:10*]. Magistrates must realise that they are obliged to comply with these provisions and ensure that the records are submitted on review or scrutiny timeously. In cases where there is a delay of weeks or months, it is imperative for the trial magistrate to acknowledge the non-compliance and explain the reason therefor. The trial magistrate should not adopt a business-as-usual approach premised on the ground that condonation for dilatoriness is automatic: see *S v Manhondo* HH-186-01 at pp 5-6 of my cyclostyled judgement.

In this matter, the most appropriate option that would meet the justice of the case is one that will ensure immediate release of the accused.

In the circumstances, the conviction is confirmed and the sentence of eight months' imprisonment is set aside and substituted as follows: $3 000 or in default of payment two months' imprisonment. As the accused has already served the alternative term, his release was ordered as stated above.

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MAPARANYANGA v SHERIFF OF THE HIGH COURT & ORS 2003 (1) ZLR 325 (S)

Citation	2003 (1) ZLR 325 (S)
Case No	Judgment No. S-132-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Gwaunza AJA
Heard	11 November 2002; 18 March 2003
Judgment	18 March 2003
Counsel	*M Chiwunda,* for the appellant *E T Matinenga,* for the first respondent *A Chinake,* for the second respondent No appearance for the third, fourth and fifth respondents
Case Type	Civil Appeal
Annotations	Link to case annotations

Flynote

C **Contract** — *performance — when must be performed in forma specifica — when equivalent performance acceptable — onus on offeree to show that performance in forma specifica not essential*

Practice and procedure — *execution — sale — setting aside of — grounds for — breach of contract in terms of which immovable property sold —* D *rights of judgment debtor and creditor — when breach material — contract specifying that payment had to be made in full — Sheriff and purchaser making arrangements for payment over a period — a material breach of contract — equivalent performance not permissible*

Headnote

E The second respondent was the successful bidder at a sale in execution of the appellant's house. Contrary to the standard form agreement of sale, he did not pay the full price at once, but only a portion, hoping to get a mortgage for the balance. He took occupation of the house. The appellant applied for the sale to be set aside. Among the grounds advanced was that the sale was invalid because the full price had not been paid. The F application was refused. While the appeal was pending, the second respondent paid the full price and took transfer. He was prevented by third parties from taking occupation.

Held, that the main issue was whether the sale was valid, given that the second respondent did not comply with the terms of the sale.

Held, further, that the fact that cash buyers of immovable property were rare, G that mortgage finance, normally paid upon transfer, was consequently the norm and that the Sheriff had been satisfied that payment of the balance of the purchase price had been adequately guaranteed, was irrelevant. Having signed the contract, both parties were bound by and obliged to adhere to its terms. What was arranged between the Sheriff and H the second respondent was a breach of the contract.

Gwaunza AJA

Held, further, that while normally a third party cannot complain of a breach A of contract, in this situation the judgment debtor and judgment creditor were interested parties. In negotiating a sale of immovable property by private treaty, the Sheriff must always be conscious of the vested interest and rights that other people have in the property that he sells in execution, including that sold in a private treaty.

Held, further, that where a contract provides for performance in a particular B manner, the onus is on the offeree to show that performance *per aequipollens* is permissible. This was not the case here.

Case cited

Van Diggelen v De Bruin & Anor 1954 (1) SA 188 (SWA) C

Legislation considered

High Court Rules r359

Case information

M Chiwunda, for the appellant D

E T Matinenga, for the first respondent

A Chinake, for the second respondent

No appearance for the third, fourth and fifth respondents

Judgment

Gwaunza AJA: At the centre of this longstanding and acrimonious dispute E is immovable property and land known as Lot 14 of Subdivision A of Tynwald South of Fountainbleau, just outside Harare. The appellant and the second respondent each claim rightful title to the property. In doing this, and in challenging the other's claim, the parties have filed with the High Court and Supreme Court numerous applications and counter-applications, and no less than six different judges have adjudicated upon these applications. The F dispute dates back to April 1995, when the property, then registered in the appellant's name, was attached and sold in execution.

The background to the dispute is as follows:

The appellant, who took title of the property in 1987, borrowed money from, or incurred certain debts with, among others, the fourth and fifth respondents. G He defaulted in his repayments, resulting in the property being attached and sold in execution. This was done in terms of a private treaty following an unsuccessful sale by public auction. The second respondent was the buyer.

Pursuant to the sale, the first respondent, who was the Sheriff of the High Court ("the Sheriff"), and the second respondent, entered into and signed a H

Gwaunza AJA

A standard agreement of sale dated 24 April 1995, the first condition of which read:

> "1. That the seller hereby sells to the purchaser who buys the property mentioned above together with all the improvements thereon at a price of $650 000.00, payable *on the signing of this agreement*." (my emphasis)

Contrary to this condition, the second respondent paid a deposit of $110 000.00 B on 25 April 1995 and $69 900 on 16 May 1995, making a total of $180 000.00. He hoped to raise the balance through a mortgage bond. At the time that the matter was heard in the court *a quo* no other payments had been effected. The second respondent, however, proceeded to take occupation of the property.

The appellant challenged the validity of this sale, and filed the first application C to have it set aside in April 1995. He argued that the price at which the property had been sold was unreasonably low. The application was dismissed by Gibson J in December of that year. The appellant filed an appeal to this court, resulting in the suspension of transfer of the property to the purchaser. This appeal was withdrawn in February 1998.

Before the judgment of Gibson J could be enforced, the appellant filed the D present application. Although the propriety of the appellant having done so was raised in the court *a quo* (given the fact that the appellant could have included the ground upon which he made the present application in the grounds for the first application), the learned trial judge noted that the Rules of the Court did not enact a time limit for bringing such an application. He E decided to hear the matter in full and decide its merits.

As correctly noted by the learned trial judge, the prosecution of this application has by no means been uneventful. It was first set down before Chidyausiku JP (as he then was) on 20 July 1998, but was postponed upon the Judge President's order for a further report from the Sheriff clarifying certain issues, the main one having to do with the fact that, contrary to the agreement of sale concluded F between the Sheriff and the second respondent, the latter had not paid the purchase price in full upon signing the agreement. When the matter resumed on 26 November 1998, Mubako J postponed it until it was set down again on 1 April 1999. A further postponement was ordered on that day and the appellant was put on certain terms. He failed to comply, whereupon default G judgment was entered against him on 4 June 1999. He thereafter successfully applied for rescission of this judgment before Ziyambi J (as she then was). The learned judge was satisfied the appellant had, on the merits of the case, shown good and proper cause for the setting aside of the default judgment. It is pertinent to set out Ziyambi J's assessment of the matter at that stage:

> "Whatever the correct procedure may be adjudged to be, the applicant does H raise issues which could result in the application being determined in his

> favour – the main observation being that, contrary to the terms of the A agreement of sale, the purchase price was not paid at the time of signature of the agreement and before instructions were given to legal practitioners for the transfer of the property to the second respondent.
>
> It is also noteworthy that although this was a sale in execution and the proceeds were to be applied to the liquidation of the applicant's debts to the judgment creditor as well as other participating creditors, it has not B been possible to make payment to the said creditors out of the proceeds of the sale, since the purchase price has not been paid by the respondent." [1]

The application was finally heard in the court *a quo* on 10 May 2000. The appellant advanced two main grounds for challenging the sale of the property to the second respondent. C

The first ground was that the sale was invalid for want of consent given by the appellant, as required by subrule 358(1) of the Rules of the High Court. After citing the relevant rule and determining that the sale had in effect been conducted in terms of subrule 358(2), the learned trial judge, in my view quite correctly, rejected this contention.

The second ground raised by the appellant was that the failure by the second D respondent to pay the purchase price of the property in full upon the signing of the agreement of sale with the Sheriff was fatal. This ground fell under the ambit of "any other good ground" under Rule 359. The learned trial judge, after examining a number of features and developments in the case, rejected this ground too. E

The learned trial judge then dismissed the application and ordered the appellant to surrender the title deeds to the property to the Sheriff, failing which the Sheriff was authorised to sign all such documents in place of the appellant as might be necessary to effect transfer into the name of the second respondent. The latter was also ordered to pay $450 000.00, being the balance of the purchase price, such price being tendered as against transfer of title, F failing which the sale in execution would be deemed to have been cancelled. The appellant was ordered to pay costs on the higher scale.

The appellant then filed this appeal. Before it could be heard, the second respondent, presumably having complied with the part of the High Court order requiring him to pay the balance of the purchase price and not having received G the original title deeds from the appellant, took transfer of the property in question. The first respondent, also in compliance with the High Court order, had signed the relevant transfer documents. Both actions amounted, effectively,

A to the enforcement, pending appeal, of the judgment now being appealed against. More on that later.

The case attracted considerable media publicity. Pressure groups advancing a position in support of the appellant's case were drawn into the fray. At one point, neither the second respondent nor the appellant was in occupation of the property, such privilege having been taken by members of one of the B pressure groups. The second respondent successfully applied for a spoliation order against the pressure group. Each party accused the other of threats to and against the other's life. The second respondent was forced to leave the country, while the appellant was compelled to seek an order from the court to allow him back into the house in order to "preserve it" in the light of reports of vandalism. C This application was not pursued since the date of hearing of the matter was imminent.

Mr Charles Nyatanga ("Nyatanga"), in his capacity as the Acting Sheriff of the High Court, was vilified for his part in the sale, which was perceived to have been biased against the appellant, if not criminal. He was even threatened with prosecution for fraud. This, and the points that the former Sheriff had raised D in his supplementary report, prompted the judge in the court *a quo* to call Nyatanga to give oral evidence on his rôle in the matter. After hearing Nyatanga, the learned trial judge noted he was satisfied that the former had acted throughout:

> "In the impartial and professional manner required of his office and had taken all decisions in good faith and in accordance with his reasonable E view of the rights of the matter".

Having read the evidence before the court, I agree with the learned trial judge that Nyatanga acted in good faith and genuinely believed he was acting in the interest of all the parties.

Despite the tensions generated in this dispute, and the many other aspects of F it that exercised the learned trial judge's mind, the matter in the final analysis fell, and falls, to be determined on one issue. This is whether the failure of the Sheriff and the second respondent to adhere strictly to the terms of the agreement of sale entered into between themselves, in particular the requirement that the full purchase price be paid upon signing of the agreement of sale, G constitutes a ground for setting aside the sale in question in terms of Rule 359 of the Rules of the High Court.

I will digress at this juncture to consider the application made by the appellant to adduce fresh evidence on appeal. The application was opposed by the first and second respondents, and judgment on it was reserved until this judgment.

H The fresh evidence sought to be adduced by the appellant on appeal was

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correspondence meant to prove that he had since paid off all his creditors, with A the exception of the Commercial Bank of Zimbabwe, with which he had entered into an agreement for payments in instalments. It was also meant to show that, contrary to the first respondent's evidence, no creditors had been paid from the proceeds of the sale of the property to the second respondent. The appellant averred that he had not placed the evidence in question before B the court *a quo* because he had failed to locate the relevant receipts, since they had been left behind in the disputed property.

The opposition to the application was raised primarily on the ground that in none of the documents filed as proof of payment was it indicated when the creditors in question had actually been paid. The time of payment of the debts said to have been paid by the appellant was, of course, relevant. The second C respondent submitted, correctly, that if the payment had been effected after the sale in execution and the preparation of a plan of distribution, then such payment did not constitute a basis for setting aside the sale.

The application was also opposed on the ground that the evidence sought to be adduced on appeal could have been obtained before the application was D heard in the court *a quo*. Also, that the issue of whether or not the creditors had been paid was not relevant to the determination of whether or not the failure by the first and second respondents to adhere strictly to the terms of the signed agreement of sale justified the setting aside of the sale of the property.

While I am not entirely satisfied that the evidence sought to be adduced could not have been obtained earlier, I am greatly persuaded by this last argument. E The relief sought in the court *a quo* and in this appeal is that the sale in execution be set aside, not because the appellant has paid all the debts owed, but because the first and second respondents breached the terms of their

agreement of sale, resulting in the objective for conducting the sale in the first place – i.e. settlement of the judgment debts – being defeated. While proof of F payment of the appellant's debts might in other circumstances serve to bolster his case for the setting aside of the sale, and perhaps serve to confirm that the purpose of the sale in execution had indeed been defeated, it is not a necessary consideration in the determination of the issue at hand. This finding finds support in Herbstein and Van Winsen's *The Civil Practice of The Supreme Court of South Africa* 4 ed at p 909, where it is noted that among the principles G applied in deciding whether to allow a party to adduce further evidence on appeal are — (i) that the evidence must be weighty, material and presumably worthy of belief, and must be such that, if adduced, it will be practically conclusive; and (ii) that justice requires such a course. These two principles are not met *in casu* considering the issue that has to be determined. H

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A For these reasons, the application by the appellant to adduce fresh evidence on appeal is dismissed.

To go back to the matter at hand. The appellant submits, while the first and second respondents deny, that the failure of the first and second respondents to adhere strictly to the terms of the agreement of sale they signed constituted a ground for setting aside the sale. The learned trial judge was persuaded by B the arguments advanced on behalf of the first and second respondents. He noted at p 20 of the cyclostyled judgment that:

> "It is unfortunate that the agreement was recorded on a standard form of contract which did not accurately record the terms of sale agreed upon. Had the dispute arisen between the Sheriff and the purchaser, this failure C may have been extremely damaging. It is not, however, a circumstance affecting the regularity of the sale nor the validity of the contract.
>
> It is, nevertheless, necessary to comment critically upon this aspect. By using the *pro forma* contract, and not producing a written memorandum that accurately records the terms agreed, the Sheriff's office has laid itself open to charges of irregularity and to the perception of collusion. It has D been to an extent responsible for the prolongation of this litigation and the consequent delay in distribution. Upon examination, I am satisfied that there was no intention to conceal the true terms; nor to favour the purchaser; nor to act wrongfully in any way. I accept the explanation that the standard form was used as a matter of course and that the terms agreed are quite normal. Yet I must hasten to add, that being the case, that in future standard forms should not be used unamended where they do not E reflect the actual agreement. In future, the written contract must reflect the precise terms of the sale."

As indicated later in this judgment, I do not agree that the breach did not affect the regularity of the sale in question. I also do not regard the standard agreement of sale as inferior to, nor less binding than, any other contract F properly entered into by the contracting parties. Consequently I am satisfied the consequences of disregarding a material term of such contract are a lot more drastic than those suggested by the learned trial judge. Because of the nature of the contract in question, the consequences are not, in my view, mitigated by the fact that the dispute did not arise between the signatories to the contract.

G The evidence of Nyatanga, which the learned trial judge accepted, was that despite signing the agreement of sale, he and the second respondent nevertheless considered themselves, in effect, to be bound by the terms of payment outlined in the second respondent's offer of purchase. In other words, the signing of the standard contract of sale was regarded as a mere formality, devoid of the H binding force that the signing of any other contract would normally have.

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That this should not have been the case is, ironically, suggested by Nyatanga A himself in his *viva voce* evidence in the court *a quo*. He stated:

> My lord, it is a standard practice in the Sheriff's office that if you are proceeding in terms of Rule 358(2), the Sheriff has to have some form of agreement and that is a standard agreement which has been there, is there and *still continues to be used for the disposal of properties under private treaty*." (my emphasis) B

It is not in dispute that despite this acknowledged practice in his office, Nyatanga went outside this practice and sought to dispose of the property according to terms he said were negotiated separately with the buyer, i.e. the second respondent.

However, a closer analysis of these other terms reveals that they, too, fell C outside what Nyatanga and the second respondent averred was understood between them. This was that payments would be effected according to the terms outlined in the second respondent's offer of purchase. According to that offer, a deposit of $180 000.00 was to be paid as follows:

$110 000.00 on 5 April 1995; and D

$70 000.00 on 11 April 1995.

The balance of $450 000.00 was to be paid against registration of transfer. Contrary to this offer, the first instalment of $110 000.00 was, according to the receipt, paid on 25 April 1995; while $69 900 was paid on 16 May 1995. The balance of $450 000.00 was still to be paid at the time this matter was heard in the court *a quo*. E

The departure from the terms offered by the second respondent disproved his evidence and that of Nyatanga that they had, despite signing the standard contract of sale, continued to regard themselves as bound by the terms of his offer of purchase. More significantly, however, this departure suggests that the office of the Sheriff set out to dispose of the immovable property in F question without reference to any written terms of agreement since, in reality, neither the standard agreement of sale nor the second respondent's offer of purchase (whatever its merits) were followed.

While no explanations were tendered in respect of the failure to follow the offer of purchase, much, as already indicated, was said as explanation for not G adhering to the terms of the standard contract of sale. This was, in effect, that cash buyers of immovable property were rare, that mortgage finance, normally paid upon transfer, was consequently the norm and that the Sheriff had been satisfied that payment of the balance of the purchase price had been adequately guaranteed.

These explanations must be considered against the background that the H

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A Sheriff's office, as a matter of administrative expediency, required not only that the Sheriff and the purchaser in circumstances such as those at hand, sign a standard contract of sale, but that both parties observe the terms thereof. From a contractual point of view, having signed such contract, both parties were bound by and obliged to adhere to its terms.

The second respondent must have fully understood the terms of the contract B before he signed it. In the absence of any of the defences available to a signatory who wishes to escape liability under a contract — misrepresentation, fraud, illegality, duress, mistake — he cannot now be heard to say he was not bound by the contract.

That the contract was in the form of a standard agreement of sale in no way C detracts from its validity as a binding contract. It can hardly have been in the contemplation of the drafters of the standard contract that it would be signed as a mere formality, nor that after signing it the parties would proceed with impunity to contravene its provisions. It is not, in my view, unreasonable to suppose that the standard contract, and the requirement for signing it, were designed with the purpose of preventing, among others, the very action (and D its consequences) that the Sheriff and the second respondent took in this case. No doubt the standard contracts were conceived out of the recognition that sales of immovable property, involving as they generally do, huge amounts of money and complex conditions, needed to be handled in such a manner as to minimise disputes related to such conditions. As correctly pointed out by the E learned trial judge, the failure by the Sheriff, as the author of the *pro forma* contract, to enforce its terms has led to that office being accused of irregular conduct and collusion with the second respondent. That conduct, it hardly needs mentioning, forms the basis of the appellant's claim in these proceedings.

If the wish of the Sheriff was to negotiate terms of sale based on the prevailing downturn in market demands, he should have considered amending the F standard contract so that it responded to the situation obtaining on the ground, rather than leave the parties to sign the contract as a formality.

The learned trial judge was satisfied that there was no breach of the contract by the purchaser when he failed to pay the full purchase price on signature of the contract. He observed as follows at p 18 of the cyclostyled judgment:

> G "Payment of the first part of the deposit, according to a report by the former Sheriff, was made on signing of the sale agreement but only receipted thereafter. Thus no material breach by the purchaser is there

disclosed. Payment of the second part of the deposit was delayed and it may be that the Sheriff could have cancelled the sale for this apparent breach. It was perfectly proper not to do so, however, given the difficulty encountered H in selling the property and given that the fundings for the mortgage had

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been secured." A

I do not agree. Firstly, the agreement signed by the parties provided that the full purchase price, not only part of it, was to be paid upon the signing of the agreement. By not paying the full amount as envisaged by the contract, the second respondent clearly breached a material term of the agreement. Secondly, the Sheriff, according to the contract, would have been perfectly within his B rights to cancel the agreement at the time the first partial payment was made. The agreement envisaged neither a deposit nor subsequent payments, so the question of delayed payment of part of the deposit did not arise. Thirdly, the provision of the contract requiring transfer against payment of the full purchase price was explicit in its terms and did not admit of payment through a mortgage. C

The learned trial judge was also satisfied no blame attached to the purchaser and that he had performed his obligations under the contract with the Sheriff.

Again, I do not agree. The second respondent, who cannot have been mistaken as to the contents of the contract that he signed, undertook to pay the full purchase price upon signing. He did not do so, but offered, instead, delayed, D staggered and insufficient payments. The fact that the Sheriff condoned and even abetted this departure by the second respondent from the terms of the contract does not in any way alter the fact that breach the contract he did.

The situation that then presents itself is one where two parties signed a contract providing for one thing, but, with one condoning the other's material breach thereof, they proceeded to do the opposite of what the contract E provided. They sought to persuade the court *a quo* to condone this departure from the signed contract, and accept that they had all along been *ad idem* as to the other terms they wished to be bound by. This was despite the fact that an analysis of what was tendered as written proof of such other terms revealed that these, too, were not complied with. F

It is argued for the second respondent, despite this background, that it does not lie in the "mouth of a third party, unconnected to the contract," to claim that the contract was breached, when the very parties to the contract express their consensus *ad idem* and both consider themselves bound by the contract.

I am not persuaded by this argument. Had the contract in question not been one in which other people had vested interests, the mutual departure from its G material terms by the parties thereto might not have been of any moment. Such, however, is not the case *in casu*. Unlike in normal contracts of sale, where the seller is synonymous with the owner of the asset being sold, or his duly authorised agent, the first respondent was neither the owner of the property nor his duly authorised agent. He was, in effect, an agent of the court in the process H

A of execution. His role in signing the contract of sale was a facilitative one. The money that was to be paid as the purchase price was to be promptly paid to the judgment creditors concerned, in order to settle the debts owed to them by the judgment debtor, in this case, the appellant. To the extent that the judgment creditors expected to be paid in this manner, hopefully in full, and the judgment debtor, by that token, expected, finally, to be freed from his debts, B all clearly had a vested interest in the contract of sale in question. This interest is what "connected" them to the contract in question.

That the judgment creditor and debtor have an interest in this type of sale is very aptly highlighted in the following passage from Mackeurtan's *Sale of Goods in South Africa* 5 ed at p 252, which appears under the heading C "**Common law duties of officers conducting judicial sales**":

> "… The officers of execution must take due care of the articles to be sold, and it is their duty to obtain as high a price as possible. Their responsibility is first to the judgment creditor and secondly, to the debtor. … They must pay over the price to the creditors to the extent of their debts and the balance to the debtor. …

> If they deliver goods to the purchaser without D getting payment, the risk of his default is theirs, for they are under obligation to exact the price *on the spot*." (my emphasis)

While such interest normally relates to the price offered for the property, it is not, in my view, unreasonable (and this is confirmed in the passage cited above, by the words "on the spot") for either party to seek to protect their interest by demanding that the mode of payment agreed between the Sheriff E and the buyer is such as would result in the immediate fulfilment of their expectations as outlined above.

The interest of the judgment creditor and debtor is put beyond doubt by Rule 359 of the High Court Rules, which gives a person with such an interest in the sale the right to challenge it on, among others, any good ground shown.

F It hardly needs emphasising that in negotiating a sale of immovable property by private treaty in circumstances such as those obtaining *in casu* the Sheriff must always be conscious of the vested interest and rights that other people have in the property that he sells in execution, including that sold in a private treaty. As evidenced by the standard agreement of sale, the Sheriff's office was, indeed, alive to the peculiar and sensitive dynamics surrounding sales of G this nature. The standard agreement was clearly meant to minimise controversy. By embodying the common law duties of officers conducting judicial sales, it was designed also to facilitate the smooth transfer of the property in question to the buyer, while at the same time ensuring that the interests of the judgment creditor and debtor, as already outlined, were protected.

H No matter how well intentioned Nyatanga was (and I agree with the learned

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trial judge that he did mean well), the fact remains that the various actions he A took in this case amounted to a serious breach of both the rules his office had specifically prescribed for the conduct of sales of this nature, and the common law duties of officers of judicial sales. His actions also resulted in a material breach of the contract that he entered into in his official capacity with the buyer, i.e. the second respondent. B

What the court has to decide in the light of this breach or omission is whether it constitutes a good ground for the setting aside of the sale in question, as prayed by the appellant. In determining this issue, I find the following passage from Mackeurtan's *Sale of Goods in South Africa ibid* at p 253*,* to be instructive:

> "… it is not every formality the omission of which will give rise to the right C under discussion [to set aside a judicial sale], for as *Matthaeus* observes, although the formalities of a judicial sale must be observed to a nicety (*ad unguem*), if only an unessential or unimportant formality has been omitted, the sale will not thereby be vitiated. The reasons for this, he says, are the maxim *minima praetor non curat* and the fact that it is not consonant with good faith to wrangle over infinitesimal points of law (*de* D *apicibus juris) (Ex parte Roberts* 3 SC 208)."

This rule can be applied with equal force to situations, like the present, where rather than an omission, there was breach of formalities to be followed. As indicated, the breach was neither unessential nor unimportant. It was material. Unlike the learned trial judge who in his discretion ruled otherwise, I am E satisfied the ground on which the appellant's claim is premised is a good ground.

The second respondent failed to comply strictly with the condition that the purchase price was to be paid upon the signing of the contract. Instead, he offered an alternative mode of payment. The learned trial judge was satisfied no material breach of the contract was thereby committed. Without spelling F it out in so many words, he was, effectively, also satisfied that under the circumstances of this case, the alternative mode of payment offered and guaranteed was equivalent and equally effective to the one stipulated in the contract. I am not satisfied, on the facts presented, that this conclusion was based on a correct interpretation of the law. G

Christie, in his book *The Law of Contract in South Africa* 3 ed at p 456*,* refers to performance effected in exactly the manner specified in the contract as being *in forma specifica* and that effected in some equivalent manner that is equally effective as being *per aequipollens*. Asserting that the distinction between the two is not always easy to make, the learned author offered, among others, the following guidelines (as per Claassen J in *Van Diggelen* v H

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A *De Bruin & Anor*) 1954 (1) SA 188 (SWA) at 192-3 for determining the issue —

(i) if the circumstances (surrounding the case) afford no clue, then there is a presumption that the condition must be performed *in forma specifica (Wessels* para 1337; Pothier *Oblig.* 206). This presumption is rebuttable by the promissor, *but it cannot be rebutted where it is clear from the* B *terms of the contract and the surrounding circumstances that performance in forma specifica was stipulated in the contract (Wessels* paras 2638-9) (my emphasis); and

(ii) the act or performance tendered *per aequipollens*, where such is permissible, must in the first instance be an equivalent act to that C mentioned in the contract or be of such a nature that it can make no material difference to the promissee.

Applying this test to the case at hand, it is evident that the second respondent could not have rebutted the presumption that the condition in the contract concerning immediate payment of the purchase price, had to be performed *in* D *forma specifica.* The nature of, and circumstances surrounding, a sale in execution are such that, in the absence of agreement to the contrary, full, and not staggered, payment is required. Nor, on the same authority cited above, can it be said that the payments effected by the second respondent were equivalent to the full payment stipulated in the contract. There can also be no doubt that such mode of payment as was offered and effected by the second respondent E made a material difference to the parties concerned. In addition to whatever else may have contributed to it, this failure to implement the condition to the letter resulted in a situation where the creditors were not paid and remained unpaid five years later when the matter was argued in the court *a quo*. Conversely, and by the same token, the appellant's debts were not paid and, on the evidence before the court *a quo*, he had to raise funds to pay some of F the debts himself.

I am thus satisfied, on a proper consideration of the evidence before the court, that the second respondent failed to satisfy both of the tests outlined above.

There is one argument advanced on behalf of the second respondent that calls for comment. It is contended for him that for public policy reasons a result G allowing the sale *in casu* to be set aside would bring the entire system of judicial sales in execution into disrepute. It is submitted further in this regard that the public at large would lose "entirely" the confidence which it has had up to now in this well established device which "for decades" facilitated the recouping of debts owed to banks and the like.

H I am not persuaded, given the facts and circumstances of this case, that setting

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aside this sale would have the undesirable outcome described in the second A respondent's heads of argument.

The court is concerned with interpreting the law and dispensing justice. That being the case, and in relation to the subject of this case, a situation resulting in the system of judicial sales being brought into disrepute would clearly not be desirable. The purpose of sales in execution is, in law, quite clear. The B common law duties of officers involved in judicial sales are also trite. The rules of the court and certain administrative measures, like the standard contract of sale *in casu*, are formulated with the object of ensuring that the purpose of such sales is achieved. In the case where the common law, the rules of the court and the administrative requirements of an office responsible for enforcing judgments are flouted, the court would be failing in its duty if it condoned such disregard C of the law and rules. It would be doing exactly that were it to allow the sale in question to stand.

It is crucial, for the proper performance of their work, that officers of the law comply with, rather than pay lip service to, the procedures designed to guide them in the performance of their duties. Needless to say, strict adherence to D such rules and procedures would enhance public confidence in the system of judicial sales.

When all is said and done, I am satisfied that the appellant proved his case and was entitled to judgment in his favour. The order of punitive costs against him was unwarranted, even taking into account the actions attributed to him that resulted in the final determination of this matter being so inordinately delayed. E The second respondent is entitled to a refund of all the money that he paid as

the purchase price of the property. The transfer of the property into his name should not have been effected in the light of the appeal then pending before this court. Title to the property should have stayed with the appellant. The effect of the judgment in this appeal is therefore to nullify such transfer and F restore the *status quo* prevailing before that transfer.

In the premises, it is ordered as follows:

1. The appeal is allowed with costs.
2. The Deed of Transfer No. 6184/2001 registered in favour of the second respondent on 28 June 2001 be and is hereby cancelled. G
3. The Deed of Transfer No. 255/87 registered in the name of the appellant on 16 January 1987 be and is hereby revived.
4. The third respondent be and is hereby directed, in respect of the relevant documents, to make the endorsements and entries necessary to give effect to paragraph 3 of this order. H

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5. The A order of the court *a quo* is set aside and is substituted with the following:

"(a) The sale by private treaty concluded between the first and second respondents on 24 April 1995 and in respect of Lot 14 of Subdivision A of Tynwald South of Fontainbleau, be and is hereby set aside; B

(b) The second respondent shall pay the costs of this application."

Chidyausiku CJ & Cheda JA Concurred

Mapfumo & Partners, appellant's legal practitioners (*In forma pauperis*)

Kantor & Immerman, first respondent's legal practitioners

C *Atherstone & Cook*, second respondent's legal practitioners

1 See HH-68-2000 at p 3 of the cyclostyled judgment.

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TANGANDA TEA CO (PVT) LTD v AMTEC (PVT) LTD 2003 (1) ZLR 340 (H)

2003 (1) ZLR p340

Citation	2003 (1) ZLR 340 (H)
Case No	Judgment No. HH-39-03
Court	High Court, Harare
Judge	Smith J
Heard	5 March 2003, 6 March 2003; 19 March 2003
Judgment	19 March 2003
Counsel	*A P de Bourbon SC*, for the plaintiff *R M Fitches*, for the defendant

Case Type Civil action

Annotations No case annotations to date

Flynote

Contract — *validity —mistake — recovery of money paid in error — condictio indebiti — when plaintiff may or may not recover such money* C

Headnote

The plaintiff sought the return of money paid to the defendant for fuel allegedly supplied by the defendant and put in the plaintiff's vehicles. An audit showed that the fuel was not actually supplied. The evidence showed that one or more petrol attendants employed by the defendant, D possibly with the connivance of drivers employed by the plaintiff, found loopholes in the system under which fuel was supplied and exploited them to steal a large amount of money.

Held, that under the *condictio indebiti*, a payment made by mistake to a third party can be recovered if three essential elements are satisfied: (1) the sum paid must not have been due; (2) there must not have been a E reasonable cause for the payment even if it was not due; (3) the person paying must not know that the money is not due. The mistake of fact which is relied on to justify relief in terms of the *condictio indebiti* must neither be negligent, slack nor studied; it must not be grossly negligent nor must it involve the plaintiff's own affairs or the affairs of others that are generally known. The real test for allowing recovery is whether the F payer has been "inexcusably slack" or "grossly negligent". This could not be said of the plaintiff, which would be allowed to recover the money paid.

Cases cited

Calder v S A Mutual Life Assurance Soc 1972 (2) RLR 46 (G) G

Georgias v ZDB Financial Svcs Ltd 2000 (2) ZLR 447 (H)

Govender v Standard Bank of SA Ltd 1984 (4) SA 392 (C)

Harare City Council v Zimucha 1995 (1) ZLR 285 (S)

Rahim v Min of Justice 1964 (4) SA 630 (A) H

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Smith J

Case information

A *A P de Bourbon SC*, for the plaintiff

R M Fitches, for the defendant

Judgment

Smith J: The plaintiff (hereinafter referred to as "Tanganda") issued summons claiming from the defendant (hereinafter referred to as "Amtec") the payment of $2 595 556.92 as being due and owing by Amtec, in respect of monies B overpaid by Tanganda during the period November 1998 to December 2000. It is Tanganda's case that the said amount was paid in consequence of invoices and statements sent by Amtec in respect of fuel allegedly supplied by Amtec in the *bona fide* but mistaken belief that the fuel had in fact been supplied by Amtec, when in fact it had not been supplied. Amtec denies that the fuel was C not supplied and further denies that the payment was made *indebito*.

Tanganda called only one witness, being Henry Nemaire, its Chief Internal Auditor, who testified as follows. Amtec's garage in Bulawayo has been supplying Tanganda with fuel for its vehicles since before 1996. When he joined Tanganda in 2000 he was asked to audit the fuel account at the Bulawayo Branch. Tanganda had a system whereby pre-numbered requisition D forms for fuel were

printed. When a driver required fuel he was supplied with a requisition form addressed to the supplier, duly completed with the name of the driver and the registration number of the vehicle. When fuel was supplied, the registration number of the vehicle, together with the quantity of fuel, and oil if any, and the cost thereof, and the date were entered on the invoice, which E was then signed by the driver and the petrol attendant. The driver was given the top copy of the invoice. The second copy was retained by the petrol attendant and was later sent to Tanganda attached to the statement showing the amount owed. At the Bulawayo Branch, log sheets for each vehicle in use were kept. There was a separate sheet for each month which showed the mileage travelled for the month in question, how much of that was on official business F and how much on private business, the quantity of fuel and oil drawn and the cost thereof. At the end of the month the figures in each column were totalled and the consumption of fuel used for each kilometre travelled was calculated.

Nemaire said that, in carrying out the audit exercise, for each vehicle used at the branch the invoices for fuel supplied to that vehicle, the requisitions issued for fuel and the log sheets were pulled out from the files and tabulated. In G respect of the month of May 1997, every instance of fuel supplied was supported by a requisition form, an invoice and an entry in the log book. Similarly, for the month of July 1997, every supply of fuel was fully supported by the appropriate documents. It was in March 1998 that the system started to leak. He had done a full and complete analysis for each month from November H 1998 to October 2000. There were 24 volumes, one for each month, of the

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documentation he had extracted from the files. His investigations showed that A there were many instances where fuel was supplied without any requisition form being issued. Furthermore, there were instances when the registration shown on the invoice was that of a motor vehicle which was a non-runner or which had been damaged in an accident and been written off. In some instances the signature on the invoice which purported to be that of the Tanganda driver B was different from what was accepted as his usual signature. In many instances, fuel shown on an invoice as having been supplied to a particular vehicle was not reflected on the log sheet. If the amount of fuel allegedly supplied was to be inserted on the log sheet, the resultant figure would show that the consumption of fuel per kilometre travelled was very high. In some instances, there were two invoices showing that the same quantity of fuel had C been supplied, which quantity was not a round figure like 20 or 30 litres. The amount claimed from Amtec was the total of amounts shown in 822 invoices issued during the period in question which were not supported by a requisition form or an entry in a log sheet.

Nemaire was subjected to a lengthy cross-examination. It was put to him that D the central system at Tanganda was slack. He replied that no system was perfect. The system then in force met the minimum standards required by the audit profession but it has since been improved.

Amtec called three witnesses. The first was Mr Moyo, the manager of the forecourt, who testified as follows. All the Tanganda vehicles which came to the Amtec garage for fuel were clearly marked with the Tanganda logo. In E addition, the driver would be wearing the Tanganda uniform. The drivers were well known to the attendants at the garage. Requisition forms were required sometimes but not at the weekends or after hours. There was no list of Tanganda vehicles but such vehicles were easily recognised. The attendants were never instructed that requisition forms were required before any fuel would be supplied to a Tanganda vehicle. When the fuel was supplied the F attendant would hand the invoice book to the driver and the driver would fill in the registration number of the vehicle and the quantity and cost of the fuel supplied. He would then append his signature, as would the attendant. The top copy of the invoice was then torn out of the book and handed to the driver.

Under cross-examination, Moyo said that he was not aware that Tanganda had G printed requisition forms for fuel. He had come across some, but not often.

The next two witnesses called by Amtec were petrol attendants. Their evidence was similar to that given by Moyo. They knew the Tanganda vehicles, because of the logo, and the drivers, because always they wore a Tanganda uniform. They supplied fuel on demand, without requiring a requisition form, and then the driver completed the invoice which was then duly signed. H

Smith J

A Mr *de Bourbon* submitted that Tanganda was entitled to reclaim the money paid to Amtec for fuel that was not delivered by virtue of the *indictio indebiti*. The money was paid by virtue of a mistake of fact. The mistake was made in all innocence. It was part of the agreement between the parties that the Tanganda drivers would hand over a requisition for the fuel required. When the requisition forms that were printed for supplies from Amtec ran out, B Tanganda then started using requisition forms made out to another supplier, Forrester. If Tanganda had stopped using the requisition form system it would not have started using forms made out for another supplier. In the summary provided by Amtec of the evidence it would lead, it is said that the Manager of the Amtec Bulawayo Branch would give evidence as to the arrangements made between the parties regarding the supply of fuel to Tanganda. However, C the only witnesses called by Amtec were the forecourt manager and two petrol attendants, none of whom was able to give evidence as to such arrangements. Therefore, the evidence of Nemaire is not disputed. In most cases, when fuel was supplied, the Tanganda drivers handed over a requisition form. On that form, it is printed that the form is to be returned with the suppliers' invoice. D That was not done by Amtec. When the statements and invoices were received by Tanganda for payment, each invoice was checked by the accounts staff to ensure that it contained the registration number of a Tanganda vehicle and a signature which purported to be that of a Tanganda driver. There was no negligence on the part of Tanganda in making the payments. It took all reasonable steps to ensure that the payments were due. The testimony of E Nemaire showed that very comprehensive investigations were made to establish which invoices related to fuel that had not been supplied to Tanganda. Where there was any doubt, Amtec was given the benefit thereof. Nemaire's evidence was not challenged. He was an impressive witness and very credible. The witnesses called by Amtec were, on the other hand, very unimpressive. Their evidence was largely irrelevant and what little was relevant could not be relied F on.

Mr *Fitches* argued that in *Wessels Law of Contract* 2ed at paras 3688 and 3690 it is stated that a party cannot bring a *condictio indebiti* if there has been inertia on its part. Tanganda had the means of getting knowledge as to whether or not the payments were due and carelessly refrained from doing so. It did too little G too late to remedy the position. Mr *Fitches* said that the *quantum* of the claim by Tanganda is not disputed. It is only liability which Amtec disputes.

A payment made to a third party can be recovered under the *condictio indebiti* if three essential elements are satisfied: firstly, the sum paid must not have been due; secondly, there must not have been a reasonable cause for the H payment even if it was not due; thirdly, the person paying must not know that

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Smith J

the money is not due: see *Wessels Law of Contract* 2ed para 3637. In A *Govender v Standard Bank of S A Ltd* 1984 (4) SA 392 (C) Rose-Innes J at 401D-F, after referring to *Rahim v Minister of Justice* 1964 (4) SA 630 (A) said:

> "The learned Judge of Appeal found that the messenger's conduct was inexcusably slack and that accordingly the State could not avail itself of B the *condictio indebiti*. Despite *Voet's* explanation that a mistake concerning what is common knowledge or concerning one's own affairs is *supina aut affectata*, there are many instances where ignorance of one's own affairs is not unreasonable and will satisfy the requirements of a *condictio indebiti*, especially where the matters concerned are remote or involved: *Union Government v National Bank of SA Ltd supra, Divisional Council of Aliwal North v De Wet supra*. The state of authority does not leave it C open to question that in order for a plaintiff to recover by *condictio indebiti*, the mistake causing the payment must be reasonable and therefore justifiable or excusable. Not all negligence excludes the *condictio*, since 'excusable negligence' does not preclude the claim. Gross negligence and negligence of a certain kind, or degree of culpability, to render it *aut supina aut affectata* or 'inexcusable' is thus a defence to the *condictio* D *indebiti*. *Rahim's* case has been followed in a number of decisions."

The law relating to the *condictio indebiti* and the circumstances in which money could not be recovered thereunder was considered by McNally JA in *Harare City Council v Zimucha* 1995 (1) ZLR 285 (S). At 291-292, the learned Judge of Appeal said: E

> "The law as to when money paid by mistake can be recovered by the *condictio indebiti* has been considered in a number of cases. It used to be said that money paid in mistake of law was not recoverable, whereas money paid in mistake of fact was recoverable. That distinction has been abandoned by the South African Appellate Division in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Anor* 1992 (4) SA 202 (A), F

approved in *Ellis NO v CoT* 1994 (1) ZLR 423 (S). The reasoning of Hefer JA in the Appellate Division judgment is, to my mind, compelling, and I respectfully adopt it. He concludes that the real test for allowing recovery is whether the payer has been 'inexcusably slack'.

On this last point of whether or not the payer was 'inexcusably slack', there was a dissent by Van Den Heever JA. And indeed the definition of G 'inexcusably slack' has caused problems. In our courts, there is the judgment of Greenfield J in *Calder v SA Mutual Life Assurance Soc* 1972 (2) RLR 46 (G); 1972 (4) SA 285 (R). In South Africa, the varying views are summed up by Rose-Innes J in *Govender v Standard Bank of SA Ltd* 1984 (4) SA 392 (C) at 401 *et seq*. Not all would go so far as saying that the negligence must be such as to evince an intention to waive the right of recovery. But it is generally accepted that not every degree of negligence H

2003 (1) ZLR p345

Smith J

A on the part of the payer bars him from recovering. And it is probably fair to say that our law is tending more in the direction of the English law as applied in England, Australia and New Zealand, where negligence is irrelevant. After all, however negligent the payer is, the fact is that the recipient is unjustly enriched and the payer is unjustly impoverished.

Therefore, it would seem right that the money should always be repayable B unless equity suggests that a greater wrong would be done by ordering repayment than by declining to do so."

McNally JA did say that the thoughts he expressed relating to the *condictio indebiti* were *obiter*, because the case he was dealing with involved a *condictio sine causa*. However, I consider, with all due respect, that they expressed clearly the principles which a court should apply in dealing with the C *condictio indebiti*.

In *Georgias v ZDB Financial Services Ltd* 2000 (2) ZLR 447 (H), Chatikobo J also considered the requisites of a *condictio indebiti*. After referring to passages in *Calder v South African Mutual Life Assurance Society* 1972 (2) RLR 46 (G) and *Rahim v Minister of Justice* 1964 (4) SA 630 (A) at 451C D D he said:

"What emerges from these passages is that the mistake of fact which is relied on to justify relief in terms of the *condictio indebiti*, must neither be negligent, slack nor studied; it must not be grossly negligent nor must it involve the plaintiff's own affairs or the affairs of others that are generally known. The absence of these prohibitory factors in a claim E based on the *condictio indebiti* is ultimately a matter of evidence. When a claimant fails to put before the court evidence which rebuts the existence of these factors the incidence of the onus becomes decisive against him. In context, the court has no way of knowing if there was negligence on the part of the applicants, or, if there was, whether such negligence was gross or studied and whether the applicants were in any way slack in the way F they did or failed to ascertain the full extent of their liability."

Tanganda has led evidence to show the system that was in place to ensure that the claims for payment from Amtec were checked. To verify the amount claimed in the statement, copies of the invoices relating to each individual amount claimed were checked to ensure that the registration number of the vehicle was shown and that the vehicle belonged to Tanganda. In addition, the G invoice had to bear two signatures, one purporting to be that of the driver, being a Tanganda employee, and the other that of the attendant who supplied the fuel. The system was not fool-proof. Tanganda could have improved its system by requiring that a copy of the requisition form be supplied with the invoice. It did not do so. However I do not consider that its failure in that regard H can result in one concluding that it was "inexcusably slack", or "grossly

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2003 (1) ZLR p346

Smith J

negligent". It is clear that one or more petrol attendants at Amtec saw the A loophole and exploited it to steal a large amount of money. It is not possible to say whether or not any driver of Tanganda connived with the petrol attendant. It is not necessary, for the determination of this case, to identify the culprits.

Having regard to the evidence before the court, I consider that the moneys paid B by Tanganda to Amtec for fuel that was not supplied should be repaid.

It is ordered that the defendant pay the plaintiff —

(a) $2 595 556.92 with interest thereon at the prescribed rate of interest from 14 December 2000 to date of payment; and

(b) costs of suit. C

Wintertons, plaintiff's legal practitioners

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

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Source:
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MAMBO v NATIONAL RAILWAYS OF ZIMBABWE & ANOR 2003 (1) ZLR 347 (H)

Citation	2003 (1) ZLR 347 (H)
Case No	Harare HH-41-03
Court	High Court, Harare
Judge	Smith J
Heard	11 February 2003; 19 March 2003
Judgment	19 March 2003
Counsel	*A Tsunga,* for the applicant *F Girach*, for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Costs**— *de bonis propriis — legal practitioner — application for review — failure to state grounds on which review is sought — appropriate for court to order applicant's legal practitioner to pay costs.*

Review — *condonation — failure to observe time — limits — condonation not to be granted, except for compelling reasons, where delay in instituting* D *review exceeds six months — unnecessary for court to consider applicant's prospects of success where delay has been unreasonably and inexcusably long*

Review — *statement of grounds of relief — to be set out in notice of application rather than in founding affidavit — failure to state grounds* E *— justification for refusal of application.*

Headnote

Where a party wishes to have a decision made by some body reviewed and set aside, that must be done expeditiously. The longer the period that a decision remains unchallenged the more difficult it is to restore the *status quo ante*. Where the delay in filing a review application exceeds F six months, the court should refuse to condone the late filing unless there are very compelling reasons.

In determining whether or not good cause has been shown for extending the eight-week time limit within which an application for review must be instituted in terms of O 33 R 259 of the High Court Rules, 1971, the court G need not consider the applicant's prospects of success if the delay in

making the application has been unreasonably long and the reasons given for the delay are unacceptable.

An applicant for review is required by O 33 R 257 of the High Court Rules, 1971, to state shortly and clearly the grounds upon which he seeks to have the proceedings concerned set aside. This statement should be set H out in the notice advising the respondent that the application for review

Smith J

is being made, rather than in the founding affidavit. A

Non-compliance with O 33 R 257 of the High Court Rules, 1971, will result in the application being dismissed, and in that event it is appropriate to order that the costs be paid by the legal practitioner concerned since the non-compliance would clearly be due to his or her incompetence or negligence. B

Cases cited

Minister of Labour & Ors v PEN Transport (Pvt) Ltd 1989 (1) ZLR 293 (S)

Mtetwa v Moyo & Anor HH-222-89

Rimayi v Minister of National Supplies & Anor S-86-90 C

Legislation considered

High Court Rules, 1971, O 33 rr 257 & 259

Case information

A Tsunga, for the applicant D

F Girach, for the first respondent

Judgment

Smith J: The applicant (hereinafter referred to as "Mambo") was an employee of the first respondent (hereinafter referred to as "the NRZ"). The second respondent is the senior labour relations officer who dealt with the E dispute between the NRZ and Mambo. Mambo, who was based in and working at Mutare, was transferred to Bulawayo on 15 November, 1999. He challenged the decision to transfer him. The dispute was due to be heard by a labour relations officer on 10 April 2000 but, at the request of the NRZ, it was postponed to 26 May. On 8 May the NRZ charged Mambo with F misconduct in that he failed to report for duty in Bulawayo in accordance with his transfer to Bulawayo. Then on 30 May the NRZ dismissed Mambo. On l September the labour relations officer ordered that Mambo be reinstated within 14 days. The NRZ appealed against that decision to the senior labour relations officer who, on 5 February 2000, determined that Mambo had violated the terms of his contract of employment by disobeying a lawful order G given to him by his employer that he was transferred to Bulawayo. The senior labour relations officer granted NRZ permission to dismiss Mambo. Mambo has appealed to the Labour Relations Tribunal against the determination of the senior labour relations officer.

On 29 May 2001 Mambo filed this application seeking an order setting aside H

Smith J

A the decision of the NRZ on 29 May 2000 to dismiss him and the decision of the senior labour relations officer on 5 February 2001 granting the NRZ leave to dismiss him. He also seeks an order that the issue of whether or not he should be transferred to Mutare be remitted for consideration by another senior labour relations officer and that he be reinstated without loss of pay and other benefits.

B The application is out of time. Mambo has applied for condonation of the late filing of his application. The reasons he gives are as follows. The two actions he instituted in the magistrates court in 2000 for the payment of his salary, which had been stopped, exhausted all his resources. He approached various bodies for financial or professional assistance, but without success. He then

C applied to the High Court on 29 March 2001 for leave to sue *in forma pauperis*, which application was successful. However, he was not able to get an appointment with the legal practitioner assigned to act for him until 24 April 2001. There was also a delay attributable to the need to wait for the Labour Courts to make a determination on the transfer issue.

This application was filed a year to the day after the NRZ determined that D Mambo be dismissed, and almost three months after the determination of the senior labour relations officer. As regards the latter, Mambo has noted an appeal to the Labour Relations Tribunal. That appeal is still pending.

I consider that the period of the delay in filing this application is such that the court cannot grant condonation on the basis of the reasons given. If the court E were to grant the order sought, it would mean that the NRZ would have to pay Mambo his salary and allowances for a whole year. Rule 259 of the High Court Rules requires that an application for review must be filed within eight weeks. The reason why there is such a limitation is obvious. Where a party wishes to have a decision made by some body reviewed and set aside, that must be done expeditiously. The longer the period that a decision remains unchallenged the F more difficult it is to restore the *status quo ante*. In my view, where the delay in filing a review application exceeds six months, the court should refuse to condone the late filing unless there are very compelling reasons.

In his founding affidavit Mambo said that he had been an employee of the NRZ for over 25 years. From April 1996 to 29 May 2002, when he was dismissed, G he had not been given any meaningful work to do and so did nothing, other than collect his salary and benefits. That means that the NRZ paid Mambo for four years without requiring him to do any work. Such a state of affairs does appear to reflect on the competence of the Human Resources Department of the NRZ. It would not be right for the court to add to the financial burden of the NRZ H by ordering it to pay Mambo for a fifth year of no work.

2003 (1) ZLR p350

Smith J

In *Mtetwa v Moyo & Anor* HH 222-89 Greenland J said that in determining A whether or not "good cause" has been shown, the first factor the court will consider is the reason for the delay. If the reason, or part of the reason, is due to a fault on the part of the applicant, then that cannot be accepted as "good cause". The second factor which the court will consider is the applicant's prospects of success on the merits. However, I consider that it will not be B necessary for the court to consider the second factor if the delay in making the application has been unreasonably long and the reasons proffered by the applicant for the delay are unacceptable.

In the case of this application, not only has there been an inordinate delay in the filing thereof, but also there is a failure to comply with r 257 of the High Court Rules. That rule requires that an application for review must state, C shortly and clearly, the grounds on which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. In many judgments handed down over the last few years, legal practitioners have had their attention drawn to the requirements of r 257 and the necessity to comply therewith. There have been warnings that failure to comply with the requirements of that rule will result in the application being dismissed. In *Minister of* D *Labour & Ors v PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) Gubbay JA, as he then was, dealt with the requirements of r 257 at 295-296 as follows:

> "The notice of motion itself was not in accordance with proper practice. It simply asked for the relief particularised in an annexed draft order, which was that the determination be set aside and the dismissal of the employee E confirmed. I am bound to reiterate the stricture of Greenfield J in *Utterton v Utterton* 1969 (2) RLR 404 (GD) at 409 F-G; 1969 (4) SA 391 (R); that the requirement of rule 227 (1) of the High Court Rules 1971, that an applicant should append to his notice of motion a draft of the order he seeks, does not relieve him of the necessity to ensure that the nature of the relief appears *ex facie* the notice. F
>
> But there was a far more serious defect in the preparation of the application. Although the existence of two grounds of review were urged upon the court *a quo* only the second, that the labour relations officer had declined to hear the employer's accountant, Mr MacKenzie, and had also failed to investigate from other employees the circumstances surrounding the dismissal, was alleged in the founding affidavit. The first ground was G not disposed of at all. It was that the labour relations officer had no jurisdiction to make the determination he did because it had been orally agreed that the employee would serve a probationary period of three months, thereby permitting termination pursuant to s 2(1)(c) of the Regulations. That omission amounts to non-compliance with Rule 257 of the High Court Rules, which provides that the notice of motion (in the H

2003 (1) ZLR p351

Smith J

A wide sense of embracing the supporting affidavit) —

'…shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected.'"

In *Rimayi v Minister of National Supplies & Anor* S 86-90, Gubbay ACJ repeated what he had said in the *PEN Transport* case*, supra*, about the B necessity comply with r 257 and said:

"Non-compliance will bar the grant of relief."

In this case there has been no attempt to set out the grounds on which Mambo seeks to have his discharge by the NRZ or the determination of the second respondent set aside. Although in the *PEN Transport* case, *supra*, Gubbay JA said that the grounds for seeking the relief sought could be set out in the C supporting affidavit, I would strongly recommend that the grounds be set out in the notice advising the respondent that the application for review is being made. If that is done, then both the respondent and the court will be made aware, before even starting to delve into the founding affidavit, of the exact relief sought and the grounds upon which the application is based.

D When an application is dismissed on the basis of non-compliance with r 257, it would be appropriate, in my view, to order that the costs be paid by the legal practitioner concerned. The failure to comply with r 257 would clearly be due to the incompetence or negligence of the legal practitioner.

Condonation for the late filing of the application is refused. The application E is dismissed.

Henning Lock Donagher & Winter, legal practitioners for applicant

James Moyo-Magweba & Nyoni, legal practitioners for lst respondent

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Source:
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ZIMBABWE GELATINE (PVT) LTD v CAIRNS FOODS (PVT) LTD 2003 (1) ZLR 352 (S)

Citation	2003 (1) ZLR 352 (S)
Case No	Judgment No. S-130-02
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA & Gwaunza JA
Heard	7 October 2002; 20 March 2003
Judgment	20 March 2003
Counsel	*A P de Bourbon SC,* for the appellant *J C Andersen SC*, for the respondent
Case Type	Civil Appeal
Annotations	No case annotations to date

Flynote

Delict — *passing off — use of distinctive word — word not descriptive of* C *product — confusion caused*

Intellectual property — *trade mark — expungement of — no basis for expungement or disclaimer*

Intellectual property — *trade mark — registered mark — infringement of — passing off — misrepresentation, damage and goodwill all established* D *— interdict and ancillary relief appropriate*

Intellectual property — *trade mark — registration — infringement of registered trade mark — right of affected party to proceed under Trade Marks Act or under common law for passing off* E

Headnote

The respondent produced dog food in pellet form. The food was marketed under the name "kibbles", which name had been registered as a trade mark. The appellant subsequently started to produce similar, but cheaper, dog food, which it also described as "kibbles". The respondent complained of both passing off and infringement of a registered trade mark, and obtained an interdict preventing the appellant from using that name. F

Held, that once a trade mark is registered it gives the registered owner of the trade mark an exclusive right to use it concerning the goods for which it is registered. Persons who purchase goods with the registered trade mark associate those goods with the owner of the trade mark. Use of the trade mark on goods other than those of the owner of the trade mark is an G infringement, generally referred to as "passing off". It amounts to a misrepresentation.

Held, further, that a person who believes his rights have been infringed can either proceed in terms of the Trade Marks Act [*Chapter 26:04*], if he has a registered trade mark, or at common law in an action for passing off.

Held, further, that the appellant was not entitled to manufacture a similar H

2003 (1) ZLR p353

Cheda JA

A product and then give it the same name as that of the respondent's product. There was no reason for the appellant to use the name "kibbles"; it could have used a different name for its product, the word not being descriptive of the dog food manufactured by the parties.

Held, further, that there was no basis for the expungement of respondent's trade mark or, *semble*, for ordering a disclaimer in respect of the word B "Kibbles".

Appeal dismissed.

Legislation considered

Trade Marks Act [*Chapter 26:04*], ss 6 and 17

Case information

C *A P de Bourbon SC,* for the appellant

J C Andersen SC, for the respondent

Judgment

Cheda JA: Cairns Foods (Pvt) Ltd, the respondent, and Zimbabwe Gelatine (Pvt) Ltd, the appellant, are both manufacturers of dog food. The respondent D manufactures Wrights Kibbles Instant Mix, while the appellant manufactures Hwau-Hwau Carnivora Kibbles Dog Food. Both parties pack their products in plastic bags of different sizes and sell to the public through shops and supermarkets throughout the country.

The respondent applied to the High Court for an order in the following terms:

E "IT IS ORDERED THAT:

1. The respondent (now the appellant) is hereby interdicted from using the trade mark Kibbles or any other mark, trading name, label or getup likely to result in the goods and/or business of the respondent being taken to be those or that of the applicant (now the respondent) without clearly distinguishing such goods and/or business from those or that of the applicant. F

2. The respondent is interdicted and restrained from infringing the applicant's trade mark 1566/95 Kibbles or any other words which so nearly resembles 1566/95 Kibbles as to be likely to deceive or cause confusion on or in relation to any of the goods for which the mark is registered. G
3. The respondent deliver up to the applicant for obliteration of the mark Kibbles, all packaging, labels, wrapping, advertising matter and other documents in the possession of the respondent bearing the trade mark Kibbles.
4. The cost of this application be borne by the respondent."

The application was granted with costs, but the counter-application by the H appellant to expunge the trade mark granted to Cairns Foods on 13 August

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Cheda JA

1996 as number 1566/95 failed and was dismissed. The appellant now appeals A against that decision.

It is common cause that both parties make their products for dogs in the form of pellets. These products are often placed close to each other in the shops where they are displayed for sale to the public. The packaging used by the appellant has a predominant white colour on a plastic bag, with a blue picture B of a dog. The plastic bag is dominated by red capital letters inside a square of blue smaller letters. On the upper half of the plastic bag are the words "Hwau- Hwau Carnivora", and below the picture of the dog the most prominent words are "Kibbles Dog Food". The word "Kibbles" appears twice on the front of the plastic bag. The reverse side is printed in blue letters only.

The respondent's packaging is also a plastic bag, mainly yellow, red and C brown against a white background. The word "Kibbles" is printed in large red letters on the upper part of the bag. Below it, are pictures of dogs' heads over a square of yellow and brown. Below the square are the words "Instant Kibbles" in white. The other side of the bag is blank.

The starting point in this appeal is that the word "Kibbles" is registered as the D respondent's trade mark. It was registered as number 1566/95.

It is common cause that once a trade mark is registered it gives the registered owner of the trade mark an exclusive right to use it concerning the goods for which it is registered: see Kerly's *Law of Trade Marks and Trade Names* 12ed at p 261. E

The purpose of registration of a trade mark is that no other party should use the trade mark. Kerly's *Law of Trade Marks and Trade Names* at p 12 para 2:08 says:

> "The function of a trade mark is to give an indication to the purchaser … of the trade source from which the goods come or the trade hands through which they pass on their way to the market." F

It follows that once a trade mark is registered, persons who purchase goods with the registered trade mark associate those goods with the owner of the trade mark.

For that reason, any use of the trade mark on goods other than those of the owner of the trade mark is an infringement generally referred to as "passing G off". It amounts to a misrepresentation. I quote once more from Kerly's *Law of Trade Marks and Trade Names* at p 261:

> "Section 4(1) gives to the registered proprietor of a valid mark (other than a certification trade mark) the exclusive right to the use of that mark in relation to those goods or services for which it is registered. H

2003 (1) ZLR p355

Cheda JA

> A In addition, 'without prejudice to the generality of' the words in the subsection granting the exclusive right, that right is deemed to be infringed by any person who, not being the proprietor or a registered user, uses a mark identical with or nearly resembling it in the course of trade (or for services 'in connection with the provision of any services'), in relation to any goods (or services) in respect of which it is registered and in such B manner as to render the use of the mark likely to be taken either;
>
> (a) as being used as a trade (or service) mark or
>
> (b) (for trade marks) in a case in which the use is use upon goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public as importing a reference to some person having the right either as proprietor or as registered user to use C the trade mark or to goods with which such a person as aforesaid is connected in the course of trade."

Our own Trade Marks Act [*Chapter 26:04*] ("the Act") provides as follows in s 6:

"6. **No action for infringement of unregistered trade mark**

D No person shall be entitled to institute any proceedings to prevent, or to recover damages for, the infringement of an unregistered trade mark.

Provided that nothing in this Act shall affect the right of any person, at common law, to bring an action against any other person for passing off goods or services as the goods or services of another."

E This section means that a person who believes his rights have been infringed can either proceed in terms of the Act, if he has a registered trade mark, or at common law in an action for passing off. In this case, the respondent complained of both passing off and infringement of a registered trade mark.

As far as the trade mark in question is concerned, the appellant's packaging F displays the word "Kibbles" in large and distinct red capital letters, just as the respondent does on its packaging. The word "Kibbles" is repeated on the reverse side of the appellant's packaging in blue letters. It is therefore, easy for a customer to mistake the appellant's product as being either the same, or related to, or from, the same source as that of the respondent's product.

The main elements of passing off are misrepresentation, damage and goodwill. G All the three were sufficiently dealt with by the court *a quo*. Figures were given on the sales and the amount spent on advertising the respondent's products. Evidence was led of a customer who was looking for the respondent's product but ended up buying the appellant's product, and then complaining to the respondent about what she had purchased. The above shows that the respondent H has established a certain amount of goodwill regarding its products, and that

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people are confusing the appellant's product with that of the respondent's. The A elements of both passing off and infringement of a trade mark were proved.

It was argued by the appellant that the delict of passing off is not intended to stifle competition but unfair competition based on representing one's goods as being those of another. I agree. Competition in the manufacture of similar or almost similar dog food would be no problem in my view. What is wrong B in this case is for the appellant to manufacture a similar product and then give it the same name as that of the respondent's product. No reason was given for the appellant's use of the name "Kibbles". Even if the products were the same, as they are both dog food in the form of pellets, the appellant could have used a different name for its product.

It was also argued that the word "kibbles" is descriptive and no one person C should have the sole right to the use of that word. In the dictionary, the meaning given as "to crush into fine pieces" is not the only one. The word has several other meanings related, for example, to a drum and rope used in mining. It is not strictly descriptive of the dog food manufactured by the parties.

The argument by the appellant that the respondent's product is more expensive D compared to that of the appellant does not assist or change the position. The effect will still be the same if some customers are led to believe that there is also a cheaper type of Kibbles on the market and turn to buy those. That does not mean to them that the cheaper Kibbles are from a different manufacturer.

The appellant conceded that the term "kibbles" describes the process rather E than the end product. The fact that the appellant has been using the word since October 1995 is no excuse to continue the unlawful use of a registered trade mark. F

The appellant also argued that there should have been a disclaimer in the registration of the trade mark. That was rejected by the Registrar of Trade Marks.

Section 17 of the Act reads as follows:

"**17 Registration subject to a disclaimer**

(1) Subject to subsection (2), if a trade mark –

(a) …

(b) contains matter common to the trade or otherwise of a non G distinctive character the Registrar, in deciding whether the trade mark shall be entered or shall remain in the Register, may require, as a condition of its being on the Register, that –

(1) the proprietor shall disclaim any right to exclusive use of any part of the trade mark or to the exclusive use of all or H

Cheda JA

A any portion of such trade mark as aforesaid, to the exclusive use of which the Registrar holds him not to be entitled; or

(2) the proprietor shall make such other disclaimer as the Registrar may consider necessary for the purposes of defining his rights under the registration."

While dog pellets may be common to the trade of manufacturing dog food, the B word "kibbles" cannot be said to be. Not only is it not common to dog food but it is also not descriptive of the end result that is marketed.

In my view, there was therefore no basis for the expungement of the trade mark "Kibbles". The word "kibbles" does not describe the shape or contents of the dog pellets produced by the respondent.

C In the result, I am satisfied that the appeal cannot succeed and it is dismissed with costs.

Ziyambi JA & Gwaunza AJA concurred.

D *Dube, Manikai & Hwacha*, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/COLD STORAGE CO LTD v RAPID DISCOUNT HOUSE LTD 2003 (1) ZLR 358 (S)

COLD STORAGE CO LTD v RAPID DISCOUNT HOUSE LTD 2003 (1) ZLR 358 (S)

Citation	2003 (1) ZLR 358 (S)
Case No	Harare S-127-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	10 September 2002; 20 March 2003
Judgment	20 March 2003
Counsel	*A P de Bourbon SC,* for the appellant *JC Andersen SC,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Agency — *agent — authority — ostensible authority — agent fraudulently* C *and without authority issuing promissory notes on behalf of principal — whether principal liable on notes*

Negotiable instruments — *promissory notes — notes issued by agent fraudulently and without authority from principal — whether principal* D *liable on notes*

Headnote

The appellant raised capital through promissory notes issued through a merchant bank. Whenever the appellant needed to raise money it would instruct the merchant bank to issue promissory notes up to the amount required, and the merchant bank would issue the notes in the appellant's E name, signing them with a computer-generated facsimile of the signature of one of the appellant's directors. The appellant had previously provided the merchant bank with a specimen signature for the purpose. The respondent lent money to the merchant bank and, as security for the loan, received what purported to be ten of these promissory notes from the merchant bank. The merchant bank failed to repay the loan and F subsequently went insolvent. It then transpired that the notes had not been issued on instructions from the appellant, but had been issued without authority by the merchant bank, whose officers had fraudulently signed them with the computer generated facsimile signature of the appellant's director. G

The respondent sued the appellant in the High Court for payment on the notes. At the trial the respondent led evidence to show that the purported notes were identical to genuine notes issued by the appellant and that there was nothing to suggest that the signatures on them had not been authorised; neither party led evidence, however, as to the circumstances in which the notes had been signed. The trial court gave judgment for the H

Malaba JA

A respondent, holding that the appellant should have led some evidence challenging the genuineness of the signatures on the notes, and that the merchant bank had had ostensible authority to sign the notes. On appeal:

Held that once the appellant had denied that it signed the notes it could not be found liable on them until the respondent had proved, on a balance of probabilities, that the appellant had signed them as maker. The mere B physical presence of the signatures on the documents did not give rise to a presumption that the appellant had signed them as maker. The fact that information required to prove this was within the particular knowledge of the appellant was no reason for removing the burden of proof from the respondent.

C *Held*, further, that there was no basis for holding that the appellant was liable on the ground of the merchant bank's ostensible authority to sign the purported notes, since there had been no communication between the appellant and the respondent when the latter received the notes, and the merchant bank had no authority to represent to the respondent. In any case the appellant did not owe the respondent a duty of care to ensure that D no false representation of its authority was made, because it had not given the merchant bank a general authority to sign the notes.

Cases cited

Gericke v Sack 1978 (1) SA 821 (A)

E *Inglestone v Pereira* 1939 WLD 55

Lotzof v Lotzof 1915 AD 127

Rand Advance (Pty) Ltd v Scala Café 1974 (1) SA 786 (D)

Smith v Prosser [1907] 2 KB 735

Legislation considered

F Bills of Exchange Act [*Chapter 14:02*], ss 22 & 89(1)

Case information

A P de Bourbon SC, for the appellant

JC Andersen SC, for the respondent

Judgment

G **Malaba JA:** This is an appeal from a judgment of the High Court dated 22 November 2000 in which the appellant was ordered to pay to the respondent the sum of $125 million with interest thereon at the rate of 35 per cent on the sum of $100 million with effect from 4 September 1998 and on the sum of $25 million with effect from 3 March 1999 to the date of payment and costs of suit.

Malaba JA

The appellant, to which I shall refer as "the defendant", is a public company A incorporated in terms of the law. Its predecessor was a parastatal known as the Cold Storage Commission. The respondent, to which I shall refer as "the plaintiff", is a private company carrying on the business of a discount house.

On 21 January 1999 the plaintiff commenced action in the High Court claiming from the defendant the payment of $100 million with interest thereon B at the rate of 35 per cent per annum with effect from 4 September 1998 to the date of payment. The cause of action as pleaded was that the plaintiff was the lawful holder of ten "commercial bills" issued by the defendant which had been dishonoured upon presentation on the due date.

The ten documents forming part of the cause of action pleaded by the plaintiff took the form of promissory notes. On the top left corner of each document is C a space for the date of issue whilst the space for the due date is on the right side of the document. Each document has a promise made in these terms:

> "The Cold Storage Company Limited undertakes to pay _____ or order the sum of ten million dollars at United Merchant Bank Zimbabwe Limited HARARE on due date against presentation of this Bill." D

Above the promise to pay the sum of $10 million on presentation is printed the logo "CSC" in white on a black background. Below the undertaking are words "for COLD STORAGE COMPANY LIMITED" written above the words "GENERAL MANAGER". The space between these two sets of words has a signature purporting to be that of the "GENERAL MANAGER" signing the E document on behalf of the defendant. The date of issue, filled in the relevant space by means of a date stamp, was 3 March 1998 whilst the due date similarly recorded was 3 September 1998. The endorsement of payee in blank meant that the documents were payable to bearer.

The defendant pleaded to the declaration as follows:

> "*2 Ad paragraph 3.* F
>
> 1.1 The Defendant denies the allegations in paragraph 3 of the Plaintiff's Declaration.
>
> 1.2 The Defendant denies that the ten commercial bills listed in this paragraph were issued by it and states that the signature that purports to be on the bill is forged and unauthorised. G
>
> 1.3 Accordingly, the Defendant asserts that the Plaintiff has no right to retain the bill or to enforce payment thereof …
>
> 3. …
>
> 4. The Defendant asserts that the persons to it presently unknown employed by United Merchant Bank Zimbabwe Limited in Harare H

Malaba JA

> A falsely and fraudulently issued to the public, which may or may not have included the Plaintiff, bills purporting to emanate from the Defendant, but which bills had not been authorised by the Defendant, and for which the Defendant was not liable.
>
> 5. In the alternative the Defendant asserts that it is unable to state which pieces of paper issued by United Merchant Bank Zimbabwe Limited B had been authorised by it, and which had not been authorised by it.
>
> 6. The Defendant asserts that it authorised the issue on 3 March 1998 of bills totalling $36 million due on 3 September 1998.
>
> 7. Accordingly the Defendant asserts, in the alternative, that its maximum liability in respect of all holders of bills due on 3 September 1998 is the sum of $36 million."

C In replication the plaintiff denied each and every allegation of fact and conclusion of law contained in the plea.

On 30 June 1999 the plaintiff made an application for the amendment of the summons to add a further cause of action. It claimed the payment of $25 million with interest thereon at the rate of 35 per cent from 3 March 1999 to D the date of payment. The application was allowed.

It was alleged in the additional cause of action that the plaintiff was a lawful holder of five "commercial bills" for $5 million each issued by the defendant. The "bills" were said to have been dishonoured upon presentation for payment on the due date. Apart from the dates and amounts contained therein the five E documents took the same form of promissory notes as described above in respect of the ten documents on which the claim for the payment of $100 million was based.

The defendant again denied that it issued the five documents as promissory notes to the plaintiff. It repeated the allegation that the signature on the documents was forged and unauthorised. It asserted that persons unknown to F it employed by UMB had falsely and fraudulently issued to the public, which may or may not have included the plaintiff, "bills" purporting to emanate from the defendant but which "bills" had not been authorised by it. The defendant specifically stated that it did not authorise the issue of any "commercial bills" on 2 March 1998 and maturing on 2 March 1999.

G The case proceeded to trial on two main issues recorded by the court *a quo* as:

"(1) Whether the 'bills' forming the subject matter of the plaintiff's claim were issued by the defendant?

(2) Whether the signatures on such bills were false and unauthorised?"

The defendant was clearly denying that the signature on the documents relied H upon by the plaintiff as the cause of action was affixed by its general manager.

Malaba JA

It was alleging in effect that the signature was placed thereon by some other A person employed by the United Merchant Bank (UMB) without its authority. The facts and circumstances which gave rise to the relationship between the defendant and UMB will help explain why the declaration and plea contain the allegations they make.

Following its incorporation the defendant found itself having to raise its own B working capital, unlike its predecessor which relied on government subsidies. The government of Zimbabwe through the Reserve Bank issued guarantees to UMB to cover "bills" and "notes" issued by the defendant with the object of raising money it found necessary to have from the finance market.

The procedure the defendant had to follow to raise money from the finance C market on promissory notes was set out in the summary of evidence as having been the following. Senior management decided on the amount the defendant wanted raised from the money market. They directed the finance manager or his assistant to give instruction to UMB to issue a specific number of "bills" or "promissory notes" to raise the amount required by the defendant. The instruction would then be given to UMB authorising it to issue the promissory D notes to raise the specific amount. The authority was given by telephone and confirmed in writing immediately thereafter.

There were three money market dealers at UMB who received the defendant's instructions. These were Mr Changara, Mr Dulani and Mr Gotora. Within twenty-four hours of receipt of the instruction, UMB through one of the money market dealers sent to the defendant a discount statement or deal slip E confirming compliance with the instructions entered into with the lenders. The statement advised the defendant, for example, on amount received, discount rate, date of issue, due date, rate of interest and net proceeds.

To enable UMB to carry out its mandate the defendant provided it with a specimen signature of its general manager. Out of the specimen signature of F the general manager, UMB computer-generated signatures which it placed on the documents issued as "promissory notes" on behalf of the defendant when appropriate instructions had been given to that effect.

The basis of the denial by the defendant of the allegation that it issued the fifteen documents as "promissory notes" was that no instruction was given to UMB on 2 March 1998 to raise $25 million from the finance market on its G behalf, nor was such an instruction given to UMB on 3 March 1998 to raise $100 million on the security of the documents as "promissory notes". The allegation was that the documents, which were admittedly not signed by the defendant's general manager with his own hand, were signed by some other person employed by UMB who placed the computer-generated signature of H

Malaba JA

A the general manager on the documents to make them "promissory notes" without authority to do so.

It was alleged that the instructions, given on behalf of the defendant by a Mr C. Mujomi on 3 March 1998 and confirmed in writing the following day by UMB, was to raise an amount of $36 million from the market by rolling over for 184 days "bills" worth $30 million which had matured on that day and B $6 million as new borrowing.

I now look at the evidence adduced by the plaintiff. It called its Managing Director, Mr Morris Musuwo ("Mr Musuwo"), and the secretary, Mr Alois Tasiya. The evidence of Mr Musuwo only needs attention because Mr Tasiya's testimony has no bearing upon the resolution of the questions raised C on appeal.

Mr Musuwo became the plaintiff's Managing Director in 1997. He had many years of experience as a money market dealer. He revealed that the plaintiff placed considerable sums of money from institutional investors with UMB as fixed deposits. Some time in 1997 UMB officials approached him and D indicated that UMB was raising money on behalf of the defendant. It was common knowledge in the money market that UMB was holding government guarantees to cover "bills" and "promissory notes" issued by the defendant to raise its working capital.

The plaintiff entered into an agreement with UMB in terms of which it lent to the latter out of the fixed deposits specific amounts of money when the need E arose. UMB gave the plaintiff "promissory notes" issued on behalf of the defendant as security for the money advanced to it. It was Mr Musuwo's evidence that UMB was the plaintiff's debtor and the latter looked to it for the payment of the money on the due dates.

On 2 March 1998 the plaintiff lent UMB an amount of $25 million by rolling F over an equivalent amount of money the payment of which had become due on that day. As security for the money UMB gave to the plaintiff five documents as promissory notes. Mr Musuwo said he believed that the documents had been issued by the defendant as promissory notes.

On 3 March 1998 Mr Musuwo attended personally at UMB. He dealt with one of the money market dealers but was not able to say who of the three was G involved in the transaction in terms of which the plaintiff lent the sum of $100 million to UMB payable on 3 September 1998 with interest thereon at the rate of 35 per cent per annum. In turn, UMB delivered to the plaintiff ten documents in the form of "promissory notes" as security for the money advanced to it as a loan. He believed that the documents had been signed by H the defendant's general manager.

Malaba JA

Mr Musuwo emphasised in evidence the fact that the fifteen documents were A not bought by the plaintiff as promissory notes. They were security for the money advanced to UMB. Had UMB paid back the money on the due dates the documents would have been returned to UMB. The plaintiff had, on 9 January 1998, however, purchased for value documents with similar properties as those on which the claim was based for $20 million. He said those documents B looked exactly the same as the ones bearing the signature which is denied by the defendant. The signature on the two sets of documents looked the same. He said there was nothing *ex facie* the documents to suggest that the signature was not authorised.

Mr Musuwo said when the plaintiff presented for payment, on 15 April 1998, the documents it purchased for $20 million, they were all dishonoured. C Information came out that UMB was in fact bankrupt. It was subsequently placed under liquidation. The money advanced to UMB as loans was not paid on the due dates. When the plaintiff presented for payment the fifteen documents it held as security they were all dishonoured. The documents purchased for $20 million were later paid by the Reserve Bank of Zimbabwe because they had been purchased for value. The plaintiff lodged a claim for the D payment of $125 million with UMB's liquidator, but the money had not been paid at the time action was commenced against the defendant.

The plaintiff closed its case. Mr *de Bourbon*, indicated to the court *a quo* that the defendant was closing its case without leading the evidence which it had indicated in the summary of evidence that it would lead. In deciding to close E the defendant's case Mr *de Bourbon* was of the opinion that the

evidence adduced by the plaintiff had not established a *prima facie* case for the defendant to answer. Mr *Girach*, for the plaintiff, had a different view of his client's case. He moved the court for judgment. After both counsel had been heard in argument, the court *a quo* gave judgment for the plaintiff, thereby prompting the appeal to this court. F

The reasons for judgment show that the learned judge was of the opinion that as there was nothing *ex facie* the documents on which the plaintiff's claim was based to show that the signature thereon was not authorised, there was a presumption of fact that the signature was there in an authorised capacity. The learned judge held that the *onus* was on the defendant, in the circumstances, G to show that the signature was placed on the documents without the authority of its general manager.

This is what he said:

> "From the pleadings filed of record there exists a dispute between the parties as to whether or not the signatures on the promissory notes were forged and unauthorised. The evidence on behalf of the plaintiff was that, H

2003 (1) ZLR p365

Malaba JA

> A from its dealings with UMB in regard to this matter and generally in regard to other transactions it received bills in the form of security it had no reason to suspect were forged or in any manner irregular. This evidence was not seriously challenged by the defendant. The plaintiff received the said promissory notes from UMB as security for loans the latter advanced to the CSC. The notes bear a signature in the space reserved for the B signature of the general manager. The coming into existence of the notes was a matter within the particular knowledge of the CSC and UMB. The evidence on behalf of the plaintiff was that it had no reason, based on its dealings with UMB to harbour suspicion at the time the promissory notes in question were tainted. The CSC put in issue the genuineness of the signatures. Apart from the averments in its plea, the defendant elected not to call any evidence and closed its case. In the view of this Court the CSC C ought to have laid a basis by leading some evidence that challenged the genuineness of the signatures appearing on the promissory notes. The plaintiff would then have been required to lead further and additional evidence to establish that the signatures on the notes were those of the CSC. In this regard the CSC could have called the evidence of its general manager putting in issue the genuineness of the signatures appearing on D the promissory notes."

No authority was cited by the learned judge for the grounds on which he based the judgment. It is clear, however, that the plaintiff brought its claim as a holder of documents it believed were promissory notes and the defendant was sued as the maker of the notes. To succeed in its action the plaintiff had to establish E the rights of a holder against the maker of documents as promissory notes. The defendant denied that it signed the documents as maker thereof, consequently denying the existence of indebtedness to the plaintiff at all.

Section 89(1) of the Bills of Exchange Act [*Chapter 14:02*] ("the Act") makes it clear that for a document to have the validity of a promissory note it must, amongst other things, have been signed by its maker. Section 22 prohibits in F absolute terms the imposition of liability on a person as a maker of the note who has not signed it as such. Once the defendant denied that it signed the documents it could not be found liable on them until the plaintiff had proved, on a balance of probabilities, that it signed the documents as the maker of them as promissory notes.

G By referring to the documents as "promissory notes" in the reasons for judgment the learned judge presumed the existence of the very fact the proof of which he had to satisfy himself had been established by the evidence of the plaintiff. No presumption of the fact that the defendant signed the documents as maker of them as promissory notes arose from the mere physical presence H of the signature on the documents.

2003 (1) ZLR p366

Malaba JA

In *Lotzof v Lotzof* 1915 AD 127 at 134 Innes CJ said: A

> "Now in view of the denial embodied in the plea it is clear that the first task falling to be discharged by the plaintiff was to establish that the signature to the note was the signature of the defendant. If he failed to satisfy the Court on that point, there was an end of the case. And the *onus* in that respect being on him, if in the result all reasonable doubt had not been dispelled, then an order of absolution was correct and proper." B

There is also the case of *Inglestone v Pereira* 1939 WLD 55 in which Ramsbottom J expressed the same view of the law at pp 70-71 saying:

> "If the fact relied on is alleged in the summons and is not denied, it is taken to be admitted, but if it is put in issue, it must be proved by the plaintiff to whose case it is necessary. Similarly, if the defendant denies that the C signature to the document is that of himself or his agent, or if he denies that the signatory was authorised to sign on his behalf, the *onus* would be on the plaintiff to establish those facts…"

Lastly, in *Rand Advance (Pty) Ltd v Scala Café* 1974 (1) SA 786 (D) Milne J at 789 D-E said:

> "Mr *Chadwick* for the plaintiff conceded that where, as here, the authority D of the defendant's agent to sign the documents in question is challenged … the *onus* is on the plaintiff to prove that the signature attributed to the defendant is in fact the defendant's."

The *onus* was clearly on the plaintiff to prove that the computer-generated signature placed on the documents by some other person employed at UMB E was authorised by the defendant's general manager. Authority as a matter of fact had to be proved by extrinsic evidence. The documents formed part of the cause of action. They could not be used to prove the fact that the signature on them was authorised. To say the signature was authorised because there was nothing *ex facie* the documents to impugn its apparent authenticity merely repeated the cause of action. F

The facts and circumstances which gave rise to the relationship between the defendant and UMB show that at the time the former gave the latter the specimen signature of its general manager it had no intention that it should immediately be placed on documents as negotiable instruments for purposes of raising money from the public. In other words, there was no general G authority given to UMB to place the computer-generated signature on documents as promissory notes on which to borrow money at any time. The specimen signature was to be kept by UMB until it received instruction from the defendant to use it on the documents as promissory notes to raise a specific amount of money.

It would be the instruction which contained the authority to UMB to place the H

Malaba JA

A computer-generated signature on the documents with the intention of making promissory notes. The plaintiff had to prove that at the time the computer generated signature was placed on the documents forming part of its cause action the instruction had been given to that effect by the defendant, otherwise the signature would be unauthorised. The authority to sign the documents, as promissory notes on behalf of the defendant, was given only after the B defendant's officials were certain that money was needed to finance its operations and had determined the amount to be raised from the money market. *Smith v Prosser* [1907] 2 KB 735 at 747, 748, 749 and 753.

Did the evidence adduced by the plaintiff establish a *prima facie* case on the question whether the signing of the documents as promissory notes on behalf C of the defendant by UMB officers was authorised? Mr *de Bourbon* argued that the evidence was woefully inadequate to establish a *prima facie* case. I agree.

The evidence led by the plaintiff was not directed at proving the fact in issue. The evidence that the signature on the documents purchased as promissory notes for $20 million was similar to the signature on the documents forming the cause of action was not probative of the fact that the signature was D authorised. The fact of similarity in the signatures was neutral in effect, because the signatures were computer-generated from one specimen. As pointed out earlier in the judgment, the plaintiff could not rely on the evidence of the documents themselves to prove that the signature on them was authorised.

E The evidence of the requisite authority would have been contained in the instructions given to UMB by the defendant's officials. There should have been produced the documents containing the confirmation of the instructions to UMB officials to raise specific amounts of money from the money market. In the absence of such documents, the plaintiff should have called one of the money market dealers to give oral evidence of the instructions they received F from the defendant.

The learned judge seems to have accepted that the plaintiff had not led the evidence it ought to have adduced. He said the evidence which the plaintiff needed to establish the fact in issue was within the peculiar knowledge of the defendant and UMB. The fact that information required by a party to prove a G fact in issue is within the particular knowledge of the other party is not a reason for removing the burden of proof from him. *Gericke v Sack* 1978 (1) SA 821 (A) at 827.

The learned judge also found the defendant liable on the ground that the evidence had established that UMB had "ostensible authority" to sign the H documents on its behalf. There was, however, no direct communication

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2003 (1) ZLR p368

Malaba JA

between the defendant and the plaintiff. The plaintiff said it lent the money to A UMB and looked to it for payment. It would have been unnecessary, in the circumstances, for the defendant to represent to the plaintiff that UMB had authority to sign the documents on its behalf. In any case the defendant did not owe the plaintiff any duty to ensure that no false representation of its authority was made to it at all times, when the authority it gave to UMB to sign the documents was not a general authority. B

There was no evidence that any representation was made to the plaintiff by the defendant that UMB had been given authority to sign the documents on which its claim was based. The representation that could have been made would have been by UMB to the plaintiff. But a representation of apparent authority by UMB could not justify the application of the principle of "ostensible C authority" against the defendant because UMB as an agent would have had no authority to represent. The belief induced in the plaintiff by the conduct of UMB would have been that the signature on the documents was affixed thereon by the defendant's general manager, which fact the defendant denied.

The ground upon which the learned judge found that UMB had "ostensible D authority" to sign the documents on its behalf at the time it did was the fact that on 3 March 1998 the defendant instructed UMB to issue "bills" for a total amount of $36 million. Mr Musuwo's evidence was, however, that the five documents given to the plaintiff as security for $25 million advanced on 2 March 1998 were in respect of money the repayment of which was rolled over. There was no new borrowing of money by UMB on 2 March 1998. The E defendant denied that it authorised the issue of any bills or notes on 2 March 1998. That authority had to be proved by the plaintiff.

More importantly, Mr Musuwo said the sum of $100 million was a new loan given to UMB on 3 March. On the other hand, the defendant's allegation was that it authorised the issue of "bills" on $30 million as roll over and $6 million F as new borrowing. The money was not necessarily raised from the plaintiff. The authority to UMB to sign the ten documents as promissory notes to raise $100 million on behalf of the defendant on 3 March had to be proved by the plaintiff. There was no basis on which a representation by the defendant to the plaintiff that UMB had authority to sign the documents forming the cause of action could have been inferred from the instruction to UMB to issue G promissory notes for the amount of $36 million on 3 March 1998.

Mr *Andersen* also raised the point that the issue was really one of fraud perpetrated on the defendant by UMB in exceeding the authority to issue a specific number of promissory notes. He argued that the *onus* was on the defendant to prove the fraud. I do not agree. That situation would have arisen had the defendant admitted that it had authorised UMB to sign documents H

2003 (1) ZLR p369

Malaba JA

A shown to amount to $36 million. The plea would have been a confession and avoidance. It is clear, however, that the defendant's position was that the documents on which the plaintiff based its cause of action were not shown to have any relation to the amount of $36 million UMB was instructed to raise on 3 March 1998. The reason is that whilst the plaintiff advanced $100 million to UMB on 3 March and received the documents signed by UMB as security, B the defendant alleges that promissory notes for $30 million were to be issued as roll over and only the amount of $6 million was a new borrowing which was not necessarily sourced from the plaintiff.

The conclusion is that the correct verdict should have been absolution from the instance.

C The appeal is accordingly allowed with costs. The decision of the court *a quo* is set aside and in its place substituted the following:

> "The judgment is absolution from the instance with costs."

D Chidyausiku CJ and Ziyambi JA: concurred

Webb Low & Barry, appellant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners

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S v MPOFU & ANOR 2003 (1) ZLR 370 (H)

Citation	2003 (1) ZLR 370 (H)
Case No	Judgment No. HB-41-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	20 March 2003
Judgment	20 March 2003
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law — *common law crimes — assault with intent to do grievous bodily harm — proof of intent — medical evidence pivotal — absence* C *of such evidence warrants reduction to conviction of common assault*

Evidence — *assault with intent to do grievous bodily harm — medical report or evidence pivotal in establishing intent to do grievous bodily harm*

Headnote

The two accused were convicted on a plea of guilty to assault with intent to commit grievous bodily harm. No medical report or evidence was D adduced. The complainant sustained a loose tooth.

Held, on review pursuant to scrutiny, that a medical report or medical evidence is generally pivotal in establishing the intent to do grievous bodily harm. The State should not lightly refrain on the ground of convenience from adducing medical evidence where that evidence may assist the court. E

Held, further, that in the absence of such report or evidence the conviction should be reduced to one of common assault.

Held, further, that the sentence imposed was inappropriately lenient for the offence as charged, but should stand in respect of the reduced conviction. F

Cases cited

S v Chikamba AD-61-80

R v David 1962 (3) SA 69 (SR)

R v Jele 1960 R&N 356 (SR)

S v Mangombe & Ors AD-161-80

R v Nqanjelwa 1959 (2) R&N 484 (SR) G

R v Rosi & Anor 1968 RLR 110 (A)

S v Sibanda 1969 (2) RLR 137 (G)

S v Sibanda AD-10-72

Judgment

Ndou J: The accused persons were jointly charged and convicted of assault with intent to do grievous bodily harm. They tendered pleas of guilty and the H

2003 (1) ZLR p371

Ndou J

A proceedings proceeded by way of a summary trial pursuant to the provisions of s 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. No medical evidence was adduced to show the extent of the injuries sustained by the complainant as a result of the assault. The learned scrutinising regional magistrate has queried this apparent omission. The trial magistrate cannot explain the reason for the omission but argues that the conviction should B stand. The nature of the assault is that the first accused punched the complainant with clenched fists all over his body and second accused head butted him. The complainant sustained a loose tooth. It appears that the assault is not a serious one. I agree with the learned scrutinising regional magistrate that in cases of assault with intent to do grievous bodily harm the State should make endeavours to obtain medical reports or evidence. In most cases this C evidence is pivotal in determining whether the proper charge is one of assault with intent to do grievous bodily harm or a mere assault common.

The medical evidence is also a factor in deciding the appropriate punishment. The State should not lightly refrain on the ground of convenience from adducing medical evidence where that evidence may assist the court. In this D regard, I refer to what Beadle CJ said in *R v Tommy* 1959 SR (not reported), as referred to in *R v David* 1962 (3) SA 69 (SR) at 71B-C:

> "It may be convenient for prosecutors from time to time to jettison certain evidence; but dictates of convenience must not be allowed to over ride the major consideration, which is that the court must be supplied with the best evidence. The best evidence should not be lightly discarded simply E because it is inconvenient to adduce it."

See also *R v Nqanjela* 1959 (2) R&N 484; *R v Jele* 1960 R&N 356; *R v Rosi & Anor* 1968 RLR 110 (A); *S v Sibanda* 1969 (2) RLR 137 (G); *S v Sibanda* AD-10-72; *S v Chikamba* AD-61-80 and *S v Mangombe & Ors* AD-161-80.

The accused persons did not admit to having caused serious injury to the F complainant. Nothing in the facts points in direction of a serious injury. At most, what the facts and admissions by the accused persons amount to is that they assaulted the complainant. Like the scrutinising regional magistrate, I doubt whether an assault with intent to do grievous bodily harm was established. I think the interests of justice demand that the accused persons should have been found guilty of assault common. As far as sentence is G concerned, a fine of $1 000 or in default of payment two months' imprisonment was inappropriately lenient for the crime of assault with intent to do grievous bodily harm. It will therefore suffice even on the finding of assault common.

In the circumstances, I quash the convictions of assault with intent to do grievous bodily harm and substitute them with assault common in respect of H both accused persons. The sentence of a fine of $1 000 or in default of payment two months' imprisonment is confirmed.

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Source:
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MAKUMBE v CHIKWENHERE 2003 (1) ZLR 372 (H)

Citation	2003 (1) ZLR 372 (H)
Case No	Judgment No HB-42-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	20 January 2003; 20 March 2003
Judgment	20 March 2003
Counsel	*Mrs S H Tsara*, for the applicant Respondent in person
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Family law — *child — custody — awarding custody to person other than parents — grounds for doing so — when such course permissible* C

Headnote

The High Court has the common law power to look after the interests of all minors, and if necessary, interfere with the exercise of parental power. The interests of the minor in such matters are always the decisive factor. The courts will not readily deprive the mother of lawful custody without D good cause shown. The court always has the power in a proper case to deprive parents of custody and award this right to a third party, usually a relative. The special grounds for doing so include detrimental or undesirable effects or influences upon the physical, moral psychological or educational welfare of a child. The test is not whether a third party can provide better materially or possesses more desirable attributes, but E whether the parent or parents should be deprived of custody for any reason involving harm or danger to the child's welfare.

Cases cited

B B (Custody of Children) [1985] FLR 166

Calitz v Calitz 1939 AD 56 F

De Montille v De Montille 2003 (1) ZLR 240 (H)

Fortune v Fortune 1955 (3) SA 348 (A)

Horsford v de Jager & Anor 1959 (2) SA 152 (N)

J & Anor v C & Ors [1970] AC 668; [1969] 1 All ER 788 (HL)

Jeche v Mahovo 1989 (1) ZLR 364 (S) G

Maluwana v Maluwana HH-155-01

More v Richardson 1974 (2) RLR 16 (G)

Nugent v Nugent 1978 RLR 66 (G)

Petersen & Anor v Kruger & Anor 1975 (4) SA 171 (C)

C, re (a minor) (Custody of Child) (1980) 2 FLR 163

September v Karriem 1959 (3) SA 687 (C) H

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A *Short v Naisby* 1955 (3) SA 572 (D)

W v W 1981 ZLR 243 (A)

Walton, Ex parte 1969 (2) RLR 133 (G)

Case information

Mrs S H Tsara, for the applicant

Respondent in person

B [*The judgment has been edited to remove the names of the children*]

Judgment

Ndou J: On 20 January 2003, after reading documents filed of record, hearing both *Mrs Tsara* for the applicant and the respondent (in person) and C interviewing the children, the subject matter of this application, I made an order in the following terms:

> "1. That for this first term of 2003 the two minor children, A and B attend Baines School, Northend, Bulawayo and during the said period be in the interim custody of their grandfather John Chikwenhere.
>
> 2. That the Department of Social Welfare, Bulawayo, monitor the D progress of these minor children and submit a report to this court for review of the order by the end of this school term.
>
> 3. That this order shall be reviewed during the first week after the end of this school term.
>
> 4. That the applicant shall be entitled to access the minor children on weekends on a fortnightly basis, commencing Friday 31 January E 2003.
>
> 5. That there shall be no order as to costs."

I indicated then that my reasons for making the order will follow. This judgment provides the rational basis for the above order.

The facts of this case are that the applicant is the father of the two minor F children. Tafadzwa was born on 7 September 1992 and Tichaona on 5 December 1994.

Mirriam Makumbe, the said children's mother, is the respondent's daughter. The applicant and Mirriam Makumbe were married to each other customarily from 1992 to 1997. They separated in 1997 with Mirriam taking the children G with her. Until 2002, Mirriam had been staying with the children with the applicant paying maintenance and school fees for the minors. Around the middle of 2002, Mirriam went to work in the United Kingdom. She left the minor children with her younger sister Cathrine. At the time of her departure, the applicant was out of the country on military duties in the Democratic Republic of Congo. When the applicant returned he did not find anything H "amiss" by this arrangement. When he was free he took time to visit the

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Ndou J

children at Cathrine's abode. Towards the end of 2002 Cathrine also left for A the United Kingdom leaving the children under the care of another sister, Betty. The applicant, due to his present marital circumstances, is unable to stay with the children. This is common cause. He, however, feels that sending the children to boarding school is the solution. He is naturally concerned as a father that the children's performance at school is less than ideal. The school B reports filed of record show that they indeed performed badly at school last year. In a nutshell the applicant's intention is that the

children will be boarders during term and stay partly with him and partly with his parents during the holidays.

During the December 2002 holidays, the children came to Bulawayo to stay with their maternal grandparents. This arrangement was made with the C agreement of the applicant. Meanwhile, the applicant had secured boarding places for the children at Selbourne Routledge School in Harare with effect from the first term 2003. He paid the necessary fees for the boarding facility. The children, however, did not return to Harare. When the applicant investigated the reason he became aware that they had instead been enrolled at Baines School in Bulawayo and were temporarily staying with their grandparents. It D also became clear that their mother had in fact purchased them a house in the low density suburbs of Queenspark, Bulawayo. The house was being furnished and they were just about to move into their house. The applicant is not happy at all about this development. He feels that the children were brought to Bulawayo under the guise of holidays for the purpose of frustrating his efforts E to have them in boarding. He consequently launched this application in which he sought:

> "**Terms of Final Order sought**
>
> That you show cause to this honourable court why a final order should not be made in the following terms:
>
> (a) That the custody of A and B to be and is hereby awarded to the F applicant.
>
> (b) That the respondent shall pay the costs of this application.
>
> **Interim Relief granted**
>
> Pending determination of this matter the applicant is granted the following relief: G
>
> (a) The respondent is hereby ordered to produce and hand over A and B to the applicant upon being served with a copy of this order.
>
> (b) The respondent shall allow the applicant to take the aforesaid children with him together with their clothing which he shall surrender to the applicant on service of this order." H

Ndou J

A It is common cause that Mirriam is the custodian mother and the applicant is the non-custodian father of the children. One of the orders sought is the reversal of this position so that the applicant becomes the custodian father. Once he is declared the custodian parent, the applicant, according to his evidence, will place the children in boarding during term and with his parents during holidays, with him having access to them from time to time. As alluded B to earlier on, the applicant is not in a position to stay with the children on a full time basis because of a situation created by a subsequent marriage entered into after separating from the children's mother.

It is trite that this court has the common law power to look after the interests of all minors, and if necessary, interfere with the exercise of parental power. C The interests of the minor in such matters are always the decisive factor: see *Fortune v Fortune* 1955 (3) SA 348 (A); *Jeche v Mahovo* 1989 (1) ZLR 364 (S); *Short v Naisby* 1955 (3) SA 572 (D); *September v Karriem* 1959 (3) SA 687 (C); *W v W* 1981 ZLR 243 (A); *Maluwana v Maluwana* HH-155-01 and *De Montille v De Montille* HB-6-03. On p 7 of his cyclostyled judgment in the last-mentioned case, Cheda J stated:

> D "The interest of the child takes precedent over those of its parents. In making a determination, the courts should be guided by the arrangements and facilities each parent has made for the child."

English authorities and literature refer to this as the welfare principle. In our jurisdiction, the courts have qualified this principle by holding that the mother E enjoys a built-in advantage in such matters. The courts will not readily deprive the mother of lawful custody without good cause shown: see *More v Richardson* 1974 (2) RLR 16 (G); *Nugent v Nugent* 1978 RLR 66 (G) and *De Montille v De Montille* . The applicant seems to be concerned with the schooling side of his children. This is what forms his desire to have these children as boarders. Such parental claims and interests should, however, not overshadow the F interests of the children. The question is one of relative weight to be given to the wishes and claims of the father against those of the minor. This involves a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare: see *J & Anor v C & Ors* [1970] AC 668, G [1969] All ER 788 (HL). The court has to take into account the child's need for stability and continuity, not only in relationships with parents, but also in physical surroundings, school, friends, brothers and sisters and relatives: see

Ndou J

Re C (a minor) (custody of child) (1980) 2 FLR 163 and *B* and *B (custody of* A *children)* [1985] FLR 166. These principles are all relevant to the present application.

Further, I interviewed both minors separately and in the absence of the parties (and relatives). *In casu*, it appears that the applicant wishes to have the children cared for by their paternal grandparents and the custodian mother B wishes them to be cared for by the maternal grandparents. Each parent naturally believes that his or her own parent will properly look after the children.

The custodian mother of the children is working outside the country. She has handed over the children to the grandparents i.e. the respondent. This conduct of the mother has drawn brash criticism from the applicant. Should the mother C be deprived of her custody of the children simply because she went to the United Kingdom leaving the children in the care of a third party? I do not think that this is, *per se*, a sufficient justification to deprive the custodian parent of her or his custodial rights. I am justified by what Goldin AJA stated in *W v W* case *supra* at 248B: D

> "I do not agree that her conduct in handing over the child to his grandmother under the strained economic and emotional situation in which she found herself has rendered her an unsuitable person so as to justify depriving her of the custody of the child. It only shows that she was concerned for the child and in the circumstances considered that it would be to his advantage to be with his grandmother until she surmounted E her problems."

Here the mother of the children has gone outside the country, according to the children themselves, to work in order to improve their lot. The children proudly informed me that their mother has since bought them a house and arrangements are at an advanced stage for their relocation to a home of their F own. The home is close to their maternal grandfather i.e. respondent's house. The house is also close to where the respondent has enrolled them. It is not seriously disputed that the children are happy with their maternal grandparents who are devoted to them. The maternal grandparents are there for them. All this comes from the horses' mouths, as it were. The children feel that this environment is conducive for improvement in their academic work. The G children are distressed by the mere mention of the boarding facilities that their father secured for them in Harare. One of the children was, in any event, a boarder at the same school previously and is vigorously opposed to going back there.

There is not much said about the paternal grandparents. The tragedy of this case is that the applicant, who is the children's father, and the only parent H

Ndou J

A living in Zimbabwe, is not able to assume the responsibility of having their custody because of his current family set up. He cannot stay with the children at his home. He wants them to shuttle between boarding school and his own parent's home. As the upper guardian of all minors, this court always has the power in a proper case to deprive parents of custody and award this right to a third party, usually a relative: see *W v W supra* at pp 246H-247A; *Short* v B *Naisby supra* at p 575A-B. In *W v W* at 247B-E, Goldin AJA admirably emphasised the point in the following terms:

> "The power to award custody to a third party does not involve or justify the adoption of a test or approach that anybody concerned becomes a candidate or claimant. Compared with parents, grandparents and others may often be able to provide superior material advantages and unlimited C time and attention, they may also be endowed with greater wisdom and patience. These attributes and assets would not, however, entitle them to custody in competition with natural parents who may not possess the same advantages. In deciding what is in the best interests of a child, the court generally has regard to the relative merits only of the parents. Grandparents are considered useful baby-sitters and a source of help in D times of need or mere convenience. They are also 'first reserves' when natural parents or a surviving parent are held not to be proper persons to whom to award custody. The natural affinity and emotional bond and attachment between parent and child are generally irreplaceable and an accepted fact of life. Such an association benefits and promotes a child's emotional security and feeling of normality, whilst the award of a child's E custody to a third party places him in a distinctly unusual or abnormal category.
>
> A court will only deprive a natural parent of custody and award it to a third party upon special grounds. Such special grounds include detrimental or undesirable effects or influences upon the physical, moral psychological or educational welfare of a child. The test is still not whether a third party F can provide better materially or possesses more desirable attributes, but whether the parent or parents should be deprived of custody for any reason involving harm or danger to the child's welfare as mentioned above: see *Calitz v*

Calitz, 1939 AD 56 at 63; *Short v Naisby supra* at p 575; *Horsford v de Jager & Anor* 1959 (2) SA 152 (N) at 154; *Petersen & Anor v Kruger & Anor* 1975 (4) SA 171 (C) at 174."

G See also Ex parte *Walton* 1969 (2) RLR 133.

As indicated above, the mother is the custodian parent. The applicant is the non-custodian parent. He seeks to reverse this application. As the upper guardian of the two children, this court has to rely on the welfare principle in the resolution of this custody dispute. These children are not only enrolled at H Baines School in Bulawayo, they have already started attending lessons, and

Ndou J

this court should be careful not to further disrupt their already disrupted lives. A The psychological and educational factors amount to special grounds to award the custodial rights to the respondent. I do not think that it is in the interests of the children to take them from Baines School and place them in the boarding school in Harare. Such an order would be inconsistent with the welfare of these children. They would certainly be devastated and their academic B performance might deteriorate further. From what the children told me, this might further strain the natural affinity and emotional bond and attachment between them and the applicant. Already, the children believe that the applicant does not love them and does not devote sufficient time to them. This may be a wrong perception on their part, but the bottom line is that their father and child relationship is currently less than ideal. This court, as upper C guardian, should ensure that they work towards restoration of the harmonious father and child relationship. There is a probability, if this matter is not handled properly, that these children will adopt the belief that their real father, the applicant, is an unworthy person who abandoned them without just cause for another woman. Such a scenario is not in the best interest of the children in the long run. D

Due to time and human resource constraints, I was unable to obtain an expert opinion of the social worker on the best interests of these children. My order endeavours to address this. Regard must be had, however, to the right of the applicant to have access to the children, notwithstanding his unfortunate incapacity. This in itself emphasises the importance that has to be attached to E the relationship between these children and their natural father, the applicant.

In applying these legal principles to the facts of the case, I arrived at the decision referred to in the opening paragraph of this judgment. In the circumstances, these are the reasons for the order that I made on 20 January 2003. F

T H Chitapi and Associates, applicant's legal practitioners

* Now reported at p 240 of this volume — *Editor*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/STRYDOM v STRYDOM 2003 (1) ZLR 379 (H)

STRYDOM v STRYDOM 2003 (1) ZLR 379 (H)

Citation 2003 (1) ZLR 379 (H)

Case No Judgment No. HB-44-2003

Court High Court, Bulawayo

Judge	Ndou J
Heard	13 February 2003; 20 March 2003
Judgment	20 March 2003
Counsel	*S P Finch,* for the plaintiff No appearance for the defendant
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Interpretation of statutes — *schedules to an enactment — effect of — C interpretation of — schedule in conflict with substantive section — latter prevailing*

Practice and procedure — *set-down — notice of — matrimonial matter — must be served on defendant even where matter is unopposed unless such service impracticable*

Headnote

D The court had to decide whether it is necessary to serve notice of set down on parties who have not entered an appearance to defend in matrimonial matters. In order to come to a decision, the court had to decide whether the form in a schedule to the rules (which did not require personal service) or the substantive rule (which did require personal service on the E defendant) should prevail.

Held, that the repeal and replacement of Form 30A to the High Court Rules did not affect the requirement of r 272(2)(b), namely, that personal notice of set-down must be served on the defendant in a case of a claim for a final order of divorce, for judicial separation, or for nullity of marriage.

Held, further, that the extent to which schedules can and will be regarded as F intra-textual, structural parts of an enactment will have to be determined with reference to their nature and intended function, relative to the context of the legislation or enactment as a whole. Schedules are treated, at least, as intra-textual sources of clarification and elucidation which are not necessarily only consulted in instances of uncertainty and ambiguity, but also as complements to or further explanations of the G apparently clear and unambiguous sections contained in the body of the enactment. However, should a schedule be in clear conflict with a section or sections, the latter must prevail.

Cases cited

H *African and European Investment Co Ltd v Warren & Ors* 1924 AD 308

2003 (1) ZLR p380

Ndou J

Barkhuizen v Kruger 1959 (3) SA 506 (O) A

Butler v Butler 1951 SR 122

Cowburn v Nasopie (Edms) Bpk & Ors 1980 (2) SA 546 (NC)

Eleftheriou v Universal Trading Co 1946 TPD 173

Le Roux v Le Roux 1957 R & N 831 (SR)

Rood v Rood 1947 (2) SA 722 (C)

S v Bechoo 1979 (3) SA 946 (A) B

Secretary for Inland Revenue v Teljoy Ltd 1980 (3) SA 314 (T)

Utopia Vakansie-Oorde Bpk v du Plessis 1974 (3) SA 148 (A)

Van Wyk v van Wyk 1976 (3) SA 289 (O)

Legislation referred to

High Court Rules 1971 (RGN 1047 of 1971), r 272(2)(b) C

High Court (Amendment Rules) 2000 (No. 35) (SI 80 of 2000), Form 30A

Interpretation Act [*Chapter1:01*]

Case information

S P Finch, for the plaintiff

No appearance for the defendant D

Judgment

Ndou J: This matter is concerned with a point of particular importance in the motion court roll. Different judges have apparently dealt with the matter differently. Each time the issue has come up before me and my brother judges, we have always invited submissions in order to enable one of us to come up E with a judgment to settle the matter. Legal practitioners have not been keen to do so, it appears. On 13 February 2003, Mr *Finch* decided to take up the challenge and make submissions. I am indebted to him. A similar matter came before my brother Cheda J on 27 February 2003. Mr *K I Phulu* of Coghlan & Welsh Legal Practitioners also made written submissions and I am indebted to him too. (His submissions were availed to me by Cheda J, who was aware F that I was busy with this judgment).

The issue concerns the service of notices of set down on parties who have not entered appearance to defend in matrimonial matters. Mr *Finch* contends that it is not necessary to serve the notice of set down in such circumstances. Mr *Phulu* holds a contrary view. G

Order 35, r 272(2)(b) of the High Court Rules deals with orders concerning divorces.

In order to enhance a contextual understanding of the issue, I will quote the relevant parts of Order 35 r 272, which provide:

"**Action for … divorce …: procedure where defendant fails to enter appearance** H

Ndou J

(1) In A an action for …, divorce, … or nullity of marriage where the defendant has failed to enter appearance —

(a) if the declaration has not been served with the summons the plaintiff wishing to obtain judgment shall file and deliver his declaration and either simultaneously or subsequently *a notice in accordance with Form No. 30 calling upon the defendant if* B *he wishes to defend, to purge his failure to enter appearance and to plead, answer or except, or make claim in reconvention within twelve days of the date of delivery of the notice and informing him that in default thereof judgment will be prayed against him*;

(b) if the declaration has been served with the summons, the plaintiff C wishing to obtain judgment shall file and deliver the aforesaid notice to the defendant after the expiry of the *dies induciae*, as calculated in the proviso to rule 119.

(2) Thereafter, the plaintiff may —

(a) in the case of an action for conjugal rights set the case drawn for trial without notice to the defendant

(b) in D the case of a claim for a final order of divorce, for judicial separation or for nullity of marriage, *set the case down for trial but shall serve personal notice of set down upon the defendant, and in such case, the court shall not proceed to trial unless it is satisfied that the personal notice of the defendant has been drawn to the fact that the matter has been set down for trial or* E *that for good and sufficient reason the giving of personal notice is impracticable"* (the emphasis is mine).

I agree with Mr *Phulu*, in his written submissions, that the requirement of personal service of a notice of set down is based on Order 35 r 272(2)(b) *supra*. It is not, in our jurisdiction, based on a practice of the court. When reference F is made to many South African cases this has to be borne in mind. Mr *Finch*'s submissions also seems to be based on the rules, to be specific, Form No. 30A. The issue arises from the interpretation of the rules and not from a practice note. Legal practitioners and, indeed, brother and sister judges who go along with Mr *Finch*'s contention, normally refer to this Form 30A. The argument here, as I understand it, it that the old Form 30A was repealed and substituted G with the current one by the High Court (Amendment) Rules 2000 (No. 35) as published in SI 80 of 2000. This new Form 30A provides, *inter alia*, on the face of it in the pertinent part:

> "If you do not enter appearance to defend, the plaintiff's claims will be heard and dealt with by the High Court without further notice to you."

H Order 35 r 272(2)(b) *supra* was, however, not specifically repealed by the High

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Ndou J

Court (Amendment Rules) 2000 (No. 35) *supra* or any subsequent amendment A to the rules. The question for determination is whether repeal of the Form 30A by the High Court (Amendment Rules) 2000 (No. 35) *supra* automatically repealed Order 35 r 272(2)(b) *supra*. Put in another way, what impact, if any, does the repeal of Form 30A by the High Court (Amendment Rules) 2000 *supra* (without making any reference to Order 35 r 272(2)(b) have on B r 272(2)(b)? The issue here is one of construction of the rules that I have alluded to.

Before attempting to answer the question, I propose to first expand on what r 272(2)(b) entails. In his article *Divorce Law – Points of Practice and Procedure* 1973 RLR volume 13, part 2 at pp 147-148, C.L. Mercer stated:

> "Order 35 r 272(2)(b) both embodies and extends the ruling made by C Tredgold CJ in *Butler v Butler* 1951 SR 122 by providing that in the case of claim for a final order of divorce, judicial separation or for nullity of marriage,
>
> 'the court shall not proceed to trial unless it is satisfied that the personal notice of the defendant has been drawn to the fact that the matter has been set down for trial or that for good and sufficient reason the giving of D personal notice is impracticable.'
>
> The reason for requiring that there be evidence before the court that the defendant is personally aware of the date of set down is to ensure that at the latest stage of the proceedings the defendant is given the opportunity to reconsider."

In *Butler v Butler supra*, the learned judge stated: E

> "It has always been the practice in this court that where the divorce is sought on the grounds of desertion the restitution order must come to the personal knowledge of the defendant: in other words, although he has knowledge of the proceedings and has authorised attorneys to act on his behalf the court has always insisted that in its final stages he should be F given personal notice of the proceedings in order that he might reconsider his position. It seems illogical that in other cases where a divorce reaches its final point it should be allowed to proceed without any notice to the defendant. In a recent case in the Cape Provincial Division, *Africa v Africa* 1944 CPD 78, the presiding judge, after consultation with the other judges, laid it down that in divorce proceedings there must be G personal service, in the case of desertion, of the restitution order and, in other cases, of the notice of trial. So this seems to me to be a salutary rule of practice. I have consulted with the other judges and they agree, and *I would accordingly direct that for the future in all cases in which a final order of divorce is sought there must be evidence before the court that the notice of set down has come to the personal attention of the defendant*" H

Ndou J

A See also *Le Roux v Le Roux* 1957 R&N 831 (SR). In *Barkhuizen v Kruger* 1959 (3) SA 506 [O], Potgieter J stated:

> "It may be, as is suggested by Neser J, that, in view of the irreparable harm that may result in a final decree of divorce, a practice exists whereby the court will insist on personal service in case of divorce on the ground of adultery."

B See also *Eleftheriou v Universal Trading Company* 1946 TPD 173; *van Wyk v van Wyk* 1976 (3) SA 289 (O); *Rood v Rood* 1947 (2) SA 722 (C). The approach is informed by the

irreparable harm that may result in a final decree of divorce. Divorce results in a finality in the change of status of the parties.

Coming back to the issue in this matter, I believe that I have to determine that C the force of r 272(2)(c) supersedes the effect of the specific wording of the forms in such a case where there is an apparent absurd contrast between the rules and the forms appearing as part of the schedules to the rules at the end of the rules.

Form 30A is a specimen form to be used in connection with procedures provided for by the rules in connection with divorce and matrimonial D proceedings.

What is important to note is that Form 30A is part of a schedule to the rules contained, as usual, at the end of the rules. Generally, schedules to legislation are aimed at limiting the physical length and streamlining the sections (rules in this case).

E The extent to which schedules can and will be regarded as intra-textual, structural parts of an enactment will have to be determined with reference to their nature and intended function, relative to the context of the legislation or enactment as a whole: see *The Interpretion of Statutes* by L M du Plessis at p 126. The learned author stated:

> F "Schedules aimed at limiting the length of an act and streamlining sections thereof by elaborating on certain matters briefly mentioned or referred to in the sections themselves, will for instance quite readily be regarded as part and parcel of those sections themselves. On the other hand, noncompliance with the exact wording or form of specimens is not necessarily held to be destructive *Liquidator Wapejo Shipping Co v Lurie Bros* 1924 AD 69 at 72-73."

G I agree with this observation.

Schedules are treated, at least, as intra-textual sources of clarification and elucidation which are not necessarily only consulted in instances of uncertainty and ambiguity, but also as complements to or further explanations of the apparently clear and unambiguous sections contained in the body of the H enactment: see *Utopia Vakansie–oorde Bpk v Du Plessis* 1974 (3) SA 148 (A)

Ndou J

at 177; *S v Bechoo* 1979 (3) SA 946 (A); *Cowburn v Nasopie (Edms) Bpk* 1980 A & *Ors* (2) SA 546 (NC) at 555-556 and *Secretary for Inland Revenue v Teljoy Ltd* 1980 (3) SA 314 (T). In all these cases, the schedules were used in the construction of the enactments. *In casu*, Form 30A being part of a schedule to the rules, must be treated in the above-mentioned context. It is, however, important to note that should a schedule be in clear conflict with a section or B sections, the latter must prevail. *In casu*, it is beyond dispute that Form 30A is in clear conflict with Order 35 r 272(2)(b), and as such the latter should prevail. In *African and European Investment Co Ltd v Warren & Ors* 1924 AD 308 at 360, Kotze JA remarked:

> "No doubt a schedule or rule attached to a statute, and forming part of it is binding but in case of clear conflict between either of them and a section C in the body of the statute itself, the former must give way to the latter. (*R v Baines*, 12 A&E 277, and 113 Eng. Rep. at p 799; In re *Baines, I Craig & Ph* at p 46 and 41. Eng Rep. At p 406; *Dean and Green*, 8 PD at p 90)."

In passing, for the sake of completeness, I should point out that the rules of this court fall within the meaning of an enactment, so the provisions of the Interpretation Act [*Chapter 1:01*] are applicable. In s 3 the definition of D enactment includes "any statutory instrument". All the rules of our courts take the form of statutory instruments made by the Minister of Justice, Legal and Parliamentary Affairs. The rule under consideration is part of High Court Rules 1971, SI 1047 of 1971.

From the foregoing, I hold the view that the force of Order 35 r 272(2)(b) E supercedes the effect of the specific wording of Form 30A, or any other parts of the schedules for that matter. Where there is apparent and clear conflict, r 272(2)(b) must prevail. Accordingly, personal service is a must except where the giving of personal notice is impracticable. The exception is entirely within the discretion of the court to decide. Where there is no personal service, what legal practitioners should do is to seek to pursuade the court to exercise its F discretion and find that service is impracticable in the particular circumstances of the case.

Once more, I wish to record my indebtedness to Mr *Finch* and Mr *Phulu* whose invaluable, researched submissions were of great help in coming up with this judgment. G

All things considered, I am satisfied that the plaintiff must serve the notice of set down on the defendant personally as required by Order 35 r 272(2)(b). I, accordingly, postpone the matter *sine die* with no order as to costs.

Webb, Low & Barry, plaintiff's legal practitioners H

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Source:
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PHIRI v PHIRI 2003 (1) ZLR 385 (H)

Citation	2003 (1) ZLR 385 (H)
Case No	Judgment No. HB-45-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	19 December 2002, 16 January 2003; 20 March 2003
Judgment	20 March 2003
Counsel	*Ms H M Moyo*, for the plaintiff Defendant in person
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *matrimonial matter — strict observance of rules* C *not insisted on — duty of court to ascertain truth — desirability of adjudicating upon all marital problems in same action*

Headnote

The married status should as far as possible and whenever possible be maintained. The task of a party who seeks to have a marriage dissolved is not a light one. For this reason, the court will not insist upon strict D observance of the formalities but will seek to ascertain the truth regardless of technicalities. It is desirable that the marital problems be adjudicated upon in one and the same action, rather than dealing with some first and others later.

Cases cited E

Coertzen v Coertzen 1954 (2) SA 69 (O)

Eorfino v De Pretto (Eorfino Intervening) 1959 (3) SA 787 (W)

Exley v Exley 1952 (1) SA 644 (O)

Fender v St John-Mildmay [1938] AC 1; [1937] 3 All ER 402 (HL)

Haddow v Haddow 1974 (1) RLR 5 (G); 1974 (2) SA 181 (R)

F *Henderson v Tucker & Anor* 1965 RLR 406 (G); 1965 (4) SA 227 (SR)

Kanatopsky v Kanatopsky 1935 EDL 308

Case information

Ms H M Moyo, for the plaintiff

Defendant in person

Judgment

G **Ndou J:** In this matter, the plaintiff seeks a divorce with ancillary relief. The plaintiff issued summons on 6 June 2001. The summons was served on the defendant by the Deputy Sheriff on 13 June 2001. The defendant entered appearance to defend on 27 June 2001. On 1 August 2001, he filed a notice of Request for Further Particulars. The plaintiff responded to the request on H 12 November 2001. The defendant did not file his plea and as a result on 14

Ndou J

December 2001 a Notice of Intention to Bar was served on him. He did nothing A about it. The plaintiff set down the matter for 19 December 2002 as unopposed in the motion court. The notice of set down was apparently served on the defendant. On 19 December 2002, he pitched up and when the matter was called he sought to make submissions. The plaintiff's counsel strongly objected on the basis that the defendant had been barred and, as such, could B not be heard without condonation by the court. I granted the defendant instant condonation and briefly heard his side of the story only in connection with failure to file the plea. As the defendant is a self actor, I did this purely on the basis of policy which dictates that the married status should as far as possible, as long as possible and whenever possible be maintained: see *Fender v St John-Mildmay* [1938] AC I at 32-33 and *The South African Law of Husband* C *and Wife* 5 ed by HR Hahlo at p 418. The task of a party who seeks to have a marriage dissolved is not a light one. In *Kanatopsky v Kanatopsky* 1935 EDL 308 at 309, Gutsche J remarked:

> "Because of its far reaching consequences to the contracting parties themselves, because it creates for them a status, and because for that and other reasons, the state is an interested third party, not only at the making D but also at the breaking, *inter vivos,* of the union, and has an interest therein throughout its subsistence, the marriage contract, of all personal contracts, is the least revocable or reversible."

The court will not insist upon strict observance of the formalities but will seek to ascertain the truth regardless of technicalities. In *Exley v Exley* 1952 (1) SA 644 (O) at 646, Horwitz J stated: E

> "… and, secondly because I bear in mind that the point is, after all, related to a matrimonial dispute when the court does not always insist upon strict formalities."

The same learned judge dealt with the issue in *Coertzen v Coertzen* 1954 (2) SA 69 (O). In this case, there was an irregularity which is more or less similar F to the one *in casu*. The defendant, in divorce proceedings, pitched up on the day of hearing of an undefended action asking for leave to defend. Postponement was granted to enable the defendant to apply on petition for condonation of late entry of appearance. The defendant did not do so, but instead merely filed an affidavit in breach of the court order. The court held that the plaintiff was not prejudiced thereby and granted the condonation but imposed a sanction G by way of a special order as to costs. The rationale for doing so is discernible from p 71C-G where the learned judge stated:

> "It is abundantly clear that at one stage the defendant, although he had ample opportunity to enter appearance to defend, did not do so, but, for some unexplained, or inadequately explained reason, refrained from H

Ndou J

> A entering appearance until the last moment when he appeared in this court and applied orally to be allowed to defend. Had this been an ordinary civil case it would have been advisable, if not necessary for the court to take this delay into very serious consideration in the present application for condonation. But I am bearing in mind that this is a divorce case in which the status of the parties is involved and that,

> therefore, in view of the fact B that the defendant has a defence and from the papers we must assume that it is a *bona fide* defence the court should not by its order prevent him placing that defence before it …
>
> In the case of *Fillis v Fillis* 1908 CTR 357, Buchanan ACJ, said that — 'in all matrimonial cases the court will hear the defendant if he is present'.
>
> If that statement be correct, then it would follow that if the court could C have heard him when he was present on 17 December last, the court can also now grant him opportunity to place his defence formally before the court. The other case to which I wish to refer is *Edwards v Edwards* 1912 WLD 80 … the learned judge who presided pointed out that this was a case affecting the status of the parties, and, even though at that stage there was already an order against the wife, leave to defend would be granted."

D See also *Haddow v Haddow* 1974 (1) RLR 5 (G), 1974 (2) SA 181 (R).

Another issue relevant to the facts is whether the court can deal with the decree of divorce and the custody first and refer the other issues for trial. This approach would be consistent with a request by the defendant as he is consenting to these two. I go along with the view that it is desirable that the E marital problems be adjudicated upon in one and the same action: see *Henderson v Tucker & Anor* 1965 RLR 406 (G), 1965 (4) SA 227 (SR) and *Eorfino v De Pretto (Eorfino Intervening*) 1959 (3) SA 787 (W). Although the facts of these cases dealt with slightly different scenarios, I think the rationale of the approach applies to this case. I therefore hold that all the matrimonial issues should be within the same trial. In line with the principle of the sanctity F of the marriage status in the above-mentioned cases, I am prepared to condone the behaviour of the self-acting defendant and allow him to have his case heard. I will not insist upon strict observance of the formalities but seek to ascertain the truth regardless of technicalities. To prevent the possible prejudice being suffered by the plaintiff, I will order that the defendant bears the costs for this application instead of committal for contempt as suggested G in *Haddow v Haddow supra*. In this case, it is beyond dispute that the defendant was out of the country. But when he went to live in Zambia he was aware that this matter had commenced. He had already participated in the litigation. He should have taken steps to ensure that his wife was not affected by the departure.

H In order to cut down on costs and prevent prejudice to the plaintiff, I direct that

Ndou J

the defendant's opposing papers be regarded as his plea and subsequent A pleadings will proceed from that stage.

I accordingly refer this matter for trial, with the defendant's opposing affidavit being regarded as his plea. The defendant will bear the costs of this application. B

Joel Pincus, Konson & Wolhuter, plaintiff's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/STANMARKER MINING (PVT) LTD v METALLON CORP LTD & ORS 2003 (1) ZLR 389 (H)

STANMARKER MINING (PVT) LTD v METALLON CORP LTD & ORS 2003 (1) ZLR 389 (H)

Citation	2003 (1) ZLR 389 (H)
Case No	Judgment No. HH-55-03
Court	High Court, Harare
Judge	Chinhengo J

Heard 5 March 2003; 8 March 2003; 25 March 2003

Judgment 25 March 2003

Counsel *A B Chinake*, for the applicant
S Moyo, for the respondents

Case Type Civil application

Annotations Link to case annotations

Flynote

C **Court** — *jurisdiction — peregrinus — need for defendant to be present in Zimbabwe or have property capable of attachment — defendant company having only an indirect interest in company owning property within Zimbabwe — court having no jurisdiction*

Practice and procedure — *attachment — to found or confirm jurisdiction —* D *when may be dispensed with — requirement to show that peregrine defendant is present within country or has property capable of attachment — defendant company having only an indirect interest in company owning property within Zimbabwe — court having no jurisdiction*

Headnote

The applicant intended to sue the first and second respondents for breach of E contract. Both were *peregrini*, the first respondent being incorporated in South Africa and the second in the British Virgin Islands. The third respondent was incorporated in Zimbabwe and operated five gold mines. The company was wholly owned by a company registered in the United Kingdom, which company was in turn wholly owned by another company incorporated in the United Kingdom. The applicant and the first respondent F had agreed to negotiate with that company to purchase all or part of the shares and assets of the Zimbabwean company and its parent company. The agreement, which was reached in Zimbabwe, included a clause which prohibited the parties from negotiating individually with the United Kingdom company.

G The only connection any of the respondents had with Zimbabwe was that the second respondent held shares in the Zimbabwean company's parent company in the United Kingdom. On that basis, the applicant sought to attach the third respondent's property to found jurisdiction.

Held, that s 15 of the High Court Act [*Chapter 7:*06] altered the common law, to give the court a discretion not to order attachment of the property H belonging to a peregrine defendant or to order his arrest but to elect in

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Chinhengo J

lieu thereof to found or confirm jurisdiction over the *peregrinus* by issue A of process. However, the plaintiff still has the burden of having to satisfy the court, before the issue of process, that the *peregrinus* is present within the country for arrest or has property within the country capable of attachment.

Held, further, that where a corporate entity owns assets within Zimbabwe and B where the defendant may only at best indirectly benefit from the business of that corporate entity, it cannot be said that the defendant has property capable of attachment.

Cases cited

Forbes v Uys 1933 TPD 362

Jamieson v Sabingo [2002] 3 All SA 392 (SCA) C

Monarch Steel (1991) (Pvt) Ltd v Fourway Haulage (Pty) Ltd 1997 (2) ZLR 342 (H)

Legislation considered

High Court Act [*Chapter 7:06*], s 15 D

Case information

A B Chinake, for the applicant

S Moyo, for the respondents

Judgment

Chinhengo J: The applicant intends to sue the first and second respondents for damages for breach of contract in the sum of US$27 315 979. The first and E second respondents (hereinafter called "Metallon" and "Pemberton" respectively) are *peregrini* defendants. Metallon is a South African registered company operating from 161 Rivonia Rd, Sandton, Johannesburg, South Africa. Pemberton is a company incorporated in terms of the laws of the British Virgin Islands and operates from 5 Pelican Drive, Columbus Centre, F Road Town, Tortola, British Virgin Islands. In the founding affidavit, the applicant was not certain as to the above facts in relation to Pemberton, hence it stated in para 4 of the founding affidavit that Pemberton is owned by Metallon and "its address for service is care of 161 Rivonia Road, Sandton, Johannesburg, South Africa". The correct position with regards to where Pemberton is incorporated and operates from was disclosed by Metallon in its G opposing affidavit and that has not been disputed by the applicant. Metallon and Pemberton are indisputably *peregrini* defendants.

This application was made *ex parte* and on an urgent basis. I directed that the respondent be served and I agreed to hear it as an urgent application. The application is made in terms of r 45 of the Rules of the High Court, as read with H

Chinhengo J

A s 15 of the High Court Act [*Chapter 7:06*]. The applicant seeks an order to confirm this court's jurisdiction by attaching the respondent's property or other proprietary interest in Zimbabwe. It also seeks an order authorising the service of the summons on the respondents in South Africa and a further order interdicting the respondents from alienating or encumbering their right and interest in the third respondent ("Independence"), which was cited "merely for B the purposes of advising its directors of the potential negative impact this application may have on its assets".

The question for my determination is a simple and straightforward one. It is whether this court has jurisdiction in the matter. I must sketch the background to this application for the easier understanding of my decision.

C The applicant and Metallon entered into an agreement in terms of which they agreed on the modalities or procedures for their mutual acquisition of Independence through the establishment of a company to be known as Newco, which was to be incorporated in Zimbabwe.

Independence operates five gold mines in Zimbabwe, namely, How Mine, Shamva Mine, Arcturus Mine, Mazowe Mine and Redwing Mine. It owns D these mines and their assets. Independence is owned one hundred percent by Cableair Ltd, a company registered in the United Kingdom. Cableair Ltd is in turn one hundred percent owned by Lonmin Plc, another United Kingdom based company. It was Lonmin Plc which intended to dispose of its shareholding in Cableair Ltd and consequently divest itself of its interest in Independence.

E The applicant and Metallon agreed that they were to jointly negotiate with Lonmin Plc the joint acquisition of all or a part of the share capital, assets or business of Independence or Cableair Ltd. In terms of clause 11.1 of their agreement, the applicant and Metallon agreed that:

> "From the signature date and for a period of 3 months thereafter, neither F party shall, without the prior written consent of the other party, engage in or enter into discussions with any other party with an interest in acquiring the share capital or business of Independence or its immediate holding company and/or engage in or enter into discussions with any other party desirous of achieving similar objectives than, or competing with, Newco."

The applicant averred that Metallon breached this clause by holding discussions G with Lonmin Plc outside the framework of the agreement and by submitting through Pemberton, during the period of three months from the date of signature of the agreement, a bid for the acquisition of Independence's business for its own benefit and thereby procuring that the bid so submitted was

accepted by Lonmin Plc. It is on this basis that the applicant seeks to institute an action for breach of contract and claim damages from Metallon.

2003 (1) ZLR p392

Chinhengo J

The applicant was correct in labelling its application as one to confirm this A court's jurisdiction. It, indeed, is so because the agreement was concluded in Zimbabwe when the applicant's deponent accepted the terms of the agreement by signing it in Zimbabwe, thereby providing the *causa jurisdictionis* separate from an attachment. Though the respondents did not agree that the contract was made in Zimbabwe when the representative of the applicant signed the B agreement following upon a telefacsimile transmission of the contract document, I am of the view that the contract was concluded in Zimbabwe: see *Jamieson v Sabingo* [2002] 3 All SA 392 (SCA) at 395(e)-(i) and at 397(a)-(f).

In terms of s 15 of the High Court Act, the court's jurisdiction can be founded or confirmed by the arrest of the person of the defendant or by the attachment of the defendant's property but the court has a discretion whether or not to C order an attachment. Section 15 provides that:

> "In any case in which the High Court may exercise jurisdiction founded or confirmed by the arrest of any person or the attachment of any property, the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment, if the High Court is satisfied D that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, as the case may be, by the issue of such process."

The clear intention of this provision was explained by Malaba J (as he then was) in *Monarch Steel (1991) (Pvt) Ltd v Fourway Haulage (Pty) Ltd* 1997 (2) ZLR 342 (H) at 345C-346A where he said: E

> "Although s 15 altered the common law to the extent that it gave the court a discretion not to order attachment of the property belonging to a peregrine defendant or order his arrest but to elect in lieu thereof to found or confirm jurisdiction over the *peregrinus* by issue of process, it did not F discharge the plaintiff from the burden of having to satisfy the court, before the issue of process, that the *peregrinus* was present within the country for arrest or had property within the country capable of attachment.
>
> It was in the sense that s 15 made it no longer necessary for the court to order the arrest of the *peregrinus* or an attachment of his property that SANDURA JP in *Clan Transport Co (Pvt) Ltd v Govt of the Republic of* G *Mozambique* 1993 (3) SA 795 (Z) said at 797F:
>
> > 'Although under common law there must be an arrest of the defendant *peregrinus* or an attachment of his property within the territorial jurisdiction of the court in order to found or confirm jurisdiction that position has been altered by s 15 of the High Court of Zimbabwe Act 29 of 1981.' H

2003 (1) ZLR p393

Chinhengo J

> A The learned Judge President did not suggest, as was argued by Mr *Carter* for the plaintiff, that it was no longer necessary to show to the court before issue of court process for purposes of s 15 of the Act, that the *peregrinus* was present within the court's jurisdiction or had property therein capable of attachment. The court's discretion lies in having to determine whether or not to order the arrest of a *peregrinus* who must be within the country B or order the attachment of his property which must also be within the country. That discretion is also available to a judge before whom a chamber application is placed in terms of Order 6 r 45.
>
> The above construction of the provisions of s 15 of the Act receives authority from the decision of BECK J (as he then was) in *African Distillers Ltd v Zietkiewicz & Ors* 1980 ZLR 135 (G), from which the C Judge President in *Clan Transport*'s case *supra*, quoted with approval at p 136 F-H …"

It must be clear from the above remarks that s 15 of the High Court Act does not dispense with the need to show that the court has jurisdiction which may be founded or confirmed by the attachment of property or the arrest of the defendant. That is the single issue which the applicant had to deal with before D he could obtain other associated relief.

The background facts which I have outlined indicate quite clearly that Metallon has no property in Zimbabwe. Its connection, if any, with Independence is through the ownership by Pemberton of the shares in Cableair Ltd which, in turn, owns the shares in Independence. It must always be kept E in mind in matters of this kind that we are here dealing with corporate entities which have separate legal personalities from each other and from the persons who act on their behalf. The owner of the assets in Zimbabwe which it is proposed to attach is Independence. Those assets are company

assets. Independence is not a party to these proceedings, nor would it be a defendant in any suit between the applicant and Metallon, the two parties to the F agreement whose breach is alleged to have occurred. Independence is a separate legal entity whose shares are owned by Cableair Ltd. And Cableair Ltd's shares were owned by Lonmin Plc. Whatever relationship exists between Metallon and Pemberton, or whatever interest Metallon may have in Pemberton, it cannot be such a relationship or such an interest, as the case may be, as would convert the assets of Independence into the assets of Metallon. G The applicant seems to me to have derived some comfort from para 7.4.3 of Metallon's opposing affidavit wherein it is conceded that Metallon and Pemberton have a beneficial interest in Independence. Similar comfort seems to have been derived also from Annexure J to the founding affidavit wherein Metallon states that it "acquired 100 percent of Independence Gold Mining H Zimbabwe from Lonmin Plc". Counsel for the applicant accordingly submitted

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2003 (1) ZLR p394

Chinhengo J

in para 8 of his heads of argument that A

> "… the existence of s 15 of the High Court Act … means that a physical attachment of the property belonging to the first respondents in Zimbabwe is not necessary. The applicant merely must show that the first respondent was or has a substantial beneficial interest in assets that are situate in Zimbabwe in respect of which the judgment in favour of the applicant may be enforced or over which this Honourable Court can exercise jurisdiction." B

I do not think that this submission is valid at all, particularly in a situation, as in this case, where a corporate entity owns the assets and where the defendant may only at best indirectly benefit from the business of that corporate entity. Thus, apart from the fact that Independence, as a corporate entity, is the owner of the mining assets within Zimbabwe, the interest which Metallon may have C through either Pemberton or Cableair Ltd is not, to my mind, the kind of interest which may be attached to confirm jurisdiction or in respect of which the discretion of the court granted by s 15 of the High Court Act may be exercised. That interest is at best dependent on whether Independence and Cableair Ltd declare a dividend in favour of those entities which own shares in them. On the facts placed before me, it is quite facetious to argue that D Metallon has any interest in Independence. The doctrine of effectiveness on which the issue of jurisdiction depends (*Forbes v Uys* 1933 TPD 369) could never find application if jurisdiction were to be confirmed in any case whose facts are similar to this case. The result is that there is no property belonging to Metallon within the jurisdiction of this court which can be attached to E confirm jurisdiction. That being the case the associated relief sought by the applicant cannot also be granted.

The application is dismissed with costs.

Kantor & Immerman, applicant's legal practitioners F

Scanlen & Holderness, first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/KUSEMA v SHAMWA 2003 (1) ZLR 395 (H)

KUSEMA v SHAMWA 2003 (1) ZLR 395 (H)

2003 (1) ZLR p395

Citation	2003 (1) ZLR 395 (H)
Case No	Judgment No. HH-46-03
Court	High Court, Harare

Judge	Makarau J
Heard	15 November 2002; 24 January 2003; 26 March 2003
Judgment	26 March 2003
Counsel	*Mrs N Bvekwa,* for the applicant *E Chivhinge,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Customary law — *application — matter capable of resolution by either* C *general law or customary law — rights acquired under one system not to be regarded as inferior to rights acquired under other — need to show that one system should apply to exclusion of other*

Headnote

The applicant's late father had, after the applicant's birth, married the D respondent under customary law. The applicant was brought up in his mother's home. The marriage was registered. The applicant's father had been allocated a stand in a township and in due course became the holder of certain disposable rights, title and interests in the stand. The applicant's father died and the applicant inherited all his father's property in terms of the will his father made. The respondent continued to live in the house E and paid rates and other expenses for doing so. The applicant sold the house to another party and sought to evict the respondent. She claimed to be entitled to stay there, being the widow under customary law.

Held, that where an issue is presented to the court, seemingly capable of resolution by the application of either general or customary law, but with F different results, the court has first to decide which law is applicable.

Held, further, that no rights acquired by one party under one legal system are to be regarded as inferior to the rights acquired by the other party under the other legal system. Both sets of rights should find expression and protection at law.

Held, further, that under general law, the applicant had a right to evict the G respondent, but under customary law a widow was entitled to support and accommodation by the heir of her late husband's estate.

Held, further, that there was no basis for holding that only the general law should apply. The right of the respondent to remain in or to be removed from the house that she regarded as her permanent home by virtue of her status at customary law could only be determined by the customary law H of the tribe that the deceased belonged to.

2003 (1) ZLR p396

Makarau J

Cases cited A

Chihowa v Mangwende 1987 (1) ZLR 228 (S)

Gwatidzo v Masukusa 2000 (2) ZLR 410 (H)

Masango v Masango S-66-86

Legislation considered B

Constitution of Zimbabwe 1980 s 89

Customary Law and Local Courts Act [*Chapter 7:05*] s 3

Case information

Mrs N Bvekwa, for the applicant

E Chivhinge, for the respondent C

Judgment

Makarau J: The applicant and the respondent are stepson and stepmother respectively. The applicant is seeking an order for the eviction of the respondent from Stand number 2061 Mabvuku Township, Harare, ["the stand"]. The facts forming the backdrop to this application are largely common D cause. They may be summarised as follows:

The late Simon Kandema ("Simon"), who hailed from Ntache, Malawi, married the respondent, from Bindura, Zimbabwe, according to African customary rites and practices in 1960. In 1968, the two had their marriage registered in terms of the African Marriages Act [*Chapter 105*], as it then was. By virtue of his status as a married man, Simon was, on 6 March 1968, E allocated accommodation at the stand, by the then department of African Administration. In due course, Simon became the holder of certain disposable rights, title and interests in the stand. The stand formed his and his wife's permanent home until his death in 1991.

Prior to his marriage to the respondent, Simon had sired the applicant. At the F time this happened, he was not married to the applicant's mother either at customary law or in terms of any other law. Upon Simon's marriage to the respondent, the applicant's mother left Simon and went back to her people, taking the infant applicant with her. She then raised the applicant and, according to African custom, gave him her own name. It is not disclosed on the papers whether the applicant, at any stage, stayed with the late Simon and the G respondent at the stand. This fact is, however, largely immaterial for the determination of the dispute before me but would have made for a fuller picture.

After Simon's death in 1991, the applicant inherited the late Simon's rights title and interests in the stand. This was in 1993. Simon left a will in which H

A he bequeathed his entire estate to the applicant. The estate was duly administered by Syfrets Trust and Executors. In due course, the applicant became the registered tenant in respect of the stand. The respondent continued to reside at the stand, paying the rates and other charges due directly to the local authority. In July 2001, the applicant sold his rights title and interests in the stand to one Abigail Domboka. He then gave the respondent notice to vacate B the property by 31 December 2001. The respondent did not respond to the notice, resulting in the applicant filing this application.

After hearing submissions from counsel at the initial hearing, I was of the view that the real issue arising from the facts of the matter had not been canvassed in the heads submitted and in the oral addresses of both counsel. It became C apparent to me that both counsel were agreed that general law applied in resolving the dispute before me. In this regard, it further appeared to me that the legal nature of the defence being put up by the respondent, as I understand it, had not been fully appreciated. In my view, the respondent is raising her relationship with customary law as a defence to a claim brought under general law. I then caused the parties to file supplementary heads on two specific D issues. These were:

1. On what basis is general law being applied to the respondent, who was married under customary law?
2. Is the respondent's occupation of the former matrimonial home not protected under customary law?

E Counsel commendably did their best to grapple with what, in my view, is a complex legal issue. They filed heads of argument in which attempts were made to answer the above two questions.

It appears to me that the conflict between customary law and general law will be an issue that will confront the courts in this jurisdiction for some time to F come. It is an issue, in my view, that has the potential of causing palpable injustice in some cases, especially for women married under customary law, who may find general law being applied against them to erode whatever positions they may be occupying by virtue of customary law. The relationship between customary law and

general law is an issue that has dogged this court before, and in the absence of intervention by Parliament expressly harmonising G the two legal systems, injustice may only be avoided by innovation and creativity on the part of judges, creating remedies that straddle, but remain compatible with, the two legal systems.

It is common cause that in this jurisdiction, general law and customary law are both recognised as competent laws of the land. The primary recognition of the H two legal systems is to be found in the Constitution. In s 89, the Constitution

provides that: A

> "Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law." B

Legal historians will trace the origins of this provision to the Royal Charter granted to Cecil John Rhodes in 1889. The Charter was apparently granted on the understanding that the cultural and traditional laws and practices of the local inhabitants were to be preserved by the incoming settlers, except in relation to matters of criminal law. The equivalent provision has been repeated C in all the constitutions of the country since the Royal Charter.

The position that the courts in this jurisdiction may have to make a choice of law between general and customary law is reinforced by the provisions of s 3 of the Customary Law and Local Courts Act [*Chapter 7.05*], which provides for the instances when customary law should apply in civil cases. The section provides as follows: D

> "**3. Application of customary law**
>
> (1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires —
>
> (a) customary law shall apply in any civil case where —
>
> (i) the parties have expressly agreed that it should apply; or E
>
> (ii) regard being had to the nature of the case and the surrounding circumstances, it appears the parties have agreed it should apply; or
>
> (iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply; F
>
> (b) the general law of Zimbabwe shall apply in all other cases."

It appears to me that in enacting this section, the legislature was putting it expressly that, in this jurisdiction, there are two legal systems that, in some cases, may apply to the same dispute. Thus, where for instance, an issue presents to the court, seemingly capable of resolution by the application of G either of the two laws, but with different results, the court deciding the dispute has to first make a determination as to the choice of law applicable. This, in my view, is the situation that confronts me in this dispute.

The applicant's position is quite simple. He argues that he inherited rights, title and interests in the stand from his late father. He now owns that property H

A by virtue of testate succession. By seeking an eviction order against the respondent, he is simply enforcing one of his rights as owner of those rights, title and interests in the property. His rights as stated are, in my view, beyond question. Under general law, he is entitled to the remedy he seeks.

The respondent's position is equally simple, in my view. She argues that she married her late husband in terms of customary law. As a result of that B marriage, her husband was allocated the stand that constituted their permanent matrimonial home. She does not claim to have inherited the stand nor to have acquired ownership of the stand by virtue of her marriage. She merely claims the right to continue regarding the stand as her permanent home and to be able to occupy it as a result of that relationship. She bases her right to regard the C stand as her permanent home on the basis of her marriage at customary law.

The applicant has sought to argue that general law applies to this dispute as he inherited the property from his late father. I have no doubt that he is correct in arguing that his rights to the property are to be determined by the application of general law. That is not the issue before me. The issue before me is whether general law should be used to evict the respondent from what at customary law D (so she claims), she regards as her permanent home. In my view, the focus should not be on the law applicable as to how the applicant acquired his rights to the stand, but, rather, on the law applicable if the respondent is to lose her occupation of the stand.

If it is accepted (which in my view, it must) that the applicant's claim is fully E based on the Roman Dutch law concept of ownership and that the respondent's defence to the claim is that she has the right to occupy the stand by virtue of her marriage at customary law to the late Simon, then in my view I am confronted by a situation similar to the one that confronted Chinhengo J in *Gwatidzo v Masukusa* 2000 (2) ZLR 410 (H). In that case, the plaintiff, married to Gwatidzo under the Marriages Act [*Chapter 5.11*], sued the F defendant for adultery damages, alleging that the defendant, married to the same Gwatidzo under customary law, had committed adultery. Whilst dealing specifically with the facts of the matter before him, the learned judge at page 420B had this to say about the situation of the two women:

> "A woman to a customary union has acquired rights in that union. A woman G to a civil marriage has also acquired rights in that marriage. Why should the one woman lose her rights merely because the other woman has acquired certain rights which purport to exclude the rights of the one?"

In my view, while the judge in that case was concerned about the particular facts of the matter that were before him, in accepting that both women had acquired rights under the respective legal systems they had pleaded before the H court, the learned judge in my view, was enunciating an important principle.

Makarau J

It is that no rights acquired by the one party under one legal system are to be A regarded as inferior to the rights acquired by the other party under the other legal system. In other words, both sets of rights should find expression and protection at law.

Instead of assigning one law to the parties, the judge proceeded to marry the two laws and show that the rights of one party could be interpreted in light of B the rights of the other. This is an approach that commends itself to me. It is an approach that does not find conflict between the two legal systems but looks for a way of accommodating and reconciling the two systems.

I have indicated elsewhere above that the applicant's inheritance at general law cannot be impugned. Further, the fact that as the current holder of certain rights, title and interests in the stand, he is at general law entitled to evict all C those occupying the stand beyond his invitation is also beyond doubt.

On the other hand, it has not been shown that the respondent is completely without rights entitling her to remain in occupation of the stand at customary law. She is a widow at customary law. I hold this position notwithstanding that her late husband disposed of his property using general law. In my view, the D fact that her late husband disposed of his property using general law can hardly de-link the respondent from customary law and make her a widow at general law. In my view what denotes her position within the legal system is her closeness to customary law and her understanding of her position within that legal system. It appears to me that to hold otherwise will amount to accepting that her position in the legal system can be determined by her late husband E from his grave.

Generally, the rights of widows at customary law to support and accommodation by the heir of their late husband's estates has been long recognised by these courts. In this regard I refer to the cases of *Masango v Masango* SC 66/86 (an unreported judgment), where at page 3 of the cyclostyled judgment, Beck JA had this to say: F

> "In the absence of making it possible for the appellant to find such alternative accommodation for herself and her children as would be reasonable in all the circumstances, I do not consider that the respondent is entitled to insist upon their eviction from what is admittedly now his house. To order their eviction without suitable alternative provision G having been made for their shelter would be tantamount to sanctioning an avoidance by the respondent of his customary law obligation to care for his father's wife and children."

The same approach was adopted by Dumbutshena CJ in the case of *Chihowa v Mangwende* 1987 (1) ZLR 228 (S).

I am aware that the above obligations may not be applicable to the applicant H

Makarau J

A for two reasons. Firstly, the applicant is not an heir at customary law. Secondly, the late Simon came from Malawi. The customary practices of his tribe in relation to the rights of widows would have to be established by a court wishing to apply customary law to the dispute. The point I make at this stage is that widows at customary law, generally, have certain rights and expectations upon the demise of their husbands. The contents of those rights and expectations B may vary from tribe to tribe, but can only be determined by the application of customary law rules and principles. Further, and more importantly in my view, those rights and expectations, once ascertained, can only be discharged or extinguished by the application of customary law.

In the matter before me, no basis has been laid for holding that the general law C of Zimbabwe alone is applicable to the dispute between the parties. No basis has been laid for excluding completely the consideration of the respondent's position at customary law. In my view, while the inheritance of the stand by the applicant is governed by the principles of general law, the right of the respondent to remain or to be removed from the house that she regards as her permanent home by virtue of her status at customary law, can only be D determined by the customary law of the tribe that the deceased belonged to. To view the resolution of the dispute in this manner is, in my view, consistent with the approach adopted by Chinhengo J in the *Gwatidzo* case, that seeks to harmonise general law with customary law.

Regarding costs, it is my view that although the applicant has not succeeded, E his position is correct at general law. His approach to the court for an eviction order is understandable in the circumstances. Further, the respondent was represented *in forma pauperis* and the level at which she was so represented caused me to request the senior partner of the law firm representing her to give me certain assurances, which, commendably, he did.

In the result, I make the following order:

1. The F application is dismissed.
2. There shall be no order as to costs.

Gutu & Chikowero, applicant's legal practitioners.

G *Manase & Manase,* respondent's legal practitioners.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/CHINOWAITA & ANOR v AIR ZIMBABWE (PVT) LTD 2003 (1) ZLR 402 (H)

CHINOWAITA & ANOR v AIR ZIMBABWE (PVT) LTD 2003 (1) ZLR 402 (H)

Citation	2003 (1) ZLR 402 (H)
Case No	Judgment No. HH-54-03
Court	High Court, Harare
Judge	Smith J
Heard	25 February 2003; 26 March 2003
Judgment	26 March 2003

Counsel *D Foroma* for the respondent

Case Type Civil Application

Annotations No case annotations to date

Flynote

Employment — *code of conduct — transfer of undertaking — employees* C *transferred to another undertaking under same terms and conditions — not applicable to code of conduct — employees not bound by former employer's code of conduct*

Employment — *contract — termination — Disciplinary Committee — procedural defects — findings of misconduct based on wrong facts* D

Headnote

The applicants were on leave from their employment with the respondent, which was the successor company to the Air Zimbabwe Corporation. They flew to Mauritius for a wedding. Their baggage was found to contain excess cigarettes. They were charged with misconduct, smuggling being classed as misconduct under a code of conduct registered by the E Labour Relations Registrar in respect of the Corporation. The respondent had taken over the business of the Corporation as a going concern in terms of s 16 of the Labour Relations Act [*Chapter 28:01*]. A disciplinary committee had found them guilty and they were dismissed.

Held, that when an undertaking in which any persons are employees is alienated or transferred, the employment of such persons shall be deemed F to be transferred on terms and conditions which are not less favourable than those which applied before the transfer. However, that could not apply to an employment code of conduct; if it did, it might result in the anomaly of some employees being bound by one code of conduct and others by another code. The Corporation's code of conduct thus did not G apply to the respondent and its employees. Accordingly the discharge of applicants was unlawful.

Held, further, that there being no applicable code of conduct, the applicants' employment could only be terminated under the relevant labour regulations.

Held, further*,* that the applicants were not on duty at the time of the alleged H

2003 (1) ZLR p403

Smith J

A smuggling. Therefore it was not *ipso facto* an act of misconduct. A further enquiry would have been necessary to establish misconduct. Absent such an enquiry, the finding of guilt could not stand.

Legislation considered

Air Zimbabwe Corporation Act [*Chapter 13:02*], s 11

B Air Zimbabwe Corporation (Repeal) Act 4 of 1988, s 8

Labour Relations Act [*Chapter 28:01*], s 16

Labour Relations (Employment Codes of Conduct) Regulations 1990 (SI 379 of 1990)

Labour Relations (General Conditions of Employment) (Termination of C Employment) Regulations 1985 (SI 371 of 1985), s 2

Case information

D Foroma for the respondent

Judgment

Smith J: The applicants were employees of the respondent. They were charged with misconduct and, after a hearing, were discharged. They have filed D this application seeking a declaratory order that their discharge is null and void. The grounds on which the application is based are as follows:

(a) the Code of Conduct used by the respondent has not been registered in terms of s 3 of the Labour Relations (Employment Codes of Conduct) Regulations, 1990; E

(b) the Disciplinary Committee which discharged the applicants usurped the functions of the hearing committee by hearing the matter itself;

(c) the hearing committee was improperly constituted in that it was not chaired by a Head of Division and some members thereof were not employees of the respondent; F

(d) the charges were not properly formulated in that it was not clearly indicated how the factual allegations constituted misconduct;

(e) the decision was not based on the allegations and the evidence.

The applicants were employed by the respondent, one as a cargo checker and the other as a cargo officer. They were on leave and flew to Mauritius for a G wedding. Both of them took, as part of their baggage, a bag containing cigarettes. When they arrived at Mauritius they discovered that their bags, which should have been placed in the hold of the aeroplane, were missing. They had been seized by the customs officials because they contained "excess cigarettes" which had not been declared. The allegation was that the applicants H were attempting to smuggle cigarettes out of Zimbabwe into Mauritius.

Smith J

After their return from their holiday the applicants were both charged with A misconduct in terms of the Code of Conduct that was being used by the respondent. There were two charges raised against each applicant, firstly under Part 5 item (a) of the Code, acting in a manner which brings or is likely to bring unjustified scorn or disrepute on the Corporations image; secondly, under Part 4 item 3(1) of the Code, abuse of staff travel cargo carriage B concessions as per Staff Regulations Manual. The applicants appeared before the Departmental Hearing Committee. Their cases were then referred to the Disciplinary Committee which found that the findings of the Departmental Hearing Committee were incomplete and did not itemise their findings. The Disciplinary Committee then proceeded to call the applicants and questioned them about what had happened. They were asked whether they had seen the C bulletin written by Mr Donohoe, who was then the Chief Executive Officer of Air Zimbabwe, in 1995 or 1996 about the smuggling of cigarettes and both said that they had not seen the bulletin. The findings of the Disciplinary Committee were as follows:

1. Bulletins are not always seen by everyone. They should be incorporated in the code of conduct and the staff regulations manual. D
2. The accused were not on duty.
3. The accused were not aware that carrying cigarette to Mauritius is not allowed by the Airline.
4. The accused went through all legal processes. They did not evade or attempt to evade Zimbabwean or Mauritian customs. E
5. The two were remorseful after finding out what they had done was wrong.
6. Patsikadova joined in 1999 way after the bulletin on cigarettes was issued.

The members of the Disciplinary Committee were divided as to the punishment that should be meted out to the applicants. The Chairman exercised his casting F vote and the decision was that the applicants should be dismissed.

I will deal *seriatim* with the grounds on which the application is based.

Code of Conduct

The Code of Conduct used by the respondent is that of the Air Zimbabwe Corporation (hereinafter referred to as "the Corporation") which was registered G by the Labour Relations Registrar on 12 November, 1991. Mr *Foroma* submitted that the applicants' conditions of service include the right to be disciplined in terms of the registered Code of Conduct that was in force at the time. As the respondent had taken over the business of the Corporation as a going concern in terms of s 16 of the Labour Relations Act [*Chapter 28:01*], H

Smith J

A that included the Code of Conduct. If the respondent did not like that Code of Conduct, it could have had it substituted or amended. The applicants contend that since the Code of Conduct purports to apply to employees of the Corporation, it cannot and does not apply to employees of the respondent. They conceded that the Minister of Transport and Communications did write to the respondent as follows:

> B "You are hereby directed to re-employ all the employees without exception on the same terms and conditions as applied to them under their preexisting contracts with Air Zimbabwe Corporation with uninterrupted continuity of service and subject to the provisions of the Labour Relations Act [*Chapter 28:01*]".

C However, they submit that such letter could not have the effect of overriding the Labour Relations Act [*Chapter 28:01*].

The Labour Relations (Employment Codes of Conduct) Regulations, 1990 (SI 379 of 1990) provide for the registration of employment codes of conduct and the subsequent amendment thereof. An application for the registration or amendment of such code must be made by an employment council or a works D council. The code must provide for the settling of any dispute or unfair labour practice at a workplace, undertaking or industry. When the Registrar registers an employment code of conduct, he is required to return to the applicant a copy endorsed with his signature and issue to the applicant a certificate of registration. The Code of Conduct used by the respondent was issued on application by the works council of the Corporation. It purports to apply to all E employees of the Corporation. I can find no basis in law for applying that Code of Conduct to the respondent and its employees, even if the respondent has taken over the functions of the Corporation. The Air Zimbabwe Corporation (Repeal) Act, 1998 (No 4 of 1998) provides for a successor company (which is the respondent) to take over all the assets and liabilities of the Corporation. F Section 8 of that Act provides for the automatic termination of all employment contracts between the Corporation and its employees and requires the successor company to endeavour to re-employ as many of the Corporation employees as is possible without prejudicing the successor company's efficiency and economic viability. In the light of that specific legal provision, the direction by the Minister of Transport and Communications that it re-employ all such G employees is clearly *ultra vires*. Subsection (2) of the said s 8 provides that all the rights and obligations of the Corporation in its capacity as employer and any contract of employment terminated by that section shall vest in the successor company. Although that provision might possibly have the effect of continuing in force *vis-à-vis* the employer and employee the Code of Conduct, H it would not have the legal effect of overriding the provisions of the Labour

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Smith J

Relations (Employment Code of Conduct) Regulations, 1990. Although the A Corporation no longer has any assets, liabilities or employees, it still exists as a body corporate. The Air Zimbabwe Corporation Act [*Chapter13:02*] which establishes the Corporation has not yet been repealed. That can only be done by the President publishing a statutory instrument in terms of s 11 of the said Act when he is satisfied that the assets and liabilities of the Corporation have B been transferred to the successor company and nothing remains to be done under the said Act.

Section 16 of the Labour Relations Act [*Chapter 28:01*] provides for the rights of employees on the transfer of an undertaking. That section merely provides that whenever an undertaking in which any persons are employees is alienated or transferred, the employment of such persons shall be deemed to C be transferred on terms and conditions which are not less favourable than those which applied before the transfer. Those provisions cannot possibly be interpreted as applying to an employment code of conduct. It would be anomalous to hold that a group of employees who are absorbed by another undertaking would continue to be bound by the code of conduct registered in D respect of their former employer, whilst the rest of the employees would be bound by a different code of conduct. Apparently another company called National Handling Services (Pvt) Ltd has been established to take over the Cargo Services Department of the respondent. It has taken over some of the former employees of the Corporation. Surely it cannot be argued that the employer code of conduct registered by the Corporation will also apply to that E company and its employees.

For the reasons given above, I considered that the Code of Conduct that applied to the Corporation does not apply to the respondent and its employees. Accordingly, the discharge of the respondents

is unlawful. In terms of s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (S I 371 of 1985) no employer shall terminate F a contract of employment with an employee unless he has obtained the prior written approval of the Minister of Labour. That provision is only excluded in the case of employees to whom the provisions of a registered employment code of conduct apply. There is no registered employment code of conduct applicable to employees of the respondent. G

Procedural Defects

I do not consider that there is any merit in the submission that the Disciplinary Committee usurped the functions of the hearing committee. I can see no wrong in the Disciplinary Committee making the inquiry it did. As regards the complaint that members of the hearing committee were not employees of the respondent, I consider that that is not a fatal defect. The persons complained H

Smith J

A of were on secondment from National Handling Services (Pvt) Ltd, a company which was formed to take over, lock, stock and barrel, the running of the Cargo Services Department of the respondent. As regards the complaints that the charges were not clearly formulated and that the decision was not based on the allegations and the evidence, I consider that there is some merit in them. According to the Code of Conduct, smuggling goods whilst on duty is defined B as an act of misconduct. Because of the qualification that the employee must be on duty, it follows that smuggling when off duty is not *ipso facto* an act of misconduct. Therefore, even if it is accepted that the Departmental Hearing Committee and the Disciplinary Committee found that the applicants had tried to smuggle cigarettes out of Zimbabwe, that was not the end of the inquiry C as those committees appear to have thought. In order for the smuggling to have constituted an act of misconduct, it was necessary to find that the smuggling was "likely to bring scorn or disrepute upon the Corporation's image" or that it constituted an "abuse of staff travel cargo carriage concessions as per Staff Regulations Manual". No such inquiry was held and consequently no findings were made in that regard. That being the case, the findings that the applicants D were guilty of misconduct cannot stand.

It is ordered that:

1. The discharge of the applicants is set aside;
2. The respondent reinstate the applicants without loss of benefits and pay them their full salary and benefits from the date of their discharge; E
3. The respondent pay the applicants' costs.

Sawyer & Mkushi, legal practitioners for respondent

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S v GUMEDE 2003 (1) ZLR 408 (H)

Citation	2003 (1) ZLR 408 (H)
Case No	Judgment No. HB-40-2003
Court	High Court, Bulawayo
Judge	Cheda J

Heard 27 March 2003

Judgment 27 March 2003

Counsel Details not supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Community service — *need for judicial officers to consider community service as first option* C

Criminal procedure — *review — need to observe time limits — effect of failure to do so*

Criminal procedure *(sentence) — general principles — fine — youthful offender not in a position to pay fine — not appropriate to impose alternative sentence* D *of imprisonment — need for court to pass sentence that will keep offender out of prison*

Headnote

To impose a fine, alternatively imprisonment, when it is clear that the accused is not in a position to pay a fine and will end up serving the prison sentence is wrong. If the court intends to keep an accused out of custody then the sentence should be clearly focussed towards that goal and not E depend on the hope of someone else coming to his rescue, unless there is clear evidence that a third party has volunteered to do so. The courts should regard community service as their first port of call when it comes to sentencing.

A deliberate delay by a magistrate in submitting a record for review is F deplorable and a breach of the magistrate's oath of office.

Cases referred to

S v Chigwendere HH-48-99

S v Khumalo HB-39-03

S v Nyambo 1997 (2) ZLR 333 (G)

S v Mtuwa HH-201-97 G

Judgment

Cheda J: This is a review judgment referred to me by the scrutinising regional magistrate. The scrutinising regional magistrate raised three queries with the trial magistrate, which he has since conceded to. The accused was aged 15 years was charged with assault with intent to do grievous bodily harm H

Cheda J

A to which he pleaded guilty. He was convicted and sentenced to pay a fine of $2 000.

The brief facts are that complainant found accused waiting at complainant's yard in the evening. He questioned accused as to what he was doing in the yard. The accused without answering back, picked up a brick and struck complainant B on the head, thus felling him. The medical report shows that complainant sustained a deep cut on the left eye, the injury was serious but there was no likelihood of a permanent disability and the degree of force used was moderate.

Following his conviction, he was sentenced to pay a fine of $2 000 or three months' imprisonment with labour. The first query raised by the scrutinising C magistrate relates to the inclusion of "imprisonment with labour" when a prison sentence is imposed. In *S v Khumalo* HB-39-03, I dealt

with two issues and pointed out that in the new Criminal Procedure and Evidence Act [*Chapter 9:07*] and in particular Part XVII reference is made to imprisonment *simpliciter.* This point was dealt with by Smith J in *S v Nyambo* 1997 (2) ZLR 333 (H). That case put paid to the doubt which always existed with regards to D the couching of a sentence where imprisonment was imposed. The point which should be made clear is that the court's duty is to impose a sentence and the prison authorities see to the implementation of that sentence as they are involved in the day to day running of the prison, therefore the performance of duties in prison are their domain. It is, therefore, improper for the court to E direct that a convicted prisoner should perform labour, for to do so will be in my view an interference with the day to day running of the prisons. I totally align myself with the reasoning by my brother Smith J in *Nyambo*'s case.

The scrutinising regional magistrate has taken issue with the imposition of a fine alternatively imprisonment when it is clear that the accused is not in a position to pay a fine and will end up serving the sentence. I agree with his F reasoning. The accused is a 15 year old boy, who is not employed and apparently under someone else's custody although the record is silent on that point. The courts, in meting out punishment, must bear in mind that punishment focuses on the individual first. In other words, it is the accused who must bear that punishment. However, in the event that his relatives or any other sympathiser comes to his rescue, it then becomes a secondary issue. Many a G time, parents and/or guardians have an impression that they should shoulder sentences imposed on minors. This, in my view, is not correct and it has resulted in our courts imposing fines on accused who have no means to pay in the hope that parents or guardians will pay for them. This approach is in my view, wrong. If the court intends to keep an accused out of custody then the H sentence should be clearly focused towards that goal and not depend on the

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hope of someone else coming to his rescue unless there is clear evidence A that a third party has volunteered to do so. This in my opinion will serve as a personal deterrent on the accused. In the present case, it is clear that accused has no means to pay a fine and to impose a fine with an alternative of imprisonment is legally baseless, as it does not serve any purpose: see also *S v Mtuwa* HH-201-97 and *S v Chigwendere* HH-48-99. B

These courts have on numerous occasions pointed out the need for the judicial officers to regard community service as their first port of call when it comes to sentencing. Our sentencing policy has changed as it is now focusing on noncustodial sentences for less severe crimes. Where a court contemplates a prison term of less than 24 months' imprisonment it should, as a rule, consider community service first. The present case is one where justice would have been C seen to have been done by sentencing the accused to perform community service. In the light of this, I find that the sentence imposed was indeed harsh.

The last point is that relating to delay. The accused was sentenced on 4 October 2002 and the record left the trial magistrate's office on 4 November 2002, a month later. It landed on the senior regional magistrate' desk on D 3 December 2002, that is two months later and was submitted at the Registrar's office on 18 February 2003. It has taken four months for the record to be placed before me. Between 4 December 2002 and 13 February 2003, there was correspondence between the trial magistrate and the scrutinising regional magistrate. I have no quarrels with that delay, as it was necessary for clarification's sake. The explanation by the trial magistrate that he was away E between mid-October to 4 November 2002 is hollow as he does not say what he was doing with the record during that period. The absence of a reasonable explanation leads one to the unavoidable conclusion that the trial magistrate was hell bent on frustrating the proper administration of justice by holding on to the record in order for the accused to serve his sentence without possible interference. This type of conduct on the part of a judicial officer is, to say the F least, deplorable and should be condemned in the strongest terms. Judicial officers need to be reminded that on their appointment they took an oath of office in terms of s 7(1) as read with s 9 of the Magistrates Court Act [*Chapter 7:10*] which reads:

> "I, A.B., do promise and swear that I will faithfully, impartially and G diligently execute to the best of my abilities the duties of the office of magistrate. So help me God."

This undertaking should always jog a judicial officer's memory whenever an accused appears before him. It is in the interest of justice that the record of proceedings be submitted to the scrutinising magistrate or reviewing judge within seven days as is stipulated in the Magistrates Court Act. In addition, H

Cheda J

A judicial officers should learn to respond to queries from those in authority with minimum delay, bearing in mind that all these queries are aimed at clarifying what is unclear, which, if left as it is, might result in the miscarriage of justice.

It is perhaps necessary that judicial officers should cast their prejudices aside, not only about those who appear before them, but about those who are above B them as well. The delay occasioned in this matter has prejudiced the accused. I hope that it is not repeated by the trial magistrate and those of like mind.

The accused has obviously served his sentence by now. I, however, confirm both conviction and sentence as in the circumstances is not seriously out of step with other decided cases.

C Chiweshe J concurred.

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MASUKUME v MBONA & ANOR 2003 (1) ZLR 412 (H)

Citation	2003 (1) ZLR 412 (H)
Case No	Judgment No. HB-46-03
Court	High Court, Bulawayo Judgement
Judge	Ndou J
Heard	31 December 2002; 27 March 2003
Judgment	27 March 2003
Counsel	*K Ncube*, for the applicant *C P Moyo*, for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Appeal — *execution — leave to execute pending appeal — when may be* C *granted — factors to consider*

Headnote

The applicant was a student teacher who had been suspended from his college for a year for alleged indiscipline. The suspension was set aside by the High Court on review but the college authorities appealed against the court's decision. The applicant then applied to the High Court for what D was

in essence leave to execute the judgment pending appeal, i.e. an order that he should be allowed to continue his studies at the college pending the hearing of the appeal. The college authorities opposed the application on the ground that his presence on the college campus might encourage ill-discipline. E

Held that the college authorities had not shown that if the application were granted they would suffer irreparable harm or that the object of the appeal would be completely defeated. The applicant, on the other hand, had shown that he would suffer considerably by losing a year of his studies and that it would be difficult, if not impossible, to restore the *status quo ante*. The application was accordingly granted. F

Cases cited

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

Dabengwa & Anor v Minister of Home Affairs & Ors 1982 (1) ZLR 223 (H)

Du Randt v Du Randt 1992 (3) SA 281 (E) G

Jeremy Prince (Pvt) Ltd v Owen & Anor HH-14-86

Leask v French & Ors 1949 (4) SA 887 (C)

Legal & General Assurance of Zimbabwe (Pvt) Ltd v B G Insurance (Pvt) Ltd HH-190-89 H

Ndou J

A *Lincoln Court (Pvt) Ltd v Zimbabwe Distance Correspondence Education College (Pvt) Ltd* 1990 (1) ZLR 158 (H)

South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)

Van t'Hoff v Van t'Hoff & Ors (2) 1988 (1) ZLR 335 (H)

Zaduck v Zaduck (2) 1965 RLR 635 (G); 1966 (1) SA 550 (SR)

B *Zimbabwe Distance (Correspondence) Education College (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H)

Case information

K Ncube, for the applicant

C P Moyo, for the respondents

Judgment

C **Ndou J:** The applicant is a registered student at the second respondent while first respondent is the acting principal of the second respondent. On 9 May 2002 the applicant was charged with an act of indiscipline, it being alleged that on 6 May 2002 he had written a letter to *The Chronicle* newspaper wherein D he highlighted a shortage of drugs at the second respondent's clinic. Applicant was charged before a disciplinary hearing pursuant to the provisions of s 9(4) of the Manpower Planning and Development (Government Teachers Colleges and Technical or Vocational Institutions) Regulations, 1999, published in SI 81 of 1999. The hearing found him guilty. He was not satisfied with that outcome and he unsuccessfully appealed. He then launched an application to E this court in case number HC 2208/02. This court in HB-140-02 ruled in his favour and ordered in the following terms:

1. That the suspension from second respondent of the applicant be set aside.
2. That the first and second respondents arrange a proper hearing of the applicant's case. F
3. That costs of this application be borne by the second respondent.

The respondents, in turn, appealed against this decision. The noting of the appeal by the respondents automatically suspended the execution of the judgment appealed against unless this court directs otherwise. In fact the operation of an order such as in an interim or final interdict is suspended by G the noting of the appeal, not merely the process of execution: see *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A); *Du Randt v Du Randt* 1992 (3) SA 281 (E) at 289A; *Zaduck v Zaduck(2)*1965 RLR 635 (G), 1966 (1) SA 550 (SR)

and Van Winsen, Cilliers & Loots, *The Civil Practice of the Supreme Court of South Africa* 4 H ed p 889.

2003 (1) ZLR p414

Ndou J

The applicant has now approached this court by way of special application for A leave to execute the judgment pending the appeal. Although the applicant has not categorically stated so in his application, in essence that is what he seeks in this court as Mr *Moyo,* for the respondents, rightly pointed out. Execution of judgment pending appeal is by way of an exception to the above-mentioned common law rule. In *Leask v French & Ors* 1949 (4) SA 887 (C) at 893 Searle J stated the rule as follows: B

> "In every case of an order of court *ad factum praestandum* there must be a serious risk of prejudice to one or other party in the event of an appeal. If execution is authorised and the appeal succeeds it is seldom, if ever, possible to restore the full *status quo ante*, whereas on the other hand if execution is stayed and the appeal ultimately fails the successful party, C through the delay, generally suffers a loss for which he cannot be compensated. In the circumstances the court can only reduce to a minimum the possibilities of prejudice by granting or refusing the application in accordance with demands of the preponderance of equities."

In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd (supra)* at page 545D-F Corbett JA enunciated the factors to which D a court would have regard in exercising its discretion in considering an application for leave to execute. After stating that the court had a wide general discretion to grant or refuse leave and, if leave is granted, to determine the condition upon which the tight to execute should be granted, he said:

> "In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would E normally have regard, *inter alia*, to the following factors:
>
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
>
> (2) the potentiality of irreparable harm or prejudice being sustained by F the respondent on appeal (applicant in the application) if leave to execute were to be refused;
>
> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time or harass the other party; G and
>
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardships or convenience, as the case may be."

These views have been cited in our jurisdiction: *Dabengwa & Anor v Minister of Home Affairs & Ors* 1982 (1) ZLR 223 (H) *Jeremy Prince (Pvt) Ltd v Owen* H

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A *& Anor* HH-14-86; *Van t'Hoff v Van t'Hoff & Ors (2)* 1988 (1) ZLR 335 (H); *Legal and General Assurance of Zimbabwe (Pvt) Ltd v BG Insurance (Pvt) Ltd* HH-190-89; *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H), *Lincoln Court (Pvt)Ltd v Zimbabwe Distance Correspondence Education College (Pvt) Ltd* 1990 (1) ZLR 158 (H) and *Zimbabwe Distance Correspondence Education College (Pvt) Ltd v Commercial Careers College* B *(1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H). In the last case Smith J emphasised the context in which this rule operates. I agree with this qualification. The learned judge admirably stated on pages 64C-65A:

> "While I accept that the court has a wide general discretion as mentioned in the cases I have referred to above, the court should always have regard to the views so ably expressed by LEWIS J (as he then was) in *Wood* C *NO v Edwards & Anor* 1966 RLR 335 at 340:
>
> > 'The learned judge, Jansen J, in the *Ruby's Cash Store* case, suggested that the matter might be treated on the same basis as an application for leave to appeal. The court should ask itself: has the applicant any reasonable prospects of success? That may well be the position where no D question of irreparable loss arises by allowing the execution, where, for instance, the judgment sounds in money and the appellant can be safeguarded by an order for security *de restituendo*. Then the question of whether or not execution should be ordered would depend on whether or not there are any reasonable prospects of success on appeal. But, in a case where the whole object of the appeal would be completely defeated if execution were to proceed, then it seems to me that this court E has no

> right to deal with the matter on the basis of whether or not there is a reasonable prospect of success on appeal.
>
> The position is this: that the appellant has an absolute right to appeal, and to test the correctness of the judgment appealed from in the Appellate Division, and if, by ordering execution the whole object of the appeal would be stultified, then this court would, in effect be usurping F the functions of the appeal court if it ordered execution merely on the basis that it thought, in its opinion, that the prospects of success on appeal were slight. It seems clear, from the authorities, that it is only where the court is satisfied that the appeal is not brought genuinely with the *bona fide* intention of testing the correctness of the judgment in the court below, but is only brought as a delaying tactic and as a means of G staving off the evil day, that the lower court may order execution to proceed in such circumstances.'"

In this case the respondents have not satisfied me that the object of the appeal would be completely defeated if the application were granted. Their fear is that if the application is granted, this may encourage ill discipline on the second H respondent's campus. This is not irreparable damage. On the other hand, if the

Ndou J

application is not granted the applicant will suffer considerably and it would A be difficult, if not impossible, to restore the *status quo ante* if the respondents' appeal were unsuccessful. He will not be able to pursue his career as a teacher for a year. He has been allocated a school and a grade to teach for the year 2003 on condition that he submits his results. If the applicant loses his place it will take a term or more before he gets alternative placing. This will be a period B spent without income, when at the same time he is expected to start servicing his education loan with the Metropolitan Bank. The balance of hardships best favours the applicant. I find that a case has been made for the granting of the application in accordance with demands of the preponderance of equities.

I accordingly grant the application in terms of the amended draft order. C

Cheda & Partners, applicant's legal practitioners

Majoko & Majoko, respondents' legal practitioners

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COMMISSIONER OF TAXES v ASTRA HOLDINGS (PVT) LTD 2003 (1) ZLR 417 (S)

Citation	2003 (1) ZLR 417 (S)
Case No	Judgment No. S-131-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Malaba JA
Heard	23 May 2002; 28 March 2003
Judgment	28 March 2003
Counsel	*L Mazonde,* for the appellant *A P de Bourbon SC,* for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

C **Administrative law** — *legitimate expectation — expectation arising out of error of law that tax was not due — whether legitimate*

Revenue and public finance — *Commissioner of Taxes — duties — duty to act fairly — to whom owed — duty to collect tax that is due — whether may waive collection of due tax — whether estopped from collecting due tax by erroneous advice given to taxpayers by his officers*

D **Revenue and public finance** — *sales tax — taxpayers — whether motor dealers or purchasers of motor vehicles are taxpayers for purposes of Act*

Headnote

The respondent company was a motor dealer and as such obliged by the Sales E Tax Act [*Chapter 23:08*] to pay tax on the sale value of motor vehicles which it sold in Zimbabwe. Between 1995 and 1997 the respondent failed to pay sales tax on vehicles whose price had been paid in foreign currency. It relied for its failure on two letters written by officials of the Tax Department to other motor dealers in which advice was given, erroneously, that no tax was payable on such vehicles. The Commissioner F of Taxes raised an assessment against the respondent for the amount of tax unpaid on the vehicles concerned and the respondent appealed to the Fiscal Appeal Court, contending firstly that the Commissioner should not have claimed the unpaid tax from the respondent, which under the Act was a mere collector of tax rather than a taxpayer; secondly, that the Commissioner abused his power by changing his policy and issuing a G retrospective assessment; and thirdly that after allowing the respondent to rely on the two letters the Commissioner's conduct was equivalent to breach of contract or breach of representation giving rise to an estoppel at private law. The Fiscal Appeal Court accepted the respondent's contentions and disallowed the assessment. The Commissioner appealed H to the Supreme Court.

2003 (1) ZLR p418

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Held, that although motor dealers had to charge and collect sales tax from A purchasers before they were able to pay it to the fiscus, they were the taxpayers for the purposes of the Sales Tax Act.

Held, further, that the Commissioner's fundamental duty under the Sales Tax Act was to collect sales tax, and in the discharge of that duty he was required, by public law, to act fairly towards both taxpayers and the fiscus. B

Held, further, that it would have been incompatible with the proper discharge of the Commissioner's statutory duty for him to have abided by the erroneous advice given in the letters; it would have savoured of unfairness to the fiscus had he not put right the error of law and invoked his powers under the Act to raise the assessment. C

Held, further, that the Commissioner's refusal to abide by the erroneous advice in the letters could not be regarded as an abuse of power and equivalent to breach of contract, since any such contract would have breached the Commissioner's statutory duty to collect the tax due to the fiscus. The Commissioner could not purport to decide that a tax imposed by Parliament was not due from a taxpayer, when in fact it was, and in D so doing disclaim the right to the tax and abandon his statutory power to collect it.

Held, further, that the Commissioner could not be regarded as having unfairly disregarded legitimate expectations created in the respondent's mind by the letters, since any such expectation arose out of an error of law to the effect that a tax which was due should not be collected. That was surely E not a legitimate expectation.

Cases cited

HTV Ltd v Price [1976] 1 CR 170

Preston v IRC [1985] All ER 327 F

R v Board of Inland Revenue, e p MFK Underwriting Agencies Ltd & *Ors* [1990] 1 All ER 9l

Legislation considered

Sales Tax Act [*Chapter 23:08*], ss 2(1) (definition of "sale value"), 4(1), G 5(1) & 18

Case information

L Mazonde, for the appellant

A P de Bourbon SC, for the respondent H

Malaba JA

Judgment

A **Malaba JA:** This is an appeal from a judgment of the Fiscal Appeal Court dated 10 February 2000, setting aside an assessment to tax raised on the respondent ("Astra Holdings") by the appellant ("the Commissioner") on 3 March 1997 in the amount of $681 724,81 for the period July 1995 to December 1996 and on 19 March 1997 in the amount of $377 493,18 for the period January to 3 March 1997 and directing that the said amounts be B refunded to the respondent with interest at the rate of 25 per cent per annum from the date the money was received by the appellant to the date of refund. There was no order as to costs.

Astra Holdings is a company incorporated in terms of the laws of Zimbabwe carrying on the business of selling motor vehicles to members of the public C under the style Puzey & Payne. It is a registered operator for the purposes of the Sales Tax Act [*Chapter 23:08*] which provided under s 4(1) that:

> "4(1) Subject to this Act there shall be charged, levied and collected for the benefit of the Consolidated Revenue Fund a tax at such rate as may be fixed by Parliament on the sale value of —
>
> (a) … D
>
> (b) …
>
> (c) …
>
> (d) motor vehicles and other goods or services sold by motor dealers, whether on their own account or on behalf of other persons …"

The sale value of goods on which the tax was to be charged was defined in E s 2(1) of the Act as:

> "the total sum payable by the purchaser or client under the agreement for the sale of the goods … and includes —
>
> (a) any amount that may be charged to the purchaser or client in respect of tax payable."

F Section 2(1) of the Act excluded from "sale value" "any sum payable outside Zimbabwe" in relation to a service supplied. "Service" was defined to exclude "a sale of goods" with the effect that no exemption from tax liability was granted or could be claimed under the provisions of the Act for the sale of motor vehicles in Zimbabwe.

G Section 5(1) of the Act provided that:

> "5(1) The tax mentioned in section *four* shall be payable —
>
> (a) …
>
> (b) in the case of a motor vehicle or other goods sold by a motor dealer —
>
> (i) where the motor dealer is the agent of the seller, by the motor

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Malaba JA

> dealer on behalf of the seller; A
>
> (ii) where the motor dealer is the seller, by the motor dealer."

It is common cause that up to the end of June 1995 Astra Holdings, as a registered motor dealer, charged and collected sales tax on the purchase prices of motor vehicles it sold to members of the public in Zimbabwe and paid the money to the Consolidated Revenue Fund. From July 1995 to 3 March 1997 B Astra Holdings did not charge and collect the tax on motor vehicles it sold to members of the public who paid the purchase prices in foreign currency. Astra Holdings said it was acting upon advice contained in a letter addressed by the Principal Tax Examiner to another motor dealer (Haddon Motors) on 1 July 1995. The letter read:

> "*SALES TAX: EXEMPTION FROM TAX ON GOODS BOUGHT USING* C *MONEY FROM A FOREIGN SERVICE*
>
> I refer to our telephone interview on 4 May 1995 concerning the above mentioned subject.
>
> This is to confirm that goods or services bought using foreign funds D (money from a foreign source) are exempt from sales tax.
>
> 'Foreign source' in this case means:
>
> 1. Payment using foreign bank drafts.
> 2. Payment using foreign cheques.
> 3. Payment using foreign credit cards E
>
> but does not include payment in Zimbabwe cash.
>
> I hope this clarifies the issue."

It was not disclosed to the court *a quo* how the letter, which was a private communication between the revenue and another taxpayer, came to be in the possession of Astra Holdings. The letter was taken to mean that motor vehicles F sold in Zimbabwe and paid for locally in foreign currency were exempted from sales tax.

Astra Holdings made reference in its case to the court *a quo* to another letter addressed to AMTEC Motors by an Assistant Commissioner of Taxes on 8 February 1996. I shall consider later the question whether or not the learned President should have placed any weight at all on this letter in deciding upon G the justification of the action of Astra Holdings in not charging and collecting sales tax on motor vehicles sold in Zimbabwe and paid for in foreign currency.

Suffice to say that when revenue officers inspected Astra Holdings' books and monthly statements submitted to the office relating to all sales of motor vehicles transacted, they discovered that the motor dealer had failed to pay H

A sales tax on motor vehicles sold locally and paid for in foreign currency.

The Principal Tax Examiner caused the assessment to be made for the amounts on which tax was payable. As a result of the assessment the two amounts mentioned in the order of the court *a quo* were found payable by Astra Holdings. The assessment was made in the exercise of the power conferred upon revenue officers by s 18(1) of the Act. It is provided therein that a revenue B officer who has reason to believe that a registered operator has failed to pay tax in respect of motor vehicles sold, may cause an assessment to be made of the amount upon which tax is payable, unless the sale in respect to which the assessment is to be made was transacted more than six years before the date of the proposed assessment.

C On 17 April 1997 Astra Holdings lodged with the Controlling Officer a written objection to the assessment. The grounds for the objection were that Astra Holdings failed to charge and collect sales tax on motor vehicles sold by it and paid for locally in foreign currency because it reasonably believed that the letter of 1 July 1995 represented the policy of the Department of Taxes towards motor dealers. It was pointed out that during the relevant period D external auditors and inspectors from the Department of Taxes examined Astra Holdings' books on two occasions. It was not indicated to it that failure to raise sales tax on motor vehicles sold locally and paid for in foreign currency was unlawful. The authenticity of the letter of 1 July 1995 was not questioned.

It was also pointed out that the monthly tax returns sent to the Department of E Taxes on behalf of Astra Holdings had annexed to them schedules indicating the types of motor vehicles sold, names of purchasers, amounts paid in foreign currency and "exemption" from tax. The argument was that the reason why revenue officers who received the monthly returns failed to query the fact that sales tax was not being charged and collected on motor vehicles paid for locally in foreign currency was that

it was the policy of the Department of F Taxes not to have sales tax levied on motor vehicles paid for in foreign currency.

The paragraph in which the letter of 8 February 1996, addressed to AMTEC Motors was referred to reads:

> "It would appear that subsequently the Department of Sales Tax Branch G Harare advised our client that Annexure "A" (letter of 1 July 1995) contained an error in that it should have related to "services" only.
>
> However, on the 8th of February 1996, the Inspector of Taxes addressed AMTEC MOTORS (PVT) LIMITED a dealer in motor vehicles whose business is very similar to our client and a copy of that letter is annexed hereto as Annexure "B". It is clear that the policy adopted by the Sales Tax H Department, would relate to all dealers and not simply to AMTEC

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> MOTORS (PVT) LIMITED." A

It seems to me that the letter of 8 February 1996 was referred to by Astra Holdings' legal practitioners to prove the existence of an alleged policy of the Department of Taxes not to demand payment of sales tax from motor dealers on motor vehicles sold and paid for locally in foreign currency. It was not referred to as proof of what influenced Astra Holdings' decision not to charge B and collect the tax from purchasers of motor vehicles who paid in foreign currency as the learned President found in the reasons for judgment.

After considering the objection the Commissioner disallowed it. The reasons given for the disallowance were that the letter of 1 July 1995 contained an error of law in that the exemption from liability to pay tax on sales of motor vehicles paid for locally in foreign currency was unlawful. There was no provision in C the Act which granted an exemption from tax in respect of motor vehicles sold locally by registered operators. He pointed out that the letter was a ruling on questions asked by the addressee on a specific matter and for that registered operator's interest. There was no intention that the letter should be used by the whole motor trade industry. It was pointed out that before relying on the letter D as representing the policy of the Department of Taxes not to demand payment of sales tax in respect of motor vehicles sold in Zimbabwe and paid for locally in foreign currency, Astra Holdings should have sought its own ruling from the department.

On 19 September 1997 Astra Holdings appealed to the Fiscal Appeal Court. Its case was stated in these terms: E

> "6. The said assessments arise out of a failure on the part of the appellant to charge sales tax on vehicles that were paid for locally in foreign currency.
>
> 7. The failure to levy sales tax arises out of a direction by the respondent made under reference number ST/NRO/LM/705. A copy of that direction is annexed hereto and marked Annexure "A" (letter of 1 F July 1995).
>
> 8. Appellant has since established that respondent wrote to AMTEC Motors (Private) Limited on 8 February 1996 expressing a similar view.
>
> 9. … G
>
> 10. …
>
> 11. …
>
> 12. …
>
> 13. Further and/or in the alternative by issuing Annexure "A" the respondent is now precluded from claiming sales tax from the H

Malaba JA

> A appellant."

The Commissioner responded in these terms:

> "2. *Ad paragraph 7*
>
> The contents of this paragraph are denied. The direction in question was not made to appellant and cannot be utilised by it. Respondent B avers that the failure to levy sales tax in fact arose out of a misconception of the law by appellant.
>
> 3. *Ad paragraph 8*

Save for saying that the contents of this paragraph are irrelevant and that the view expressed was wrong, the contents hereof are not denied. C

6. *Ad paragraph 13*

Respondent avers that the grounds relied upon are bad in law in that respondent cannot be estopped from collecting tax lawfully due to it; respondent has not waived any rights it may have against appellant; finally Annexure "A" was not issued to appellant and so cannot be relied upon by it."

D Astra Holdings called its Financial Manager Mr Edmore Ndudzo to give evidence. He confirmed that the decision not to charge sales tax in motor vehicles paid for in foreign currency was taken on the basis of the letter of 1 July 1995. After saying Astra Holdings used to send to the Department of Taxes monthly tax returns to which were attached schedules with details on E the cars sold, names of purchasers and amounts paid in foreign currency on which sales tax was not charged he was asked:

"Q. Mr Ndudzo can you just explain to the court what the attitude of Puzey and Payne is in this matter?

A. Our attitude in this matter is, to start off with our role in this whole aspect is that we are not the tax payers, we are merely collecting tax F on behalf of the Commissioner of Taxes. The taxpayers are our customers. We had it in writing that we shouldn't collect this tax if the transactions were paid for in foreign currency and I am told although this was before my time with Puzey and Payne that at the time there was also a check with the officials at the Tax Department whether that letter that we relied on was really authentic or not and G the answer was it is an authentic letter. So we had it in writing that we shouldn't collect tax if the money was paid in foreign currency and we didn't collect tax and for now the Tax Department to claim that tax from us when we are clearly in a position where we cannot recover from the customers is putting us in a very injudicious situation. So we feel that we have really be unjustifiably treated …"

H The case submitted to the Fiscal Appeal Court on behalf of Astra Holdings

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Malaba JA

was, therefore, that it was not the person liable to pay the sales tax but was A merely obliged in terms of the legislation to collect tax on behalf of revenue. The argument was that as a collector of tax, Astra Holdings could not have acted contrary to the ruling of the revenue officer to the effect that it was not necessary in the particular circumstances for it to collect the sales tax. It was unfair for the revenue to change its mind and issue a retrospective order for B the payment of such taxes against Astra Holdings as a collector who had acted upon the ruling of the revenue officer that the tax should not be collected.

The learned President did not decide the question whether or not Astra Holdings was a taxpayer in terms of the relevant legislation. He found that the advice given by the revenue officer in the letter of 1 July 1995 represented as the policy of the revenue department that tax should not be levied on sales of C motor vehicles the purchase prices of which were paid in foreign currency. It was the learned President's view that Astra Holdings acted in terms of the advice contained in the letter of 1 July 1995. He held that it was an abuse of statutory power for the Commissioner to change policy on the levy and collection of tax on motor vehicles paid for in foreign currency without prior D notice to Astra Holdings of the intended change and to demand from it the unpaid tax retrospectively.

He said:

"In this case it is clear that officials of the Department advised motor dealers that in the case of vehicles bought using funds from a foreign source, the sales were exempt from sales tax. The appellant acted on this E advice and did not collect the tax from those purchasers of vehicles who used funds from a foreign source. Prior to getting the advice from officials of the Department, the appellant collected sales tax from all purchasers of vehicles, including those who used funds from a foreign source. It was only after obtaining the advice from the officials that it changed its practice. … In respect of the demand for unpaid sales tax, I consider that F it would be unfair if the Department, having advised that the sales in question were exempt from sales tax, were to be permitted to demand the sales tax. It is not as though the appellant has collected the extra money from the buyers of the vehicles and thereby gained greater profits. The buyers were advised that the sales tax element was not payable. The change of policy and demand for sales tax that was not collected is, in my view, equivalent to a breach of contract or a breach of representation." G

On appeal, Mr *Mazonde*, for the Commissioner argued that the learned President misdirected himself in holding that the letter of 1 July 1995 represented as a policy of the Department of Taxes not to claim sales tax on motor vehicles in respect to which the purchase prices were paid in foreign currency on the ground that such sales were by law exempted from tax. He said H

Malaba JA

A it was clear from the recorded evidence that Astra Holdings had not in its individual capacity inquired from the Commissioner whether the sales in question were at law exempted from sales tax. Reliance by Astra Holdings on a letter addressed to another motor dealer, not in any way related to it and without evidence as to what sales the questions of exemption had been raised by that motor dealer in its private communication with revenue, was not B sufficient for the purposes of establishing a relationship between revenue and Astra Holdings the violation of which would be equivalent to breach of contract or breach of representation giving rise to estoppel at private law.

Mr *de Bourbon*, for Astra Holdings, conceded that the Commissioner had a statutory duty to collect tax to which revenue had a right. He, however, argued C that in exercising statutory powers in the discharge of his statutory duty, the Commissioner was required to act fairly towards the taxpayer. It was his contention that having advised Astra Holdings that sales of motor vehicles for which the purchase prices were paid in foreign currency did not attract tax and the latter having acted upon the advice, it was unfair for the Commissioner to change "policy" without prior notice of its intention to do so and then D backdate the claim for the unpaid tax. He also said the Commissioner was guilty of a breach of the principle of fairness in that he claimed the unpaid tax from Astra Holdings which in terms of the Act was not a taxpayer but a mere collector of taxes.

I consider the point that Astra Holdings was not a taxpayer. It appears to me E that section 5(1)(b) imposes upon a motor dealer the obligation to pay the tax charged and collected on the sale value of the motor vehicles he would have sold to members of the public. The tax is payable by him when the purchase price on which it is levied is in his possession after the sale transaction has been completed. Nowhere does the Act provide that the sales tax is payable by the purchaser of the motor vehicle. Whilst the motor dealer has to charge and F collect the tax in order to be able to pay it to revenue, he is the taxpayer for the purposes of the Act.

I turn to consider the question whether the learned President was correct in holding that the decision by the Commissioner to retrospectively assess Astra Holdings to the unpaid sales tax and claim its payment was an abuse of power. The Commissioner's fundamental duty under the Act is to collect the tax G created and imposed on the taxpayer by Parliament for the benefit of the fiscus.

In exercising the powers conferred upon him for the proper discharge of the statutory duty the Commissioner is required, by public law, to act fairly towards taxpayers as a body or as individuals. He also has a duty to act fairly to the fiscus.

Malaba JA

The unfairness complained of in this case arose from the error of law A committed by the revenue officer who wrote the letter of 1 July 1995 upon which Astra Holdings acted when it stopped charging and collecting sales tax which on the proper construction of the statute was due to revenue. It appears to me that acting on the letter of 1 July 1995 would not have been compatible with the proper discharge of the Commissioner's statutory duty. B

Section 18 of the Act gives the Commissioner the power, in appropriate circumstances, to assess a registered operator to tax retrospectively, provided that no such assessment can be made in respect of any sale which was transacted six years before the date of such proposed assessment. It would have savoured of unfairness to the fiscus had the Commissioner not put right the error of law and invoked the powers conferred upon him by s 18(1) of the C Act.

In *Preston v IRC* [1985] 2 All ER 327 (HL), Lord Templeman said at 339d-341a:

> "Counsel for the taxpayer submitted that, as Lord Scarman announced in the *Self Employed* case ([1981] 2 All ER 93 at 112), the commissioners D owe a duty of fairness to the general body of taxpayers the commissioners must equally owe a duty of fairness to each individual taxpayer. I agree, but a taxpayer cannot complain of unfairness merely because the commissioners decide to perform their statutory duties, including their duties under s 460 to make an assessment and to enforce a liability to tax. The commissioners may decide to abstain from exercising their powers E and performing their duties on grounds of unfairness, but the commissioners themselves must bear in mind that their primary duty is to collect, not to forgive, taxes. And, if the commissioners decide to proceed, the court cannot in the absence of exceptional circumstances decide to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair …

> The court can only intervene … to direct the commissioners to abstain F from performing their statutory duties or from exercising their statutory powers if the court is satisfied that 'the unfairness' of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners."

The Commissioner's decision to exercise the power to assess Astra Holdings G to the unpaid tax was not driven by improper motives. Its purpose was to achieve the very objective for which the power was conferred upon him.

In *HTV Ltd v Price* [1976] I CR 170, cited in *Preston's* case, *supra* at 339, the Price Commission misconstrued the counter inflation price code and changed its mind as to the treatment of Exchequer levy as an item in the costs of H

Malaba JA

A television companies allowable for the purpose of increasing their advertising charges within the limits prescribed by the code. The effect of the change of mind of the Price Commission was to deprive the companies of an increase of advertising charges which they were plainly intended to enjoy and which they badly needed in order to remain viable.

It was held that the decision by the Price Commission to rely upon an error of B law in an attempt to enforce the code, was unfair to the television companies and amounted to an abuse of power. It appears to me on the authority of the *HTV* case, *supra*, that the error of law committed by the revenue officer who wrote the letter of 1 July 1995 had already brought about unfairness to the fiscus by depriving it of the sales tax which was due to it. Continued C maintenance of the *status quo* would have resulted in further injustice.

The learned President did not, however, consider the case from the point of view of the unfairness suffered by the fiscus. He, instead, held that the decision by the Commissioner to correct the mistake and assess Astra Holdings to the tax it ought by law to have paid, amounted to an abuse of power. He was of the opinion that, if the Commissioner was not a public officer, his conduct would D have entitled Astra Holdings to an injunction or damages based on breach of contract or breach of representation giving rise to estoppel.

The Commissioner was found guilty of unfairness to Astra Holdings because his conduct of correcting the misconception of the law and assessing the latter to unpaid tax retrospectively without having given the company notice of the E intended change of "policy" was said to be equivalent to a breach of contract or a breach of representation.

For the learned President to have arrived at the decision that the conduct of the Commissioner amounted to an abuse of power in the sense that it was equivalent to a breach of contract or a breach of representation, he ought, in my view, to have first decided whether or not the relationship between the F revenue and Astra Holdings, which admittedly could only have been based on the error of law contained in the letter of 1 July 1995, could pass for a contract or representation giving rise to estoppel. The learned President did not make that finding of fact which was a pre-condition to the correctness or otherwise of the decision he made.

G The question must be stated and answered. Can it be said that in writing the letter of 1 July 1995 which contained the error of law the Commissioner, by the revenue officer, purported to contract with Astra Holdings or purported to represent to it that the statement was true and that thereafter he would not assess it to unpaid tax which was by law due to revenue. In other words, did the Commissioner bind himself to accept as valid the actions of Astra H Holdings regarding the non-payment of the sales tax based upon the error of

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Malaba JA

law? A

There is no doubt that the purported contract would have been born out of the mistake of the law requiring that sales tax be charged and collected by the motor dealer on all motor vehicles sold locally. Although unknown to the parties it would have been in contravention of the law for Astra Holdings not to charge and collect the sales tax which the statute required it to collect. B

In my view such an arrangement would be null and void *ab initio.* It is a bargain the Commissioner could not make at law because it would have the effect of being in breach of his statutory duty to collect tax which is due to revenue. It is one thing for revenue to enter into an arrangement with a taxpayer on how, in the exercise of its managerial powers, it will collect tax, but it is another for it to seek to decide that a particular tax imposed by Parliament is not due from C a taxpayer when in fact it is and in so doing disclaim the right to the tax and abandon the statutory power to collect it. In *R v Board of Inland Revenue ex p. MFK Underwriting Agencies Ltd & Ors* [1990] 1 All ER 91 Bingham LJ said at 110d-j:

> "I am, however, of opinion that in assessing the meaning, weight and effect D reasonably to be given to statements of the Revenue the factual context, including the position of the Revenue itself, is all important. Every ordinarily sophisticated taxpayer knows that the Revenue is a taxcollecting agency, not a tax-imposing authority. The taxpayer's only legitimate expectation is, *prima facie*, that he will be taxed according to statute, not concession or a wrong view of the law (see *R v A.G. ex p.* E *Imperial Chemical Industries plc* (1986) 60 TC 1 at 64 per Lord Oliver). Such taxpayers would appreciate, if they could not so pithily express, the truth of Walton J's aphorism: 'One should be taxed by law, and not be untaxed by concession' (see *Vestey v IRC (No 1)* [1977] 3 All ER 1073 at 1098, [1979] Ch. 177 at 197). No doubt a statement formally published by the Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the F approach to the Revenue is of a less formal nature a more detailed inquiry is, in my view, necessary. If it is to be successfully said that as a result of such an approach the Revenue has agreed to forego, or has represented that it will forego, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgment, be ordinarily necessary for the taxpayer to show that certain conditions had G been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. H

2003 (1) ZLR p429

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> A It means that he must indicate to the Revenue the ruling sought. It is one thing to ask an official of the Revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the Revenue will forego any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling B given. This is not because the Revenue would wish to favour one class of taxpayers at the expense of another but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all. Second, it is necessary that the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification."

C The *onus* was on Astra Holdings to prove the existence of a contract or representation on the terms of the contents of the letter of 1 July 1995. It was unable to give details of the circumstances in which the letter was written because it was a private communication between revenue and another taxpayer. It was not correct to say, as the learned President did, that Astra Holdings was D advised by revenue not to charge and collect sales tax on such vehicles paid for in foreign currency.

It is not known whether the letter was intended to be circulated generally in the motor trade industry. The statement in the letter is far from being clear and unambiguous to found a contract or representation giving rise to estoppel. The E purported definition of "foreign source" makes no sense.

I am of the opinion that the conclusion reached by the learned President that the Commissioner's conduct was equivalent to a breach of contract or a breach of representation was influenced by some inaccurate findings of fact which he made.

At the beginning of the judgment he said failure by Astra Holdings to charge F and collect the sales tax on motor vehicles paid for locally in foreign currency "started because of two letters that were written to two other motor dealers". That statement of fact is not supported by evidence. The letter of objection to the assessment to tax dated 17 April 1997 alleged that the letter of 8 February 1996 had no bearing at all to the decision by Astra Holdings to stop charging G and collecting sales tax on motor vehicles paid for locally in foreign currency.

When that letter of 8 February 1996 was written the decision had already been taken and implemented in July 1995. The case Astra Holdings submitted to the Fiscal Appeal Court clearly stated that it discovered after the assessment to tax that revenue officers had written a similar

letter to AMTEC Motors on 8 February 1996. That caused the Commissioner in paragraph 3 of his case to H say that reference to the letter of 8 February 1996 by Astra Holdings was

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irrelevant to the consideration of factors which influenced its decision to stop A charging and collecting sales tax on motor vehicles paid for in foreign currency. The letter of 8 February 1996 would therefore have been irrelevant to the question whether the Commissioner purported to enter into a contract with Astra Holdings.

The learned President also based his conclusion on a finding that Astra B Holdings received the "two letters"; checked with Revenue whether they were authentic and only after having been told that they were authentic did it proceed to act on them. In this regard he quoted Mr Ndudzo as having said:

> "In February 1996 the appellant was given copies of the letter written by an Assistant Commissioner of Taxes to another motor dealer, in which the dealer was advised that no sales tax was payable where payment was made C in a foreign currency. When the appellant was given copies of the letters that had been written to the two other dealers, it checked with the Department and was told that the letters were authentic."

A reading of the evidence recorded from Mr Ndudzo does not support the view that he said Astra Holdings received a copy of the letter to AMTEC Motors in February 1996. The only evidence he gave on the letter reads as follows: D

> "Q. Now, I think in addition to the letter that you are holding which perhaps could be marked exhibit "A". I think there was a letter written to AMTEC Motors which was also brought to your attention?
>
> A. That's correct.
>
> Q. This is a letter dated 8 February? E
>
> A. Correct."

There was no allegation in the evidence that the letter was received by Astra Holdings on 8 February 1996 as the learned President found. That evidence would have contradicted the statement made by Astra Holdings in the letter of objection to the assessment to tax as well as in the case submitted to the court F *a quo*.

In his testimony Mr Ndudzo alluded to hearsay evidence which he said was to the effect that a check was made with revenue whether the letter of 1 July 1995 was authentic. There was no reference in his evidence to a check on the authenticity of the letter of 8 February 1996. The hearsay evidence given by the witness did not indicate the form the inquiry on the authenticity of the letter G of 1 July 1995 was said to have taken.

There was no hint from the learned President as to why reliance was placed on the evidence considering its nature. There had been no mention in the letter of objection to assessment of such checks having been made nor was there mention of such checks in the case stated for the court *a quo*. H

Malaba JA

A Astra Holdings' case had always been that it relied upon the letter of 1 July 1995 which it admitted had not been addressed to it. It said that it believed that the letter represented the policy of the Department of Taxes. It had not been Astra Holdings' case that it relied on direct confirmation of the authenticity of the letter by revenue. Astra Holdings knew that the Commissioner's case had always been that it should have sought its own ruling on the matter rather B than act upon a letter not intended for its digestion.

In the light of all these facts it is clear to me that the learned President should not have relied upon the hearsay evidence as proving that Astra Holdings checked with revenue the authenticity of the letter of 1 July 1995. Without the reliance on the hearsay evidence there was no basis upon which the learned C President could have assumed that the Commissioner purported to contract with or make a representation giving rise to estoppel to Astra Holdings. Finally, the learned President was of the opinion that the Commissioner was guilty of unfair treatment of Astra Holdings in that he failed to consider legitimate expectations which had been created in the mind of the latter that

before change of "policy" was effected motor dealers who had acted on the D letter of 1 July 1995 would be informed in advance and the change effected prospectively.

The question whether or not the principle of legitimate expectation is applicable to a decision of a public body depends upon the particular legislation in terms of which the decision was taken. It is clear in this case that E the legislation required that sales tax be charged and collected by the motor dealer on all motor vehicles sold by him locally. The legitimate expectation created in Astra Holdings as a motor dealer would, in the circumstances, be that it should be taxed according to the law.

I cannot think of legitimate expectation arising out of an error of law to the effect that a tax which is due to revenue should not be collected. The F expectation by Astra Holdings in that regard would be that it should remain untaxed by the mistake of law. That surely would not be a legitimate expectation.

As I said, there was unfairness to the fiscus. There was no unfairness to Astra Holdings in acting upon the error of law contained in the letter of 1 July 1995. G In *ex p. MPK's* case, *supra*, Judge J said at 114B-C:

> "The correct approach to 'legitimate expectation' in any particular field of public law depends on the relevant legislation. In *R v A.G. ex p. Imperial Chemical Industries plc* (1986) 60 TC 1 the legitimate expectation of the taxpayer was held to be payment of the taxes actually due. No legitimate expectation could arise from an *ultra vires* relaxation of the relevant H statute by the body responsible for enforcing it. There is in addition the

Malaba JA

> clearest possible authority that the Revenue may not 'dispense' with A relevant statutory provisions (see *Vestey v IRC (No 1 and 2)* [1979] 3 All ER 976, [1980] AC 148)."

I agree with the observations.

The appeal, accordingly, succeeds with costs. The judgment of the court *a quo* is set aside and substituted with the following: B

> "The appeal is dismissed. There will be no order as to costs."

Chidyausiku CJ and Cheda JA: concurred

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

Wintertons, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/PRIVATIZATION AGENCY OF ZIMBABWE & ANOR v UKUBAMBANA KUBATANA INVESTMENTS (PVT) LTD & ANOR 2003 (1) ZLR 433 (S)

PRIVATIZATION AGENCY OF ZIMBABWE & ANOR v UKUBAMBANA KUBATANA INVESTMENTS (PVT) LTD & ANOR 2003 (1) ZLR 433 (S)

Citation	2003 (1) ZLR 433 (S)
Case No	Judgment No. S-9-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Gwaunza JA

Heard 17 February 2003; 3 April 2003

Judgment 3 April 2003

Counsel *A P de Bourbon, with him F Girach,* for the appellants
P Nherere, for the first respondent
C C Seddon, for the second respondent

Case Type Civil Appeal

Annotations No case annotations to date

Flynote

C **Person** — *artificial person — universitas — what constitutes*

Practice and procedure — *locus standi of a party to proceedings which does not have characteristics of a universitas*

Headnote

D The most basic of all the requirements of a *universitas* (a corporate body established under the common law) is that it must be a legal fiction representing an association of individuals for stated objectives. If a body does not fall into that or any of the other recognised categories of artificial persons (ie. the State or bodies incorporated by or registered under a statute) it has no legal personality and thus cannot sue or be sued.

Case cited E

Morrison v Standard Building Society 1932 AD 229

Case information

A P de Bourbon, with him F Girach, for the appellants

P Nherere, for the first respondent

F *C C Seddon,* for the second respondent

Judgment

Gwaunza JA: This is an appeal against a judgment of the High Court, in terms of which the first appellant ("the PAZ") was ordered to announce to the bidders, of which the first respondent was one, the results of an open tender G floated by the PAZ pursuant to a document entitled "Information Memorandum" dated 19 July 2001. The court *a quo* also ordered the second respondent to forthwith allot the shares, subject to the same tender, to the winning bidders.

Mr *Seddon*, who appeared briefly for the second respondent, informed the court that his client had chosen not to be an active party to these proceedings, H preferring instead to abide the court's judgment. Consequently, there is

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effectively only one respondent before the court, that is, the first respondent. A I shall hereinafter refer to the first respondent as just "the respondent".

The tender in question involved some 88 526 968 shares in three demerged companies of the company formerly known as Astra Ltd. The shares were held by the second respondent for and on behalf of the Government of Zimbabwe, which was, therefore, the beneficial owner thereof. B

It is not in dispute that the PAZ was established by the Government of Zimbabwe in September 1991 with a mandate to spearhead, advise and manage the Government's privatisation programme in a transparent manner. In dispute was the status of the PAZ. In its founding affidavit, the respondent had referred to the PAZ as a "legal entity" established by the Government of Zimbabwe. The PAZ disputed this status, and instructed its legal practitioners C to address a letter to the respondent's legal practitioners, stating that the PAZ was not a legal entity but "merely a unit in the Office of the President and Cabinet". Consequently, it was further stated in the letter, the PAZ did not have the necessary *locus standi* to be cited as a respondent in the matter. The letter went on to say that, as the proper respondent should have been the Head D of the Office of the President and Cabinet in his official capacity, the respondent was obliged to adhere to the requirements of the State Liabilities Act [*Chapter 8:14*] ("the Act"). These entailed the giving of notice and other requirements specified in the Act.

This letter, which ended by inviting the respondent to withdraw its court application, prompted the deponent to its founding affidavit to file a E supplementary founding affidavit restating, in greater detail, the respondent's position that the PAZ was a legal entity separate from the Government and with the capacity to sue and be sued in its own right.

Thus, apart from the merits of the application, the court *a quo*, as does this court, had to determine the issue of the PAZ's rightful status. The learned trial F judge was satisfied, from a reading of the papers before him, that the PAZ had a "*sui generis*" status, quite different from that of other Government departments or agencies. He stated at pp 236 and 239 of the record:

> "It seems to me that PAZ has, from a reading of the [PAZ] publication, a *sui generis* status quite different from that of other Government departments or agencies … G
>
> Having regard to these terms in the (Information) 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 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 H

> A they were entering into a contract, not with PAZ, but with Government."

He then went on to deal, at length, with the merits of the application and then made the order now being appealed against.

It is correctly averred for the respondent that the matter of the PAZ's status is crucial to both the procedural question of whether the case was properly B before the court and the substantive question as to whether or not there was a contract between the respondent and the PAZ.

I agree with the submission by Mr *Nherere*, for the respondent, that a finding to the effect that the PAZ was not a juristic person would effectively dispose of the matter.

I shall, therefore, consider at the outset the question of whether or not the PAZ C was a juristic person, capable of being sued in its own right.

Mr *de Bourbon*, for the appellants, contends that the PAZ does not fall into any of the recognised categories of artificial persons which, broadly, are: (i) the State; (ii) bodies specifically incorporated by statute, such as local authorities, statutory corporations, statutory boards or commissions; (iii) D corporate bodies registered under more general legislation, such as companies or pension or provident funds; and (iv) corporate bodies under the common law. He contends the PAZ was established by the Office of the President and Cabinet to undertake the functions set out in that Office's Circular Letter No. 1 of 2000, and as such has no different a legal status to the many other separate groupings organised within the Government, such as the Department E of Immigration. He also contends that the functioning of the Government in any country requires that it be able to create and, where necessary, disband departments, agencies and other bodies to fulfil its obligations. As an administrative action, Mr *de Bourbon* further contends, the creation or disbandment of such a body creates no legal *persona* nor destroys any legal F *persona* different to the Government itself. Finally, Mr *de Bourbon* submits that the PAZ cannot be a *universitas*, since it does not meet the legal requirements of such an entity. In this respect, he contends that the PAZ is not an association of persons for a specific objective, nor did any group of persons contractually bind themselves to create the PAZ and be bound by any constitution thereof.

G While conceding that the PAZ was established by an administrative Act, rather than an Act of Parliament, Mr *Nherere*, for the respondent, contended that that fact alone was not decisive. Rather, the court should look at the entity that the Government intended to create, and did create — its nature, the purpose of its establishment, its powers and its other attributes. If, in judging H these factors, the court is satisfied that the PAZ, as an entity, has the

characteristics of a juristic person, then such it should be adjudged to be. A

Mr *Nherere* relies for this contention on the following dictum by Wessels JA in *Morrison v Standard Building Society* 1932 AD 229 at 238:

> "In order to determine whether an association of individuals is a corporate body which can sue in its own name, the court has to consider the nature and objects of the association as well as its constitution, and if these show B that it possesses the characteristics of a corporation or *universitas*, then it can sue in its own name. Nor can I see any valid objection to such a society suing in its own name."

Since the PAZ was, to go by Mr *de Bourbon's* categorisation, neither the State nor a creature of statute, the only possible category it could fall into was that of corporate bodies under the common law, i.e. a *universitas*. C

It appears to me there is therefore no better method to determine the status of the PAZ as a juristic person, or *universitas*, than that suggested in the dictum cited above. However, before the test spelt out therein can be effectively applied to the circumstances of the case at hand, it is necessary to set out what are generally accepted as the characteristics of a *universitas*. The following D passage in Herbstein & van Winsen's *The Civil Practice of the Superior Courts in South Africa* 4 ed at p 156 is instructive in that respect:

> "A *universitas* is a legal fiction, an aggregation of individuals forming a *persona* or entity having the capacity of acquiring rights and incurring obligations to as great an extent as a human being. The main characteristics of a *universitas* are the capacity to acquire certain rights as apart from the E rights of the individuals forming it, and perpetual succession. The right to hold property in its own name is often given as one of its features: see *Webb & Co Ltd v Northern Rifles*; *Hobson & Sons v Northern Rifles* (1908 TS 462); *Cassim v Molige* (1908 TS 748); and others). If an association of persons possesses these characteristics it is a *universitas*, but if it lacks any, it is not. Thus a body having perpetual succession but F no power to hold property apart from its members has been held not to be a '*universitas*' (*Jeschin v Kopuno Sick Benefit & Benevolent Society* 1936 WLD 9)."

In applying this expanded test to the facts of this case, the first point to consider, in my view, is whether or not the PAZ represented "an aggregation of individuals" who came together to create an entity with a *persona* separate G from the association. The definitions of a *universitas* given in the authorities cited start from the premise that a *universitas* is an association of natural rather than artificial persons. This requirement seems to be accepted as a *sine qua non*, an absolute necessity. Indeed counsel for the appellants submitted he had been unable to find any case law or text law authority for the proposition that one or more artificial persons can associate together for the purposes of H

A creating a *universitas*.

On the evidence before the court, it was the Government, as an artificial person, that established the PAZ. It is not suggested that an aggregation of individuals came together to create the PAZ.

In the light of the foregoing, I find that the PAZ does not meet the most basic B of all the requirements of a *universitas*, that is, that it must be a legal fiction representing an association of individuals for stated objectives. On that basis alone, the application should have been dismissed.

There is, in any case, other evidence before the court to fortify this finding and to support the appellant's assertion that the PAZ did not have an existence independent of the Government.

C There is, firstly, the contract of employment entered into between the Government and one Innocent Gadaga, an investment analyst/banker and signed by the parties on 3 September 1999. It was submitted for the appellants that the contract was an example of the contracts signed by all personnel recruited to work for the PAZ. The contract makes it clear that it was between D the

Government and the employee concerned. The implication of this is that those tasked with the responsibility of running the affairs of the PAZ were contracted to do so as employees of the Government not of the PAZ.

Secondly, the document produced by the PAZ, which both parties have cited, informs that the PAZ was established by the Government out of the need to create a single "semi-autonomous" institution that would be responsible, on E a day to day basis, for the privatisation of State-owned enterprises. The use of the terminology "semi-autonomous" rather than "autonomous" is, in my view, further confirmation that the Government did not mean, in this respect, to establish an entity separate from itself.

Thirdly, there is the question of the PAZ's right (or lack thereof) to own F property in its name. One of the accepted characteristics of a *universitas* is that it has the right to own property in its own name. There is no evidence before the Court to suggest that the PAZ had such a right. The Cabinet Memorandum which sets out the functions of the PAZ, significantly, does not make any reference to any such right. The Memorandum officially publicised the existence and mandate of the PAZ, and should have been the one to contain G such information, had that been the intention. Cogent proof of the PAZ's inability to own property in its own name is to be found in the fact that the PAZ did not own the disputed shares; nor was it going to receive for itself the sale price. The learned trial judge was alive to this circumstance, as evidenced by his observation at p 32 of the cyclostyled judgment that:

> H "… 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 A the shares will automatically transfer the shares to the winning bidder although it would be expected to do so" (my emphasis).

It is not in dispute that the shares in question were held by the second respondent for and on behalf of their beneficial owner, the Government. As submitted for the appellants, the proceeds from the sale of the shares would accrue to the Government, not the PAZ. B

It is, in my view, correctly contended for the appellants that this confirms that the PAZ was not autonomous with the Government, and that it was established merely to fulfil administrative responsibilities towards a legitimate Governmental objective. That its role was merely facilitative is put beyond doubt when one considers the PAZ's functions, set out in Cabinet Circular C Letter No. 1 of 2001. The emphasis there is on its functions as an advisor to the Government on issues pertinent to the privatisation process, the preparation of detailed work plans for privatisation of designated enterprises, and assistance to line Ministries in the identification of local and/or external consultants. The PAZ also acts as a Secretariat for the Inter- Ministerial Committee on Commercialisation and Privatisation of Parastatals. D

The fourth consideration relates to the constitution. In terms of the dictum cited above (*per* Wessels JA in *Morrison v Standard Building Society supra*), the constitution of a *universitas* should offer some guidance on the true nature of the association. The assumption, again, is that a *universitas* has a constitution. *In casu*, apart from there being no evidence to suggest that the PAZ had a E written constitution, there is also, in fact, no document on file purporting to be the one in terms of which the PAZ was established. There are, instead, documents referring simply to the establishment by the Government of the PAZ "in September 1999" as a "semi-autonomous" privatisation agency. While a supporting affidavit from the Secretary to the President and Cabinet, Dr Utete, might have helped clarify the intention of the Government concerning F the status of the PAZ, the absence of such an affidavit, as correctly contended for the appellants, does not carry the respondents' case any further. Thus, the PAZ again fails to meet another important requirement for a *universitas*.

On the authorities cited above, an association must possess *all* the characteristics of a *universitas* for it to be so regarded. The PAZ, as is evident from the G foregoing and despite its *modus operandi* which persuaded the learned trial judge to a contrary view, lacks several of the characteristics of a *universitas*. It is, therefore, not a *universitas*.

As it also does not fall into any of the other categories of corporate entities that have been mentioned above, the conclusion is inevitable that the respondent has failed to prove that the PAZ is an entity separate from the Government nor, H

Gwaunza JA

A consequently, that it has the *locus standi* to be cited as the respondent in this matter.

It is correctly contended for the appellants that the Government, as the beneficial owner of the shares in question, had a real, direct and substantial interest in the outcome of the litigation. The respondent should therefore have complied with the State Liabilities Act, in terms of giving the requisite notice B and, thereafter, joined the additional appellant in this case as a party to the proceedings. This is because the President is the one vested with the executive authority of Zimbabwe by virtue of s 31(H)(1) of the Constitution of Zimbabwe. The respondent's failure to join the Government as a party, in the light of my determination of the status of the PAZ, is fatal to these proceedings.

C That being the case, I do not consider it necessary to go into the merits of the respondent's case against the appellants.

The appeal, accordingly, succeeds.

It is, in the premises, ordered as follows:

1. The appeal is allowed with costs. D
2. The order of the court *a quo* is set aside and substituted with the following:

   "The application is dismissed with costs."

E Chidyausiku CJ and Cheda JA concurred

Costa & Madzonga, appellants' legal practitioners

Dube, Manikai & Hwacha, first respondent's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/S v NDUNA 2003 (1) ZLR 440 (H)

S v NDUNA 2003 (1) ZLR 440 (H)

Citation	2003 (1) ZLR 440 (H)
Case No	Judgment No. HB-48-03
Court	High Court, Bulawayo
Judge	Cheda J & Ndou J
Heard	3 April 2003
Judgment	3 April 2003
Counsel	*R. Moyo-Majwabu,* for the appellants *M Moya-Matshanga,* for the respondent.
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure — *trial — irregularity — citation of wrong section of* C *Act — not fatal unless wrong principles also applied*

Evidence — *accomplice — who is — person committing an illegal act other than that which is being charged — not an accomplice*

Evidence — *single witness — approach to — discrepancies in such witness's evidence – relevance of* D

Headnote

The fact that a magistrate cited the wrong section of the Criminal Procedure and Evidence Act when giving his reasons for the way he approached the evidence was not fatal. It might have been had he in addition applied wrong principles

Where a conviction relies on the evidence of a single witness, discrepancies E in the witness's evidence are not necessarily fatal. The discrepancies must be of such magnitude and value that it goes to the root of the matter to such an extent that their presence would no doubt give a different complexion of the matter altogether. Discrepancies whose presence do not usher in that change should be regarded as immaterial and as such of no value in the determination of the truth or otherwise of the matter at F hand.

The fact that the single witness is himself guilty of some unlawful conduct does not make him an accomplice in the crime which is charged. Where the accused, who were policemen, arrested and robbed a person who was crossing the border illegally, that person was not an accomplice. G

Cases cited

R v Juwaki & Anor 1965 (1) SA 792 (SR); 1964 RLR 604

S v Lawrence & Anor 1989 (1) ZLR 29 (S)

S v Makandigona 1981 ZLR 408 (S)

S v Zimbowora 1992 (1) ZLR 41 (S) H

2003 (1) ZLR p441

Cheda JA

Legislation considered A

Criminal Procedure & Evidence Act [*Chapter 9:07*] s 269

Case information

R. Moyo-Majwabu, for the appellants

M Moya-Matshanga, for the respondent.

Judgment

B **Cheda J:** The appellants were convicted by the regional magistrate on 14 February 2001 and were sentenced to six years' imprisonment of which two years' imprisonment was suspended on the usual conditions. It is that finding that they now appeal against.

The appellants were members of the Zimbabwe Republic Police attached to C the Support Unit Branch, based at Fairbridge, Bulawayo. During the month of December 1998 they were deployed along the Zimbabwe/Botswana border in order to crack down on the rampant robberies, rapes and border jumping. One of them was armed with a CZ pistol. Whilst on patrol they came across the complainant whom they robbed of six hundred dollars (Z$600), two D hundred and fifty pula (P250) and a few items which he had brought from Botswana. They both pleaded not guilty.

The thrust of their appeal is that there were discrepancies in the State's case, which discrepancies should not have been ignored by the trial court, which erred in making a finding that the single evidence rule was enacted in s 270 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] yet it is in fact in E s 269 which reads:

"**Sufficiency of one witness in criminal cases, except perjury and treason**

It shall be lawful for the court by which any person prosecuted for any offence is tried to convict such person of any offence alleged against him F in the indictment, summons or charge under trial on the single evidence of any competent and credible witness:

Provided that it shall not be competent for any court —

(a) to convict any person of perjury on the evidence of any one witness as to the falsity of any statement made by the accused unless, in addition to and independently of the testimony of such witness, some G other competent and credible evidence as to the falsity of such statement is given to such court;

(b) to convict any person of treason, except upon the evidence of two witnesses where one overt act is charged in the indictment or, where two or more such overt acts are so charged, upon the evidence of one witness to each such overt act;

Cheda J A

(c) to convict any person on the single evidence of any witness of an A offence in respect of which provision to the contrary is made by any enactment."

This section, if my understanding is correct, gives the court power to convict on the single evidence of any competent and credible witness. The issue, therefore, is whether the discrepancies in such witness' testimony are fatal. B This is what should be addressed first. It is quite common to find discrepancies in evidence but such discrepancies are not necessarily an indication of falsehood on the part of the deponent. I fully associate myself with the approach in *R v Juwaki & Ors* 1965 (1) SA 792 (SR) at 794 D-E 1964 RLR 604, in which Quenet JP at 606C-D stated:

> "Where there are imperfections in the evidence of an accomplice and there C is no corroboration of his evidence implicating the accused, the question remains whether there are other features which reduce the danger of false incrimination and if there are, whether they reduce it to the point where there is no reasonable possibility that the accused has been falsely implicated. Indeed, that was the manner in which Clayden CJ approached the question of the correctness of the second appellant's conviction in D *Lembikani*'s case (1964 R & N 7). And may I say that, in considering whether the danger of false incrimination has been satisfactorily removed, the need that the other features should be strong and significant must, in each case, be related to the quality and character of the accomplice's evidence and the degree of its imperfection."

This principle was referred to with approval in *S v Lawrence & Ors* 1989 (1) ZLR 29 (S). E

Discrepancies in a case must be of such magnitude and value that they goes to the root of the matter to such an extent that their presence would no doubt give a different complexion of the matter altogether. In my view discrepancies whose presence do not usher in that change should be regarded as immaterial F and as such of no value in the determination of the truth or otherwise of the matter at hand. In *S v Makandigona* 1981 ZLR 408 (A) where the witness had made a previous inconsistent statement, Baron JA at 411D-E stating the proper approach to evidence where there were inconsistencies said:

> "Even without a previous inconsistent statement, and ignoring also that she was an obvious accomplice with an obvious interest to support the G appellant, the proper approach of the court was to consider the evidence of all the witnesses, whether called by the prosecution or the defence, and to decide where the truth lay."

In the present case the evidence adduced before the court clearly points to the fact that the appellants were involved in the robbery of the complainant. In the present case the inconsistencies referred to by appellants' legal practitioner H

Cheda J A

A are far outweighed by the corroborative evidence by the appellants themselves, for example the indications and the description of their clothes on the day of the commission of the offence.

The next question then is to decide whether or not the reference to a wrong section by error should *per se* result in the acquittal of the appellants. I agree with the appellants that the trial magistrate referred to the provisions of s 270 B which deal with evidence of an accomplice. However, in my view, the matter can not just end there. Section 270 of the code refers to single evidence of an accomplice. While the magistrate referred to this section he, however, proceeded to deal with this

case with the application of the provisions and requirements of s 269 which deals with the sufficiency of evidence of a single competent and C credible witness. This is confirmed by his reference to the case of S v *Zimbowora* 1992 (1) ZLR 41 (S) where Ebrahim JA stated:

> "The court *a quo* was entitled to convict the appellant on the single evidence of the complainant but it was necessary for such evidence to be clear and satisfactory in every material respect. See *R v Mokoena* 1932 OPD 79 at 80; *R v Ellis* 1961 R & N 468; *S v Bvundura* S-125-82; *S* v D *Murenda* S-86-84; *S v Jabangwa* S-25-89; *S v Corbett* 1990 (1) ZLR 205 (S); *S v Shako* S-88-90; *S v Mpofu* S-161-90 and *S v Gwanzura* S-44-91."

Reference to the principle stated above is, in my view, an indication that the learned trial magistrate was alive to the caution necessary in dealing with evidence from a single competent and credible witness. I could not see in the papers before me any indication that the complainant was an accomplice. It is E clear that he was treated as a complainant throughout the trial. The fact that he is a confessed border jumper, which is a crime in its own way, does not *per se* qualify him to be an accomplice. His evidence in relation to the present matter has nothing to do with his unlawful conduct as a border jumper; if anything it adds credence to his credibility in that he made a clean breast of F his travel status.

I hold the view that mere reference or wrong citation of a section on its own without corroborative evidence that in addition to the wrong citation, the judicial officer proceeded and continued to treat the matter under the wrong section is not enough reason to treat such an error as being fatal to his decision. It would be entirely different if, in addition to the wrong citation he continued G to labour under the same mistake, for that would clearly result in the wrong conclusion. Section 269 entitled the court to convict a person on the single evidence of any competent and credible witness except where the person is charged with perjury, treason or of an offence in respect of which provision to the contrary is made by an enactment. I therefore do not agree with the H appellants' legal practitioner's argument on his understanding of the learned

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Cheda J A

trial magistrate's reasoning. A

As pointed out in *Zimbowora's* case the evidence of a single witness has to be clear and satisfactory. The complainant gave his evidence very well and was consistent throughout. He had no reason to lie about the appellants and he indicated the spots he was taken to by the appellants and they did not deny having been with him on 24 December 1998. The court *a quo* understood this B evidence in its clearest form and was duly satisfied with it. I also agree with him that the evidence presented was not only clear but satisfactory in all material respects.

The appellants have queried the sentence imposed as that which induces shock because of its harshness. The appellants were members of the police force who were officially armed and were deployed to deal specifically with robbers C along the Zimbabwe/Botswana border. Instead of protecting members of the public and eliminating crime they, to the contrary of their duties, went out to commit the very crime they were supposed to prevent. What more cheek would a police officer have than this type of behaviour. They saw the complainant who was a border jumper whom they should have arrested, but instead chose D to rob him of his property. They are indeed first offenders but I believe that this is one of the cases where the courts should send a clear message to those in authority that such brazen abuse of power will not be tolerated by these courts. The appellants can therefore not escape being used as guinea pigs in this matter. I therefore find that the conviction and sentence are proper and this appeal must accordingly fail. E

Ndou J concurred

James, Moyo-Majwabu & Nyoni, appellants' legal practitioners

Criminal Division of the Attorney-General's Office, respondent's legal F practitioners

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NCUBE & ANOR v MINISTER OF HOME AFFAIRS & ANOR 2003 (1) ZLR 445 (H)

Citation	2003 (1) ZLR 445 (H)
Case No	Judgment No. HB-50-2003
Court	High Court, Bulawayo
Judge	Cheda J
Heard	1 April 2003; 3 April 2003
Judgment	3 April 2003
Counsel	*J, James,* for the applicants *H. Ushewokunze III,* for the respondents
Case Type	Criminal application
Annotations	No case annotations to date

Flynote

C **Criminal procedure** — *extradition — application for release from custody — accused in custody for more than two months pending extradition — no good reason shown for delay in processing the matter — release from custody ordered*

Headnote

The applicants were arrested by the Zimbabwean police on behalf of the D South African authorities, as the applicants were wanted to face charges of attempted murder and armed robbery in South Africa. Nearly six months later they applied for their release from custody as the South African authorities had still not processed the formal request for extradition, despite the fact that they had been advised of the urgency of E the matter.

Held, that the court can only dismiss the application if satisfied that the Minister of Home Affairs had not been given sufficient notice or where the Minister has shown good cause why the applicant should not be released from custody. Both the Zimbabwean and the South African Authorities had been given ample opportunity to act in this matter but F had failed to do so. The alleged complexity of the case was not reason enough to take priority over the right of the individual to liberty.

Cases cited

S v Makhuta 1969 (2) SA 490 (O)

S v Ncube & Anor HB-126-02

Case information

G *J, James,* for the applicants

H. Ushewokunze III, for the respondents

Judgment

Cheda J: This is an application for the immediate release of the applicants H from custody. The brief facts are that an armed robbery was committed at the

Cheda J

Johannesburg International Airport in South Africa on 27 December 2001, A resulting in the two applicants and various other suspects being arrested. The applicants are, therefore, wanted to appear in court in South Africa to answer allegations of robbery.

The applicants were arrested in Zimbabwe by members of the Zimbabwe Republic Police on 23 September 2002, after they had presented themselves B at a police station for a totally different matter altogether. The South African authorities have indicated that they would like to have the applicants extradited to South Africa to face the charges of armed robbery and attempted murder. The applicants were arrested and detained, pending the outcome of extradition proceedings that had been commenced by the South African authorities. Warrants of arrest were issued against the applicants but the warrants were C defective and, therefore, were of no force or effect.

The applicants' arguments are that the South African authorities have not shown any keen interest in processing the extradition proceedings against them, and that the allegations of armed robbery which occurred in South Africa should not be used as the reason for the denial of their liberty, as armed D robbery is not a continuing offence. This in fact, is correct, and hence our courts have no jurisdiction to try them for the alleged offence. This point was observed by my brother Ndou J in *S v Ncube & Anor* HB-126-02 at p 2 of the cyclostyled judgment: see also *S v Makhuta* 1969 (2) SA 490 (O) at 493A-B.

The applicants further argue that a period of two months has elapsed since their detention pending their extradition. This argument is based on s 33 of the E Extradition Act [*Chapter 9:08*] which reads:

"**Discharge from Extradition**

1. If any person in custody awaiting his extradition in terms of this Act is still in custody after the expiry of a period of two months beginning with the first day on which he could in terms of this Act have been F extradited, he may apply to the High Court for his discharge from custody.
2. If upon application made in terms of subsection (1) the High Court is satisfied that reasonable notice of the proposed application has been given to the Minister it shall, unless good cause to the contrary is shown, order that the applicant be forthwith discharged." G

Mr *Ushewokunze*, for both the respondents, has opposed this application on the grounds that extradition proceedings are in progress, as they are in constant touch with the South African authorities about the pending extradition proceedings. To enhance their argument, they filed a letter from the Office of the Director of Public Prosecutions in South Africa which reads: H

Cheda J

A "30 January 2002 (03)
The Attorney General: Mr Chigovera
Republic of Zimbabwe
4th Floor Corner House
Samora Machel Avenue
Harare
B Private Bag 7714
Causeway
Harare
Dear Sir
C EXTRADITION: ZIMBABWE
ROBBERY — JOHANNESBURG INTERNATIONAL AIRPORT
CASE 338/12/2001

STATE VS KHULEKANI NCUBE

NGOBENI MAFU

STANDFORD SIBANDA

D VUSI NDLOVU

THEMBA MAHLANGU

Following the meeting held at my office on 30 January 2003, I wish to advise you as follows:

E KHULEKANI NCUBE, NGOBENI MAFU and STANDFORD SIBANDA are currently being held in custody in Zimbabwe. VUSI NDLOVU and THEMBA MAHLANGU, who are known to be in Zimbabwe, are also being sought for the abovementioned robbery and a request for their provisional arrest will be conveyed to Zimbabwe through the Interpol channel.

F Zimbabwe is a designated country in terms of section 2(1)(b) of the South African Extradition Act of 1962.

I hereby, wish to inform you that the Government of the Republic of South Africa will seek the assistance of the Government of the Republic of G Zimbabwe for the extradition of the abovementioned persons back to South Africa to be prosecuted on the following charges:

- Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977
- Attempted murder

Cheda J

- The unlawful possession of arms and ammunition in contravention of A the Arms and Ammunition Act, 75 of 1969.

Each of the said offences is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more. The formal extradition request is in the process of being drafted and will be forwarded, via diplomatic channel, to your office as a matter of urgency. B

Yours faithfully

(Signed)

A P DE VRIES SC

DIRECTOR OF PUBLIC PROSECUTIONS C

WITWATERSRAND LOCAL DIVISION OF THE HIGH COURT OF

SOUTH AFRICA."

In response to this letter, Mrs M Cheda of the Attorney-General's office Bulawayo, Zimbabwe, in her letter to the South African authorities of 31 January 2003, emphasised the need for them to attend to the extradition D process in view of the limited two-month period. The Director of Public Prosecutions again wrote to the Zimbabwean authorities on 12 March 2003. Their letter reads:

"The Attorney General: Mr Chigovera

Republic of Zimbabwe

Private Bag 7714 E

Causeway

Harare

Fax: 09-263-4-781769

Dear Sir F

EXTRADITION: ZIMBABWE

ROBBERY — JOHANNESBURG INTERNATIONAL AIRPORT

CASE 338/12/2001

STATE VS KHULEKANI NCUBE

NGOBENI MAFU G

STANDFORD SIBANDA

D VUSI NDLOVU

THEMBA MAHLANGU

Kindly find attached a copy of the indictment in above matter, the formal extradition request is currently being finalised and will be forwarded, via H

2003 (1) ZLR p449

Cheda J

A diplomatic channel to your office within two (2) weeks.

Yours faithfully

(Signed)

H J BROODRYK

DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

B WITWATERSRAND LOCAL DIVISION."

It seems that nothing was done by the South African authorities despite the fact that they were expected to respond by 4 February 2003. The law in relation to extradition matters is quite clear in that if nothing is done after two months from the time of the applicant's detention pending extradition, the applicant may apply to the High Court for his discharge. The court can only dismiss that C application if it is satisfied that no reasonable notice to the Minister of Home Affairs has been given, or where good cause is shown by the Minister why the applicant should not be discharged from custody.

The question here is whether or not the Minister has been given reasonable notice to act in this matter or whether there has been good cause shown to the D contrary by the respondents. As long ago as September 2002, the South African Police have been aware that the applicants had been apprehended, and a meeting to discuss the extradition process was held in South Africa between the Zimbabwe Attorney-General, Mr Chigovera, and his South African counterpart. This is evidenced by a letter to them of 31 January 2003 from the Attorney-General's office. It seems to me, however, that the South African E authorities have not pursued this matter with any zeal or vigour. In their latest letter to the Attorney-General's office in Zimbabwe of 12 March 2003, they undertook to forward the formal extradition documents within two weeks. However, to date nothing has been sent to the Zimbabwean authorities. This matter is by any standards a very serious one. So much so that it should merit a lot of attention by those adversely affected, namely, the South African F authorities. It is, in my view, not fair for them to drag their feet, as it were, while the liberty of the suspects is being compromised. Both the South African and Zimbabwean authorities have been given more than enough notice to act in this matter but have failed to do so.

It is Mr *Ushewokunze*'s argument that this matter is complex, and while I G accept that it might be so, the question of efficiency still surfaces. The length of time the respondents have taken to finalise the extradition process leaves a lot to be desired: in fact, it falls far short of the expected standard of police international co-operation through Interpol. The South African authorities' response can only be described as curt and does not shed light on their H problem, if any, in finalising this matter.

2003 (1) ZLR p450

Cheda J

With the greatest respect, I do not see any good reason why the South African A Police should have taken such a long time to finalise this matter. I am left with the irresistible conclusion that there is some unexplained reluctance on their part. Therefore, having been given sufficient notice to act in this matter, it would be unreasonable, in my opinion, to ask for more time to do what they are legally required to do within two months, and which they have failed to do. B

On 27 February 2003, the applicants made an application for bail before me under case number HB-27-03 which I dismissed. My main reason for dismissal, amongst others, was that the case was quite complex, and as such, the police should be given reasonable opportunity to delve into that case, thus "untying the tentacles of this octopus in our midst". A month after that, the police have not untied those tentacles and, in fact, the South African Police have not taken C any reasonable steps at all to extradite the applicants. It is my view, that they have been given more than enough opportunity to regularise their previous, defective warrants.

These courts hold individuals' rights to liberty in very high regard. It has been said on numerous occasions that the general principle in this regard is that the D courts should always lean in favour of the liberation of an individual unless it is shown that such liberation will frustrate the proper administration of justice.

These courts, in my view, should not be seen to assist the State by continuing to hold suspects in custody when there is no good and sufficient reason to do so. However, the courts, as administrators of justice, should, where possible, E assist the State machinery in bringing the suspects to book, but such assistance should be carried out within the precincts of acceptable legal principles. At present, the applicants are not even facing any criminal charges in Zimbabwe, and as such I find no good and sufficient cause to continue to hold them indefinitely for and on behalf of a seemingly uninterested jurisdiction. F

In light of the above, I find that it would be unjust to continue to hold the applicants in custody pending the mooted extradition, when there is nothing, in the papers to indicate that the South African authorities have taken, or are taking, any reasonable steps towards the extradition process.

This application is accordingly granted with costs. G

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

Office of the Attorney-General, respondents' legal practitioners H

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TSVANGIRAI & ANOR v THE EDITOR, THE HERALD & ANOR 2003 (1) ZLR 451 (H)

Citation	2003 (1) ZLR 451 (H)
Case No	Judgment No. HH-58-2003
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	12 July 2002; 9 April 2003
Judgment	9 April 2003
Counsel	*B W Elliot*, for the applicants Mrs *M Chitewe*, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C **Delict** — *defamation — right of reply to allegedly defamatory statement in media — limits to — need to show that statement is untruthful or that it impinges on plaintiff's rights or interests*

Media — *right of reply — article published in which alleged falsehoods appear — what party alleging falsehood must show — need to specify* D *untruths and submit counter — statement — no right to insist that counterstatement appears unedited*

Headnote

Section 89 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] introduces a new concept in the law relating to the defamatory statements published in the media, the right of reply to E alleged untruths. However, a party alleging that an article is untruthful must show directly or indirectly in what way the information published is untruthful or that it impinges on its rights or lawful interests. It may do so by spelling out the untruths in the offending article or by submitting a counterstatement that sets the record straight and exposes the mischief in the impugned article. It is not enough to merely allege grave falsehoods F without specifying them or submitting a counterstatement. There is no right to insist that the counter-statement be published unedited; to hold that there was would be to make unwarranted inroads into editorial control in respect of the quality of the material published, and the way in which issues of public interest are treated. It would also impinge on G the constitutional freedom of others to impart ideas and information without interference.

Case cited

Miami Herald Publishing Co v Tornillo 418 US 241 (1974)

2003 (1) ZLR p452

Hlatshwayo J

Legislation considered A

Access to Information and Protection of Privacy Act [*Chapter 10:27*], s 89

Case information

B W Elliot, for the applicants

Mrs *M Chitewe*, for the respondents B

Judgment

Hlatshwayo J: The first applicant, Morgan Tsvangirai (hereinafter "the applicant") is the leader of the second respondent, a political party called the Movement for Democratic Change (MDC). The applicant contested the Presidential Election held on 9-11 March 2002 and lost to Mr R G Mugabe of the Zimbabwe African National Union-Patriotic Front (ZANU-PF). On 12 C April 2002, the applicant filed an election petition challenging the result of the election. Thereafter, beginning on 13 April 2002, *The Herald* newspaper, which is edited by the first respondent and published by the second respondent, produced a number of articles on the election petition: for example, on its issue of 13 April 2002, on pp 1 and 2, it published an article entitled "MDC files D petition seeking presidential election re-run" dealing with the issues that the applicant had raised in his election petition. On 8 June 2002, and again on its pages 1 and 2, following the filing on 7 June 2002 by President Mugabe of his opposing affidavit to the election petition, *The Herald* published an article entitled: "MDC petition opposed: Tsvangirai had poorly managed presidential campaign: President". The applicant alleges in his founding affidavit that the E article dated 8 June 2002 gives more information of the contents of President Mugabe's opposing affidavit than the article dated 13 April 2002 did of the applicant's election petition, but quickly, and rightly so in my view, adds that this is not the cause of complaint in this application.

The basis of complaint in this application is an article published on 10 June 2002, headed "President speaks on MDC Petition" and quoting verbatim the F preliminary remarks of President Mugabe's

response to the applicant's petition. The following statement prefaced the 10 June article:

> "The High Court Petition by the leader of the MDC, Mr. Morgan Tsvangirai, challenging the results of the March 9-11 Presidential Election won by President Mugabe by over 400 000 votes has raised a lot of debate G both at home and abroad. In the interest of our readers, we produce President Mugabe's preliminary response to the issue raised by Mr Tsvangirai in his application to have the election set aside."

On 13 June 2002, the applicant's lawyers wrote to *The Herald* editor demanding "by return of mail" confirmation of their client's right of reply on the basis that the article in question "contains many grave falsehoods and H

Hlatshwayo J

A seeks to denigrate our client's good name and reputation in the minds of the public who reads your newspaper". On 17 June 2002, the lawyers acting for *The Herald* replied indicating that they were seized with the matter and undertaking to "revert to you soonest" after obtaining detailed instructions from the newspaper. Two days later, on 19 June 2002, the applicants filed the present application on an urgent basis, seeking the following order:

> B "IT IS DECLARED:
>
> 1. That in accordance with section 89(1) of the Access to Information and Protection of Privacy Act [*Chapter 10:27*], the Applicant has a right of reply in The Herald newspaper, at no cost to him, to the article which appeared on page 9 of The Herald newspaper dated Monday 10 June 2002 C under the heading "President speaks on MDC Petition."

ACCORDINGLY, IT IS ORDERED

1. That the respondents shall comply with the above Declaration within three (3) days of the receipt by them from the applicant of the said reply to the said article in *The Herald* newspaper dated Monday 10 June 2002. D
2. That the respondents shall publish the said reply from the applicant without amendment and without any comment and shall give it the same prominence as the said article, which appeared in *The Herald* newspaper dated Monday, 10 June 2002.
3. That the respondents shall pay the applicant's costs of suit, jointly and severally, the one paying, the other to be absolved."

E In their opposition to the application, the respondents denied that the applicant is entitled to the right of reply because, firstly, the article did not seek to denigrate the good name and reputation of the applicant as alleged but was one in a series aimed at covering the litigation pertaining to the Presidential election petition in the public interest and, secondly, the applicant failed to F specify the alleged "grave falsehoods".

In order to make a decision in this dispute, I need to examine the law on and the concept of the right to reply.

Section 89 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] (hereinafter "the Act") states as follows:

> "(1) A G person or organisation in respect of whom a mass media service has published information that is not truthful or impinges on his rights or lawful interests shall have a right of reply in the same mass media service at no cost to him, and the reply shall be given the same prominence as the offending story.
>
> "(2) The reply shall be featured in the next issue of the mass media H service."

Hlatshwayo J

Now, s 89 of the Act introduces a new concept in our law. The right of reply A as a remedy for defamation is found in certain Continental countries in Europe, especially France and Germany. It has not found favour in Common Law countries or in South Africa or Zimbabwe up to now. I am greatly indebted to counsel for the applicants in making available to the court the following insightful internet précis of the right of reply as it obtains in Europe, which I quote below at length: B

> "A statutory right of reply exists in several European jurisdictions. In France, the *droit de response* gives an individual a right to respond where he or she is named in a newspaper or daily written periodical. The *droit de rectification* allows ministers, civil servants and other public officials the right to respond at any time

where her or his activities have been C inaccurately described by a newspaper. Danziger identifies several practical flaws in the operation of the *droit de response*, including its potentially wide availability, which may encourage overuse and misuse. The newspaper may also be encumbered with inept, useless and irrelevant rebuttals. The *droit de rectification* may be used by officials in a way that misleads the public. D

In Germany, the right of reply allows anyone affected by a publication in print, television, radio or film to rebut a statement of fact. In the case of the print media, the reply must be printed within three months and there are provisions dealing with the presentation of the reply which require that it reaches the same audience, and with the same forcefulness as the original material. In the case of the electronic media, the broadcaster must E transmit a counter-version, prepared in writing by the person who has been affected by an assertion of fact made in a programme. Danziger says that the right of reply can be used by overly sensitive individuals (for example, it has been used by theatre directors, editors and hotel directors) and says that the requirement that the reply be unedited has the potential to fill a journal with dull, unreadable material.

In Switzerland, the right of reply allows prior restraint of newspaper F articles if the editors have not complied with a right of reply. This had occurred in at least one case, in which a magazine was restrained from publishing any further articles about the plaintiff."

See generally Danziger, C 'The Right of Reply in the United States and Europe' (1986) 19 *International Law and Politics* 171. G

From the above summary, it appears that the right of reply enshrined in s 89 of our Act is closest to the German model, with the outstanding difference that our law does not include the provision that the reply should be published unedited. It was submitted on behalf of the applicant that the reply must not be subject to amendment by the respondents, otherwise the effect of the reply will be nullified. Apart from not having a statutory or other legal basis, this H

Hlatshwayo J

A proposition puts in sharp focus the objection which freedom of expression campaigners have with a widely framed legally enforceable right of reply, namely that it has a potential of stifling free and robust expression or might lead to the filling of media with dull, unreadable material or worse still prevent editors from excising socially and morally objectionable material.

A distinction must be drawn between editing and comment. The proposition B that editorial comment should not be included within the reply but may be contained elsewhere within the same publication is reasonable, otherwise the reply might be completely negated by pointed, running commentaries. Such a proposition would also be in line with the letter and spirit of s 89. However, to assert an amendment-proof right of reply as the applicant has sought to do, C is not only to invite the kind of criticism outlined above and, as submitted by the respondents, "make unwarranted inroads into editorial control in respect of the quality of the material published, and the way in which issues of public interest are treated", but it is also to impinge on the freedom of others to impart ideas and information without interference, which is guaranteed by our Constitution.

D In the American case of *Miami Herald Publishing Co v Tornillo* 418 US 241 (1974), 41 L Ed 2nd 730, the United States Supreme Court considered an appeal on an action based on a Florida State statute granting a political candidate a right of reply where his personal character or official record is assailed by a newspaper. Pat L Tornillo Jr had demanded that the Miami E Herald Publishing Company print verbatim his replies to the newspaper's editorials, which had been critical of his candidacy. The Florida statute provided that the reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply. The Supreme Court held that the Florida statute operated as a command in the same sense as a statute forbidding the newspaper to publish specific matter, which, it concluded, F interfered with editorial judgment and control, and detracted from the freedom of the press, which is guaranteed in the US constitution's Fifth Amendment. The statute was therefore declared unconstitutional. Accordingly, I find favour in the submission made on behalf of the respondents that the part of the order sought by the applicant requiring amendment-proof publication not only lacks any statutory basis, but on the persuasive authority of the *Miami* G *Herald Publishing Company* case, also makes such intrusions into the constitutionally guaranteed freedom to impart ideas and information as to render it unjustifiable in our democratic society.

There still remains, however, the question whether the applicant on the facts is, nonetheless still entitled to a right of reply, which may be amended or H commented upon as explained above. Section 89 of the Act does not specify

Hlatshwayo J

how the right of reply may be exercised, and detailed regulations may require A to be developed by bodies charged with the implementation of the Act to cure the lack of specificity. However, I am of the view that at the very least a party alleging the violation of s 89 must show directly or indirectly in what way the information published is untruthful or that it impinges on its rights or lawful interests. It may do so by spelling out the untruths in the offending article or B by submitting a counterstatement that sets the record straight and exposes the mischief in the impugned article. It is not enough, as the applicants have done in this case, to merely allege grave falsehoods without specifying them or submitting a counterstatement. Therefore the order sought by the applicants cannot be granted.

As far as costs are concerned, the rule that the costs follow the outcome shall C apply.

Accordingly, this application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Gula-Ndebele & Partners, respondent's legal practitioners D

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Source:
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TSVANGIRAI v MUGABE & ORS 2003 (1) ZLR 457 (H)

Citation	2003 (1) ZLR 457 (H)
Case No	Judgment No. HH-137-03
Court	High Court, Harare
Judge	Mavangira J
Heard	28 March 2003; 14 April 2003
Judgment	14 April 2003
Counsel	*B W Elliot* (on 28 March 2003) and *A P de Bourbon SC* (on 14 April 2003), for the applicant *T Hussein*, for the first respondent Mrs *Y Dondo*, for the second and third respondents *G Chikumbirike*, for the fourth respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Election — *election petition — determination of — need for trial to be held* C — *not permissible for petition to be upheld by default — application to strike out defence for non-compliance with orders for discovery of documents — application having effect of deciding matter by default — application dismissed*

Practice and procedure — *application — to strike out defence — striking out having effect of deciding matter in favour of applicant — election* D *petition — requirement for trial — application to strike out not being appropriate*

Headnote

The applicant was bringing an election petition in terms of s 102 of the Electoral Act [*Chapter 2:01*] to have the 2002 presidential election set E aside. The allegations made against the first respondent, the winning candidate, were violence and various other corrupt practices. The applicant also sought the setting aside of the election on the basis that the second and third respondents (the Registrar-General and the Minister of Justice) did not comply with the principles of the Act, that is, improper and illegal conduct of the elections themselves. A number of court orders had F previously been obtained against the Registrar-General and Minister ordering discovery of documents, in particular, the voters' rolls. The applicant alleged that they did not comply with these orders, and alleged contumacy on their part. He sought, in terms of r 165 of the High Court Rules 1971, to strike out their defences in the main petition. The respondents disputed the allegations of contumacy and contended that G they had complied with all the orders in question.

Held, that the effect of striking out their defences would be that the election petition would be decided by default. It was clear from s 136(1) of the Electoral Act that it is only after a trial that the High Court may determine the issues raised by the applicant to enable it to make an order under

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s 102(2) setting aside an election. In any event, the matter was of such A national importance that the order sought should not be granted. If the second and third respondents had not fully discovered all the required documents, it would be open to the applicant, at the trial, to urge the trial court to order the production of the documents in terms of r 167.

Held, therefore, that this would not be a proper case for the court to exercise its discretion to strike out the defence. B

Cases cited

Chihota v Registrar-General & Anor HH-11-02

Dongo v Mwashita 1995 (2) ZLR 228 (H)

Durbach v Fairway Hotel Ltd 1949 SR 115 C

Supiya v Mutare District Council & Ors 1985 (2) ZLR 53 (H)

Tsvangirai v Registrar-General & Ors HH-29-02

Tsvangirai v Registrar-General HH-32-03

Wallis & Wallis v Corporation of London Assurance 1917 WLD 116

Legislation considered D

Electoral Act [*Chapter 2:01*], ss 102 and 136(1)

High Court Rules 1971 (RGN 1047 of 1971), rr 165 & 167

Case information

B W Elliot (on 28 March 2003) and *A P de Bourbon SC* (on 14 April 2003), for the applicant

T Hussein, for the first respondent E

Mrs *Y Dondo*, for the second and third respondents

G Chikumbirike, for the fourth respondent

Judgment

Mavangira J: On 28 March 2003, I called the parties in chambers and gave directives as to how I intended to deal with the matter, with particular reference to the filing of papers and heads of argument. During the proceedings, the fourth respondent's * legal practitioner objected to his client's joinder in the proceedings on the basis that his client is not a party to the proceedings and that no relief is sought against it in any event. He bitterly complained about having been called to attend court on this matter as it was a complete waste of time and resources for the fourth respondent. G

In response, Mr *Elliot* submitted that the application before the court affected all the four parties directly and for that reason all the respondents, including the fourth respondent, had been cited. He also submitted that as the fourth

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A respondent was a party at the pre-trial conference on 16 September before Garwe JP, it consequently was a party to the present application. Furthermore, the fourth respondent had not complied with orders issued against it by the Judge President. He also submitted that although the fourth respondent's legal practitioner insisted that his client is not a party to these proceedings, he has made no effort whatsoever since April 2002 to have his client struck out as a B party. It would thus be extremely anomalous therefore not to serve the notice of set down on the fourth respondent. He submitted that an order had also been issued by Guvava J against the fourth respondent compelling it to discover documents that it had refused to discover.

In response, Mr *Chikumbirike* submitted that it was not in dispute that the C fourth respondent is a party to these proceedings but proceeded to state that it is a misjoinder which will be a preliminary issue at the hearing of the main matter, the Election Petition in case No. HC 3616/2002. The fourth respondent has no interest in the present application. The order by Guvava J, it was submitted, is not before this court and will be dealt with appropriately. It might be appealed against. He submitted that the applicant should bear the fourth D applicant's costs for the day.

Although the court asked Mr *Chikumbirike* to formally indicate and in writing the fourth respondent's stance, to date he has not done so.

Mr *Chikumbirike* asked to be excused before I had given my directives in full as to the filing of papers and the hearing of the application which was to be E on 14 April 2003. Since then there has been no further participation by the fourth respondent which did not file any papers nor attend the hearing on 14 April 2003.

This is an application in which the applicant prays that the court exercises its discretion in terms of r 165(2) of the High Court Rules and issues an order in F the following terms:

"It is declared:

1. That the second respondent has failed to comply with the Orders of this Honourable Court dated 12 October 2002 in case Nos. HC 469/2003 and 470/2003, being Orders made in terms of r 165(1) of the High Court Rules 1971. G
2. That the third respondent has failed to comply with the Order of this Honourable Court dated 12 October 2002 in case No. HC 471/2003, being an Order made in terms of r 165(1) of the High Court Rules 1971.

Accordingly, it is ordered:

1. That H in terms of r 165(2) of the High Court Rules 1971 the second

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respondent's application to the applicant's application in case No. HC A 3616/2002 be and is hereby struck out and judgment be and is hereby given in default with costs in case No. HC 3616/2002 against the second respondent and in favour of the applicant.

2. That in terms of r 165(2) of the High Court Rules 1971 the third respondent's Opposition to the Application in case No. HC 3616/ 2002 be and is hereby struck out and judgment be and is hereby given B in default with costs in case No. HC 3616/2002 against the third respondent and in favour of the applicant.
3. That the second and Third respondents shall pay the applicant's costs of suit in relation to this application jointly and severally, the one paying the other to be absolved."

The applicant is the President of the political party called the Movement for C Democratic Change (MDC). He stood as a Presidential candidate on behalf of the MDC at the Presidential Election held on 9-11 March 2002. The second respondent * declared the first respondent, who is also the President of the political party Zimbabwe African National Union (Patriotic Front) (ZANU (PF)), the winner of the Presidential Election. D

On 12 April 2002 and in case No. HC 3616/2002, the applicant instituted an Election Petition in terms of s 102 of the Electoral Act [*Chapter 2:01*] against all the respondents cited in this application, challenging the outcome of the Presidential Election held on 9-11 March 2002. The applicant submits that in his affidavit in case No. HC 3616/2002 he made numerous serious allegations against the second and third respondents in relation to the manner in which E they conducted the said Presidential Elections. The said respondents filed notices of opposition and opposing affidavits after which the applicant filed answering affidavits.

On 16 September 2002, and in case No. HC 3616/2002, Garwe JP granted an order in the following terms: F

"It is ordered that:

1. The applicant shall file and serve his discovery affidavit and list G of the witnesses he intends to call together with a summary of their evidence by Friday 4 October 2002.
2. The respondents shall file and serve their discovery affidavits and list of witnesses they intend to call together with a summary of their evidence by 31 October 2002.
3. Thereafter a pre-trial conference shall be convened for purposes of discovering all issues related to the holding of the trial.

A 4. Costs are to be in the cause."

In his discovery affidavit filed on 30 October 2002, the second respondent disclosed two documents. On 6 January 2003, the applicant filed a notice to produce documents for inspection. The applicant submits that there was no response to the said notice, leading to the applicant instituting proceedings in case No. HC 469/2003, seeking an order that the second respondent makes B available the discovered documents in terms of Order 24 of the High Court Rules 1971. Such an order was granted on 12 February 2003 and it was served on the second respondent on 21 February 2003. The order is in the following terms:

"It is ordered:

1. That C the respondent shall make available for inspection by the applicant's Legal Practitioners in terms of Order 24 of the High Court Rules the Voters' Roll for the 2002 Presidential Election within five (5) days of the date of service of this Order on the respondent."

The second paragraph of the order relates to the issue of costs.

The second respondent filed an urgent chamber application in case D No. HC 1788/2003 seeking directions on how to comply with the order in case No. HC 4691/2003. The application was summarily dismissed with costs on 4 March 2003. The second respondent then filed a notice to inspect documents on 6 March 2003, which notice. the applicant submits, was not filed in accordance with the court order in case No. HC 469/2003.

E On 10 March 2003, the second respondent filed another urgent chamber application in case No. HC 2022/03, seeking a postponement of the inspection programme set out in his notice filed earlier on 6 March 2003. The application was dismissed with costs on 11 March 2003.

The notice to inspect documents filed in case No. HC 469/2003 on 6 March 2003 reads:

F "Take notice that you may inspect the voters' roll for the 2002 Presidential Election on the dates and at the places mentioned in the schedule annexed hereto between the hours of 9 a.m. - 12.30 p.m. and 2.00 p.m. - 4 p.m."

The "Visiting Dates" in the schedule to the notice span a period from l March 2003 to 21 October 2003, that is slightly longer than 32 weeks, covering 120 G constituencies and with the inspection to be carried out at 53 stated places and/ or offices.

The applicant submits that the notice to inspect documents, which was filed on 6 March 2003 fails to comply with the order in case No. HC 469/2002 for two main reasons. Firstly, because r 164(2)(a) of the High Court Rules sets out H the place for inspection as:

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"The place for such inspection shall be — A

(a) If the person called upon is represented by a legal practitioner, the office of that legal practitioner …"

The applicant submits that despite this the second respondent summarily and unilaterally appointed various places situated throughout Zimbabwe for inspection of the documents, thus breaching the court order. B

The second reason, in the applicant's submissions, is that Order 24 requires inspection to take place within five days. The second respondent, however, summarily and unilaterally has only allowed inspection to take place from 10 March 2003 to 21 October 2003, thus breaching the court order. The applicant also made reference to cases in which the second respondent has in the past been criticised for his conduct by this court. Reference was made to *Dongo* C *v Mwashita* 1995 (2) ZLR 228 (H); *Chihota v Registrar-General of Elections & Anor* HH-11-02 and *Tsvangirai v Registrar-General & Ors* HH-29-02, especially from the foot of pp 24-25 and from pp 50-51. Reference was also made to *Supiya v Mutare District Council & Ors* 1985 (2) ZLR 53 (H), the main case in Zimbabwe dealing with r 165, as authority for the granting of the relief sought by the applicant in this application. D

The applicant submits that the second respondent has persistently disregarded orders and directions of this court. Even as at April 2003, over five months after discovery was made, proper inspection had still not been allowed. The court should also consider that this is not an isolated incident as the second respondent has persistently flouted orders and directions issued by this court. E The applicant also submits that the second respondent is thus guilty of gross contumacy and this, it was held in the *Supiya* case *supra* is a good reason to strike out a defence. It is thus now time for this court to stamp its authority on the second respondent by striking out his defence.

The applicant also submits, in the second instance, in relation to the second F respondent, that the discovery that he made in the election petition, case No. HC 3616/2002 was grossly inadequate, contrary to the requirements of the law as highlighted in various cases including the following: *Wallis & Wallis v Corporation of London Assurance* 1917 WLD 116; *Durbach v Fairway Hotel Ltd* 1949 SR 115; *Supiya v Mutare District Council & Ors supra* and *Tsvangirai v Registrar General (Elections)* HH-32-03 at pp 9-15. G

The applicant submits that the Electoral Act gives the second respondent considerable functions and it is obvious that in order to fulfil those various functions he must compile a considerable amount of documentation. He also submits that it is apparent from the paucity of the documents discovered by the second respondent that he has a considerable amount of documents which he H

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A has failed to discover.

The applicant makes reference to the court order 4 in case No. HC 470/2003 issued on 12 October 2002 and served on the second respondent on 21 February 2003. The order reads:

"It is ordered:

1. That B the respondent shall effect further discovery in terms of Order 24 of the High Court Rules of the documents set out in the schedule annexed hereto within five (5) days of the date of service of this Order on the respondent."

The second paragraph relates to costs.

The schedule annexed to the order lists more than ten categories of documents C to be discovered by the second respondent. The applicant contends that the order has not been complied with. He submits that the second respondent failed to specifically answer various paragraphs in the schedule to the court order and that this failure means that there is no way of knowing whether the second respondent has made full discovery. He submits that in the circumstances the second respondent has still not made full discovery.

D The applicant also submits that para 2 of the schedule to the court order relating to the registration of voters after 10 January 2002 is not dealt with at all by the second respondent in his further discovery affidavit. He submits that this is a deliberate omission by the second respondent

because this registration was done secretly with the deliberate aim of assisting the re-election of the E first respondent.

In relation to the other documents or categories of documents listed in the schedule, the applicant submits that because of the way in which the second respondent's schedule to the further discovery affidavit is framed, the extent of compliance, if any, is unknown. He also submits that the second respondent F has chosen to ignore the strictures in the judgment case No. HH 32/2003 which sets outs in considerable detail what is required of the second respondent in relation to discovery. He contends that this failure by the second respondent to make full discovery, even when ordered to do so, emphasizes his contumacy and further adds to the argument that the only and in fact proper option for this court to adopt is to strike out his defence in the main action, that is, case No. G HC 3616/2002.

In relation to the third respondent *, the applicant submits that the discovery affidavit that he filed on 22 November 2002 was grossly inadequate, resulting in the applicant filing and serving on the third respondent, a notice to make

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further discovery. No response was received to that notice. A

On 12 February 2003, in case No. HC 471/2003, this court issued an order against the third respondent to make further discovery. It was filed and served on the third respondent on 21 February 2003. The third respondent then filed a further discovery affidavit on 6 March 2003. The applicant submits that, as with the second respondent, the third respondent has not complied with the B court's order as proper and full discovery has still not been made.

The order in case No. HC 471/2003 reads:

> "It is ordered:
>
> 1. That the respondent shall effect further discovery in terms of Order 24 of the High Court Rules of the documents set out in the schedule C annexed hereto within five (5) days of the date of service of this order on the respondent."

The second paragraph relates to costs.

The schedule annexed to the order lists 14 categories of documents to be discovered. The applicant submits that various documents are listed by the third respondent in Part 2 of the First Schedule of the discovery affidavit. D However, privilege is claimed for those documents but no reason for so claiming is given, contrary to requirement for the grounds to such claim being clearly stated. See in this regard *The Civil Practice of the Supreme Court of South Africa* by Herbstein & Van Winsen at p 594 and the cases cited therein: see also *Tsvangirai v Registrar-General (Elections)* HH-32-03 at pp 14-15. The applicant submits that, even when ordered to do so, the third respondent E has still failed to give any reasons why he is claiming privilege. Furthermore, that, in those circumstances and also bearing in mind the complete inadequacy of the documents listed in Part 1 of the Schedule, that the third respondent is guilty of gross contumacy and that, as with the second respondent, his defence in the main application in case No. HC 3616/2002 should be struck out. F

It is the applicant's contention that, if the orders he prays for are granted, then the trial in case No. HC 3616/2002 will proceed but will only be concerned with the defences raised by the first and fourth respondents.

The second and third respondents, on the other hand, contend that they have not wilfully refused to comply with the said court orders but that they have in G fact complied with all the orders that have been put in issue by the applicant.

The second respondent's response is to the following effect. He was ordered to file a discovery affidavit by 31 October 2002, which he did. The fact that he failed to disclose more documents does not mean non-compliance. It is therefore incorrect for the applicant to contend that he did not comply with the order issued by the Judge President. H

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A Although the applicant contends that the second respondent failed to comply with the order to produce the voters roll for inspection within five days, he however also acknowledges that the second respondent made an urgent application for directions within the five day period. The notice to inspect was then filed within two days of the dismissal of the application for directions.

B In response to the contention that the notice to inspect does not comply with the order as it requires the inspection to be conducted at various places and outside the five day period, the second respondent submits that in terms of r 164(2), it is clear that even where a person is legally represented, the place of inspection does not necessarily have to be the office of the legal practitioner. C Exceptions are provided in r 164(2)(b) and (c), in terms of which inspection may be conducted at the usual place of custody of a banker's books or other books of account or books in constant use for the purpose of any trade, business or undertaking or at some convenient place mentioned in the notice.

The second respondent submits that because the voters' roll is not being kept in one place but at various centres in the country, he had sought directions on D how to give effect to the order. As the application was dismissed, the second respondent gave effect to the order in the best way he could. Furthermore, it is completely impractical for the inspection to take place at the Civil Division of Attorney-General's Office (the Civil Division) due to lack of space as these are bulky documents. It is also because the voters roll is not being kept in one E place that the notice to inspect documents covers the period 10 March 2003 to 21 October 2003. It was impractical to have the inspection take place within five days. Furthermore, the voters' roll comprises bulky documents and the inspection could not have been concluded within the five day period. In the circumstances, the second respondent did not fail to comply with the court order to make documents available for inspection.

F The second respondent filed a further discovery affidavit in compliance with the order in case No. HC 470/2003. By letter dated 6 March 2003, the applicant advised the second respondent's legal practitioners in the Civil Division that one form was incorrect as there were no paragraph by paragraph responses and further argued that the further discovery affidavit was inadequate. The Civil Division replied and promised to rectify the form. But, before this G could be done, the applicant brought the present application.

The second respondent contends that he has made full discovery and that there is no basis for the allegation that there is a deliberate omission to cover up some unlawful conduct on his part. He submits that whilst in the *Supiya* case *supra* the respondent failed to comply with a court order, in this case he has H strived to comply with court orders and has never ignored same. He thus cannot

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be held to be guilty of contumacy. The second respondent also submits that A he has discovered most of the documents requested by the applicant and that those documents not disclosed do not exist. In the circumstances his defence should not be struck off.

The third respondent's response is to the following effect. He has made full discovery, contrary to the applicant's contention that he has failed to comply B with a court order dated 12 February 2003 for further discovery, in that the schedule to the order has not been complied with. He also submits that he filed his further discovery affidavit before he had seen the judgment HH 32/2003, hence his failure to give reasons for claiming privilege. In any event, the applicant is not precluded from challenging the third respondent's claim for privilege. He has thus not wilfully refused to comply with any order and the C allegation of gross contumacy is unwarranted. His defence should therefore not be struck out as there is no basis for doing so.

Both the second and the third respondents submit that this is a matter of such national importance that it should not be dismissed on a mere technicality. Furthermore, should the court find that there has been insufficient compliance, D it is within the court's discretion to condone it and put the respondents on terms. They have not failed to comply with any of the court orders and there has been substantial compliance therewith. This application should thus be dismissed with costs.

The first respondent's response is to the following effect. The effective relief sought by the applicant, that is, the striking out of the second and third E respondents' defences and default judgment against them in case No. HC 3616/ 2002 cannot be granted as a default judgment entered against the two would result in the election being set aside.

The petition is instituted against the first respondent as the winning candidate on the grounds of violence and various other corrupt practices. The applicant F seeks a declaration that the first respondent was not duly elected on this basis. The applicant also seeks the setting aside of the election on the basis that the second and third respondents did not comply with the principles of the Act, that is, improper and illegal conduct of the elections themselves.

The first respondent submits that the causes of action against the first, second and third respondents are divisible and may on their own result in the setting G of the election. He also submits that, as the causes of action against the second and third respondents emanate from s 102 of the Electoral Act, the issues may only be determined at a trial as required by s 136(1) of the Act. Furthermore, s 102(4) of the said Act is inapplicable to Presidential elections. In the circumstances it is not within the powers of this court to grant paras 1 and 2 H

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A of the applicant's draft order. The first respondent thus prays for the dismissal, with costs, of this application.

It is important to call back to mind the relief sought by the applicant in this application. It is for both respondents' opposition to the application in case No. HC 3616/2002 to be struck out and for judgment in default, with costs, to be entered in case No. HC 3616/2002 against the respondents and in favour B of the applicant.

It thus becomes important to ascertain the relief or order sought in case No. HC 3616/2002. The draft order in case No. HC 3616/2002 is in the following terms:

> "It is ordered:
>
> 1. That C the first respondent was not duly elected as the President of Zimbabwe as a result of the Presidential Elections held on 9-11 March 2002.
> 2. That General Notice 116E of 2002 by the third respondent in a Government Gazette Extraordinary dated 19 March 2020 and General Notice 118B of 2002 published by the Acting Secretary for Justice, D Legal and Parliamentary Affairs in a Government Gazette Extraordinary dated 28 March 2002 be and are hereby set aside.
>
> Accordingly, it is ordered:
>
> 1. That in accordance with s 102(2)(b) of the Electoral Act [*Chapter 2:01*] the Registrar of this Honourable Court shall forthwith give notice of E the Declaration set out in paras 1 and 2 above to the second respondent who shall forthwith publish a notice in the Government *Gazette* stating the effect of the order of this Honourable Court.
> 2. That the costs of this application shall be paid by the respondents, jointly and severally, the one paying, the others to be absolved."

It should be noted that the citation of the parties in case No. HC 3616/2002 F is exactly as it is in the present application.

As highlighted by the first respondent, the applicant instituted the election petition in terms of s 102 of the Electoral Act, which provides that an election petition complaining of an undue election of a person to the office of President, by reason of irregularity or any other cause whatsoever, may be G presented to the High Court within thirty days of the declaration of the result of the election in respect of which the petition is presented, by any person claiming to have had a right to be elected at that election or alleging himself to have been a candidate at such election.

The applicant also seeks the setting aside of the election on the basis that the H second and third respondents did not comply with the principles of the Act,

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that is, improper and illegal conduct of the elections themselves. In this regard, A s 149 of the Electoral Act is relevant. It provides:

> "An election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the High Court that —
>
> (a) the election was not conducted in accordance with the principles laid down in this Act; and B
> (b) such mistake or non-compliance did effect the result of the election."

Section 136(1) of the Electoral Act provides that an election petition shall be tried by the High Court in open court.

It appears to be clear that it is only after a trial that the High Court may C determine the issues raised by the applicant to enable it to make an order in terms of s 102(2) which provides:

> "(2) If, on the trial of an election petition, presented in terms of subsection (1), the High Court makes an order declaring —
>
> (a) that the President was duly elected, such election shall be and remain valid as if no election petition had been presented against his D election; or
>
> (b) that the President was not duly elected, the Registrar of the High Court shall forthwith give notice of that fact to the Registrar-General who shall publish a notice in the *Gazette* stating the effect of the order of the High Court."

This court is being requested to make an order in terms of s 102(2)(b) without E holding a trial as required by the Electoral Act. This court is being requested to exercise its discretion in terms of r 165(2) of the High Court Rules. The order sought in this application by the applicant, in my view, has the effect, if granted, of setting aside the election petition. Thus, if the second and third respondents' defences are struck out and judgment in default in case No. F HC 3616/2002 is entered, this court would in the event be effectively granting the order sought in the main matter, case No. HC 3616/2002. It appears to me, therefore, that this is not a proper case for the exercise of the court's discretion in the manner prayed for by the applicant.

From the whole tenor of the applicable and relevant provisions of the Electoral Act, it is in my view clear that the intention of the legislature was for a hearing G or trial to be held before the court may make any order in respect of an election. In any event, this is indeed a matter of such national importance that the order sought by the applicant should not be granted in the circumstances. Furthermore, if in fact the second and third respondents have not fully and properly discovered all documents that they should have discovered, it should, in my H

A view, still be open to the applicant to urge the trial court to invoke r 167 which provides

> "The court may, during the course of any action or proceeding, order the production by any party thereto under oath of such documents in his power or control relating to any matter in question in such action or proceedings as the court may think just, and the court may deal with such B documents, when produced, as it thinks just."

It appears very clear to me also, even if it was competent for the court to grant the order sought, of which I cannot be convinced, that, if granted, the order would affect the first respondent in a final and conclusive manner without affording the first respondent an opportunity to be heard. In my view, this could never have been the intention of the legislature.

C For the above reasons, this court is unable to exercise its discretion in the manner requested by the applicant and has to dismiss the application.

In the result, it is ordered as follows:

It is ordered:

D That the application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Hussein Ranchod & Co, first respondent's legal practitioners

Civil Division of the Attorney-General's Office, second and third respondents' legal practitioners

E *Chikumbirike & Associates*, fourth respondent's legal practitioners

* The Electoral Supervisory Commission —*Editor* H
* The Registrar-General —*Editor* H
* The Minister of Justice —*Editor*

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KATEDZA v CHUNGA & ANOR 2003 (1) ZLR 470 (H)

Citation	2003 (1) ZLR 470 (H)
Case No	Judgment No. HH-50-03
Court	High Court, Harare
Judge	Smith J
Heard	19 April 2002; 20 April 2002
Judgment	20 April 2002
Counsel	*N Machingauta*, for the applicant
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Customary law — *marriage — effect — rights of father of child of such marriage — rights not affecting mother's rights under general law* C

Family law — *child — name — child born out of wedlock — child born of customary law marriage — right of mother to exercise rights of guardianship and select name*

Headnote

The applicant was married under customary law and had a child. The birth D was registered and the child took its father's surname. The applicant separated from her husband (the first respondent) a few months after the child was born. She changed the child's surname to her own by notarial deed. She then sought to have the birth certificate changed accordingly. The Registrar-General (the second respondent) said that the father's consent was required and that the father, having been interviewed on the E matter, objected to the change.

Held, the father's rights in relation to the child were for customary law purposes only and extended only to customary law relating to status, guardianship, custody and rights of succession. The acquisition of a birth certificate, a passport or a visa cannot be regarded as part of customary law relating to the status, guardianship or custody of children. F Under the general law, and for purposes of the general law, the child was regarded as having been born out of wedlock. The mother was the sole guardian and was entitled, among other things, to select a name for the child. In terms of s 18(1) of the Births and Death Registration Act [*Chapter 5:02*], she was the "responsible parent". If she applied for the G registration of the altered surname, the Registrar-General was obliged under s 18(3) to register the change.

Smith J

Cases cited A

Dhanabakium v Subramanian & Anor 1943 AD 160

Docrat v Bhayat 1932 TPD 125

Legislation considered

Births and Death Registration Act [*Chapter 5:02*], s 18

B Customary Marriages Act [*Chapter 5:07*], s 3(5)

Case information

N Machingauta, for the applicant

Judgment

Smith J: The applicant filed this application for an order declaring that she C is the guardian of her minor child and directing the second respondent (hereinafter referred to as "the Registrar") to issue a birth certificate for the child in its new name. I granted the order sought. My reasons for granting the order are as follows. The relevant facts are not in dispute. The applicant was born in this country on 17 January 1974. Shortly after her birth, her family migrated to the United States of America where they lived for seven years. D They returned to this country in 1981, shortly after Independence, but soon after their return her father was appointed ambassador to Japan so she lived there for the next four years. She returned to this country after her father's tour of duty and attended a secondary school in Harare. Thereafter she went with her family to Italy for a year and then attended a university in Canada. After obtaining her degree, she returned to this country and started working in the E local film industry.

In May 1998, the first respondent and her family entered into an agreement which resulted in a customary union between the applicant and the first respondent. Lobola was paid to her family. Pursuant to the customary union, she lived with the first respondent for three years until they separated in April F 2000 due to incompatibility. The customary union resulted in the birth of a baby boy on 3 February 2000. On 26 May 2002, the applicant appeared before a notary public and changed her son's syrname to her own. The notarial deed that was drawn up was registered in the Deeds Office on 30 July. Thereafter, the legal practitioners applied to the Registrar for the issue of a new birth certificate in the new name of her son. The Registrar refused the application G on the basis that the consent of the first respondent was required. That resulted in the legal practitioners writing to the Registrar and pointing out that the question of the father's consent was not in issue as the child was born out of wedlock and therefore full guardianship vests in the mother. The Registrar replied, saying that the first respondent, being the father, had been interviewed

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Smith J

and said he strongly objected to the change of surname and was prepared to A fight his case in the courts. The Registrar concluded by saying that the applicant could approach the court for redress.

The contention of the applicant is that the change of name is a *fait accompli*, having been effected before a notary public. Accordingly, the function of the Registrar is simply to record what has been legally effected. He has no right B to refuse to issue the birth certificate requested. Since there was a customary union between the parties, the first respondent may have certain rights of guardianship in relation to the child, but that would only be for customary law purposes. The position under the general common law of this country is that she, being the mother, is the guardian of her child and, as such, she has the right to select a name for the child. The rights accorded to a father in terms of s 3(5) C of the Customary Marriages Act [*Chapter 5:07*] are operative at customary law only and do not take away the mother's rights under the common law.

The first respondent did not oppose the application, neither did the Registrar. However, the Registrar did file an affidavit in which he said that he would no longer insist on the consent of the first respondent and that it is up to the court D to decide what is in the best interests of the child. He did not oppose the change of name and the issuing of a new birth certificate. He concluded by saying

that the issues raised are issues of law which have very little to do with the issue of change of name which is governed by s 18 of the Births and Deaths Registration Act [*Chapter 5:02*] (hereinafter referred to as "*Chapter 5:02*").

In *Docrat v Bhayat* 1932 TPD 125 at 127, De Wet J said: E

> "Now our law does not recognise marriages by Mahommedan rites, and therefore the marriage between the applicant and his deceased wife is not considered valid according to our law. That might be an unfortunate position, but there is no moral stigma on the parties or their children. But on a legal question our courts have to consider such a marriage as nonexistent, and any issue of the marriage must be regarded as illegitimate. F That being the position here, I think it is clear that the applicant in this case has no *locus standi* at all as far as the custody of the child in question is concerned. The mother of the child was the natural guardian. If the mother were alive, and if an application were made in which both the mother and father claimed the custody of the child, the mother would undoubtedly have been entitled to succeed." G

Tindall JA, in *Dhanabakium v Subramanian & Anor* 1943 AD 160 at 166, echoed the above where he said:

> "Now though the mother, and not the father, of an illegitimate child is generally speaking, the natural guardian of the child." H

Smith J

A In Spiro's *Law of Parent and Child* 4 ed at p 452, the learned author states that the mother of a child born out of wedlock has all the rights and duties *vis-àvis* her illegitimate child which a sole parent has. He then deals with the question of the registration of its birth, saying:

> "In the first instance, the illegitimate child takes its name from its mother. The registrar shall not enter in the birth register the name of any person B as the father of the illegitimate child except at the joint request of the mother and of the person who in the presence of the registrar or assistant registrar acknowledges himself in writing to be the father of the child, any such acknowledgement being only of evidential value in respect of the question who the natural father is. It is also for the mother to assign a Christian name to her minor illegitimate child."

C It is clear from the above that the mere fact that the father's name appears on the birth certificate does not mean that he has any rights of guardianship or custody.

Section 18 of *Chapter 5:02* provides for the change of a name in any register. Subsection (3) thereof provides that where the birth of a person has been D registered in any register and the surname of the person is changed, if that person has not attained the age of 18 years his responsible parent or legal guardian may apply to the Registrar-General for the registration of the surname and the Registrar-General *shall*, on payment of the fee and on being satisfied that a notarial deed has been registered in the Deeds Register and that the change has been advertised in the *Gazette*, register the change of surname. E The term "responsible parent" is defined in s 18(1). It means, if the father is dead or the mother has been given custody or the child is born out of wedlock, the mother of the child. In all other cases, it is the father. The provisions of s 18(3) are mandatory.

In this case, the applicant's child was born out of wedlock. That means that F she is the responsible parent as defined in s 18(1) of *Chapter 5:02*. When she made the application for the change of surname to be registered and provided the necessary details, the Registrar was obliged to register the change of surname. He has no discretion in the matter. The surname of the child was changed in the manner required by s 18(3) of *Chapter 5:02*. The Registrar exceeded his responsibilities when he interviewed the father of the child. It as G not his function to make any such inquiry. It was because the Registrar failed to do what s 18(3) of *Chapter 5:02* required him to do that the applicant was obliged to come to court to get an order requiring the Registrar to carry out his functions, which are so clearly spelt out in the Act. Had the Registrar acted reasonably and responsibly, this court application would not have been H necessary. There is no ambiguity in s 18(3) of *Chapter 5:02* which requires

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Smith J

clarification. Accordingly, I considered that it was appropriate to order that the A Registrar pay the applicant's costs on the legal practitioner and client scale.

This application was dealt with whilst I was doing the Motion Roll. Case No. HC 10172/02, *Nenya v Gambakomba,* also appeared on the roll as an unopposed application. That was an application by Nenya in terms of s 4(1) of the Guardianship of Minors Act [*Chapter 5:08*]. The facts of that case are B as follows. Nenya entered into a customary union with Nyasha Gambakomba in January 1996. A child was born of that union in May 1996. The birth certificate of the child shows Nenya to be the mother and Gambakomba to be the father. The parties lived together until 1997, when they separated. The child stayed with the mother and Gambakomba emigrated to the United States of America. Nenya has enrolled the child at primary school but says that she C is unable to apply for a passport for him because there is an insistence on the part of the Registrar-General of Citizenship that the consent of the father be obtained. She therefore applied for an order granting her sole guardianship of her son. Since her son was born out of wedlock, he is regarded under the common law of this country as being illegitimate. Accordingly, Nenya is the sole guardian by operation of law. It is not necessary for that to be declared by D order of court. However, because it might assist her in her dealings with officials who do not know the law, or who are directed to apply the law as some would like it to be rather than what it is, I granted the order sought.

Subsection (5) of s 3 of the Customary Marriages Act [*Chapter 5:07*] provides as follows: E

> "A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage."

The acquisition of a birth certificate, a passport or a visa cannot be regarded F as part of customary law or custom relating to the status, guardianship and custody of children. Birth certificates are issued in terms of *Chapter 5:02* and passports are issued to citizens to enable them to exercise their rights of freedom of movement under the Constitution. Neither of these concepts are governed or affected by customary law. Therefore, s 3(5) of the Customary G Marriages Act [*Chapter 5:07*] - cannot affect the right of the mother of a child born out of wedlock to claim a birth certificate or a passport or visa for her child in her capacity of sole legal guardian of the child. The father has no say in the matter. The mother does not need to obtain his consent. If the mother of a child born out of wedlock wishes to visit another country and take her child with her, she is the one who must apply for a passport or a visa on behalf of her child H

Smith J

A as she is the sole guardian, unless of course the father has been made guardian by an order of court.

Honey & Blanckenberg, applicant's legal practitioners

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

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Source:
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MANDHU v SCOTFIN LTD 2003 (1) ZLR 476 (H)

Citation	2003 (1) ZLR 476 (H)
Case No	Judgment No. HH-64-03
Court	High Court, Harare
Judge	Garwe JP

Heard 3 October 2002; 30 April 2003

Judgment 30 April 2003

Counsel *G S Wernberg*, for the applicant
A P de Bourbon SC, for the respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Contract — *suretyship — surety — liability of — judgment debt arising out of principal debtor's failure to pay debt — surety's liability dependent* C *on interpretation of contract — contract worded so as to extend liability to all sums and to judgment debts*

Prescription — *extinctive — running of — when interrupted — surety — debt due under suretyship can prescribe independently of principal debt* D

Headnote

The applicant bound himself jointly and severally as surety *in solidium* and co-principal debtor for the payment of all sums due under a hire-purchase contract between the respondent financial institution and a transport company. The company failed to service the debts, and in 1995 the property was repossessed and the company was sued for the balance. Judgment was granted against the company in September 1999. In June E 2001 the respondent instituted proceedings against the applicant and obtained default judgment two months later. The applicant sought to have the judgment rescinded, principally on the grounds that the debt had prescribed, the debt arising in 1995 when the transport company defaulted. The respondent argued that the cause of action was the judgment debt, which had not prescribed. F

Held, that a suretyship debt can prescribe independently of a principal debt before the institution of proceedings and the running of prescription, as regards the surety, is not delayed by any personal circumstance which delayed the running of prescription against the principal debtor.

Held, further, that the issue was the effect on the applicant of the judgment G granted against the principal debtor in 1999. In the final analysis, regard must be had to the contract of suretyship and the interpretation of that contract. From the wording of the contract, it was clear the intention was not to limit the applicant's liability to the hire purchase agreement executed in 1993. Liability was extended to all sums due from time to time and to facilities to be granted in the future. A judgment debt arising H

Garwe JP

A from the failure to honour the terms of the hire purchase agreement was thus contemplated.

Cases cited

Absa Bank Bpk v de Villiers 2001 (1) SA 481 (SCA)

Ahmed v Mfg Industries S-254-96

B *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S)

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

ZESA v Dera 1998 (1) ZLR 500 (S)

Legislation considered

C Prescription Act [*Chapter 8:11*], ss 16 & 24(2)

Case information

G S Wernberg, for the applicant

A P de Bourbon SC, for the respondent

Judgment

Garwe JP: This is an application for the rescission of a default judgment D granted by this court on 8 August 2001.

The facts of this matter are as follows. On 26 June 1993, the applicant bound himself jointly and severally as surety *in solidium* and co-principal debtor for the due fulfilment of all obligations and punctual payment of all sums due from time to time in consideration of hire purchase facilities already granted or in future to be granted to Expedite Haulage (Pvt) Ltd ("Expedite Haulage"). E Expedite Haulage failed to pay in terms of its agreement with Scotfin Ltd ("the respondent"), following which the respondent repossessed the goods forming the subject of the hire purchase agreement and resold them, leaving balances outstanding. It is not clear when this happened, but Mr *Wernberg*, during oral submission, told the court that this was in 1995. Thereafter, the respondent F instituted proceedings against Expedite Haulage and on 13 September 1999 this court granted judgment in its favour. That judgment remains unsatisfied.

On 15 June 2001, the respondent then instituted an action against the applicant as surety and co-principal debtor for payment of the amounts specified in the judgment granted against Expedite Haulage. A judgment in default was then granted against the applicant on 8 August 2001. It is that G judgment which the applicant seeks to have rescinded.

The explanation proffered by the applicant for the default is that he had sold the property where service of the summons was effected and that he had since left the property. For that reason he says he did not have sight of the summons. That explanation has not been seriously challenged. Although in the agreement H of sale the seller is reflected as Haroon Abdulla there is evidence suggesting

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that the property in question was the subject of an agreement of sale. In all the A circumstances therefore, I am persuaded to hold that the explanation given for the default is acceptable.

It is agreed between counsel that the real issue is whether the applicant has a defence on the merits. It is the applicant's contention that having signed the deed of guarantee in 1993, a period of more than three (3) years had lapsed B before the respondent instituted the present proceedings. Therefore, so he argues, the respondent's cause of action had prescribed by the time a summons was issued in June 2001 against the applicant.

The respondent, on the other hand, argues that on the papers the cause of action on which applicant was sued was the judgment debt of September 1999. It was submitted that as surety to the principal debt the applicant remains C bound while the principal debt remains payable or is still due in terms of a judgment.

The issue before me can be simply stated. It is whether the suretyship debt itself had prescribed independently of the principal debt. Put another way the issue is whether the interruption of the running of prescription against the D principal debtor would have in any way affected the running of prescription against the surety in this case.

As already noted, it is the contention of the applicant, in his founding affidavit, that a period of three years had lapsed from the time the deed of suretyship had been executed and that therefore any cause of action against him had E prescribed. That position is of course not correct in law, for the reason that in terms of s 16 of the Prescription Act [*Chapter 8:11*], prescription only commences to run as soon as a debt is due. Mr *Wernberg*, for the applicant, conceded the point. In his submissions, he argued that by 1995 when the respondent re-took possession of the hire-purchase goods, prescription had started running. In short, his submission was that prescription started running F from 1995 — and not 1993 as stated in the founding affidavit. Mr *de Bourbon,* for the respondent, submitted that the applicant cannot be allowed to change the basis of his pleadings in

this fashion. Whilst I accept that there is some substance in the submissions by Mr *de Bourbon* in this regard, I am however satisfied that, in the absence of prejudice, the submission by Mr *Wernberg* can be entertained. It involves a point of law. The position is now settled that a G point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed. See *Ahmed v Manufacturing Industries* S-254-96; *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S); *ZESA v Dera* 1998 1998 (1) ZLR 500 (S). H

2003 (1) ZLR p479

Garwe JP

A On the facts, the deed of surety was executed in 1993. It was submitted during argument that by 1995 the principal debtor had defaulted in his payments and the goods forming the subject of the hire purchase agreement had been repossessed by the applicant. If this submission is correct, then prescription would have started running from 1995 and by 1998 the debt would have been extinguished as against both the principal debtor and the appellant. The B position is now established that if a principal debt is prescribed, the surety debt would be extinguished at the same time. See s 24(2) of the Prescription Act and also *Absa Bank Bpk v de Villiers* 2001 (1) SA 481 (SCA). Whether or not the principal debt had prescribed is not really an issue before me, although some comment has been made on this aspect. The respondent, in the last paragraph of its opposing affidavit, says the principal debtor filed an C application for rescission of judgment on the basis that the claim had prescribed and that the application was dismissed by Chatikobo J. No further detail has been given. The issue is whether a suretyship debt can prescribe independently of the principal debt. The position now seems settled that a suretyship debt can prescribe independently of a principal debt before the D institution of proceedings and, further, that the running of prescription, as regards the surety, was not delayed by any personal circumstance which delayed the running of prescription against the principal debtor. See *Absa Bank Bpk v de Villiers supra*. However, it is clear that in order to determine whether the suretyship debt has prescribed independently of the principal debt in any given case one must have regard to the provisions of the contract of E suretyship itself.

Looking at the matter from a different angle, the issue that arises is the effect on the applicant of the judgment granted against the principal debtor on 13 September 1999. Under Roman law, liability of a surety was dependent on a debtor without limitation and the obtaining of a judgment against a principal F debtor was a perpetual bar to a plea of prescription by a surety: see *Rand Bank Ltd v De Jager* 1982 (3) SA 418 (C) at 422. In that case, Baker J, in an exhaustive review of Roman Dutch Law authorities, came to the conclusion that the position under Roman law applied only to co-debtors *in solidium* and not to sureties. He further held that, as a general rule, if a creditor wishes to have recourse against all his solidary debtors, he must sue them all. If they have G all waived the benefits of excussion and *de duobus vel pluribus reis,* prescription starts to run in their favour as soon as summons is served on the one sued and should logically run for three years. Therefore, in order not to lose his recourse, a creditor must sue the others within those three years (at p 455D-F).

H The position now seems settled that, in the final analysis, regard must be had

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2003 (1) ZLR p480

Garwe JP

to the contract of suretyship and the interpretation of that contract. In A particular, there is need to ascertain whether the intention of the parties was to limit the liability of the surety and in particular whether such liability would extend to a judgment debt which remains unsatisfied.

In the present case, in terms of the deed of suretyship, the applicant undertook as follows: B

> "In consideration of facilities already granted or in future to be granted to Expedite Haulage (Pvt) Ltd … either by the discount of Hire Purchase/ Suspensive Sale Agreement/Lease Hire Agreements/ Acknowledgements of Debt/Memoranda of Agreement of Sales, or by the discount of Bills of Exchange and/or Promissory Notes or by any other means whatsoever I bind myself jointly and severally as surety *in solidium* and co-principal C debtor for the due fulfillment of all his/their obligations and the punctual payment of all sums due by them from time to time, and I expressly renounce the benefits of division and excussion …"

From the wording of the deed of suretyship, it is clear the intention was not to limit the applicant's liability to the hire purchase agreement executed in 1993. Liability is extended even to

acknowledgements of debt, or facilities D granted "by any other means" and the obligation to pay extends to all sums due from time to time. Liability also extended to facilities to be granted in future. It seems to me that a judgment debt arising from the failure to honour the terms of the hire purchase agreement was contemplated.

Accordingly, my finding is that the applicant remains liable in terms of his E contract of suretyship to pay sums arising out of a court judgment. The applicant therefore has no defence in this regard. He has no defence to the claim.

Accordingly, the application be and is hereby dismissed with costs.

P Chiutsi, applicant's legal practitioners. F

Gill, Godlonton & Gerrans, respondent's legal practitioners

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ZAPCHEM DETERGENT MANUFACTURERS CC T/A STARCHEM v POLARIS ZIMBABWE (PVT) LTD 2003 (1) ZLR 481 (H)

Citation	2003 (1) ZLR 481 (H)
Case No	Judgment No. HH-67-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	20 March 2003; 30 April 2003
Judgment	30 April 2003
Counsel	*P Nherere,* for the applicant *A Brooks,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Delict** — *passing off — goodwill — right to — product manufactured by one person in one country but sold or marketed exclusively by another person in another country — meaning of goodwill — necessarily associated with an undertaking — limited circumstances where trader can acquire goodwill in respect of goods manufactured by another*

Headnote

D The respondent company, a Zimbabwean company, imported detergent powder from a manufacturer in South Africa, the predecessor company to the applicant, and marketed and

distributed the powder in Zimbabwe. Initially the powder was sold in packaging supplied by the manufacturer but later locally printed packaging was used. The packaging indicated E that the manufacturer was the applicant. A dispute arose between the parties and the respondent stopped obtaining detergent from the applicant; it changed to another supplier from another country and continued to market and sell detergent from that supplier in the packaging it had used before. The applicant sought an interdict, which the respondent opposed on the grounds that it and not the respondent had the necessary goodwill F in the product.

Held, that the question was who has the right to the goodwill of a product manufactured by one person in one country and sold or marketed almost exclusively by another person in another country.

Held, further, that goodwill, the attracting force of an undertaking, is determined by a multiplicity of factors – the reputation of the undertaking, G the fact that it is well-known, its creditworthiness, but more particularly the undertaking's locality, the personality of the entrepreneur or another person such as an employee who is connected with the business. However goodwill is created or however it comes into existence, it cannot be created or come into existence independently of or outside the H context of an undertaking.

Chinhengo J

Held, further, that the only situation in which a trader in the position of the A respondent can acquire goodwill in respect of a product which is manufactured by another but sold by itself is where such a person is not a mere conduit for the goods of another but markets its own product under its own name. This was not the case here, as the packaging indicated that the goods were manufactured by the applicant. B

Cases cited

Capital Estate and General Agencies (Pty) Ltd & Ors v Holiday Inns Inc & Ors 1977 (2) SA 916 (A)

Kinemas Ltd v African Theatres Ltd 1928 WLD 100

Pick-N-Pay Stores Ltd v Pick-N-Pay Superette (Pvt) Ltd 1973 RLR 244 (G); 1973 (3) SA 564 (R) C

Premier Trading Co. (Pty) Ltd & Anor v Sporttopia (Pty) Ltd 2000 (3) SA 259 (SCA)

Slenderella Systems Inc of America v Hawkins & Ors 1959 (1) SA 519 (W)

Tribac (Pvt) Ltd v Tobacco Marketing Board 1996 (2) ZLR 52 (S) D

Case information

P Nherere, for the applicant

A Brooks, for the respondent

Judgment

Chinhengo J: The applicant, Zapchem Detergent Manufacturers CC E trading as Starchem, (hereinafter referred to as "Zapchem"), is a foreign company carrying on its business from 33 Brooklyn Road, Jacobs, Durban, South Africa. It is a successor company to Starchem Manufacturing (Pty) Ltd (hereinafter, referred to as "Starchem"). Zapchem manufactures two types of detergent powder known as "Energy Automatic" and "Energy Micro" (hereinafter collectively referred to as "the detergent powder") under the F trademark ENERGY. The respondent, Polaris Zimbabwe (Pvt) Ltd (hereinafter referred to as "Polaris") is a distributor and manufacturer of home care products. It repacks and distributes certain home care products and manufactures and distributes certain others.

The facts in this case are largely not in dispute. Those facts which are in dispute are not very relevant to my decision. G

Zapchem averred that it has exported the detergent powder to Zimbabwe from 1995. To do this it appointed a local company, New Group (Pvt) Ltd, as its sole agent for the importation of the detergent powder. In 1998, a company known as Woodoc (Pvt) Ltd (now known as New-wood Holdings (Pvt) Ltd and hereinafter referred to as "Woodoc") took over from New-Group (Pvt) Ltd, the H

Chinhengo J

A agency for the detergent powder in Zimbabwe. Woodoc had one customer in Zimbabwe, namely Polaris. All the detergent powder imported into Zimbabwe by Woodoc was intended to meet and did meet only the orders placed by Polaris. Polaris initially purchased from Woodoc not only the detergent powder but also the boxes into which the powder was to be packed. Polaris packed the detergent powder into the boxes bought of and supplied by B Zapchem through Woodoc and sold the packed detergent powder to wholesalers and retail outlets in Zimbabwe. It purchased, between 1997 and 1999, about eight to ten thousand kilograms of the detergent powder annually. Its orders were placed with Woodoc twice per year and the stocks, once purchased, would, according to Zapchem and Woodoc, last between four and five months before another order was placed.

C Although Zapchem said that it started to export the detergent powder to Zimbabwe in 1995, this was disputed by Polaris which stated that a test run for the detergent powder was carried out in 1997 and, after it proved successful, Polaris then purchased the detergent powder for sale for its own account. That this may be so seems to me to be supported by Annexure R4, D being a memorandum dated 11 February 1997 issued to prospective customers by Polaris to test the market. Annexure R4 is not however conclusive proof that the detergent powder had not been sold in Zimbabwe before that date. This dispute of fact is not really material to my decision. I think that I can safely accept that Zapchem exported the detergent powder to Zimbabwe from 1995 and that the structured marketing of the detergent powder was properly done E by Polaris as from 1997.

It seems that the parties conducted their business smoothly until September 1999. In that month, Polaris indicated that the cost of importing the packaging from South Africa was too high and that the cost of the detergent powder could be reduced if the packaging was locally manufactured. It is in dispute between F the parties what exactly happened leading to the local manufacture of the boxes into which the detergent powder was eventually to be packed. Zapchem averred that it was advised by Woodoc that Polaris had proposed to manufacture the boxes locally in order to do away with customs duty on the packaging material. It averred that after further exchanges it agreed to the local manufacture of the boxes but on condition that a disclaimer was placed on the boxes that G the detergent powder was

> "Packed in Zimbabwe under authority of the licensed owners and distributors of Energy products by Polaris Zimbabwe (Pvt) Ltd."

Zapchem averred that it was satisfied that the proposal had been agreed upon on its terms. In September 1999, it supplied the detergent powder without the H packaging material or boxes. Contrary to Zapchem's assertion, Polaris averred

Chinhengo J

that it had no obligation to purchase the boxes from Woodoc and it did not A have to seek Woodoc or Woodoc's principal's permission to manufacture the boxes locally. It however admitted that it was told of the requirement to place the disclaimer on the locally manufactured boxes. It averred that whilst it would have had no objection to placing the disclaimer on the boxes, it required confirmation that Zapchem owned the trademark ENERGY in Zimbabwe and B that Woodoc was Zapchem's sole registered licensed user of the name or trademark ENERGY. Zapchem averred that it gave samples of the boxes to Polaris for local manufacture but Polaris disputed this and stated that only computer generated colour prints of the proposed material were sent to it. Polaris averred further that the confirmation it had sought was not given. To it this was understandable because from its own research Zapchem had not C registered "ENERGY" as its trademark in Zimbabwe nor was there any documentary proof that Woodoc was the licensed user of the trademark ENERGY. Again, whatever actually happened is not material to the determination of this matter. What is not in dispute, and that is material to my decision, is that Polaris manufactured the boxes locally and packed the detergent powder for local sale where Zapchem believed that its conditions D had been met and Polaris believed that there was no need to be authorised to produce the boxes locally as in any case Zapchem was not the registered owner of the trademark ENERGY in Zimbabwe, nor was Woodoc the licenced user of the trademark. What is also not in dispute is that the locally manufactured boxes were a replica of Zapchem's boxes: the get-up was the same and so was the trademark or trade name. E

It would appear that the present dispute arose because Polaris stopped buying Zapchem's detergent powder in September 1999. For a while thereafter, Polaris continued to sell the remaining stocks of the detergent powder and then imported a different detergent powder from an Austrian company and packed it in the same boxes in which it had packed Zachem's detergent powder F and sold it to the Zimbabwean consumer. Zapchem did not give any reason why Polaris stopped purchasing its detergent powder. I was left to speculate as to the reason. The reason which may be inferred from the affidavit deposed for Zapchem is that a dispute over Polaris's failure to place the disclaimer on the boxes as required by Zapchem had arisen. Polaris's reason for ceasing to purchase from Zapchem was that Woodoc had changed the payment terms G from requiring Polaris to pay only a third of the value of the detergent powder upon delivery, a third of the value after sixty days, and a third of the value after ninety days, to requiring it to pay seventy *per centum* of the value of the detergent powder upon delivery. Polaris averred that the new payment terms became burdensome to it because of the shortage of foreign currency in H

Chinhengo J

A Zimbabwe and so it decided to import the Austrian detergent powder because the payment terms were easier. Polaris did not advise Zapchem that it was purchasing Austrian powder and selling it in the same boxes into which it had packed Zapchem's detergent powder. What started off as a suspicion on the part of Zapchem that Polaris was no longer selling Zapchem's detergent powder was confirmed in December 2001 when Polaris admitted that it was B packing the Austrian detergent powder in the same boxes in which it had packed Zapchem's detergent powder. In this application, therefore, Zapchem sought an order:

(a) interdicting and restraining Polaris from passing off the Austrian detergent powder as being that of, or associated with, Zapchem; C

(b) interdicting and restraining Polaris from using the trademark ENERGY in relation to detergent powder other than the detergent powder manufactured by or with the authority of Zapchem;

(c) restraining Polaris from using Zapchem's ENERGY get-up or any get-up which is confusingly similar to Zapchem's ENERGY get-up in relation to any detergent powder other than Zapchem's detergent powder; D

(d) requiring Polaris to deliver up to Zapchem any packaging, advertising or promotional material, business stationery or other documents in the possession of or under the control of Polaris bearing the trademark ENERGY or bearing Zapchem's get-up.

Zapchem also sought an order of costs against Polaris.

E The order sought, as is apparent, is mainly prohibitory but it is also mandatory in some respect.

Polaris's contention in opposing this application is that it purchased the detergent powder and, initially, the boxes from Woodoc, packed the powder and sold it using its own marketing skills and resources. As such, it contended F that any goodwill or reputation attaching to the detergent powder is associated with it and not with Woodoc or Zapchem, both of which did not sell the detergent powder in Zimbabwe. Polaris in fact averred that it did not have any direct dealings with Zapchem and that its dealings with Woodoc were purely as between seller and purchaser such that the entity known in Zimbabwe and associated with the detergent powder was itself and not Woodoc or Zapchem.

G There is no doubt at all that Zapchem is the manufacturer of the detergent powder. It also manufactured the boxes or packaging material into which the detergent powder was packed. The trade name ENERGY and the ENERGY get-up as appears on Annexure FJ1 for both ENERGY AUTOMATIC and ENERGY MICRO were associated with Zapchem's product. Polaris did not H dispute that it imported and packed a third party's detergent powder (the

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Chinhengo J

Austrian detergent powder) into the same boxes bearing Zapchem's trademark A or trade name and its get-up. In addition, Polaris did not dispute that there was a possibility that the Zimbabwean purchasing public might be misled or deceived into believing that they were buying Zapchem's product when in fact they were buying the Austrian detergent powder. The issue, to me, seems to

be simply whether Polaris is passing off the Austrian detergent powder (its detergent powder) as being that of or associated with Zapchem. B

The law with regard to passing off is clear. That wrong is committed where one person represents that his merchandise is that of another or that it is associated with that of another and that representation is reasonably likely to result in members of the public being confused into believing that the business of the one is, or is connected with, that of another: see *Capital Estate and General* C *Agencies (Pty) Ltd & Ors v Holiday Inns Inc & Ors* 1977 (2) SA 916 (A) and *Premier Trading Co. (Pty) Ltd & Anor v Sporttopia (Pty) Ltd* 2000 (3) SA 259 (SCA). The question whether or not there was, in fact, a passing off does not really arise. Once it is determined which of the parties owns the goodwill, then the fact of passing off is accepted. I have, therefore, to examine the question D whether Polaris acquired the goodwill associated with the detergent powder in Zimbabwe so as to become entitled to ride on or take advantage of it.

The position is that, at least from 1997, the detergent powder was sold to the public in Zimbabwe by Polaris only. Woodoc or Zapchem did not sell the product directly to the public in Zimbabwe. The question here is whether it is Polaris which owns the goodwill associated with the detergent powder or that E that goodwill is owned by Zapchem. There is no dispute as to whether goodwill or reputation has attached to the detergent powder. What is in issue is whether the detergent powder is associated with Polaris or with Zapchem and *ipso facto* the goodwill.

Polaris did not argue its case as a challenge to Zapchem's *locus standi.* In my F view, its opposition is, in substance, based on exactly that: a challenge to Zapchem's *locus standi* to institute an action on the ground of passing off. The question which must be answered in the first place is who has the right to the goodwill of a product manufactured by one person in one country and sold or marketed almost exclusively by another person in another country. I must mention in this regard that it is also not in dispute that Zapchem has not G registered the trademark ENERGY in Zimbabwe. It has, however, applied for registration of the trademark in its name. That application is still pending. Polaris has also applied to register the trademark ENERGY as its own. Its application has been opposed by Zapchem. The application is also pending. Both parties have conceded that the non-registration of the trademark is immaterial to the decision I have to make on this application. I agree because H

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A the issue before me is, as summarised in the applicant's heads of argument, simply

> "Whether or not it was the applicant or the respondent who had the goodwill in the product and the packaging get up."

In *Kinemas Ltd v African Theatres Ltd* 1928 WLD 100, it was held that the B owner of the goods or the person who has propriety rights in the goods or the assignee of the goods has the *locus standi* to sue for passing off if his or her rights are infringed by the act complained of. As the issue of *locus standi* was not at all raised by any of the parties, I will assume that Zapchem has the *locus standi* to institute these proceedings. It may appear that by making this assumption I have pre-empted the decision I have to make. That is not quite so. C Polaris's argument is that Zapchem has not acquired the goodwill in the detergent powder because it has not only not sold the product in Zimbabwe but also that if that goodwill is attached to any entity it would be Starchem.

Polaris took issue in its heads of argument with Zapchem being a successor company to Starchem. It did not, however, take issue with this fact in its opposing affidavit and as such it would be inappropriate to raise that issue in D the heads of argument. No opportunity was given to Zapchem to prove that it is the legal successor to Starchem. I will therefore accept as proved fact that Zapchem is the legal successor to Starchem, and that it is the manufacturer of the detergent powder.

I will now deal with the contentious issue whether a trader in the position of E Polaris can acquire the goodwill in a product that it does not produce but in respect of which it is the exclusive vendor in a country other than the country of manufacture. The facts in this case are different from the facts in *Slenderella Systems Incorporated of America v Hawkins & Ors* 1959 (1) SA 519 (W). In *Slenderella,* the applicants had not traded in South Africa or conducted any business therein at all and the court came to the conclusion that the applicant F could not be protected against an alleged passing off. In coming to this conclusion, the court however, accepted as the position at law that a

person who has sold his merchandise in the market can be protected. In this regard, it stated at 521A-D the following:

> "The court will protect the right of property existing in another in regard G to the name or goodwill enjoyed by that other in respect of a trade or goods. That right of property may be enjoyed by a *peregrinus* but only, it would seem, where that *peregrinus* has a right of property in regard to his name or goods within the jurisdiction … It is not necessary that the *peregrinus* should actually carry on business in the jurisdiction in which he seeks relief. It is sufficient if his goods are sold on the market within the jurisdiction and have thereby given him a right of property therein in H a reputation, name or goodwill attaching to the goods or business."

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The decision in *Slenderella*'s case was followed in *Pick-N-Pay Stores Ltd* v A *Pick-N-Pay Superette (Pvt) Ltd* 1973 (3) SA 564 (R).

The position in this case is that Zapchem traded, through its agents in Zimbabwe — through New Group (Pvt) Ltd initially and later through Woodoc. The detergent powder was exported into Zimbabwe by Zapchem for delivery to Woodoc. Polaris then purchased the detergent powder from B Woodoc and sold it to wholesale and retail outlets in Zimbabwe. Quite obviously, Zapchem sold the detergent powder in Zimbabwe and therefore met the requirements of the *dictum* in *Slenderella supra.*

It is possible to look at the question which has arisen in this case from a different angle. Is goodwill inseparable from the undertaking which manufactures the goods in issue or can it be acquired by virtue only of the C marketing of the product as contended by Polaris? There is an informative analysis by the authors of *Unlawful Competition,* Van Heerden & Neethling at pp 94-100 under the heading "Right to goodwill as immaterial property right". What I understand from the learned authors' analysis is that goodwill, the attracting force of an undertaking, is determined by a multiplicity of D factors: the reputation of the undertaking, the fact that it is well-known, its creditworthiness, but more particularly the undertaking's locality, the personality of the entrepreneur or another person such as an employee who is connected with the business (at p 96). The analysis made by these authors boils down to the proposition that however goodwill is created or however it comes into existence, it cannot be created or come into existence independently E of or outside the context of an undertaking. I agree with this proposition. The boxes into which Polaris packed or packs the detergent powder or the Austrian powder, as the case may have been, clearly indicated that the manufacturer of the detergent powder was Starchem. Although it was not clear from the evidence whether the boxes manufactured locally at the instance of Polaris indicated that the detergent powder was manufactured by Starchem, what is F however evident, and Polaris did not make any averment to the contrary, is that at no stage was it indicated on the boxes that Polaris was the manufacturer or in any way connected with the detergent powder. This means that Polaris did not at any stage market or sell the detergent powder as its own product. Without any indication on the boxes that Polaris was the manufacturer of the G detergent powder it is difficult to see how the Zimbabwean purchasing public would have associated the detergent powder with Polaris. The original boxes into which Polaris packed the detergent powder were clearly marked "*Starchem Manufacturing (Pty) Ltd, 14 Pink Street, Isithebe (032) 459 1720*" and "*Manufactured by Starchem Manufacturing, 14 Pink Street Isithebe*" to clearly indicate who the manufacturer of the product was. H

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A Polaris averred that if the goodwill did not accrue to it, it, at best for Zapchem, accrued to Starchem. Having held that Zapchem is the legal successor to Starchem, I have to accept that the goodwill accruing to Starchem accrued to Zapchem as legal successor.

To sum up, in arriving at the decision that the goodwill in respect of the detergent powder accrued to Zapchem, I have necessarily had to reject B Polaris's contention that the goodwill attached to it. The only situation in which a trader in the position of Polaris can acquire goodwill in respect of a product which is manufactured by another but sold by itself is postulated in *Unlawful Competition op cit* at p 168 where the learned authors state:

> "The issue in question frequently enjoyed the attention of the courts in C regard to *parallel importation*. A trader who has the sole right to sell and distribute in South Africa a product which is packed by a foreign

manufacturer under his own trade name, and who sells and distributes the product completely unaltered without adding anything to the name or getup, may not sue on the ground of passing off if a rival trader imports and distributes the product in the same get-up. Since the trade name and get D up distinguish the manufacturer's business and products, only the manufacturer, and not the distributing agent, acquires the right to the distinctive mark. On the other hand, where such agent (bare licensee) is not "a mere conduit for the goods of another", but "markets its own product under its own name", he in principle has *locus standi* to institute an action for passing off. In this case, the bare licensee acquires his own right to the distinctive mark."

E In my view, Polaris, though not an agent but outright purchaser of Zapchem's product, is in no different position to the agent or bare licensee referred to in the above passage who does not market the product in its own name. It is a "mere conduit for the goods of another". Goodwill cannot exist in the air. It exists in the context of the undertaking which produces the goods to which the F force of attraction relates. I am quite satisfied that the goodwill created in Zimbabwe is that of Zapchem as the manufacturer of the detergent powder and as successor to Starchem. Polaris did not sell the detergent powder as its own product or make it apparent in any way that the detergent powder was its own. How then could it have been associated with the detergent powder and the goodwill flowing from its sale in Zimbabwe? All that Polaris did was to pack G Zapchem's detergent powder into Zapchem's boxes and sell it. Later, it packed the Austrian detergent powder in boxes bearing Zapchem's trade name and get-up and sold it to the public. In this sense it represented that the Austrian detergent powder (which is Polaris's own product for the present purposes) is the detergent powder manufactured by or associated with H Zapchem. Polaris clearly passed off its product as that of Zapchem or

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Chinhengo J

associated with Zapchem and thereby committed the wrong of passing off. A

The issue in this application was, as I have already pointed out, whether the goodwill attached to Zapchem or to Polaris. There was no argument whether or not any goodwill had been created in Zimbabwe. In fact it was commonly accepted that the detergent powder had acquired a reputation in this country. Having resolved that the goodwill attached to Zapchem, there is no longer any B impediment to a finding in favour of Zapchem.

Although fault in the form of intent or negligence is not a necessary requirement for granting an interdict, in this case, Polaris intentionally passed off its product as that of Zapchem. That to me is clear from its having simply packed the Austrian detergent powder into the boxes bearing Zapchem's trademark or name and its get-up. In such a case, there is every justification to grant an C interdict. It is not a requirement that the applicant for an interdict in a case such as this should show that he has actually been prejudiced or to prove that any potential customer has actually been deceived or confused because what the applicant must establish is a reasonable likelihood of deception or confusion on the part of the purchasing public. As authority for this, see *Unlawful* D *Competition op cit* at pp 194-195 and the cases there cited. I am satisfied that the applicant has met all the requirements for granting an interdict: a clear right, an injury reasonably apprehended and the absence of similar protection by other ordinary remedy as was laid down in *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S). In the result, there will be an order in terms of the draft order attached to the founding affidavit. E

Honey & Blanckenberg, applicant's legal practitioners

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

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MASULANI v MASULANI & ORS 2003 (1) ZLR 491 (H)

Citation	2003 (1) ZLR 491 (H)
Case No	Judgment No. HH-68-03
Court	High Court, Harare
Judge	Makarau J
Heard	26 February 2003; 30 April 2003
Judgment	30 April 2003
Counsel	*SD Jairosi*, for the applicant Miss *NV Soza*, for the first respondent *J Tomana*, for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administration of estates — *executor — appointment — who may be* C *appointed — surviving spouse — eligible for appointment but not having absolute right to be appointed*

Legal practitioner — *conduct and ethics — duty of confidentiality to client — extent of duty — applies even after client has withdrawn from legal practitioner*

D **Practice and procedure** — *judgment — by consent — setting aside of judgment — principles to be applied before such judgment will be set aside – no difference whether judgment granted in terms of rules of court or under common law*

Headnote

The confidence of a client is absolute and must be preserved by the legal E practitioner. Confidentiality between a client and his legal practitioner is much wider than privilege, which is a concept of the law of evidence. Information that may not be privileged for the purposes of the law of evidence must be kept confidential by the legal practitioner to maintain the integrity attaching to the office of the legal practitioner. The confidentiality reposing in a legal practitioner remains even after a client F has withdrawn from the legal practitioner, for whatever reason. Where a legal practitioner is made a party by his former client, he should not disclose information that is not germane to his defence.

An application to rescind a judgment given by consent enjoins the court to have regard to:

(a) the G reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(b) the *bona fides* of the application for rescission; and

(c) the *bona fides* of the defence on the merits of the case which *prima facie* carries some prospects of success; a balance of probability need not be established.

Makarau J

Too much emphasis should not be placed on any one of these factors. A They must be viewed in conjunction with each other and with the application as a whole. A very strong defence on the merits may strengthen an unsatisfactory explanation. Overall, though, the applicant bears the onus of proving that he is entitled to the indulgence sought, as against the public policy interest that there is a need for finality in litigation. B

The same considerations apply whether the judgment was granted in terms of the rules or at common law. To distinguish between the two forms of judgment is to make a distinction without a difference. On both cases, the court will only grant a judgment at the behest of the parties or their legal representatives. Consent might have been given orally or in writing. C

Where a person dies without leaving a will or codicil in which an executor is appointed, the Master must call a meeting at which he appoints a fit and proper person to act as executor. The Master has a discretion to choose from a pool of persons set out in s 29A of the Administration of Estates Act [*Chapter 6:01*]. A surviving spouse is eligible for appointment as executor dative by the Master but does not have an absolute right to be D appointed.

Cases cited

Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (1) ZLR 356 (H)

Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (2) ZLR 488 (S) E

Roland & Anor v McDonnell 1986 (2) ZLR 216 (S)

Washaya v Washaya 1989 (2) ZLR 195 (H)

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 25 & 29A F

High Court Rules 1971 (RGN 1047 of 1971), r 56

Case information

SD Jairosi, for the applicant

Miss *NV Soza*, for the first respondent

J Tomana, for the second respondent G

Judgment

Makarau J: On 22 August 2001, the applicant filed this court application seeking an order setting aside the consent order granted in case No. HC 5814/ 01 on 9 July 2001. She also prayed that the first respondent pays the costs of the application on the scale that pertains between a legal practitioner and a client. H

Makarau J

A The first and second respondents opposed the application. The fourth respondent did not file any papers but wrote to the Registrar, undertaking to stand by the judgment of the court.

The facts giving rise to this application are as follows.

The late Lovemore Masulani passed away on 16 April 2000. At an edict B meeting convened by the third respondent [1] the applicant was appointed executrix dative in the estate. The applicant then appointed the fourth respondent as her agent in winding up and representing the estate.

Meanwhile, the first respondent was also appointed as executor dative in the same estate at the magistrates' court. This was in the absence of and without the knowledge of the applicant.

C On 15 June 2001, the first respondent approached this court by way of an urgent chamber application under case No. HC 5814/01, citing, as respondents, the applicant and the Deputy Sheriff, Harare. In the chamber application, the first respondent sought an order compelling the applicant to return to him a certain vehicle and, that, pending the finalisation of a distribution plan in the D estate, he be allowed to retain the property belonging to the estate.

The application was opposed. In due course, it was set down before a judge in chambers.

Before hearing the matter, the learned judge referred the application to the third respondent, who wrote to the Registrar giving his opinion in the matter. The third respondent was of the view that he could not file a report in terms E of the rules as he had neither been served with the application nor

cited in the application as a party. In his letter to the Registrar, the third respondent however wished the following to be brought to the attention of the judge:

> "It is clear that there is a tussle between the spouse and relatives for the control of the estate. The impartiality of Fanuel Masulani is very much in F doubt given the background of the matter and the general content of his affidavit. Whether Margaret was separated from her husband at the time of death or not was beside the point. She remained a wife of the deceased and was entitled to be consulted on matters of appointment and administration of the estate. Whether Margaret was aware of the estate at the magistrate court or not remains to be seen.
>
> G From my own analysis, both parties are not being honest to each other and I suggest that the court sets aside Fanuel's appointment after which I will call for another meeting at which a neutral executor will be appointed."

At the hearing of the chamber application, it was ordered by consent that the appointment of Fanuel Masulani as executor dative in the estate of the late

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Makarau J

Lovemore Masulani be set aside. It was also ordered by consent that the A appointment of the applicant be set aside. The third respondent was directed to appoint forthwith one Richard John Chimbari of R.J.C. Executor Services, Harare, as executor dative in the estate. The costs of each party were to be paid from the estate.

The applicant now seeks to have that consent order rescinded on the basis that B her legal practitioner did not have her authority to agree to the terms of the order.

In terms of r 56 of the High Court Rules, 1971, a judgment given by consent under the rules may be set aside and the applicant given leave to prosecute or defend his claim. Such leave shall be granted on good and sufficient cause. C

It is common cause that the consent judgment in the application before me was not granted in terms of the rules. The parties appeared before a judge in chambers and indicated the terms of the consent order to the judge orally. No formal document was signed and filed by the parties, embodying the consent order. Technically, the consent order in the application before me was not granted in terms of the rules. It was granted at common law: see *Washaya* v D *Washaya* 1989 (2) ZLR 195 (H) at 199F.

It would appear to me that the fact that a consent judgment was granted in terms of the rules or at common law is of no importance when considering an application to set it aside. This court and the Supreme Court have applied the same considerations to set aside a consent judgment granted in either circumstance: see *Washaya v Washaya supra and Georgias & Anor* v E *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S).

It does appear to me that to distinguish between a consent order granted in terms of the Rules from one granted at common law is indeed to make a distinction without a difference. In both cases, the judge or court will only proceed to grant a consent judgment at the behest of the parties or their legal F practitioners. The behest may be in writing and signed by the parties or their legal practitioners, or may be made orally during argument or during a trial. In both instances, the judge or court will be relying on the submissions of the parties or their legal practitioners that a settlement has been reached in the matter and a consent order may be granted. In this regard, it may be worth considering amending r 56 so that it applies to all consent judgments, simply G to put it beyond doubt that, in both instances, the court may set aside a judgment given by consent on good and sufficient cause.

The law relating to the criteria that the court should take into account when considering an application to set aside a judgment given with the consent of the parties was, in my view, clearly set out by Gubbay CJ in *Georgias & Anor* H

Makarau J

A v *Standard Chartered Finance Zimbabwe Ltd supra.* Citing with approval the decision in *Roland & Anor v McDonnell* 1986 (2) ZLR 216 (S), and rejecting the criteria used by Greenland J in *Washaya v Washaya (supra)* as being far too restrictive, this is what he had to say at pp 492H-493A:

"But, with respect, he erred in ruling that an applicant need show only that he did not consent to the order. Indeed, the contrary was decided by this B court in *Roland & Anor v McDonnell* 1986 (2) ZLR 216 (S). It was there laid down that a judgment given by consent may be set aside on 'good and sufficient cause'; an inquiry to be determined in accordance with the same principles as are applicable to the grant of the indulgence of rescission of a judgment given by default.

The adoption of those principles to an application to rescind a judgment C given by consent enjoins the court to have regard to:

(a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(b) the *bona fides* of the application for rescission;

(c) the *bona fides* of the defence on the merits of the case which *prima* D *facie* carries some prospects of success; a balance of probability need not be established."

The learned Chief Justice proceeded to observe that, as is the situation in an application for the setting aside of a default judgment, too much emphasis should not be placed on any one of the above factors. They must be viewed in conjunction with each other and with the application as a whole. A very strong E defence on the merits may strengthen an unsatisfactory explanation. In considering the application before me, I shall be guided by this precedent.

Needless to say, the onus is upon the applicant to move the court to grant the indulgence sought. The judgment will not be set aside for the mere asking.

While this court in *Georgias & Anor v Standard Chartered Finance Zimbabwe* F *Ltd* 1998 (1) ZLR 356 (H) and the Supreme Court in the same case on appeal, considered the approach taken by Greenland J in *Washaya v Washaya supra* as far too restrictive, I do not understand either court to have been in material disagreement with Greenland J's approach as to the onus that rests on an applicant seeking to set aside an order granted with the consent of the parties. Regarding the onus that rests on such an applicant, Greenland J had this to say:

G "It seems to me that where the court is satisfied that a legal practitioner has the authority of his client to consent to judgment, the client will be bound by such consent and the court will visit on the client a heavy onus before rescinding the judgment."

By heavy onus, I do not understand the learned judge to have meant that the H applicant has to prove his case on any test other than on a balance of

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probabilities. In my view, the applicant bears the onus of proving that he or she A is entitled to the indulgence sought, against the interests of public policy that there is need to see finality in litigation. In this regard, the applicant must show that the merits of his or her application far outweigh the interests of the public policy. This appears to me to have been the approach that that was adopted in *Roland & Anor v McDonnell supra* where at p 226G Dumbutshena CJ had this to say: B

"The court has also to consider the defendant's prospects of success at the trial and the question of public policy, that is, the need to reach finality in litigation: see *S v Franco & Anor*; *S v Lasovsky Brothers & Ors* 1974 (4) SA 496 (R, AD) at 501E-F and *Arab v Arab* 1976 (2) RLR 166 (A) at 172E. In the instant case, all that was required of the defendant in his C application for rescission was to show that with the averments in his affidavits, if established at the trial, he would succeed. It was therefore important to establish whether his defence had any prospects of success. If he was unlikely to succeed because of the principle of public policy, then his application must fail."

Having laid out what I understand to be the law on how to consider D applications such as the one before me, I now turn to consider whether the applicant is entitled to the indulgence she seeks.

Regarding the circumstances under which the consent judgment was granted, the applicant makes a bald statement that her legal practitioner had neither authority nor instructions from her to consent to the judgment on her behalf. She then goes on to show, in detail, how the appointment of the first E respondent as executor to her late husband's estate should not have been made in the first instance, as he is not the deceased's next of kin, being a half brother to the deceased. She proceeds to use the alleged inappropriateness of that appointment to show that her own appointment should not have been set aside.

I have some difficulty in responding favourably to the applicant's submissions F in this regard. It appears to me that for an applicant to succeed in having a consent order set aside, he or she must

place before the court the full circumstances leading to the consent order so that the court may determine whether or not the explanation is reasonable. In my view, the position of such an applicant is similar to that of an applicant applying for a judgment given in default to be set aside. The applicant in the latter application is required to give G the details leading to the non-appearance or non-filing of a pleading resulting in the default judgment being granted. As it is has been held to be insufficient in the latter application to simply aver that one was not in wilful default, so in my view, it is insufficient in the former to simply aver that the applicant did not give his or her consent to the order. The applicant needs to go further and H

Makarau J

A place before the court facts upon which it can be found that that he or she did not consent to the order.

Despite the commendable efforts by Mr *Jairosi* in oral argument to persuade me otherwise, in my view the applicant's case is deficient in that, in her founding affidavit, she does not place before me facts upon which a finding can be made that she did not consent to the order when it was entered into.

B It is trite that an application falls or succeeds on the basis of the contents of the founding affidavit.

The second respondent [2] has filed an opposing affidavit in which he explains the circumstances leading to the granting of the consent judgment. Implicit in his affidavit is the belief on the part of the second respondent that he was acting C within the scope of his mandate in representing the best interests of the estate when he agreed to the terms of the consent order. In the absence of facts placed before me by the applicant to the contrary, I cannot find that the second respondent exceeded his mandate.

I, however, wish to make an observation on the contents of the affidavit of the D second respondent.

It is my view that the applicant erred in citing the second respondent as a party to the proceedings. While this may be so, it is my further view that the second respondent breached the duty of confidentiality between client and legal practitioners by deposing to the affidavit in the manner and in the detail that he did. Information highly prejudicial to the applicant was deposed to and/or E attached to the affidavit and was made available not only to the court but to the other respondents.

The confidence of a client is absolute and must be preserved by the legal practitioner. Confidentiality between a client and his legal practitioner is much wider than privilege, which is a concept of the law of evidence. Thus, F information that may not be privileged for the purposes of the law of evidence, must be kept confidential by the legal practitioner to maintain the integrity attaching to the office of the legal practitioner. The confidentiality reposing in a legal practitioner remains even after a client has withdrawn from the legal practitioner for whatever reason. [3]

There is no indication that the applicant consented to the disclosure of the G confidential information by the second defendant. Even if the second respondent

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Makarau J

had been improperly dragged to court by the applicant, in my view, he went A overboard in divulging information about the applicant that was not germane to his defence.

I merely point out this breach of ethics by the second respondent in the hope that legal practitioners will maintain the integrity and professionalism attaching to the office of the legal practitioner by observing the rules relating to B confidentiality between a legal practitioner and a client.

Assuming that I was wrong in holding that there are insufficient facts before me upon which a finding can be made that the applicant did not consent to the granting of the order, I turn to consider the merits of her application.

The dispute between the parties is primarily over who should be appointed executor to the estate of the late Lovemore Masulani. C

The applicant contends that her appointment as executrix dative was valid at law and should not have been set aside. That she was eligible to be appointed executrix in the estate and should have been preferred, cannot be doubted. It is, however, trite that the appointment of an executor dative

in a deceased estate is in the discretion of the Master of the High Court. Section 25 of the D Administration of Estates Act [*Chapter 6:01*] provides that where the deceased died without leaving a will or codicil in which he appoints an executor, the Master shall call for a meeting at which he appoints a fit and proper person to be executor in the estate. Section 29A prescribes the pool from which the Master can make the appointment, but does not oblige him to make a specific E appointment. Thus, the fact that the applicant is a surviving spouse in the estate simply makes her eligible for appointment, but does not grant her an absolute right to be appointed.

In the matter before me, the clear opinion of the Master is that a neutral executor should be appointed to the estate. In the premises, I find without merit the contention by the applicant that her appointment should not have been set F aside by virtue of her position as the surviving spouse in the estate.

On the basis of the above, I have reasoned thus: even if I were to rescind the consent judgment and grant the applicant leave to defend the proceedings in case No. HC 5814/01, the views of the Master have to be sought as to the appointment of an executor in the estate, since one or both of the appointments G has to be set aside. The Master has already made his views in the matter known, that he would prefer to have a neutral executor appointed in the estate. While the applicant should be preferred for appointment, a good reason exists for the appointment of a neutral executor in the estate. There is therefore no arguable case to refer back to a judge in chambers. To do so will only prolong litigation between the parties and the winding up of the estate. This will work against H

Makarau J

A the interests of public policy on the need to see finalisation in litigation.

I find the applicant's application weak on the merits.

For the above reasons, the application by the applicant cannot succeed. In the result, I make the following order:

The application is dismissed with costs.

B *Sawyer & Mkushi,* applicant's legal practitioners

FO Mzawazi & Partners, first respondent's legal practitioners

Muzangaza & Partners, second respondent's legal practitioners

1 The Master of the High Court — *Editor*
2 He was the applicant's former legal practitioner, who had consented to the judgment on her behalf — *Editor*
3 Lewis *Legal Ethics* p 297

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/WOMEN & LAW IN SOUTHERN AFRICA & ORS v MANDAZA & ORS 2003 (1) ZLR 500 (H)

WOMEN & LAW IN SOUTHERN AFRICA & ORS v MANDAZA & ORS 2003 (1) ZLR 500 (H)

Citation 2003 (1) ZLR 500 (H)

Case No Judgment No. HH-71-2003

Court High Court, Harare

Judge	Smith J
Heard	15 April 2003; 30 April 2003
Judgment	30 April 2003
Counsel	*A N B Masterson*, for the applicants *P Nherere*, for the first and second respondents
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Interpretation of statutes — amending legislation — duty of court to C *interpret so as to give effect to what legislature had in mind*

Practice and procedure — parties — trust — not a legal person — cannot appear as a party — action must be brought by trustee

Trust — status of — not a legal person — cannot appear as a party D

Headnote

A trust is not a legal person and an action cannot be brought in the name of a trust. Any action must be brought by a trustee.

When interpreting an amendment to a statute or other legal instrument it is the court's duty to so interpret it as to give effect to what the legislature or the maker of the instrument had in mind in order to realise the purpose of the amendment. E

Cases cited

CIR v MacNeillie's Est 1961 (3) SA 833 (A)

Crundall Bros (Pvt) Ltd v Lazarus NO & Anor 1990 (1) ZLR 290 (H)

Crundall Bros (Pvt) Ltd v Lazarus NO & Anor 1991 (2) ZLR 125 (S) F

Case information

A N B Masterson, for the applicants

P Nherere, for the first and second respondents

Judgment

Smith J: The constitution of the first applicant (hereinafter referred to as "WLSA") was duly registered at the Deeds Office in 1993. It was amended in G 1999. The second applicant (hereinafter referred to as "Shongwe") is a trustee of WLSA and claims that she was appointed chairperson of the board on 28 February 2003. She is a resident of Swaziland. The third applicant (hereinafter referred to as "Moyo") was nominated as a trustee of WLSA in September 2002 and approved at the WLSA General Assembly on 28 February 2003. H

Smith J

A WLSA is a regional non-governmental organisation whose main object is to carry out research in Zambia, Malawi, Lesotho, Mozambique, Swaziland, Botswana and Zimbabwe, with a view to uplifting the legal status of women in those countries. Since its inception it has conducted research in three-year phases. Phase 1 was from 1989 to 1991, Phase 2 from 1992 to 1994, Phase 3 from 1995 to 1997 and Phase 4 from 1998 to 2000. From January 2001 to June B 2002, the organisation was

involved in executing the action required for getting Phase 5 off the ground. Phase 5 will be from 2002 to 2005. WLSA has its head office in Harare and has national offices in each member country. There is a national co-ordinator based in each member country and a regional co-ordinator. WLSA sources financial assistance from donors. It has had immense support from the Danish Ministry of Foreign Affairs, also known as C DANIDA.

The first respondent (hereinafter referred to as "Mandaza") was appointed as a trustee in 1993 and became chairperson of the board. She has held the position of chairperson since then. The second respondent (hereinafter referred to as "Harrison") is the acting regional co-ordinator. The third to D seventh respondents are commercial banks at which WLSA has accounts. Mandaza and Harrison are signatories for those accounts.

The applicants are seeking an order that Mandaza and Harrison cease forthwith to withdraw any money from the WLSA bank accounts in Zimbabwe and that the banks concerned suspend all banking transactions and revoke the E signing powers of Mandaza and Harrison in respect of those accounts.

The dispute which has resulted in this application started when Mandaza and her board appointed Harrison as acting regional co-ordinator, following the death of the incumbent of that post. The national co-ordinators were not prepared to accept that appointment because they felt that one of their number should be promoted to the post. On 29 January 2003, they advised Mandaza F that they did not accept the appointment of Harrison and would not recognise her as the regional co-ordinator. Mandaza informed them that, as far as she was concerned, the board had legally appointed Harrison and, if the national coordinators refused to accept what the board had done, then they would be regarded as having committed an act of misconduct. When the national coordinators refused to retract, Mandaza wrote to each national co-ordinator G saying that she had been summarily dismissed by the board because of wilful disobedience to a lawful order given by the board.

On 30 January 2003, the national co-ordinators and some programme officers and research associates wrote to Mandaza and five other trustees to remind them that their tenure of office had come to an end in or about April 2001 after H Phase 4. They said that the request for the trustees to remain in office was

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specifically for the purpose of awaiting approval of DANIDA funding, A approving the relocation of the WLSA regional office and participating in a donor round-table meeting in Lusaka on 31 October 2002. Those tasks had been successfully completed. Therefore, the trustees should vacate their office forthwith so that new trustees could be nominated and appointed. Mandaza replied on 31 January, saying that at the board meeting on 2 March 2002 the B national co-ordinators, as management, requested that certain trustees who were due to retire should remain in office until certain matters had been attended to, including the process of a proper handover to the new trustees. Then at the board meeting on 14 September 2002 the process of retirement was again discussed, as it seemed that the national offices had not addressed the issue of the process of appointment and handover as requested by the board. C Therefore, the trustees concerned would not vacate their offices except in terms of the agreed position as stated in the minutes and as generally agreed. Consequently, they would disregard the WLSA staff's request for the trustees to vacate their office by 5 February 2003.

The members of staff responded to this letter by noting Mandaza's admission and acceptance that the term of office of herself and the other trustees had D expired and pointing out that the other issues that needed to be done had been carried out. They also pointed out that Mandaza had been presented with farewell gifts from all WLSA countries on 14 September 2002. Mandaza replied saying that there was no admission or acceptance that her term of office and that of the other trustees had expired. She went on to say that WLSA E management had requested that the trustees whose terms of office were due to expire should not vacate their office until certain matters were attended to. That request was accepted and adopted and recorded in the minutes. Therefore, the particular trustees would remain in office until the process of handover was duly effected as agreed at the board meetings on 2 March and 14 September. Neither herself, as chairperson, nor any of the other trustees had been F informed of the process of the appointment of the future trustees. Until there was a proper handover as agreed at the board meetings, the trustees concerned remain in office.

The applicants claim that the crux of the dispute between the parties is the refusal by Mandaza and certain other trustees to accept that their term of office G has expired. Mandaza denies that. She claims that it is the refusal on the part of management to accept the decision of the board to appoint Harrison as acting regional co-ordinator that has led to the present dispute.

In my opinion, the resolution of the dispute turns on one issue. Has Mandaza's term of office as trustee, and therefore as chairperson of the board, terminated? She is a signatory to the various bank accounts of WLSA in her capacity as H

A chairperson. If she is no longer chairperson, then she cannot remain a signatory.

The Trust Deed of WLSA that was adopted and registered in 1993 provided for the appointment of eight trustees, three being representatives of Zimbabwe and one being from each of the other member countries. The country concerned nominates a person for appointment as trustee but the final B appointment lies with the board. There was no provision fixing the term of office of a trustee. There are other shortcomings in the Trust Deed. For instance, there is no provision setting out how persons are nominated for appointment as trustee. In 1999, the Trust Deed was duly amended, clauses l to ll thereof being deleted and 16 clauses being substituted. The new clause C 5 provides as follows:

> "5.1. A Trustee shall hold office for a period not exceeding one research phase of the Trust or the remaining period of any research phase for Trustees appointed during the course of a research phase.
>
> 5.2. Retiring Trustees shall be eligible for nomination to no more than one additional term of office."

D The applicants contend that, as Mandaza had already served more than two research phases, her term of office expired at the end of 2000 and she was not nominated for a further term. Therefore she is no longer a trustee and, *ipso facto*, no longer chairperson of WLSA. Mandaza's contention is that laws apply prospectively and not retrospectively and therefore her term of office has E not expired. She is still fully in office, together with the trustees who joined the board on the same date that she did, which was in 1993. When the amendment to the Trust Deed was made in 1999 she was holding office in Phase 4, which ran from September 1999 to May 2001 and she was eligible to remain in office for an additional term, which is Phase 5, which runs from November 2002 to April 2005.

F The original Trust Deed and the amendments that were made in 1999 clearly were not drafted by a skilled draftsperson. Many eventualities are not catered for. For example, it is not stated how or by whom a person is nominated for appointment as a trustee. Clause 6.2 provides that when a vacancy occurs the country "unrepresented" on the board shall forthwith nominate a candidate and the board shall appoint such candidate to fill the vacancy. As Zimbabwe G has three trustees, if one of them resigns or dies there are still two members representing Zimbabwe, so it will not be "unrepresented". There is no indication as to how the chairperson is appointed or elected. There is no provision for the removal of a trustee who commits a serious offence. Although H the term "research phase" is not defined in the Trust Deed, there is no dispute

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between the parties as to what it means, although they differ as to when Phase A 4 ended and Phase 5 began.

In her opposing affidavit, Mandaza says that, at the request of management, the board agreed to amend the Trust Deed to insert a provision fixing the tenure of office of trustees. Clearly management felt that no trustee should serve more than two consecutive terms of office, i.e. for more than two research phases. B It was obviously felt by management, and the board agreed, that when a trustee had served two terms, he or she should move on and allow new blood, with fresh ideas, to come onto the board. If that was the feeling amongst management and the trustees, it would be completely unreasonable to find that the intention was that serving trustees would be exempt from that provision. Mandaza and her fellow trustees who were appointed in 1993 had been in office for four C research phases when the amendment to the Trust Deed was made in 1999. If it was felt by all that a trustee should serve a maximum of two research phases, why would it be all

right that existing trustees, who had already served four research phases, should be eligible to stand and serve for a fifth research phase? It would appear that earlier this year Mandaza shared the view of management that she would not be eligible to serve a fifth term. In her letter D to the regional co-ordinator she said that she was entitled to stay on because management had asked her and the other trustees to stay on until certain formalities had been completed and new trustees appointed and the board had accepted that proposal by management.

In Kellaway's *Principles of Legal Interpretation* at para 40 on p 177 the E learned author states:

> "In the courts of Britain and South Africa, it has often been said that if the 'intention' of the legislature is clearly expressed there is no need for any rules of construction, and that principles of interpretation are intended … as aids to resolving any doubts as to the legislature's true intention.
>
> However, Lord Watson said: F
>
> > 'The intention of the legislature is a common, but slippery phrase, which popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it … What the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either G in express words or by reasonable and necessary implication'."

Then at p 178 the learned author concluded:

> "To conclude, when construing a statute, it is a court's duty to so interpret it as to give effect to what the legislature had in mind in order to realise the purpose of the amendment." H

Smith J

A The intention of those who were responsible for the amendment of the Trust Deed, and that includes the trustees, was to introduce the principle, that no trustee should serve more than two consecutive terms of office. That was the main reason why the Trust Deed was amended. Obviously it was felt that a regular introduction of new trustees with fresh ideas was necessary for the well-being of WLSA. To give clause 5 of the Trust Deed the interpretation B suggested by Mandaza would lead to an absurdity. It would result in the interpretation that trustees could not serve more than two consecutive terms but the trustees in office in 1999 could serve 5 consecutive terms.

Even if Mandaza were correct in her contention that she was eligible to serve a fifth term, that does not mean that she is still a trustee. Clause 5.1 of the Trust C Deed fixes the term of office of a trustee as one research phase. At the end of the research phase, the trustee's term of office comes to an end. That means that the trustee must vacate his or her office unless he or she is nominated for a second term and the board then appoints him or her as trustee. Shongwe, in her founding affidavit, alleges that Mandaza's term of office expired at the end of 2000 and that she was not nominated for a further term. In her opposing D affidavit, Mandaza does not assert that at the end of Phase 4 she was nominated for another term and that the board thereafter appointed her as a trustee for the Phase 5 term. She seems to have assumed that, by virtue of clause 5 of the Trust Deed she was entitled to continue in office for a subsequent term.

Mr *Nherere* took the point, *in limine*, that WLSA, being a trust, is not a corporate body and therefore cannot appear as a party. That contention is E legally sound. In *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A) at 840F-H, Steyn CJ said:

> "Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a *persona* or legal entity consisting of an aggregate of assets and liabilities. Neither our authorities nor our courts have F recognised it as such a *persona* or entity. The Estate Duty Act, like the Income Tax Act, 31 of 1941, does not define 'person'. The statutory definition in sec. 2 (*x*) of the Interpretation Act, 33 of 1957, does not mention a trust or any category of persons which would include a trust. It is trite law that the assets and liabilities in a trust vest in the trustee. The introduction of another *persona* consisting of those assets and liabilities G for the purposes of the imposition and collection of a tax, when there is a trustee ready to hand, would be an extraordinary measure which would call for some adjustment, the nature of which is by no means obvious, and of which there is no trace in the Act, between the legal position of such a *persona* and that of the trustee."

The views expressed above were cited with approval in *Crundall Bros (Pvt)* H *Ltd v Lazarus NO & Anor* 1990 (1) ZLR 290 (H) at 298E where it was said:

Smith J

> "I can see no reason why a trust should be regarded as a 'person' for the A purposes of the Regulations, when it is not regarded as a 'person' for other purposes."

That statement of the law was confirmed by the Supreme Court in *Crundall Bros (Pvt) Ltd v Lazarus NO & Anor* 1991 (2) ZLR 125 (S) where at 128F, it was said: B

> "A trust is not a person. The trustee is the person to be considered for the purposes of the Regulations."

It is interesting, however, to note that when Mandaza instituted an action seeking to interdict Shongwe from holding herself out as chairperson of WLSA (case No. HC 2053/03) the action was brought in the name of WLSA. Mandaza deposed to the founding affidavit, but the applicant was cited as C WLSA. It seems strange that she was prepared to institute an action in the name of WLSA and yet, when Shongwe instituted this action in the name of WLSA, she claims that it is legally improper to do so.

It is tragic that WLSA is being brought to its knees, if not being killed off, because the trustees and management, who should hold the welfare of WLSA D at heart, cannot resolve their problems amicably and must resort to the courts to settle their differences. Because of the dispute and the course it has taken, DANIDA has frozen all funding to WLSA. It has requested WLSA to solve the management crisis and to take immediate steps to sort out the allegations of financial misconduct. As it has serious doubts as to the management of the organisation and who carries the financial responsibility, it has requested that E funds from the regional account are not to be released unless authorised in writing by DANIDA. As I say, it is most unfortunate that the trustees have allowed the dispute to degenerate as it has. One wonders why the trustees are so determined to cling to office when they themselves approved the amendment to the Trust Deed which introduced the principle that a trustee should not serve more than two consecutive terms of office. They have served four terms and F insist on serving a fifth, even if it means that WLSA is destroyed and the good work that it has done comes to an ignominious end.

For the reasons set out above, Shongwe and Moyo are entitled to the provisional order sought. The effect of that order will be that the bank accounts concerned will be frozen until new signatories are appointed. Mr *Masterson* G said that it may well be necessary to pay salaries or make other payments in the interim. It was agreed that the parties would discuss the matter and try to find a solution to the problem. I said that if a consent paper was produced, I would be prepared to issue the order required. That position will still pertain, notwithstanding the issue of the provisional order. H

Smith J

A A provisional order in terms of the draft is issued.

Coghlan, Welsh & Guest, applicants' legal practitioners

Honey & Blanckenberg, first & second respondents legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/NYATANGA v MLAMBO NO & ORS 2003 (1) ZLR 508 (H)

NYATANGA v MLAMBO NO & ORS 2003 (1) ZLR 508 (H)

Citation 2003 (1) ZLR 508 (H)

Case No Judgment No. HH-85-03

Court High Court, Harare

Judge	Smith J
Heard	2 May 2003
Judgment	2 May 2003
Counsel	Details not supplied
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Criminal procedure — *arrest — without warrant — discretion given to police officer to arrest when he has reasonable suspicion that offence has* C *been committed — factors to consider before making arrest — discretion may be interfered with when exercised grossly unreasonably*

Headnote

The police arrested the applicant, who was Master of the High Court. Some 8 years earlier, he had ordered the transfer of property, following a sale in execution. The owner of the property had initially challenged the sale D but had withdrawn his challenge. After failing to achieve satisfaction through litigation, the owner made allegations of fraud against the applicant. The applicant was visited by the police, who asked him to come to the police station to make a statement in answer to the allegation of fraud. The police then arrested the applicant and proposed to detain E him over the weekend. The applicant sought an order for his release.

Held, that in terms of s 25(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a peace officer must have reasonable grounds to suspect a person of having committed a First Schedule offence before he is empowered to arrest him without a warrant. If he has such suspicion, he has a discretion to effect an arrest. Factors he should consider before F doing so include: (i) the possibility of escape; (ii) the prevention of further crime; and (iii) the obstruction of police enquiries. The police officer's discretion may be interfered with if exercised unreasonably, contrary to the *Wednesbury* principles. In view of all the circumstances of this case, the decision to arrest and detain the applicant flouted those principles and the applicant's release would be ordered. G

Cases cited

A-G v Blumears & Anor 1991 (1) ZLR 118 (S)

Botha v Zvada & Anor 1997 (1) ZLR 415 (S)

Feldman v Minister of Home Affairs 1992 (2) ZLR 304 (S)

Maparanyanga v Sheriff of the High Court & Ors 2003 (1) ZLR 325 (S) H

Smith J

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

Nyatanga v The Editor, The Herald & Anor 2001 (1) ZLR 63 (H)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 25(1)(b)

Judgment

B **Smith J:** The applicant (hereinafter referred to as "Nyatanga") is the Master of the High Court and is also acting as Registrar of the High Court. He has held the office of Master for a number of years. He filed an urgent application seeking an order declaring that his arrest and detention was illegal and unlawful. The interim relief claimed was that he be released forthwith from the holding cells at the Harare Central Police Station, or any other police station. C I granted the provisional order. My reasons for doing so are based on the following considerations.

At about 1.00 p.m. on Friday 2 May, the second respondent (hereinafter referred to as "Chikundila"), who was the investigating officer, arrived at Nyatanga's offices in the High Court in the company of one Bobby Maparanyanga. D Nyatanga was allowed to call his lawyer, who arrived soon after. Chikundila indicated that he wanted to record a warned and cautioned statement from Nyatanga in connection with a fraud case, wherein it was alleged that Nyatanga had fraudulently transferred a piece of land belonging to Maparanyanga to an unidentified third party. Nyatanga and his lawyer went with Chikundila and Maparanyanga to the Harare Central Police Station. On arrival, despite repeated E requests for such, details of the offence were not provided. However Chikundila proceeded to type out the preamble to the warned and cautioned statement that he wished to record. The allegation in the preamble was that Nyatanga "unlawfully and with intent to defraud, misrepresented to Fidelis Maredza of the Deeds Office to transfer the Title Deed No. 00899/95 belonging to Bobby F Maparanyanga meant for Lot 1 of Willowvale". Nyatanga, in his statement, denied the allegation, saying that the transfer was effected lawfully pursuant to a lawful sale in execution; that the charge was being brought eight years and three months after the transfer; that Maparanyanga was entitled to challenge the sale in accordance with the High Court Rules; that he had done so but withdrew the challenge of his own free will in 1995.

G The proceedings were being conducted in the presence of Maparanyanga until Nyatanga's lawyer objected and asked that he be ordered to leave the room. That was done before Nyatanga made his statement. The statement was recorded and completed at 13.45 p.m. When Nyatanga's lawyer asked for a copy of the warned and cautioned statement Chikundila said that he required H authority from the Officer-in-Charge before he could release a copy. Chikundila

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took them to see the third respondent (hereinafter referred to as "Zondi"), A allegedly the Officer-in-Charge of Investigations, who indicated that because of the allegations against him, Nyatanga would be detained over the weekend. That was the first that Nyatanga and his lawyer learnt that the former was to be kept in the cells over the weekend. They asked Zondo if they could be shown the allegations but he refused. He then left the office. Chikundila then B took Nyatanga and his lawyer to the alleged Officer-in-Charge of Shift 4, Inspector Chingere. Chingere heard what had happened and then said that he was knocking off duty and the matter should be dealt with by the fourth respondent (hereinafter referred to as "Ziki") who was allegedly the Officerin- Charge of the next shift. Ziki said that she had no authority to overrule Zondo and accordingly signed the document authorising that Nyatanga be C detained over the weekend.

As Nyatanga was detained in the cells, the founding affidavit was deposed to by his lawyer. He contended that there were no valid reasons for the detention of Nyatanga. He based that contention on the following. Nyatanga was not advised of the allegations against him, other than what was stated in the preamble in the warned and cautioned statement. The allegation of fraud D relates to a sale in execution and the subsequent transfer of property that belonged to Maparanyanga in 1995 which was done in the execution of his official duties as Sheriff of the High Court. At the time, Maparanyanga exercised his right to challenge the sale but subsequently withdrew the challenge. Maparanyanga was present when Nyatanga was arrested and during E the recording of the preamble to the warned and cautioned statement. He only left when Nyatanga's lawyer threatened to stop the process until he left. Maparanyanga saw each of the police officers involved before Nyatanga and his lawyer saw them in an effort to get information about the allegations or to secure his release. He even went so far as to accompany Nyatanga and his lawyer to the holding cells. F

The lawyer also submitted that this was a clear case where undue influence had been brought to bear on the police for one reason or another. Maparanyanga has been harassing Nyatanga for many years with allegations of fraud. In the recent case of *Maparanyanga v Sheriff of the High Court & 4 Ors* S-132-02, * which was handed down on 18 March 2003, where the court was dealing with G the case of a sale in execution of another piece of property owned by Maparanyanga, the court said that

the case had attracted considerable media publicity. It pointed out that Nyatanga was vilified for his part in the sale, which was perceived to have been biased against Maparanyanga, if not

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2003 (1) ZLR p511

Smith J

A criminal, and that Nyatanga had even been threatened with prosecution for fraud. In the court *a quo* the learned trial judge had noted that Nyatanga had acted throughout "in the impartial and professional manner required of his office and had taken all decisions in good faith and in accordance with his reasonable view of the rights of the matter". The Supreme Court concurred with the views expressed and added that Nyatanga had "acted in good faith and B genuinely believed he was acting in the interests of all the parties".

The lawyer further pointed out that no investigation had been commenced. Nyatanga was not advised of the allegations against him and therefore had no fair opportunity to answer them. This was not a matter which ordinarily would have required that the culprit be detained. Nyatanga is a senior official of the C High Court and is well respected. He owns a house in Harare where he has been resident for more than five years. He is not a "flight risk".

In *Feldman v Minister of Home Affairs* 1992 (2) ZLR 304 (S), the applicant sued for damages for wrongful imprisonment. Gubbay CJ, at p 308, referred to what the Supreme Court had said in *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) at 122A-C:

> D "The standard for the deprivation of personal liberty under s 13(2)(e) of the Constitution are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. The standard represents a necessary accommodation between the individual's fundamental right to the protection of his personal liberty and the State's duty to control crime. It E seeks, on the one hand, to safeguard the individual from rash and unreasonable interference with liberty and privacy, and from unfounded charges of crime, yet, on the other, to give fair leeway for enforcing the law in the community's protection. The criterion of reasonable suspicion is a practical, non-technical concept which affords the best compromise for reconciling these often opposing interests. Requiring more would unduly F hamper the legitimate enforcement of the law. To allow less would be to leave law-abiding persons at the mercy of the whim or caprice of the authorities."

Then at p 309 the learned Chief Justice continued:

> "It had to be shown by the respondent that, in effecting the arrest of the appellant at Woolworths Store, the police officers not only subjectively G harboured a suspicion that she, individually, had stolen the money, but that, on an objective appraisal, there existed reasonable grounds for that suspicion, resulting from what they had ascertained prior to arresting her. In other words, the circumstances giving rise to the suspicion were such as would ordinarily lead a reasonable man to form the suspicion that the arrestee had committed an offence mentioned in the First Schedule to the H Criminal Procedure and Evidence Act (which includes theft)."

2003 (1) ZLR p512

Smith J

The Supreme Court again considered the question of wrongful arrest and A detention in *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S). At p 95-96, Gubbay CJ said:

> "Section 29(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*] * makes it clear that a peace officer must have reasonable grounds to suspect a person of having committed any of the offences B mentioned in the First Schedule — which includes an offence at common law — before he is empowered to arrest him without a warrant. Without such an important protection, even the most democratic and enlightened society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens in the case of an arrest made without a warrant, it is essential for a peace officer to demonstrate the reasonable grounds upon which the arrest was based. The importance C of this to citizens of a democracy is self-evident. Yet society must also be protected against crime. Thus, what has to be struck is a necessary accommodation between the individual's right to liberty and that of society to be protected from crime. It is done by requiring of a peace officer that before arresting without a warrant he must satisfy himself that reasonable grounds for suspicion of guilt do exist. That requirement is D very limited. He is not called upon before acting to have anything like a *prima facie* case for conviction. 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."

The court found that the police officer concerned had reasonable grounds for suspecting that the person arrested had committed the crime of assault and E theft but went on to consider whether or

not the power of arrest had been reasonably exercised. At p 98-99 Gubbay CJ, referring to the Criminal Procedure & Evidence Act [*Chapter 59 of 1974*], said:

> "Section 29(1) of the present Act employs the phrase 'is hereby authorised … to arrest'. I am satisfied that, read with para (b), it is to be construed F as imparting a discretion upon the peace officer in the exercise of his power of arrest. This conforms with common sense, for it would be absurd if, for instance, a peace officer were compelled to arrest a person whom he had reasonable grounds to suspect of having assaulted another by gesturing with his fist. It is also consistent with comparative provisions in both the South African Criminal Procedure Act 1977, and the Police G and Criminal Evidence Act 1984, of England and Wales: see s 40(1)(b) and s 24(6) respectively. In short, in enacting s 29(1)(b), the law-maker did not intend that the power given a peace officer to arrest is always, or even ordinarily, to be exercised.

2003 (1) ZLR p513

Smith J

A In the celebrated case of *Holgate - Mohammed v Duke* [1984] 1 All ER 1054 (HL), the issue arose as to whether the exercise of the discretion to arrest was to be treated in the same manner as the assessment of the existence of reasonable grounds for suspicion. Stated otherwise: was the arrest rendered unlawful if the decision was one which the court believed to be unreasonable, applying the same general objective test as it would B to the existence of grounds? The House of Lords held that the police constable's discretion to arrest was not reviewable in the same way as the grounds for arrest, but only on the principles applicable in administrative law, where an executive discretion is conferred on a public officer. This was explained by Lord Diplock in the course of his speech at 1057e-g:

> C 'So the condition precedent to Det Con Offin's power to take the appellant into custody and the power of the other constables at Southsea police station to detain her in custody was fulfilled; and, since the wording of the subsection under which he acted is "may arrest without warrant", this left him with an executive discretion whether to arrest her or not. Since this is an executive discretion expressly conferred by statute on a public officer, the constable making the arrest, the lawfulness D of the way in which he has exercised it in a particular case cannot be questioned in any court of law except on those principles laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680; [1948] 1 KB 223, that have become too familiar to call for repetitious citation. The *Wednesbury* principles, as they are usually referred to, are applicable to determining E the lawfulness of the exercise of the statutory discretion of a constable under s 2(4) of the 1967 Act, not only in proceedings to judicial review but also for the purpose of founding a cause of action, at common law for damages for that species of trespass to the person known as false imprisonment, for which the action in the instant case is brought.'

See also *Shaaban Bin Hussein v Chong Fook Kam* [1969] 3 All ER 1626 (PC) at 1630E; F Wade *Administrative Law* 6ed at p 405.

Accordingly, a far stricter test than reasonableness in the normal meaning of the word is to be applied. The decision will be held to be *ex facie* unreasonable and subject to interference only where it is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it': G *per* Lord Diplock in *Council of Civil Service Unions v Minister for the Public Service* [1984] 3 All ER 935 (HL) at 951a-b. Later, in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] 1 All ER 199 (HL) at 202f, Lord Scarman spoke of a decision having to be so absurd that the decision-maker 'must have taken leave of H his senses' for a challenge to succeed."

2003 (1) ZLR p514

Smith J

Then at pp 99-100 the learned Chief Justice continued: A

> "In making the determination of whether the decision to arrest the plaintiff is open to challenge, several important factors require to be considered. They are: (i) the possibility of escape; (ii) the prevention of further crime; and (iii) the obstruction of police enquiries.
>
> It ought to have been apparent to Constable Makuvatsine that the plaintiff B was a respectable and elderly lady of fixed abode. There was little, if any, risk of her absconding in order to evade being tried on such charges. Quite apart from the inherent pettiness of the offences and the consequent certainty that if convicted she would be granted the option to pay a fine, the plaintiff had a sixteen-year-old daughter to care for. In the knowledge that she was to be questioned about the assault and theft of the wristwatch, she had complied with the request to be at the police station on the C morning of 23 December 1988.
>
> Moreover, there was absolutely no warrant to believe that if the plaintiff were permitted to remain at liberty she would commit further offences, especially since Maria had removed herself and her belongings from the

house."

In *Botha v Zvada & Anor* 1997 (1) ZLR 415 (S), the question of false arrest D and detention was again under consideration. The court found that when Botha was arrested, there were no reasonable grounds for suspecting that he had shot and killed the deceased. Korsah JA at p 422 went on to say:

> "Even assuming Zvada did have reasonable grounds to suspect the appellant of being the culprit, he was obliged to exercise his discretion to arrest and E detain without flouting the Wednesbury principles; *CCSU v Min for the Public Service* [1984] 3 All ER 935 (HL) at 951. In the exercise of that discretion, submitted Mr *Nherere*, Zvada should have taken the following factors into account:
>
> (a) the possibility of escape;
>
> (b) the prevention of further crime; and F
>
> (c) obstruction of police enquiries.
>
> Having due regard to the appellant's age and condition, Zvada had no reason to believe that the appellant would, if not detained, escape. The appellant having been dispossessed of all guns available to him, the danger of his committing a similar crime had effectively been curtailed. G All the evidence to be garnered from his employees was already at hand and there was not the remotest possibility that he could obstruct police investigations, especially as the instrument which Zvada believed was used in the perpetration of the offence was already in police custody. In the circumstances, no sensible person, who had addressed his mind to the question whether or not to arrest and detain the appellant, could have arrived at the decision reached by Zvada." H

2003 (1) ZLR p515

Smith J

A It seemed clear to me that the decision to arrest and detain Nyatanga flouted the Wednesbury principles referred to by Korsah JA in the *Botha* case *supra*. Nyatanga is a highly respected officer in the Public Service and has been one for very many years. He holds high office in the High Court. He is a family man of fixed abode. The offence he is alleged to have committed was supposed to have taken place more than eight years ago. This is apparently the first time that B there has been any suggestion that what Nyatanga did in relation to the property concerned was done fraudulently. Maparanyanga has made many allegations imputing fraud against Nyatanga in relation to another piece of property in Tynwald but, in that connection, both the High Court and the Supreme Court found that Nyatanga had acted in an impartial and professional manner and in good faith. The involvement of Maparanyanga makes the C conduct of Chikundila, Zondo and Ziki very suspect. Why was Maparanyanga allowed to accompany Chikundila to Nyatanga's office in the High Court? Why was he permitted to be present when Nyatanga was warned and cautioned and asked to make his statement? Why was he allowed to wander from office to office in the police station speaking to the various policemen handling the D case? Why was he allowed to help shepherd Nyatanga into the cells? It seems to me that the reasons for his involvement should be investigated.

Other factors which raised suspicions about the *bona fides* of Nyatanga's arrest are as follows. No details were given to him as to the fraud that he had perpetrated. He was told that "with intent to defraud" he had "misrepresented" to an official in the Deeds Office "to transfer the Title Deed No. 00899/95 E belonging to Bobby Maparanyanga meant for Lot 1 of Willowvale". The allegation as so expressed is difficult to comprehend. The police made no attempt to question him in order to investigate the allegations. Why was he arrested on a Friday afternoon and not on some other day of the week when he could be taken to court the following day? It seemed clear to me that the F prime motivation was so that he would be locked up in the cells for the weekend. In other words, the intention was to punish him, although it is not clear why he was to be punished.

Having regard to Nyatanga's position in society, the post he is holding and the length of his service in the Public Service, it should have been apparent to Chikundila that there was little, if any, possibility of Nyatanga fleeing the G country. The alleged offence was allegedly committed more than eight years ago. During that period, there have been a number of police probes into the allegations of fraud: see *Nyatanga v The Editor, The Herald Newspaper & Anor* 2001 (1) ZLR 63 (H) where *The Herald* reported police probes into Nyatanga's conduct and was sued for defamation. The defendants admitted H that the article in question was defamatory and were ordered to pay damages.

2003 (1) ZLR p516

Smith J

If no evidence of fraud had been discovered over the years, why should A Nyatanga now suddenly decide to flee the country when the same old allegations surfaced once again? Since there were no allegations in the intervening eight years that Nyatanga had committed similar offences, why would it now be necessary to arrest him in order to prevent him committing further similar fraudulent acts? As the acts complained of were committed B eight years ago, the police have had ample time to complete their investigations. Nyatanga could not possibly, at this late date, obstruct their further enquiries. As I was satisfied that the decision of Chikundila to detain Nyatanga in the cells was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it", I issued the provisional order, ordering that he be released C forthwith. I did not issue a final order because I had dealt with the application *ex parte*. I did that in order to spare Nyatanga the ordeal of spending the weekend in the cells unnecessarily. It was 7 p.m. and it would have been impossible to serve the papers on all the respondents and require them to file their opposing papers before morning. However, as the order is provisional, the path is open for the respondents to file papers to establish that there were D reasonable grounds for suspecting that Nyatanga had committed fraud and, also, that there were reasonable grounds for arresting him without warrant and incarcerating him in the police cells. If that is done, the provisional order will be discharged and there will be no order that the arrest was illegal and unlawful. If, however, no such papers are filed, then the order will be confirmed. E

Kantor & Immerman, applicant's legal practitioners F

* See p 325 of this volume — *Editor*
* Now s 25 of *Chapter 9:07* — *Editor*

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CHIRENGA v DELTA DISTRIBUTION 2003 (1) ZLR 517 (H)

Citation	2003 (1) ZLR 517 (H)
Case No	Judgment No. HH-72-03
Court	High Court, Harare
Judge	Smith J
Heard	10 March 2003; 7 May 2003
Judgment	7 May 2003
Counsel	*E Musakana*, for the applicant *A M Gijima*, for the respondent
Case Type	Application for review
Annotations	No case annotations to date

Flynote

Administrative law— *review — grounds for — breach of audi alteram partem* C *rule — disciplinary proceedings — employee requesting legal representation but such request refused — rule breached*

Employment — *code of conduct — disciplinary action under — employee's right to legal representation— legal representation being requested and refused — breach of audi alteram partem rule*

D **Practice and procedure** — *parties — citation — employee bringing application for review against employer — enough to cite employer and not other employees whose decision is being brought on review*

Headnote

The applicant was dismissed from his employment on allegations of dishonesty. He brought an application, directed at the company by which he was E employed, seeking a review of the decision to dismiss him. Various grounds were relied on, the principal one being that he was denied the right legal representation at the disciplinary hearing. The company's code of conduct made no mention of such a right, although it said that a person being subjected to disciplinary proceedings could be represented by a member of the workers' committee.

F The company raised, *in limine*, the argument that the application should, in terms of r 256 of the High Court Rules 1971, have been directed at the person or body which made the decision complained of. In this case that would have been the disciplinary committee and the general manager. It also argued that as there was no mention in the code of conduct of legal G representation, the inference was that there was no right to representation other than by the workers' committee.

Held, that where an employee who has been dismissed wishes to bring under review the decision or proceedings of another employee or a committee consisting of employees of his employer which led to his dismissal, it would be adequate if the employer is cited. It is not necessary to cite the H employees or committee as well. It would then be for the employer to

ensure that the actions of the employee or committee have been recorded A and explained in the opposing affidavit.

Held, further, that not every man has the ability to defend himself on his own. If justice is to be done, he ought to have the help of someone to speak for him. Rarely would a fellow employee who is not a lawyer do much better. Most employees in this country are not highly educated. They cannot be B expected to prepare a case to avoid dismissal. They are highly unlikely to be aware of what issues may be raised in mitigation. They are not sufficiently experienced to be able to cross-examine effectively or to assess whether witnesses should be called to help their case.

Held, further, therefore, that if an employee who is facing a charge of misconduct which might lead to his dismissal wishes to have legal C representation, and his request is refused, the requirements of the *audi alteram partem* rule would not be met. This is so even where the code of conduct makes no mention of a right to representation.

Cases cited

Cargo Carriers (Pvt) Ltd v Zambezi & Ors 1996 (1) ZLR 613 (S) D

Chrmn, PSC v Marumahoko 1992 (1) ZLR 304 (S)

City of Mutare v Mlambo 1992 (1) ZLR 17 (S)

Dladla & Ors v Admin, Natal & Ors 1995 (3) SA 769 (N)

Marumahoko v Chairman of the Public Service Commission & Anor 1991 (1) ZLR 27 (H)

MMCZ v Mazvimavi 1995 (2) ZLR 353 (S)

Nhari v PSC & Anor 1998 (1) ZLR 574 (H) E

Nhari v PSC & Anor 1999 (1) ZLR 513 (S)

Savanhu v Postmaster-General 1992 (2) ZLR 455 (H)

Sibanda v Postmaster-General HH-263-90

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

Zikiti v United Bottlers 1998 (1) ZLR 389 (H) F

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 256

Case information

E Musakana, for the applicant

A M Gijima, for the respondent G

Judgment

Smith J: This is a review application. In the application itself, not in the founding affidavit, the legal practitioners for the applicant (hereinafter referred to as "Chirenga") have set out, shortly and clearly, the grounds on which he relies and the relief sought. Such strict compliance with Order 33 r 257 is to be commended. Chirenga was employed by the respondent (hereinafter H

Smith J

A referred to as "Delta"). He was dismissed with effect from 29 October 2002. He seeks an order setting aside his dismissal and reinstating him on full salary and benefits from the date of his suspension. The grounds on which he relies are:

(a) he was not given adequate notice to attend the disciplinary hearing and to prepare his case; B

(b) he was suspended on a charge of fraud but the charge put to him was one involving theft, forgery and uttering and that was the basis of his dismissal;

(c) he was not asked for a statement before he was suspended;

(d) he was not furnished with a charge sheet setting out the charges; C

(e) he was denied the right to legal representation;

(f) he was not afforded adequate time to lodge his appeals.

Delta opposes the application. It raised two points *in limine*. Firstly, in terms of Order 33 r 256, the application should be directed at the person or body who made the decision that is complained of, which was not done in this case. Secondly, Chirenga has not exhausted his domestic remedies and has not D given a reason for not doing so. As regards the merits, Delta submitted as follows. Adequate notice was given to Chirenga to attend the disciplinary hearing and to prepare his case. He was suspended in order to facilitate investigations. He was asked to make a statement and in fact he did so. Likewise, he was furnished with a charge sheet. The code of conduct has no provision for legal representation. Chirenga was afforded adequate time to E lodge his appeal. Delta denied that there were any irregularities in the conducting of the disciplinary proceedings. It submitted that the application is frivolous and vexatious and should be dismissed with costs on the higher scale.

Mr *Musakana* made the following submissions. As Delta was the employer of F Chirenga, it is only proper that the application is brought against it and not one of the internal disciplinary bodies: see *Savanhu v Postmaster-General* 1992 (2) ZLR 455 (H). Chirenga is not obliged to exhaust his domestic remedies before turning to this court for relief: see *Zikiti v United Bottlers* 1998 (1) ZLR 389 (H) and *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S). Not only has Chirenga raised the question of procedural irregularities, he has G also raised the question of his right to legal representation: see *Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor* 1993 (1) ZLR 162 (S) and *Marumahoko v Chairman of the Public Service Commission & Anor* 1991 (1) ZLR 27 (H).

Mr *Gijima* argued that r 256 requires that in a review application the applicant H must cite the person who made the decision that is being brought under review.

Smith J

In this case, Chirenga is complaining about the decision that was made by the A disciplinary committee and that which was made by the General Manager. Both of those should have been cited. Mr *Gijima* also submitted *in limine* that Chirenga was obliged to exhaust his domestic remedies before turning to this court. He has not shown that there are special features which should persuade the court to exercise its discretion in his favour. As regards the merits, Mr B *Gijima* submitted that there was nothing irregular in the proceedings held to determine that Chirenga was guilty of misconduct. He was informed of the allegations against him and he had adequate notice to attend the disciplinary hearings. Mr *Gijima* further argued that Delta's code of conduct allowed for Chirenga to be represented by a member of the workers' committee. There is no mention in the code of legal representation and therefore the omission gives C rise to the inference that no right of representation other than by the workers committee was intended to be conferred: see *Minerals Marketing Corporation of Zimbabwe v Mazvimavi* 1995 (2) ZLR 353 (S).

Rule 256 provides as follows:

> "Save where any law otherwise provides, any proceedings to bring under D review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected."

In a case such as this, where an employee seeks to bring under review a E decision by his employer to dismiss him, it is obvious that his employer must be cited. Where that is not done, his application will fail. Thus, in *Sibanda v Postmaster-General* HH-263-90 and *Savanhu v Postmaster-General supra,* the applications were dismissed because the applicants cited the Postmaster- General as the respondent and not the Posts and Telecommunications F Corporation, which was the actual employer of the applicants. I consider that where an employee who has been dismissed wishes to bring under review the decision or proceedings of an employee or a committee consisting of employees of his employer which led to his dismissal, it would be adequate if the employer is cited. It would then be for the employer to ensure that the actions of the employee or committee have been recorded and explained in his G opposing affidavit. The employer can always attach to his founding affidavit any record of proceedings or affidavit from the employee concerned.

The main question for determination is whether the refusal on the part of Delta to permit Chirenga to be legally represented amounted to such a gross irregularity that it necessitates the setting aside of the proceedings. In *City of* H

Smith J

A *Mutare v Mlambo* 1992 (1) ZLR 17 (S), the Supreme Court was adjudicating on an appeal from a decision of Reynolds J. At p 19, Gubbay CJ said:

> "The learned judge *a quo* upheld the contention raised before him, that the denial of legal representation constituted so gross an infringement of the respondent's fundamental right to be afforded a fair hearing as to warrant judicial intervention without more ado. It has been argued before this B court that he was wrong in that regard."

Unfortunately, the court dismissed the appeal for other reasons and so did not rule on the question of whether the determination by Reynolds J regarding the refusal to permit legal representation was wrong. The issue of legal representation was considered by Adam J in *Marumahoko*'s case *supra*. He held that it is inconsistent with the Zimbabwe Constitution when a person is C denied legal representation at an inquiry on issues of fact. At p 49, he said:

> "On the right to legal representation, Lord Denning in *Maynard v Osmond* [1977] QB 240 at 252; [1977] All ER 64 (CA) at 79 observed:
>
> > 'On principle, if a man is charged with a serious offence which may have grave consequence for him, he should be entitled to have a qualified D lawyer to defend him. Such has been agreed by the government of this country when it adhered to the European Convention on Human Rights. But also, by analogy, it should be the same in most cases when he is charged with a disciplinary offence before a disciplinary tribunal, at any rate when the offence is one which may result in his dismissal from the force or other body to which he belongs; or to loss of his livelihood; or, E worse still, may ruin his character forever.
> >
> > I gave the reason in *Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125, 132:

"If justice is to be done, he ought to have the help of some one to speak for him. And who better than a lawyer who has been trained for the task?"

He should, therefore, be entitled to have a lawyer if he wants one. But, F even if he should not be entitled as of right, I should have thought that as a general rule the tribunal should have a discretion in the matter. Legal representation should not be forbidden altogether. The tribunal should have a discretion to permit him to have a lawyer if they think it would assist'."

G The decisions of Adam J were taken on appeal: see *Chairman, Public Service Commission v Marumahoko* 1992 (1) ZLR 304 (S). At p 314A-B, McNally JA said:

"First it must be pointed out that the right to legal representation did not arise as an issue in this case, because there was no inquiry. Section 17(2) of the regulations prohibits legal representation at an inquiry. Whether H that section is *ultra vires* the Constitution is a matter as to which the

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Smith J

Commission may wish to seek legal advice — indeed it would be A surprising if it has not already done so in the light of my remarks in *Chairman, Public Service Commission & Ors v Hall* S-49-89 at p 7 and subsequently the Chief Justice's remarks in *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 157-158. A ruling on the matter will not be given in proceedings in which the question does not arise." B

McNally JA repeated the remarks referred to above in the *Vice-Chancellor, University of Zimbabwe* case *supra.* At p 174B-C, he said:

"When the Act was amended so as to omit reference to the right to legal representation, one finds that for eighteen months — and indeed as far as we know the position is still unchanged — the Ordinance remained C unattended. It still referred to the student's right to legal representation. Why should we assume, in those circumstances, that the University intended to deprive the students of that right? The intention of the University in this respect is the intention of the Council as expressed through its Ordinances. The Ordinance never changed. Why then assume that the intention changed?

Whether one interprets *in favorem libertatis*, or *contra proferentem*, the D result must be the same. One must assume that the Council, recognising the demands of natural justice, decided against any amendment to the Ordinance, because it did not wish to deprive the students of the right to legal representation, despite the opportunity to do so which was provided by the amendment to the legislation. It was not for the Chairman of the SDC to amend the Ordinance. Nor indeed was it for the legislature to do E so. It was the function of the Council to do so. And it did not do so.

If the Council had wished to amend the Ordinance it could have done so quite simply by deleting s 8.4.6. Whether this court would have upheld that deletion in the light of s 18(9) of the Constitution is another matter. It is not necessary now to decide it because, in my view, the Ordinance still recognises the right to legal representation. F

I would simply say that in a series of cases — *Chairman, Public Service Commission v Hall* S-49-89; *Metsola v Chairman*, *Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 158A; *City of Mutare v Mlambo* 1992 (1) ZLR 17 (S) at p 21; and *Chairman, Public Service Commission & Anor v Marumahoko* 1992 (1) ZLR 304 at p 314 — this G court has suggested, without deciding the point, that there is much to be said for the view that where an individual's career is at stake before a tribunal he may be entitled as of right, by reason of natural justice, to legal representation if he so wishes."

In *Minerals Marketing Corporation of Zimbabwe v Mazvimavi* 1995 (2) ZLR 353 (S), the Supreme Court dealt with an appeal from a decision of the Labour H

Smith J

A Relations Tribunal. That Tribunal had declared that during the course of the hearing in question the disciplinary committee of the MMCZ had committed a series of gross irregulations. One of them was the denial of the employee's request to be legally represented before it. Dealing with the particular issue, Gubbay CJ at p 358F-359 said:

"Whether or not a denial of legal representation before a tribunal other than B a court of law infringes the right of the person affected to a fair hearing is a somewhat open question: See *City of Mutare v Mlambo* 1992 (1) ZLR 17 (S) at 21; *Vice-Chancellor, University of Zimbabwe & Anor v Mutasah & Anor* 1993 (1) ZLR 162 (S) at 174G-H; Baxter, *Administrative Law* at pp 555-556. But it is one which falls squarely within the purview of the High Court's review powers. This is so even where what is in C contention is a failure by that body to exercise a proper discretion in refusing legal representation and not

merely the existence of an absolute right to enjoy it: see *Dladla & Ors v Admin, Natal & Ors* 1995 (3) SA 769 (N) at 776B-J.

In the sphere of employment law, where a disciplinary code governs the conduct of employees, the right to be legally represented at an enquiry is D dependent on the provisions of the code itself. See *Dabner v SAR&H* 1920 AD 583 at 598; *Cuppan v Cape Display Supply Chain Svcs* 1995 (3) SA 175 (D) at 182G-I. It is just as if the employment relationship were regulated under a contract. See *Lamprecht & Anor v McNeillie* 1994 (3) SA 665 (A) at 668B-I.

Section 101(3)(f) of the Labour Relations Act mandates that an employment E code of conduct must grant to the employee, alleged to be in breach thereof, the right to be heard by the person, committee or authority responsible for its implementation, before any decision is made in the case. The Corporation's code provides that members of staff accused of committing work-related offences may be represented at the disciplinary hearing by the workers' committee. It was common cause that this form F of representation was always available to the respondent. But there is no mention in the code of legal representation. The omission, I think, gives rise to the inference that no right to representation, other than by the workers' committee, was intended to be conferred."

The learned Chief Justice then went on to hold that the Tribunal had erred in believing that it was empowered to decide whether the refusal to permit an G employee to be legally represented amounted to a violation of the principles of natural justice. However, he did not reach a conclusion as to whether or not a denial of legal representation before a tribunal other than a court of law infringes the right of the person affected to a fair hearing.

The question of legal representation was considered by Didcott J in *Dladla &* H *Ors v Administrator, Natal & Ors* 1995 (3) SA 769 (N). At p 775-776 he said:

Smith J

"Counsel drew my attention to *Pett v Greyhound Racing Association Ltd* A [1969] 1 QB 125 (CA); [1968] 2 All ER 545, an English case about a licensed trainer of greyhounds who had been denied legal representation at a disciplinary enquiry into his conduct. Lord Denning MR had this to say on that (at 132A-133A (QB) and 549C-I (All ER):

> 'Mr Pett is here facing a serious charge…If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his B reputation and his livelihood. On such an enquiry I think that he is entitled not only to appear by himself but also to appoint an agent to act for him … Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He C may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have D thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor … Natural justice then requires that he can be defended, if he wishes by counsel or solicitor.'

The description given there of the inadequate defences proffered in most cases by laymen fending for themselves is echoed loudly by our local E experience. Rarely, what is more, would a fellow employee who was no lawyer do much better. Those remarks of Lord Dennng have not been accepted in England, according to *Lamprecht and Another v McNeillie* 1994 (3) SA 665 (A) at 671I-672B, as authority for the proposition that legal representation must always be countenanced in situations of the sort with which he dealt. But counsel did not cite his judgment, and I have not F quoted from it, in support of that proposition, the untenability of which I shall assume for the purposes of my decision. The present aptness of the passage reproduced by me lies rather in its relevance to the discretion which has on that hypothesis to be exercised, I agree with counsel, once legal representation is neither allowed nor disallowed by any statute, regulations or rules governing the proceedings and the occasion therefore arises for a discretionary decision on the point. G

Such occasions were discussed in a second English case to which I was referred, the one of *Enderby Town Football Club Ltd v The Football Association Ltd & Anor* [1971] 1 Ch 591 (CA); [1971] 1 All ER 215, when Lord Denning returned to the subject, stating at 605D-G (Ch) and 218 b-c (All ER): H

Smith J

A 'Is a party who is charged before a domestic tribunal entitled as of right to be legally represented? Much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. They are masters of their own procedure, and if they in the proper exercise of their discretion, decline to allow legal representation, the courts will not B interfere … But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule: "We will never allow anyone to have a lawyer to appear for him". The tribunal must be ready, in a proper case, to allow it. That applies to anyone in authority who is entrusted with a discretion. He must not fetter his discretion by making an absolute rule from which he will never depart.'

C Reverting to the *Pett* case, and explaining the decision reached in it, he continued at 605H-606B (Ch) and 218f-g (All ER):

'Mr Pett was charged with … a most serious offence carrying severe penalties. He was to be tried by a domestic tribunal. There was nothing in the rules to exclude legal representation, but the tribunal refused to D allow it. Their reason was because they never did allow it. This court thought that that was not a proper exercise of their discretion. Natural justice required that Mr Pett should be defended, if he so wished, by counsel or solicitor … Maybe Mr Pett had no positive right, but it was a case where the tribunal in their discretion ought to have allowed it.'

The *Lamprecht* judgment left open (at 672H-I), the question whether our E law took the same general view of the discretion exercisable in the state of affairs thus postulated. That it surely does so is an answer for which support can be derived, however, from *Morali v President of the Industrial Court & Ors* 1987 (1) SA 130 (C), a matter in which Berman J declared at 133C-D:

'The common law … provides, and it is indeed one of the cornerstones F of the common law, that a party be afforded a fair opportunity to present his case, which is a facet of the *audi alteram partem* rule, so that while the party appearing before an administrative tribunal has no right to be represented, the tribunal has a discretion to permit this, … a discretion which it will exercise in appropriate cases, … each case being dealt with on its particular merits'."

G The learned judge concluded that the tribunal had a discretion to permit legal representation. He went on to say at p 777A-E:

"What remains to be considered is whether there was a proper exercise by the officials concerned of the discretion which I therefore believe them to have had when it came to the legal representation of the applicants. The conclusion is inescapable, in my opinion, that nothing of the sort H occurred. The jobs and livelihoods of the applicants were at stake. They

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Smith J

were handicapped by every disability of laymen which Lord Denning MR A had described. Their fate lay in the hands of no independent tribunal, but officials of the very establishment which had charged them with misconduct, officials who would hardly have felt inclined in any strife between them and it to look with sympathy at their side of the story. The disadvantage from which they suffered on that score was then aggravated by the differences of race, culture, language and background that distanced them B from the officials, impairing the prospects of shared insights and mutual understanding. Their need for a lawyer to defend them was strong in all those circumstances. Yet, when they were denied the opportunity to have one, such considerations were wholly disregarded. None even entered the minds of the officials, who were preoccupied with their usual practice and oblivious to everything else. In no emergency where a delay in the C proceedings could not be brooked, and for no reason that has emerged but conformity for its own sake, they followed the practice unquestioningly and slavishly. They made up their minds to do so, furthermore, without waiting to hear or deigning to care what the applicants or their attorney might have wanted to say about that."

He set aside the dismissals of the employees because there was a failure to D exercise a proper discretion to allow the employees legal representation at the disciplinary enquiries.

The views expressed by Lord Denning in the *Pett* case *supra* and by Didcott J apply equally in this country. Employees facing a charge of misconduct which might result in dismissal cannot expect to be calm and rational when E appearing before a disciplinary tribunal. Most employees in this country are not highly educated. They cannot be expected to prepare a case to avoid dismissal. They are highly unlikely to be aware of what issues may be raised in mitigation. They are not experienced sufficiently to be able to cross examine witnesses who testify against them. They are unlikely to be able to assess whether witnesses should be called to help their case. I consider that if F an employee who is facing a charge of misconduct which might lead to his dismissal wishes to have

legal representation, and his request is refused, the requirements of the *audi alteram partem* rule would not be met.

In *Nhari v Public Service Commission & Anor* 1998 (1) ZLR 574 (H), Devittie J was dealing with a case where the applicant, who was entitled to be legally represented, applied for a postponement of the disciplinary inquiry so that he G could obtain legal representation and his application was rejected. At p 578G, he said:

> "The right to legal representation before a tribunal other than a court of law is beyond question." H

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Smith J

A He then went on to cite the remarks of Lord Denning in *Maynard v Osmond* which I have referred to earlier. The learned judge held that the rejection of the application for a postponement had not prejudiced Nhari and so dismissed the application for review. There was an appeal from his decision *Nhari v Public Service Commission* 1999 (1) ZLR 513 (S). At p 518B-F, Gubbay CJ said:

> "It is, to my mind, a matter of considerable importance, both in the interests B and administration of justice, that every person who enjoys the fundamental right to be represented by a legal practitioner before a court or other adjudicating authority established by law should be accorded every opportunity of putting his or her case clearly and succinctly to such body. Almost invariably that function can only be performed properly when it is presented by a person trained and experienced in the law. Indeed, I can C do no better than to quote the words of Sutherland J, of the United States Supreme Court, in *Powell v Alabama* 287 US 45 (1927) at 68-9:
>
> > 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of D counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction E because he does not know how to establish his innocence.'
>
> These *dicta*, although spoken in the context of criminal proceedings, apply with equal force to the position of a person charged with a serious disciplinary offence, one which, if proved, will, as in this case, result in dismissal, the loss of livelihood and ruination of character: see *Maynard v Osmond* [1977] 1 All ER 64 (QB) at 70a *per* Lord Denning MR. It seems F to me that if the absolute right to procure legal representation is to have any meaning and significance, it must embrace the right to be afforded a reasonable opportunity to secure it. A refusal of that opportunity, where requested, constitutes a denial of the right to a fair hearing guaranteed under subs (2) and (9) of s 18 of the Constitution of Zimbabwe."

Accordingly, for the reasons, set out above, I consider that the dismissal of G Chirenga must be set aside. Delta may, of course, institute fresh disciplinary proceedings against Chirenga, if it so wishes but must afford him the right to be legally represented.

It is ordered that:

1. The H decision by the respondent to dismiss the applicant is set aside.

2003 (1) ZLR p528

Smith J

2. The applicant be reinstated to his original position with full salary and A benefits from the date of suspension.
3. The respondent pay costs of suit.

Mapambure & Associates, applicant's legal practitioners B

Gill, Godlonton & Gerrans, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/S v ZULU 2003 (1) ZLR 529 (H)

S v ZULU 2003 (1) ZLR 529 (H)

Citation	2003 (1) ZLR 529 (H)
Case No	Judgment No. HB-52-2003
Court	High Court, Bulwayo
Judge	Cheda J & Ndou J
Heard	31 March 2003; 8 May 2003
Judgment	8 May 2003
Counsel	*G Nyoni*, for the appellant Mrs *M Cheda*, for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

Criminal procedure (sentence) — *common law crimes — indecent assault —* C *adult male placing hands on breasts of young girl — appropriate sentence*

Criminal procedure (sentence) — *general principles — imprisonment— need to avoid imprisonment where possible — public opinion — relevance — need to reflect feelings of society but still avoid severe punishments*

Headnote

D The appellant was convicted of indecent assault. He had touched the breasts of a young girl aged 10. He was sentenced to a term of imprisonment. On appeal:

Held, that over the years the courts have emphasised that imprisonment is a severe and rigorous form of punishment, to be imposed as a last resort and E when no other form of punishment will do. There has also been a shift from the more traditional methods of dealing with crime and the offender towards a more restorative form of justice, which takes into account the interests of society and the victim. This is a holistic approach to sentencing, in that it punishes the offender, causes him to pay reparation and integrates him into society.

F *Held*, further, that one of the functions of the criminal law is to give expression to the collective feelings of revulsion towards acts such as the indecent assault of children. Although it is vain to preach to any society that it must suppress its feelings, an enlightened society will recognise the futility of severely punishing unavoidable retrogression in human dignity. The law, if wisely administered, should dramatise its punishments. G All men live more or less in their imaginations, and the realisation that one will be hissed off the social stage to suffer pain is bound to act as a strong deterrent. Not only the severity, but the certainty, of punishment is vital. Civilisation means rationality by eliminating needless cruelty, and our methods of punishment must undergo profound changes, even H though they cannot cease to be punishments.

Ndou J

Held, further, that factors such as the age of the complainant, acts or A statements accompanying the touching of the breasts, the reaction of the complainant, the frequency of the touches, and so

on, should be taken into account in determining the seriousness of the conduct. In this case, a fine, coupled with a suspended term of imprisonment, would be appropriate. B

Cases cited

S v Banana 2000 (1) ZLR 607 (S)

S v Chigova 1992 (2) ZLR 206 (S)

S v Gumbo 1995 (1) ZLR 163 (S)

S v Kashiri HH-174-94

S v Manyemba A-82-79 C

S v Mbada S-184-90

S v Mlambo 1994 (2) ZLR 410 (S)

S v Msindo & Ors HH-25-02

S v Ndhlovu A-88-79

S v Ndlovu 1994 (1) ZLR 290 (S) D

S v Phiri G-B-27-77

S v Ramushu & Ors S-25-93

S v Sithole HH-50-95

S v Soko S-118-92

S v Weeks & Anor S-118-93 E

Case information

G Nyoni, for the appellant

Mrs *M Cheda*, for the respondent

Judgment

Ndou J: The appellant was convicted by a Bulawayo provincial magistrate of indecent assault, it being alleged that he fondled the complainant's breasts F and touched her legs (or lifted her skirt). He was sentenced to 24 months' imprisonment with six months suspended on condition of good behaviour. The appellant is aggrieved and dissatisfied with the conviction and sentence. This appeal is an expression of such dissatisfaction. The salient facts of this matter are that the appellant's and the complainant's families shared a house in Makokoba suburb, Bulawayo. The complainant was aged ten years at the G time of the incident. It is common cause that on 12 December, the appellant's and the complainant's family members were away. It is common cause that the appellant called the complainant and sent her to go and buy him beer at a nearby shebeen. It is common cause that when the complainant returned the appellant further sent her to go and get an opener from her parent's room. She H

A obliged. As to what happened when she returned with the opener and handed it over to the appellant, the appellant's and complainant's versions start to differ. On the one hand, the appellant testified that the complainant brought an opener which depicted a man and woman intimately involved in some act. He asked the complainant about the ownership of this opener. She indicated to him that it belonged to her father. He warned her against the use of the B opener, as it was "obscene". He denied fondling the complainant's breasts or lifting up her skirt or touching her legs. He was surprised to hear about these allegations of indecent assault from the complainant's father. On the other hand, the complainant gave the following account of what happened after she returned with the opener:

> C "The accused asked me what grade I was doing at school and I told him I was in grade 5. He asked me how old I was and I told him 10 years. The accused then pulled me on to the sofa he was sitting on and started fondling my breasts. He then asked me whether I was able to misbehave and I told him I could

not. He said "does it fit" and he asked that I opened (sic) my legs. I did not know that accused was referring to when he said, 'does it fit'? The accused then gave me $20 and said I was to put it in my D bag."

I agree with Mr *Nyoni,* for the appellant, that the prosecution was poorly conducted. The complainant was not asked whether she in fact "opened her legs" or lifted up her skirt. Besides the fondling of breasts, the testimony does not show any further assault of an indecent nature. As these facts had been E alleged in the State outline the prosecutor should have canvassed the issue further when the complainant testified, especially when the complainant was aged ten years. In his judgment, the trial magistrate found "the accused then *pulled her* to the sofa he was seated and fondled her breasts and *opened her legs* after asking her to behave" (emphasis is mine). The highlighted parts of the judgment are based on the allegations in the State outline. In her testimony, F the complainant never mentioned that. The learned trial magistrate misdirected himself in this regard. *Mr Nyoni* did not attribute this failure to lead such evidence to the credibility of the complainant. This is a case of poor presentation of evidence by the prosecutor which is not of the complainant's making and thus the assessment of her demeanour is not affected thereby. It G is trite that the complainant's credibility is not to be assessed on apparent conflicts between her *viva voce* evidence and a statement or summary of the case prepared by someone else: see *S v Chigova* 1992 (2) ZLR 206 (S) at 213D. In any event, the inconsistency referred to cannot be said to be so blatant as to be irreconcilable; that being so, too much weight cannot be placed on them: H see *S v Weeks & Anor* S-118-93 at p 7 of the cyclostyled judgment.

Ndou J

It is trite that the assessment of the credibility of a witness is the province of A the trial court: see *S v Mlambo* 1994 (2) ZLR 410 (S). At p 413 of the judgement, Gubbay CJ stated:

"The assessment of the credibility of a witness is *par excellence* the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense." B

In *S v Soko* S-118-92 at p 8 of the cyclostyled judgment, Ebrahim JA stated as follows:

"A court of appeal will not interfere with a trial court's assessment on credibility tightly. There has to be something grossly irregular in the proceedings to warrant such interference. This is because the trial court by having the witness before it is better able to make an assessment on C demeanour and all other factors relevant in assessing credibility. The appeal court, on the other hand, is confined to the record."

In *S v Mbada* S-184-90 at p 7 of the cyclostyled judgment, Gubbay CJ stated as follows:

"An appellate court must never overlook that the trial court's living through D a drama of a case is in a unique position to evaluate the evidence in its proper perspective. To justify the conclusion that the assessment made by a trial court of the credibility of the witnesses is wrong, an appellate court must be persuaded that the finding defies reason and common sense. Questions of credibility are *par excellence* the province of the trial court."

The above cases set out admirably the approach that this court, sitting as a E court of appeal, should adopt. The crux of the matter *in casu* is the finding of credibility of the complainant by the trial court. My careful reading of the record of proceedings *in casu* does not lead me to a conclusion that there were gross irregularities in the manner in which the trial was conducted. But that is not necessarily the end of the matter. As rightly pointed out in *Soko*'s case *supra* at pp 8-9: F

"The matter does not, however, end that easily. The legal system is based on the principle of the presumption of innocence. Before an accused person is convicted, the State must prove beyond reasonable doubt that it was indeed the accused who committed the offence in question."

With this in mind I examined the totality of the State evidence carefully. G Although it is trite that the cautionary rule in sexual offences is no longer warranted, the sexual acts still need to be considered carefully: see *S v Banana* 2000 (1) ZLR 607 (S). At p 614E-G of the judgment, Gubbay CJ stated:

"It is my opinion that the time has now come for our courts to move away from the application of the two-pronged test in sexual cases and proceed in conformity with the approach advocated in South Africa. In so holding, H

Ndou J

A I have not overlooked the well researched judgment of Gillespie J in *S v Magaya* 1997 (2) ZLR 138 (H). But having regard to the abrogation of the obligatory nature of the rule in such countries as Canada, the

United Kingdom, New Zealand and Australia, as well as by the State of California: (see Chaskalson *et al*, *Constitutional Law of South Africa* at 14-62; Hatchard, 1993 *Journal of African Law* 97 at 98; (1983) 4 *Canadian* B *Journal of Family Law* 173), I respectfully endorse the view that in sexual cases the cautionary rule of practice is not warranted. *Yet I would emphasise that this does not mean that the nature and circumstances of the alleged sexual offence need not be considered carefully.*" (emphasis is mine)

In casu, the issue of the identity of the assailant does not arise. The issue is C whether the appellant fondled the complainant's breasts. There is no room for doubting the complainant's evidence in this regard. Her explanation of what the appellant did constitutes an assault of an indecent nature. The trial magistrate's assessment in this regard cannot be faulted. The finding of the trial court in the circumstances does not defy reason and common sense. The conviction is unassailable and the appeal against conviction has to be D dismissed.

The basis of the appeal against sentence is that it is manifestly excessive so as to induce a sense of shock. In assessing the appropriateness of a sentence, an appeal court should be guided by what Gubbay CJ stated in *S v Ramushu & Ors* S-25-93 at p 5 of the cyclostyled judgment:

E "But in every appeal against sentence, save where it is vitiated by irregularity or misdirection, the guiding principle to be applied is that sentence is preeminently a matter for the discretion of the trial court, and that an appellate court should be careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive, should only be altered if it is viewed as being disturbingly inappropriate."

F See also *S v Msindo & Ors* HH-25-02.

So far as sentence is concerned, the appellant is a first offender. In *S v Manyemba* A-82-79, the accused was found guilty of indecently assaulting a young girl aged sixteen and a half years. He was sentenced to a fine of $75 or in default of payment 25 days' imprisonment, plus an additional custodial sentence of three months suspended on condition of good behaviour. The G appellant in that case indecently assaulted the young complainant *by placing an arm about her waist, seizing her wrist and placing a hand upon her breasts* (emphasis is mine). At p 6 of the cyclostyled judgment, Davies JA stated:

"… but it seems to me that although the nature of the assault did not indicate serious indecency, it nevertheless merited at least the punishment H imposed by the magistrate … Quite obviously there is a need for a

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deterrent sentence in this regard. Obviously, imprisonment as such was A not called for and, of course, an effective period of imprisonment was not imposed upon the appellant."

In *S v Ndhlovu* A-88-79, the accused was convicted of indecent assault committed in the course of searching the complainant. The complainant was a juvenile. He searched her because he believed, apparently genuinely, that she B might have been responsible for stealing a sum of money from his house. On appeal, a sentence of 18 months' imprisonment (with eight months suspended on condition of good behaviour) was set aside and substituted with one of $50 or, in default of payment, one month' imprisonment. In that case the indecent act comprised touching her breasts and interfering with her clothing in the course of the search. In *S v Phiri* G-B-27-77, the accused was proved to have C felt an 11 year old girl. He lay on top of her and touched her breasts. He was sentenced to 18 months' imprisonment, of which nine months' was suspended on condition of good behaviour. The child was frightened by the accused's actions. On review, the sentence was reduced to nine months, suspended on condition of good behaviour. Mr *Nyoni* contends that the appellant's moral blameworthiness was not judiciously assessed. Mrs *Cheda*, for the respondent, D concedes that sentence imposed is manifestly excessive. She, however, contends that a reduction of the custodial sentence from 24 months to 12 months' imprisonment with part thereof suspended will meet the justice of the case. As both parties agree that there was an improper exercise of sentence discretion, this court is at large as far as sentence is concerned. Mr *Nyoni* contends that a non-custodial sentence is called for. He submits that the option E of a fine or community service should, at least, be considered. I agree that our superior courts have over the years emphasised that imprisonment should be imposed as a last resort on first offenders: see *S v Kashiri* HH-174-94 and *S v Gumbo* 1995 (1) ZLR 163 (S). This reflects a paradigm shift. First, over the years our courts have emphasised that a sentence of imprisonment is a severe F and rigorous form of punishment, which should be imposed only as a last resort and where no other form of punishment will do. Second, there have been concerted efforts to shift from the more traditional methods dealing with

crime and the offender towards a more restorative form of justice that takes into account the interests of both society and the victim. This is a holistic approach to sentencing in that it punishes the offender, causes the offender to pay G reparation and integrates the offender into the society: see *S v Ndlovu* 1994 (1) ZLR 290 (S) and *S v Sithole* HH-50-95.

In this case, the aggravating factor is that the complainant was aged ten years at the time. If the matter had been properly prosecuted and it was proven that in addition to fondling the breasts, the appellant lifted her skirt and touched H

2003 (1) ZLR p535

Ndou J

A her legs I would have no hesitation in imposing a custodial sentence. Another factor is that the appellant was *in loco parentis*. Generally, the courts deal severely with fiendish perpetrators of horrible crimes on children. It is one of the functions of the criminal law to give expression to the collective feeling of revulsion toward certain acts such as indecent assault of children. But an enlightened society will recognise the futility of severely punishing unavoidable B retrogression in human dignity. But it is vain to preach to any society that it must suppress its feelings. The law, if wisely administered, should dramatise its punishment. It is a fact that all men live more or less in their imagination, and any imaginative realisation that one will be hissed off the social stage to suffer pain is bound to act as a strong deterrent. In this connection, it is well to repeat the frequently made, but still just, observation that not only the C severity but the certainty of punishment is a factor in the case: see *Reason and Law* by Morris R Cohen at pp 59 and 60. If civilisation, however, means rationality in the elimination of needless cruelty, then our methods of punishment must certainly undergo profound changes even though they cannot cease to be punishments. Is mere touching of breasts a serious act of D indecency? Does it warrant imprisonment?

I believe factors such as the age of the complainant, acts or statements accompanying the touching of the breasts, the reaction of the complainant, the frequency of the touches etc. should be taken into account in determining the seriousness of the conduct. In this case, after touching the complainant's breasts the appellant gave her $20, presumably to silence her or to buy in her E approval. This is a bad thing for an adult to do. The appellant was teaching, or least encouraging, this ten year old some form of prostitution. This conduct would introduce children to prostitution i.e. men can satiate their lust with your body in exchange for money. This is a perception that children can have of this conduct. In this case, it was also bad for him to send her to shebeens F to buy him beer.

In light of the above, I feel that a fine coupled with a suspended custodial sentence will meet the justice of the case. I accordingly, confirm the conviction and set aside the sentence imposed by the court *a quo* and substitute in its place the following:

> G "A fine of $10 000 or default of payment 5 months' imprisonment. In addition, 12 months' imprisonment wholly suspended for 5 years on condition the accused in that period does not commit an offence of indecent assault or of a sexual nature and for which he is convicted and sentenced to a fine in excess of $500."

2003 (1) ZLR p536

Ndou J

Cheda J concurred. A

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

Criminal Division of the Attorney-General's Office, respondent's legal practitioners B

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Source:

S v RUTURI (2) 2003 (1) ZLR 537 (H)

Citation	2003 (1) ZLR 537 (H)
Case No	Judgment No. HH-26-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	7 May 2003; 12 May 2003
Judgment	12 May 2003
Counsel	*J Jagada*, for the appellant *G Chikumbirike*, for the respondent
Case Type	Bail appeal
Annotations	No case annotations to date

Flynote

Criminal procedure — *bail — appeal — against grant of bail — reluctance* C *of appeal court to interfere when bail has been granted*

Criminal procedure — *bail — appeal — to High Court against decision of magistrate — nature of appeal — whether High Court can substitute its own discretion for that of magistrate*

Criminal procedure — *bail — co-accused — equality of treatment — need* D *for equality, taking into account factors personal to each accused*

Criminal procedure — *bail — grounds for refusal — likelihood of accused person absconding — need for State to establish cognisable indication that accused likely to abscond — fact that accused concealed existence of foreign bank account — whether indicates likelihood of accused* E *absconding*

Headnote

If there is no basis for differentiating the treatment to be accorded to persons who are jointly charged with an offence, then they should be treated in like manner, whether in respect of bail, sentence or any other ground. In practice, it is not often that persons jointly charged with the same offence F are treated equally in every respect: factors personal to them may set them apart for purposes of the grant or refusal of bail. Much the same can be said about the imposition of sentence. This does not, however, detract from the general principal that persons in equal circumstances must be treated equally.

G In an appeal to the High Court against the grant or refusal of bail by a magistrate, the High Court can interfere in the magistrate's decision only if there was an irregularity or misdirection or if the magistrate exercised his or her discretion so unreasonably or improperly as to vitiate the decision.

Chinhengo J

Where a magistrate has granted bail to an accused person, the High Court on A appeal should not lightly interfere with that decision and withdraw the bail, unless there are compelling reasons to do so.

The respondent was one of two senior managers of a building society who were charged with stealing a very large sum from the society. Both were refused bail in the magistrates court and they appealed separately to the B High Court against the refusal. The respondent's appeal was dismissed but his co-accused was successful and he was admitted to bail. As a result of his co-accused's success, the respondent again applied to a magistrate for bail on the ground that his co-accused's admission to bail amounted to a change of circumstances, and this time he was successful: he too was granted bail, though the magistrate imposed certain additional conditions C to cater for his particular circumstances. The State appealed to the High Court, arguing that the different personal circumstances of the respondent ¾ in particular, the fact that he possessed substantial assets in South Africa ¾ meant that he should be treated differently from his co-accused. The State also alleged that, by failing to disclose the existence of a bank account in South Africa, the respondent had shown he was likely to D abscond.

Held that by imposing additional conditions of bail on the respondent, the magistrate removed those factors which would have justified a different treatment of the respondent from his co-accused; the magistrate did not therefore go against the principle of equal treatment.

Held, further, that for the State to establish that an accused person is likely E to abscond if granted bail, it must show a cognisable indication that the accused will abscond. The mere fact of not disclosing a foreign bank account does not provide such an indication.

Held, further, that there was no misdirection in the decision of the magistrate and there was therefore no basis to interfere with the magistrate's F decision.

Cases cited

Aitken & Anor vAttorney-General 1992 (1) ZLR 249 (S)

Ellish & Andere v Prokueur-General, WPA 1994 (4) SA 835 (W)

S v Chikumbirike 1986 (2) ZLR 145 (S) G

S v Dzawo 1998 (1) ZLR 536 (S)

S v Fourie 1973 (1) SA 100 (D)

S v Lotriet & Anor 2001 (2) ZLR 225 (H)

S v Masuku HH-79-02

S v Ruturi HH-31-03 H

Chinhengo J

Legislation considered A

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 121(5) & (8)

Case information

J Jagada, for the appellant

G Chikumbirike, for the respondent

Judgment

B **Chinhengo J:** This was an appeal by the Attorney-General against the magistrates court's decision admitting the respondent to bail. The appeal was made in terms of s 121(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

C The respondent is facing a charge of fraud or alternatively theft of $958 651 946,16 from his employer, First National Building Society (FNBS). The respondent is not only an employee of FNBS but, through a company in which he and his co-accused Nicholas Border Musona (Musona) are the major shareholders, holds a substantial if not the controlling interest in FNBS. The respondent is facing the charges of fraud or alternatively theft together with D Musona.

On 4 February 2003, the respondent and Musona applied to the magistrates court for admission to bail. Their application was dismissed. The respondent, averring changed circumstances, made a

second application on his own on 10 March 2003 to the same court. The application was again dismissed. He E appealed to the High Court against both decisions of the magistrates court. The first appeal was heard and dismissed by Makarau J on 28 February, 2003 — see her ladyship's judgment in *Samson Ruturi v The State* HH 31-03 *. The second appeal was heard and dismissed by Omerjee J on 26 March 2003 — see his lordship's judgment in *Samson Ruturi v The State* HH 48-03. It is common cause that Musona appealed against the decision of the magistrates F court separately. His appeal was heard and allowed by Matika J. Musona was thus admitted to bail on certain conditions. This prompted the respondent to lodge a third application for admission to bail to the magistrates court on the grounds of changed circumstances. This time he was successful and he was admitted to bail on conditions similar to those on which Musona was admitted to bail, but with additional conditions which were intended to take into G account certain circumstances which were peculiar to him.

The changed circumstances which formed the basis of the respondent's third application were that his co-accused had been admitted to bail by Matika J and

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that a period of ten weeks had gone by since his arrest. The mainstay of his A application seems to me to have been the first — the admission to bail of his co-accused. The expiry of ten weeks from the date of his arrest seems to me to have been tacked onto the main submission as an incidental factor for the court to consider. I say so because Mr *Chikumbirike* did not make further submissions to advance this ground as a basis for his client's admission to bail and the magistrate did not consider it in reaching her decision. B

In the court *a quo* Mr *Chikumbirike* submitted that the respondent should be treated in the same manner as his co-accused and be admitted to bail because they faced the same charges and the court had, from the time that they both first appeared in court, treated them in the same manner and had refused them bail on the same grounds. Indeed in dismissing their first application for bail the C court *a quo* seems to have treated them in the same manner. It is recorded in Makarau J's cyclostyled judgment at p 1 that in dismissing their appeal the magistrate had stated the following:

> "In considering the submission, by both the State and the defence in their application for bail, it is the court's view that if the accused are granted bail, there is a likelihood that they will abscond considering the amount D involved which is close to a billion (dollars) and also the fact that they are internationally connected. As such bail is refused."

It is clear that the magistrate denied them bail on the basis that the amount involved was large and that they both had international connections and were likely to abscond. It does not appear that the nature or extensiveness of their E international connections were disclosed to the court. What is significant, however, is that the court *a quo* accepted that the two had international connections and that they were likely to abscond by taking advantage of those connections. This seems to me to support Mr *Chikumbirike's* submission that the court had treated the two in the same manner in so far as the reasons for denying them bail were concerned. F

The appellant opposed the respondent's third application for bail in the court *a quo* on the basis that the court was not entitled to treat the respondent and his co-accused in the same manner because the court had to consider their personal circumstances, and if those personal circumstances were different, the one could be admitted to bail and the other not, depending thereon. The G appellant submitted that the respondent's personal circumstances were different from those of Musona in that, whereas the respondent owned immovable property in South Africa and had personal bank accounts in the same country and in other countries, Musona did not. This, it was argued, provided a basis for differentiation. The appellant highlighted in particular that when the respondent had been called upon to disclose his personal foreign bank H

A accounts, he had failed or neglected to disclose one such account with a bank in South Africa in which he held the sum of R116 218. The non-disclosure of this account was viewed by the appellant as an indication that he intended to abscond and use the amount in the undisclosed account to start himself up in a foreign country. The appellant also viewed the non-disclosure as an indication that the respondent could well have other foreign bank accounts B which he had not disclosed.

To these assertions Mr *Chikumbirike* responded by stating that the account did not exist and that the State had not given to the court documentary proof that that undisclosed account actually existed. It seems to me that although the appellant was in possession of a memorandum from Price Waterhouse C Coopers in South Africa which stated that the disputed account existed, that memorandum was not produced for the court's perusal. Even though the memorandum was not notarially authenticated it could have provided some basis for the court to reach its decision if it had been handed in.

In granting bail to the respondent, the magistrate gave the following brief reasons:

> D "The main basis of this application of the defence is that there are changed circumstances and that the accused's co-accused has since been granted bail as shown by the High Court Order 3529/03 produced in court by the defence.
>
> The court does agree with the defence that right from the start when the E accused started appearing in court, they were being treated equally. The reasons for denial of bail were the same for both accused. At no time was there any differentiation. The court finds that the State is taking a wrong approach as it sought in its address to treat the accused differently now.
>
> Since the accused were being treated equally and are equally facing the same charges, the court finds it to be in the interests of justice to treat the F accused in the same manner. Accordingly the accused (1) (respondent) is granted bail on the same terms as follows…"

The conditions were that the respondent (a) deposits the sum of $4 million dollars with the Clerk of Court, Harare Magistrates Court; (b) he resides at House No 80 Folyjohn Crescent, Glen Lorne; (c) he reports at the Serious Fraud Squad offices once daily between 6 a.m. and 6 p.m.; (d) he does not G interfere with State witnesses; (e) he does not visit FNBS premises until the matter is finalised; (f) all the property of the accused is to remain interdicted and bank accounts frozen as per Karwi J's order in case no HC 997/03.

The magistrate then added other conditions applicable only to the respondent *viz* that - (g) the respondent surrender all his travel documents to the clerk of H the court at Harare Magistrates Court; (h) that the (undisclosed) account No

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6203370565, FNBS, S.A. with R 116 218 be submitted to the curator so that A it could also be frozen; and (i) that the house in South Africa be surrendered to the curator and to remain so until the matter was finalised.

The magistrate also ordered that the last two conditions should be effected by the accused (respondent) signing a power of attorney authorising the Deputy Sheriff to hold the account and the house until the finalisation of the criminal B case in this matter and to be disposed of only in the event of a judicially proven indebtedness.

The magistrate based her decision almost entirely on the reasoning that the respondent had to be treated in the same manner as his co-accused. The magistrate did not state the reasons for imposing the additional conditions. It can, however, be inferred from the imposition of the additional conditions that C the magistrate must have accepted that the earlier undisclosed account existed, hence the order that it be surrendered to the curator of FNBS and that the Deputy Sheriff be authorised to deal with it in the event that the accused was found liable to pay any money to FNBS. It is clear that by equal treatment the magistrate meant that if one of two persons jointly charged is admitted to bail, D the other must also be admitted to bail.

The appellant contended in the appeal that the magistrate had misdirected herself in a number of respects. Whilst the appellant conceded that the admission to bail of Musona constituted a change in the circumstances for the purposes of making a fresh application by the respondent, it did not agree that the court should have treated the two accused persons equally for the purposes E of assessing the respondent's suitability for admission to bail. The appellant submitted that the different personal circumstances of the respondent warranted a different treatment. In particular, the fact that the respondent had assets outside the jurisdiction required that his application be considered in a different light.

The second misdirection which the magistrate is said to have made was that F she missed the essence of the appellant's submissions on the respondent's failure to disclose the existence of a

third foreign account in South Africa. Mr *Jagada* said that the essence of that submission was not as to how to control that account after its discovery but that the respondent had failed to disclose it. G

The third misdirection alleged is that by imposing the further conditions, the magistrate had failed to consider whether or not it was practicable to enforce the conditions relating to the surrender to the curator of the foreign accounts and the house in South Africa. Mr *Jagada* contended that the order issued by Karwi J did not have extra-territorial effect and the accounts held by the H

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A respondent could thus not be effectively frozen. He also submitted that the stipulation that the respondent should issue a power of attorney and that his immovable property in South Africa could be disposed of by the Deputy Sheriff upon proven indebtedness were not an assurance that what was intended in the order could actually be achieved.

The appellant submitted that I should take into account the personal B circumstances of the respondent, give them due weight, and then substitute my discretion for that of the magistrate, and, without being constrained by the existence of any misdirection or irregularity in the magistrate's decision, deny bail to the respondent.

Mr *Chikumbirike* opposed the appeal on all the grounds on which the State C based its case. I will deal with the arguments by Mr *Chikumbirike* in what follows.

When the parties first appeared before me on 7 May 2003, I directed that the appellant should produce proof as to the existence of the "undisclosed account". I gave the appellant up to 9 May 2003 to do so. I extended that period to 12 May. The State did not produce that proof. When the matter resumed on D the last-mentioned date, I dismissed the appeal after giving my reasons for doing so. The appellant requested that I should give my reasons in writing, which is the purpose of this judgment.

It seemed to me that the following are the issues for consideration. The first is whether the magistrate misdirected herself in the respects highlighted by the State. E The second is, if she did not misdirect herself, would I be at liberty, nonetheless, to substitute my own discretion for hers and reach a different decision so as to deny bail to the respondent.

The question of equal treatment of persons jointly charged with a criminal offence, whether in respect of bail or sentence, is one which in general terms F can always be answered with the words "of course they should be treated in the same manner". By so saying, one is really saying that if there is no basis for differentiating the treatment accorded to persons jointly charged with an offence, then they should be treated in like manner, whether in respect of bail, sentence or any other ground. Support for this proposition comes from the decision in terms of which both the respondent and his co-accused were G denied bail. One of the reasons was that they were internationally connected. Without explaining to the court *a quo* how Matika J had dealt with this very significant point of similarity between the two, the appellant argued for the respondent to be denied bail when his co-accused had been admitted to bail. This did not at all advance the commonly accepted principle that justice must H be evenly administered. Further support for the proposition appears in *S* v

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Lotriet & Anor 2001 (2) ZLR 225 (H), where Blackie J considered the A principle of equal treatment and stated the following at p 229B:

> "Notwithstanding the significance of the other factors in this case, the applicants are entitled to bail. They are so entitled because of two principles of fundamental importance: the right of the individual to liberty and the perception that justice is evenly administered. It is vital that in the B administration of justice there does not appear any form of discrimination, particularly in a matter where the liberty of a person is involved."

Thus stated, the general principle is that persons jointly charged with an offence must be treated in the same way. In practice, however, it is not often that persons jointly charged with the same offence are treated equally in every respect. One accused may have to be treated differently from another because C of certain factors, either personal or related to the offence, which set him apart from the other person with whom he is jointly charged. In the case of admission to bail, one of

jointly charged persons may, in the view of the court, be likely to abscond and the other not. One may be more likely to interfere with evidence or witnesses and the other not. One may be more likely to commit the same or similar offences and the other not. And one may be much more closely D connected to the offence and more liable to be convicted and the other not. These are some of the factors which may justify the granting of bail to the one and its denial to the other. In broad terms, therefore, factors personal to jointly charged persons may set them apart for purposes of the grant or refusal of bail. Much the same can be said about the imposition of sentence - various factors E can set apart persons who have been convicted of the same offence when it comes to sentence. All this, however, does not detract from the general principle that persons in equal circumstances must be treated equally. The question in every case would, however, be a factual one - whether their circumstances are equal or the same. I have just observed it is not often that those circumstances are the same. In my view, therefore, to the extent that the F magistrate based her decision on equal treatment of persons jointly charged with an offence without qualifications, she did not express herself well, but I cannot say she misdirected herself. That, in any case, is not the end of the inquiry.

The magistrate dealt with those factors which set the respondent apart from his co-accused — the possession of personal bank accounts and immovable G property in foreign jurisdictions. She then imposed what she considered were suitable conditions to take account of the factors which would have resulted in the respondent having to be treated differently from his co-accused. By imposing the additional conditions in respect of the respondent, the magistrate removed those factors which would have justified a different treatment of the H

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A respondent from his co-accused. In effect it can be said that the magistrate did in fact treat the respondent differently from his co-accused by imposing the additional conditions, but at the same time she applied the principle of equal treatment. It cannot be said that she went against the grain of the principle of equal treatment. I am satisfied that in adopting the approach that she did the magistrate cannot be said to have misdirected herself.

B Coming specifically to the points raised by the appellant in seeking to show that the magistrate misdirected herself, it is necessary to consider whether the alleged concealment of the third account with the South African Bank is a sufficient basis for concluding that the respondent was likely to abscond and that, therefore, he was not a proper candidate to be admitted to bail.

C Counsel for the respondent specifically put in issue the non-existence of the account allegedly not disclosed. The appellant did not produce sufficient proof that the account existed. It was necessary for the appellant to place before the court sufficient proof of the existence of the accounts. The furthest that the appellant went was to give the account number, the Bank in which it is held and the amount in credit. When at the hearing of the appeal I gave the D appellant what I and the appellant considered to be adequate time within which to establish this fact, still the appellant was unable to do so. The magistrate, however, was careful to ensure that if the account does exist, it should be brought to account in the same way as the other foreign accounts of respondent. She ordered that it be surrendered to the curator to be dealt with E in the same way that the other declared accounts were to be handled.

This brings me to a consideration of the argument by the appellant that the magistrate misdirected herself by failing to appreciate the difficulties associated with giving effect to the freezing of the foreign accounts and the prohibition against disposal of foreign held assets. In case No HC 998/03 Karwi J ordered that:

> "1 (a) The F Respondent be and is hereby restrained from disposing of or causing the disposal of all or any assets in his control including but not limited to the assets detailed on the schedule hereto and the respondent shall immediately withdraw any instructions already given by him for the disposal of any assets.;
>
> (b) This interdict shall not restrict instruction given in respect of properties G detailed in the Acknowledgement of Debt signed by the Respondent annexed hereto;
>
> 2. The Respondent shall within two working days of the service of this Order by the Applicant's Legal Practitioners on the Respondent or his Legal Practitioners provide to the Applicant (FNBS) full and complete H details of all assets owned or beneficially owned by the Respondent or in

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his control or where he has an interest and the whereabouts of such asset A including all bank accounts and investments;

3. In the event of the failure by the Respondent to comply with the terms of this interdict this matter shall again be referred to Karwi J.
4. Each party shall bear its own costs".

In the face of the order by Karwi J, it is untenable to argue that the order cannot B be given effect to. The magistrate is a junior judicial officer and it is hardly her place to contradict a decision of the High Court which must have issued the order after satisfying itself that effect can be given to it. The order was drawn to the magistrate's attention and she made it a condition of the granting of bail that the third foreign account be handled in the same manner as the respondent's other foreign bank accounts as determined by Karwi J. Even though the C magistrate was dealing with a criminal matter where Karwi J was concerned with a civil application, I do not consider that the magistrate erred in taking guidance from an order of this court. In any case, the order is binding on the respondent and he is required to comply with it.

The non-disclosure of the third foreign bank account as a factor to be D considered in the bail application depends very much on whether it exists or not, and assuming that it exists it must still be determined whether the nondisclosure can be construed as an indication that the accused intended to use the funds there in the event that he absconded. In order to establish an intention to abscond, there must be an indication that the accused person might abscond. In *S v Masuku* HH 79-02. I referred with approval to the statement in *S v Fourie* E 1973 (1) SA 100 (D) at 101G where Miller J said:

> "It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any *cognizable indication* that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused, (*cf S v Mhlawili & Ors*, 1963 (3) SA 795 (C)."(the F emphasis is mine).

There is, in my view, a need to show a *cognizable indication* that the accused will abscond. I do not think that the mere fact of not disclosing an account in a bank in South Africa (if that account exists) provides a cognizable indication on its own that the accused intends to abscond. There can be other reasons for G non-disclosure, e.g. the need to pay creditors out of the funds held in that account. The non-disclosure would in this case amount to a failure to comply with Karwi J's order but beyond that I do not think that, on its own, it is an indication that the respondent intended to abscond. The magistrate had before her information on the respondent's assets within and outside Zimbabwe. The former are in excess of $2 billion dollars in value terms. I would not consider H

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A that in exercising her discretion in the manner she did the magistrate can be said to have misdirected herself.

It may appear that the position adopted by the appellant is supported by the decisions of Makarau and Omerjee JJ cited above, but it must be noted that in reaching their decisions the learned judges' attention was not drawn to Karwi B J's order. That in my view provides a point of departure.

In the last paragraph of its statement on appeal the appellant stated the following:

> "It is prayed that this Honourable Court will give the personal circumstances of the respondent the proper consideration they deserve and deny him *bail as it can substitute the discretion of the learned magistrate with its own* C *without specifically restricting itself to the misdirection or irregularity by the court a quo (Aitken & Anor v The State 1992 (1) ZLR page 249 paragraph G)"* (emphasis is mine).

I understood this submission to be an invitation to me to examine the facts of the case and reach my own decision, whether or not there was any misdirection by the magistrate in the court *a quo*. I have determined that the magistrate did D not misdirect herself. The question that must now be answered is: am I in a position, against that finding, to re-look at the matter and possibly reach a different conclusion?

In HH 31/03 Makarau J considered this issue. She said at p 2-3 of her judgment that —

> E "It has been argued before me on behalf of the appellant that in deciding this matter, I am exercising my narrow appellate jurisdiction. As such, the argument proceeds, I must first find a misdirection on the part of the magistrate before I can be at large to consider and substitute my own discretion for that, of the

magistrate. Mr *Chikumbirike* was quite clear in his submission that if I were to find as proven, any one of the misdirections F alleged by the appellant, I am then at large to use my own discretion in the matter and proceed to determine the application as if I were the magistrate."

Her Ladyship relied on the decision in *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S) to reach the conclusion that:

"It thus appears settled that in considering the appeal before me, I need not find a misdirection on the part of the magistrate before I exercise my G discretion in the matter".

I must make it clear that Makarau J was considering an appeal from a refusal by the court *a quo* to grant bail to the respondent. In *Aitken's* case *supra* the position was the same, that the applicant for bail had had his application refused both by the magistrates court and the High Court. In *S v Chikumbirike* H 1986 (2) ZLR 145 (S), bail had also been refused by the High Court but the

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Supreme Court, in relation to the issue at hand, stated the following at p 146 A E-F:

"The next matter to be decided is whether this court in hearing the appeal should treat it as an appeal in the wide sense, that is to say, that it is to be treated as if it was a hearing *de novo*. Once again that matter has been decided by the case of *The State v Mohamed supra* at 542 B-C where TROLLIP JA said that *in an appeal of this nature the Court of Appeal will* B *only interfere if the court a quo committed an irregularity or a misdirection or exercised its discretion so unreasonably or improperly, as to vitiate its decision. On reflection, Mr de Bourbon who appeared for the appellant, has accepted the correctness of that approach".* (the emphasis is mine).

Indeed, as commented by Makarau J in HH 31/03, Gubbay CJ said that in C considering an appeal from the magistrates court against a refusal of bail, a judge of the High Court was at liberty to substitute his own discretion for that of the magistrate on the facts placed before the judge. This, I think, provides the basis of John Reid Rowland's statement in *Criminal Procedure in Zimbabwe* at p 6.14 that: D

"On appeal, a judge may make such order as seems just in the circumstances of the case. An order made by the judge on appeal is deemed to be an order of the magistrate against whose decision the appeal was made".

John Reid Rowland's statement is a true reflection of what is provided in s121(5) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as amended by Act No 8 of 1997. Therein it is provided that: E

"A judge who hears an appeal in terms of this section may make such order relating to bail or any condition in connection therewith as he considers should have been made by the judge or magistrate whose decision is the subject of the appeal".

Section 121(5) does not, in my view, help to determine whether or not the High F Court is at large to substitute its own discretion for that of the magistrate where no misdirection or irregularity has been shown to exist. That determination depends entirely on a construction of the decided cases. *Chikumbirike's* case *supra* and *Aitken's* case*, supra* were decided before The Criminal Procedure and Evidence Act was amended in 1997. The 1997 amendment of s 121 of the Criminal and Procedure Act had the result that if bail is refused by the G magistrates court an appeal lies to the High Court and in that instance there is no further appeal to the Supreme Court: see s 121 (8) which provides that:

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A "There shall be no appeal from a decision or order of a judge in terms of this section".

This amendment led to the decision in *S v Dzawo* 1998 (1) ZLR 536 (S) where Gubbay CJ had this to say at 538E to 539A about the effect of the amendment:

"Subsection (2) (of s 121) provides that an appeal in terms of subs (1) against a decision of a judge of the High Court shall be made to a judge B of the Supreme Court and against the decision of a magistrate to a judge of the High Court. Thus, where the initial application for bail was to a judge of the High Court, an appeal with leave lies to a judge of the Supreme Court; but where the initial application was before a magistrate, there is an absolute right of appeal to a judge of the High Court …

Subsection (8) … can only mean, in the context of the subsections C referred to, that the aggrieved person is entitled to a single appeal. If the initial application was made to a magistrate, the appeal must be made

to a judge of the High Court; but if made to a judge, then an appeal lies, with the grant of leave, to a judge of the Supreme Court.

In sum, the change brought about by the amendment to s 121 has removed the right of the person concerned who had appealed to a judge of the High D Court against the decision of a magistrate in relation to bail, to take the judge's decision, subject to leave, on appeal to a judge of the Supreme Court."

I think that the 1997 amendment had the effect of placing the High Court in exactly the same position which the Supreme Court was in in relation to an E appeal against the decision of a judge of the High Court. This means that where the Supreme Court could not substitute its own discretion for that of a judge of the High Court, as in *Chikumbirike's* case *supra* and *Aitken's* case *supra* the High Court also cannot now substitute its own discretion, in the absence of a misdirection or irregularity, in an appeal against a magistrate's decision. The appeal to the High Court has, in my view, become an appeal "in the narrow F sense" as the words are used in *Aitken supra* at 252F. The statement by Beck JA in *Chikumbirike's* case*, supra,* at p 146F now applies to the High Court, with the result that "a Court of Appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its own decision". This must be so because the 1997 amendment constituted the High Court as a final court of G appeal in matters of bail commenced in the magistrates court and removed the right to a further appeal to the Supreme Court. It seems to me that it would be absurd to find that the High Court on appeal now has wider powers than the Supreme Court had.

I also think that where a magistrate has granted bail to an accused person, on H appeal a judge should not lightly interfere with that decision and withdraw the

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bail unless there are compelling reasons. The finding that a magistrate has A misdirected himself or herself should not be lightly made. It must always be borne in mind that the granting or refusal to grant bail is a matter in the discretion, to be judicially exercised, of the presiding judicial officer. If that discretion has been properly exercised and no misdirection or irregularity is shown to exist, a judge on appeal should not interfere with the decision made. B As stated by Blackie J in *Lotriet's* case, *supra*, the right of the individual to liberty is a principle of fundamental importance. When a responsible judicial officer, after considering all the circumstances, has decided that a person should be admitted to bail, that decision should not be set aside unless there are compelling reasons to do so. It must also be borne in mind that the process of reasoning which a judicial officer applies in determining an application for C bail goes to the probable future conduct of the accused which has to be determined on the basis of certain information which relates to the past and the future and that what has to be determined is not a fact or a set of facts but merely a future prospect which is speculative in nature even though it is based on proven facts (see *Ellish en Andere v Prokueur-General, WPA* 1994 (4) SA 835 (W)). D

I found no misdirection in the decision of the magistrate in the present matter. I would therefore have had no basis to interfere with her decision. Even if I am wrong on the interpretation which I have given to the 1997 amendment, as read with the decision in *Dzawo's* case *supra*, I would still not have allowed the appeal for the reasons I have earlier given. I would have found that the E respondent was in all the circumstances unlikely to abscond, considering his extensive proprietary interests in this country and the fact that he is the majority shareholder in FNBS, a building society worth some $15 billion dollars in asset value.

These then were my reasons for dismissing the appeal. F

Chikumbirike & Associates, applicant's legal practitioners

Office of the Attorney-General, legal practitioners for the State G

* Now reported at page 259 of this volume — *Editor*
* 1997 (2) SA 501 — *Editor*

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KWANGWARI v COMMERCIAL BANK OF ZIMBABWE 2003 (1) ZLR 551 (H)

Citation	2003 (1) ZLR 551 (H)
Case No	Judgment No. HH-79-03
Court	High Court, Harare
Judge	Ndou J
Heard	9 July 2002; 14 May 2003
Judgment	14 May 2003
Counsel	*E W W Morris,* for the plaintiff *S F Hwacha*, for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

C **Employment** — *termination— probationary employee — grounds on which employment may be terminated — need for fairness — need to give warning to unsatisfactory probationer before terminating employment — whether managerial employee on probation need be given warning*

Headnote

D The essence of a probationary appointment is that the employer retains the right not to confirm the appointment after a specified period, particularly on grounds of capability. An employer must give an employee on probation a proper opportunity to prove himself, and give a warning if the required standards are not being met; before such an employee is dismissed he should be timeously informed of his deficiency, be told E how to rectify it, and be given a reasonable opportunity to improve. A senior employee on probation, however, has a duty independently to assess his problems and take steps to ensure that he complies with the required standards. While employers are required to justify the dismissal of probationary employees in much the same way as they are required to F do in the case of any other employee, the courts may be disposed to accept reasons slightly less compelling than they would require in the case of employees of longer standing. Employers are required to act reasonably and in a *bona fide* manner.

The plaintiff was appointed to a senior managerial position in the defendant bank for a probationary period of six months, during which period either G party could terminate his employment on seven days' notice. He was notified in writing that his performance was deficient in an important respect, and on the last day of the period the bank purported to extend his probation by a further six months. A month later the bank gave him seven days' notice that his employment was terminated. He instituted H proceedings in the High Court for wrongful dismissal.

Ndou J

Held that the plaintiff did not become a permanent employee by default at A the end of his probationary period; there was no ground for him to assume that the respondent bank had abandoned or waived its right to extend or terminate the probationary period, and no legal ground to justify an inference of an election to employ him on a permanent basis.

Held, further, that the plaintiff, as a senior employee, was expected to realise B of his own accord that he was not meeting the required standards, but had to be given a fair hearing before being dismissed. The court had to determine whether the employer behaved grossly unfairly and arbitrarily.

Held, further, that the plaintiff was made aware of his failings and was given a reasonable opportunity to remedy his weakness. He failed to do so, and his dismissal was fair in the circumstances. C

Cases cited

Amalgamated Beverage Industries (Pty) Ltd v Jonker (1993) 14 ILJ 1232 (LAC)

Bako & Anor v Bulawayo City Council 1996 (1) ZLR 232 (S)

Black Allied Workers Union v One Rander Steak House (1988) 9 ILJ 326 D (IC)

Blue Circle Materials (Pty) Ltd v Haskins (1992) 1 LCD 6 (LAC)

Carlton-Shields v James North (Africa)(Pty) Ltd (1990) 11 ILJ 82 (IC)

Donn v Greater London Council IDS Brief 65

Enslin v Society for the Prevention of Cruelty to Animals NHK 13/2/1580 E (IC)

Hamblin v London Borough of Ealing [1975] IRLR 178

Inner London Education Authority v Lloyd [1981] IRLR 394

James v Waltham Holy Cross UDC [1973] ICR 398

Kodesh v G Snow & Co (1989) 10 ILJ 420 (IC)

Madayi v Timpson Bata (Pty) Ltd (1987) 8 ILJ 494 (IC) F

Medispa (Pty) Ltd v Kroebel Tools & Products (Pty) Ltd 1988 (4) SA 415 (W)

Muzondo v University of Zimbabwe 1981 ZLR 333 (G)

Naidoo & Ors v Brand Engineering (Pty) Ltd NHK 13/2/187 (IC)

National Union of Metalworkers of SA v Tek Corp Ltd & Ors (1991) 12 ILJ 577 (LAC) G

Ndamase v Fyfe-King NO 1939 EDL 259

North Eastern Districts Assoc (Pty) Ltd v Surkhey Ltd & Ors 1932 WLD 181

North Vaal Mineral Co Ltd v Lovasz 1961 (3) SA 604 (T)

Okereke v Post Office [1974] IRLR 170 H

Ndou J

A *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A)

Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318 (IC)

Thomas v Carlton Centre Pharmacy (1992) 1 LCD 94

Van Dyk v Markly Investments (Pty) Ltd (1988) 9 ILJ 918 (IC)

Venter v Renown Food Products (1989) 10 ILJ 320 (IC)

B *Zungo v Strip Gasket Industries* (1986) 7 ILJ 747 (IC)

Case information

E W W Morris, for the plaintiff

S F Hwacha, for the defendant

Judgment

Ndou J: The plaintiff, Juston Kwangwari (hereinafter referred to as Mr Kwangwari), was offered a post of General Manager - Delivery Channels by the defendant, the Commercial Bank of Zimbabwe Limited (hereinafter referred to as CBZ), on 2 November, 1998. Mr Kwangwari duly accepted the offer. In terms of the agreement between Mr Kwangwari and CBZ, Mr Kwangwari would be on probation for six months, during which time his contract of employment could be terminated by either party giving seven days' notice in writing of such intention. Mr Kwangwari commenced work on l November 1998 and the six months probation period expired on 30 April 1999. On 30 April 1999 the contract of employment was neither terminated nor was Mr Kwangwari confirmed as a permanent employee of CBZ. Instead, the acting Managing Director, Mr Len Loader, addressed a memorandum to Mr Kwangwari in the following terms:

> "Subject Probation Period
>
> With regards to your letter of appointment, I have been requested by the managing Director, Mr G Gono, to advise you that your probation period is being extended to 30 June, 1999, that you make an appointment with Mr Gono as soon as he returns from Europe and clear the air. Please be guided accordingly."

A memorandum dated 22 April 1999 referred to by Mr Loader was also addressed to Mr Kwangwari. It reads:

> "**Subject: Market Research Market : Market Perception Towards CBZ**
>
> My memo dated 20 April 1999 refers.
>
> Our Managing Director, Mr Gono wrote me the following note before he left for Europe:

Ndou J

> 'I am very disappointed by the non-delivery of the Probe Market Research report by Mr Kwangwari. Please reassure me that its not a deliberate case of insubordination considering as I have said before, that people were initially reluctant to undertake this exercise in the first place. No excuse justifies the 3 months delay. It's taken too long and Mr Kwangwari or whoever is responsible deserves to be reprimanded for non-performance.
>
> Please take this into account when reviewing Mr Kwangwari's 6 months probation, which ends this month. At that rate of performance, he may not fit in any of my new departments'.
>
> I have had the opportunity to discuss this with him and reassured him that the delay was not done deliberately. I therefore suggest that you make every effort to have the report produced, evaluate it and make your recommendations taking into account our Strategic Plan. This must be ready when Mr Gono returns from Europe mid May.
>
> As I shall be handing over Delivery Channels to Mr Gono as from l June 1999, I suggest that you make an appointment with him and clear the matter."

From the above facts it is clear that CBZ unilaterally purported to extend Mr Kwangwari's probation to 30 June 1999. There was no written agreement extending the probation period signed by both parties. As advised by Mr Loader, Mr Kwangwari addressed a memo to Mr Gono, the Managing Director of CBZ, on 17 May 1999. The memo reads:

> "**Subject: Probation Period**
>
> Reference is made to Mr I. Loader's memo dated 30 April 1999 on the above. Could you be kind enough to slot me in your busy schedule, so that we can discuss this issue".

CBZ, through Mr Loader, in his substantive position as Executive Director, Operations responded on 31 May 1999. Mr Loader wrote to Mr Kwangwari in the following terms:

> "**Termination of Contract of Employment**
>
> I refer to my letter to you dated 30 April 1999 advising of the extension of your probationary period and our discussion today. I now wish to give you formal notice of termination of your contract of employment with Commercial Bank of Zimbabwe Limited effective end of business, 7 June 1999 in terms of the notice period required as per your contract of employment.

Ndou J

A The reason for termination of your contract of employment arises from the fact that your performance has failed to measure up to the standard expected by the Bank, details of which have been discussed with you…."

[*The rest of the memorandum is characterised by handover/takeover procedures not relevant to this matter*].

B Mr Kwangwari acknowledged receipt of this letter on 4 June 1999. As a result of this last communication Mr Kwangwari commenced these proceedings against CBZ. The parties agreed at the pre-trial conference that the issues for determination during the trial are:

(a) whether the defendant extended the plaintiff's period of probation; C

(b) whether the defendant could unilaterally extend the period of probation without the plaintiff's consent, the contract of employment not having been terminated during the period of probation;

(c) whether the plaintiff accepted the extension of his probation period.

In my view, this matter could have been dealt with as an opposed application. D Be that as it may, the trial procedure was opted for. At the commencement of the trial Mr *Morris* conceded that the reinstatement of Mr Kwangwari at CBZ was no longer feasible due to the delay in the finalisation of this matter. All that Mr Kwangwari now seeks is salary for two years together with benefits applicable in terms of the agreement. Mr Kwangwari is now employed elsewhere.

E Mr Kwangwari testified in support of his case. He confirmed most of what is apparent from the documents referred to in the preceding paragraphs. He said when he received the memorandum purporting to extend his probation, he queried this. The author thereof, Mr Loader, indicated to him that the memorandum was self-explanatory and that if he had problems with the F contents he had to see Mr Gono upon his return from Europe mid-month of May. After the return of Mr Gono he made valiant attempts to see him. He did not succeed due to the latter's busy schedule. To his surprise and dismay he received the memorandum dated 30 April 1999 whose contents I have already outlined. Although it was stated therein "our discussion today", Mr Kwangwari testified that he never held any such discussion with Mr Loader or Mr Gono. G He stated that after he received the memorandum he went to see Mr Loader, who referred him to letters from Mr Gono. He was paid his salary until the end of June 1999. Thereafter he remained unemployed until 30 June 2001. During this period he made several attempts to obtain alternative employment. He attended several interviews. The most frustrating question which hindered his H chances of obtaining employment is the manner in which he left employment

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Ndou J

with CBZ. Eventually Zimbank, for whom he had worked before venturing to A CBZ, took him back. He stated that, as far as he was aware, the contract he signed on 2 November 1998 meant he would be on probation for six months. He understood the probation to operate in two ways. It gave him an opportunity to assess CBZ and CBZ an opportunity to assess his performance. Under cross-examination he stated that from 2 November 1998 he knew that he B would not permanently employed by CBZ until 30 April 1999. He conceded that on 30 April 1999 he did not receive confirmation of permanent employment with CBZ. He did not sign any other contract stating that from 30 April 1999 he had become permanently employed by CBZ. After his agreed probation period expired sometime in May 1999, he requested the cost-of-living induced increment. CBZ refused to award him that on the basis that it was only due to C permanent employees of CBZ. He did not challenge this attitude in the Labour Tribunal. He stated that he believed that he was permanently employed on the basis of the contract. He made reference to clauses in the contract of 2 November 1998. Maybe at this stage I should quote the contents of the said letter of appointment:

"Dear Mr Kwangwari D

Post of General Manager (Delivery Services)

I refer to your application for employment and subsequent interview with us and am pleased to make you an offer of employment as Head of Internal Audit (*sic*) reporting directly to the Executive Director (Operations). E

The terms and conditions of this offer are as follows -

1. Your employment will commence on November 1, 1998.

2. The basic salary being offered to you during the first six months of your employment with the Bank is $65 000,00 per month payable in F arrears.
3. In addition, you will be entitled to the following benefits and allowances:
   (a) Housing Allowances of $4 000,00 per month taxable
   (b) Bank maintained car of the appropriate range (min 626 Cronos) taxed per new tax laws as amended from time to time G
   (c) Home entertainment allowance of $2 000,00 per month taxable
   (d) Electricity, water and telephone allowance up to $1 500,00 per month paid against actual bills
   (e) Leave days: 30 annual and 10 days casual per year H

Ndou J

   (f) You A may join 2 clubs of your choice for which membership fees shall not exceed $7 500,00 per year
   (g) Non contributory medical aid (PSMAS) Executive Scheme
   (h) Mortgage protection scheme
   (i) Non contributory NSSA B
   (j) Annual bonus/13th cheque
   (k) Annual business class holiday trip for you and your partner calculated on the basis of Harare/London/Harare
   (l) Fees for up to 2 children per year up to High School against actual bills (Tuition Fees only). Scheme to be revised soon

   The Bank does have a profit sharing scheme when we make C profits for which you will be eligible
   (m) Staff loan and advance facilities
4. You will be on probation for six months during which time the contract of employment may be terminated by either party giving seven days notice in writing of such intention. D
5. You will be required to sign a formal contract of employment and an Oath of Secrecy in terms of our service regulations on joining our institution.
6. Your services are transferable to any office of our organisation in Zimbabwe.
7. Your services will be governed by the existing service rules and E regulations of our institution or as may be framed thereafter.
8. The Bank will take over all outstanding staff loans standing in your name with your present employer on joining, subject to terms and conditions applicable to staff loans at Commercial Bank of Zimbabwe.
9. Please note that this offer of employment is subject to receipt of F satisfactory medical reports.

Should you agree to the offer, kindly sign and return the duplicate of this letter together with 2 passport size photographs of yourself at your earliest convenience but before end of Tuesday, November 1, 1998.

I wish, on behalf of the Board/Chairman Mr N M Vingirai and the entire G Board of Directors to congratulate you on this appointment and extend a warm welcome to you to the Jewel Management and Staff of CBZ family.

Yours sincerely

(Signed)

G Gono

H MANAGING DIRECTOR

Ndou J

Date accepted 2/11/98 Signed (Juston Kwangwari)" A

What Mr Kwangwari seems to be saying is that he was employed by CBZ on a full term contract subject to a resolutive condition that during the probation period of six months the contract is terminable by either side on seven days' notice. In support of that assertion reference was made by Mr *Morris* to specific clauses in the above letter of offer *viz*: B

(a) In paragraph 1 "I refer to your application for employment and subsequent interview with us and am pleased to make you an offer of employment…"

There is no mention of probation in this introductory paragraph.

(b) In paragraph 8, "The Bank will take over all outstanding staff loans standing in your name with your present employer on joining, subject to C terms and conditions applicable to staff loans at Commercial Bank of Zimbabwe."

(c) In paragraph 9 "Please note that this offer of employment is subject to receipt of satisfactory medical reports".

(d) In the concluding paragraph: "I wish on behalf of the Board/Chairman Mr D N M Vingirai and the entire Board of Directors to congratulate you on this appointment and extend a warm welcome to you to the Jewel Management and Staff of CNZ family".

Mr *Morris* submits that these clauses are *indiciae* that this is a full term contract of employment. He submits that such clauses are only relevant when E the employee is being offered full term employment. He submits that medical reports would not be required if the contract was a probationary one for a period of six months. Another clause, not captured in paragraphs (a) to (d), is the question of annual bonus. He submitted that an annual bonus is not relevant for a six-month contract. The cumulative effect of all these clauses is that the parties entered into a full term agreement of employment. F

Mr *Hwacha* submits that the probation in paragraph 4 is a suspensive clause. A permanent relationship between the parties was suspended. What the parties are saying is that they are not in permanent relationship unless the plaintiff's performance is satisfactory to the defendant. The plaintiff cannot become a permanent employee by default. The parties did not sign a formal agreement appointing the plaintiff as a permanent employee of the defendant G company. The fact that the plaintiff made valiant attempts to meet Mr Gono is consistent with there being no contract in existence after the six months. He was adamant that there is, from the testimony of the plaintiff and the contents of the documents produced, nothing that makes the plaintiff a permanent employee of the defendant. H

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A The employment relationship, the *locatio conductio operarum*, is one of the most common legal relationships in society. The contract must comply with the usual laws relating to the formation of contracts. Generally, no formalities are required for contracts of employment except where some statutory law specifically requires it. Employers often seek to protect themselves against being permanently saddled with an incompetent worker by inserting so-called B probationary clauses into their employees' contracts of service. Probationary clauses typically reserve for the employer the right to terminate the contract after a specific period if the employee's performance is found to be unsatisfactory. At common law, a probationary clause apparently empowers the employer to terminate, at will, at the conclusion of the stipulated period. The question is whether such termination amounts to dismissal or a mere non C renewal of the contract. Probationary clauses provide for a trial period during which the reciprocal periods of notice required for termination are shorter, and which purportedly give both parties the right either to confirm or not to confirm the contract at the conclusion of the probationary period. As alluded to above, at common law these clauses give the employers absolute power to D terminate the contract on expiration of the probationary period. The courts, however, do not take such a liberal view of probationary clauses, and require employers to justify the dismissal of probationary employees in much the same way as they are required to do in the case of any other employee, with the possible proviso that the court may be disposed to accept, in the case of the dismissal of a probationary employee, reasons slightly less compelling than E they would require in the case of employees of longer standing: see *Black Allied Workers Union v One Rander Steak House* (1988) 9 ILJ 326 (IC): *Kodesh v G Snow & Co* (1989) 10 ILJ 420 (IC); *Carlton-Shields v James North (Africa) (Pty) Ltd* (1990) 11 IL J 82 (IC); and *Riekert's Basic Employment Law* by Grogan, 2 ed at pages 38 and 111-12.

F Before dismissal is embarked upon the general principle is that the employee should be timeously informed of his deficiency, be told how to rectify it and be given a reasonable opportunity to improve before any action is taken against him: see *Venter v Renown Food Products* (1989) 10 ILJ 320 (IC) and also *Zungo v Strip Gasket Industries* (1986) 7 ILJ 747 (IC) and *Madayi v Timpson Bata (Pty) Ltd* (1987) 8 ILJ 494 (IC) for the exception to this rule. The plaintiff G occupied the position of a senior manager, and this is a relevant factor because his position was of vital strategic importance to CBZ and, as such, he could not easily be accommodated elsewhere. Generally, higher standards are expected of senior or managerial employees than ordinary workers

doing work of a relatively menial nature. While fair warnings should be given in cases of H this kind, a duty also rests on such a senior employee independently to assess

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his problems and take steps to reform. In the English case of *James v Waltham* A *Holy Cross* UDC [1973] ICR 398; [1973] IRLR 202, NRC it was stated:

> "An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the 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 possibilities or likelihood of dismissal on this ground and giving him an opportunity of improving his B performance."

Such warning may be dispensed with in exceptional cases where the inadequacy of performance is so extreme that there must be an irredeemable incapacity. In such circumstances a warning and an opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the employer. C In another English decision *Okereke v Post Office* [1974] IRLR 170, it was stated:

> "There is no reason why an employee whose capability is complained of should be given an opportunity to explain away what is being held against him. The proper test of fairness in capability cases is whether the employee was made aware of his failings and given a last opportunity over D a reasonable period to show that he can do the job". See also *McPhail v Gibson* [1977] ICR 42; [1976] IRLR 254, EAT.

The essence of a probationary appointment is that the employer retains the right not to confirm the appointment after a specified period, particularly on grounds of capability. In *Donn v Greater London Council* IDS Brief 65 the majority of the tribunal held that the tests which are applied to a probationary E employee are not necessarily the same as those which apply to a confirmed appointment, and a decision not to retain a probationer may be justified even through a similar decision made with respect of a fully established employee may not be justified. For a probationary employee must know that he is on trial, and must therefore establish his suitability for the post. I agree with this F approach. The employer, however, must give the employee a proper opportunity to prove himself, and give a warning if the required standards are not being met. A probationary employee is still an employee, and is therefore entitled to have appropriate guidance and advice: see *Hamblin v London Borough of Ealing* [1975] IRLR 354; *Post Office v Mughal* [1977] ICR 763, [1977] IRLR 178; *Inter London Education Authority v Lloyd* [1981] IRLR 394 and *Law of* G *Employment* by M Selwyn 6 ed at page 44 para 2.53. I again agree with this approach.

The objective of a probationary period is not only to assess whether the employee has the technical skill and ability to do the job; it also serves the purpose of ascertaining whether the employee is a suitable employee in a much H

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A wider sense. This would include an assessment of aspects such as his ability to get on with existing employees, customers or clients, his demeanour and diligence, as well as his character and his ability to fit in — see *The South African Law of Unfair Dismissal* by Le Roux and Van Niekerk at pages 71 and 72 para 5.8. The learned authors quoted the words of a Canadian arbitrator as follows:

> B "The company during the probation period has the right to lay down standards it expects a probationary employee to meet if he is to be retained, and such standards are not necessarily related to quality and quantity but also may include consideration of an employee's character, ability to work in harmony with others, potential for advancement and general suitability as an employee of the company concerned: (Quoted in C E E & B M Palmer — *Collective Agreement Arbitration in Canada* 3 ed (Butterworths 1991) at 296.

The objective of a probationary period is to provide the parties with an opportunity to test one another and to find out whether they are compatible: see *Amalgamated Beverage Industries (Pty) Ltd v Jonker* (1993) 14 ILJ 1232 D (LAC); *Ndamase v Fyfe-King* NO 1939 EDL 259 at 262 and *Thomas v Carlton Centre Pharmacy* (1992) 1 LCD 94 (IC). In the case of *Ndamase v Fyfe-King (supra*) at pages 262 to 263 Gane J stated as follows:

> "Can an employee on probation in the sense above described, whose every action is admittedly a proper subject of scrutiny and judgment, claim to be in a better position than if he had not been on probation? Can he in E effect argue: "Even if my conduct at an early stage of my probation shows entire unfitness for

my contemplated position, and even though it is clear from my conduct that I shall never fit myself for that position, nevertheless I claim the right to hold the position until the last moment of my probationary period?'. So to state the position is to provide the answer to the question. Such a position cannot be maintained. The very use of the F word 'Probation' alone seems to lead to the same conclusion. If at any time it becomes clear that the purpose of the probation has been already frustrated, then there is no object in continuing the probation and no objection at least to a dismissal on reasonable notice."

Generally, where an employer wishes to dismiss a probationary employee on the grounds of incapacity or inability to do the job, the South African courts G have required the employer to go through a process of appraisal and consultation prior to dismissal in order to acquaint the employee with the standards required of him, and to provide the employee with an opportunity to improve: see *Carlton-Shields v James North (Africa) (Pty) Ltd supra, Enslin v Society for the Prevention of Cruelty to Animals* NHK 13/2/1580 (IC); *Naidoo & Ors* H *v Brand Engineering (Pty) Ltd* NHK 13/2/187 (IC) and *Van Dyk v Markly*

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Investments (Pty) Ltd (1988) 9 ILJ 918 (IC). I agree with A this approach, with the qualification that a senior probationary employee, like Mr Kwangwari, should himself realise that he also bears some responsibility to raise problems that he might have and to ensure that he complies with the required standards.

In casu CBZ sought to terminate the extended agreement before the expiry of the extended probationary period. The common law position is that termination B could take place prior to the expiry of the probationary period if the employee is found to be unsuitable for the job prior to the completion of the probationary employment: see *Muzondo v University of Zimbabwe* 1981 ZLR 333 (G), 1981 (4) SA 755 (Z); *Ndamase v Fyfe-King NP (supra)* and *The South African Unfair Dismissal (supra*) at page 73. The court has to investigate the substantive fairness of a dismissal for incapacity. In *Amalgamated Beverage* C *Industries (Pty) Ltd v Jonker (supra)* at 1249G-1250A it was held that the position of a probationary employee should not be equated with that of a permanent employee and that an employer is entitled to terminate a probationary employee's employment provided that it does not behave "grossly unfairly or arbitrarily". In other words there is a duty to act reasonably and in a *bona fide* manner. A probationary employee enjoys the prospects of permanent D employment provided he meets the standard set by the employer. The courts should prevent the probationary employee being deprived of the prospects of such employment on the basis of a spurious claim of misconduct: see *National Union of Metalworkers of SA v Tek Corporation Ltd & Ors* (1991) 12 ILJ 577 (LAC). E

Mr Kwangwari was a managerial employee. As an employee in the higher levels of the hierarchy within CBZ, he still qualified for protection against unfair dismissal. The court should generally investigate allegations of unsatisfactory work performance in order to ascertain that the dismissal was fair. However, the court will, to some extent at least, be prepared to defer to the opinion of management regarding the competence of managerial employees. F Mr Kwangwari's managerial position will be taken as one of the relevant factors in the determination of the issues in this matter. His seniority at CBZ and experience in the banking sector are of such a nature that he is expected to realise of his own accord that he is not meeting the required standards in most situations: see *Blue Circle Materials (Pty) Ltd v Haskins* (1992) 1 CCD G 6 (LAC) and *Stevenson v Sterns Jewellers (Pty) Ltd* (1986) 7 ILJ 318 (IC). What is important, however, is that Mr Kwangwari, as a managerial employee, should also be given a fair hearing prior to the dismissal.

In the present matter I have to determine whether CBZ behaved grossly unfairly and arbitrarily. I should protect Mr Kwangwari as a probationary employee from being deprived of the prospect of permanent employment, if he H

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A meets the standards set by the employer, on the basis of a spurious claim of unsatisfactory work performance.

In casu, before embarking on dismissal, CBZ timeously informed Mr Kwangwari of his alleged deficiency. He was told how to rectify the deficiency and given a reasonable opportunity to improve

before action was taken. This was all in black and white in Mr Loader's memorandum addressed to Mr B Kwangwari dated 22 April 1999. Part of that memorandum explicitly stated:

> "…Mr Gono, wrote me the following note before he left for Europe. *'I am very disappointed by the non-delivery of the Probe Market Research report by Mr Kwangwari…* people were initially reluctant to undertake this exercise in the first place. No excuses justified the 3 months delay. C It's taken too long and Mr *Kwangwari* or whoever *is responsible deserves to be reprimanded for non-performance. Please take this into account when reviewing Mr Kwangwari's 6 months probation which ends this month. At that rate of performance, he may not fit in any of my new departments*." (the emphasis is mine).

In the same memorandum Mr Loader further stated —

> D "I therefore suggest that you make every effort to have the report produced, evaluate it and make your recommendations taking into account our Strategic Plan. This must be ready when Mr Gono returns from Europe mid-May."

In his testimony Mr Kwangwari does not say that he produced the said report before the set deadline of mid-May. It seems to be beyond dispute that up to E the time of the termination the report was still outstanding. It seems to me that whether Mr Kwangwari is found to be permanent or probationary, we have an issue of unsatisfactory performance. What is the position CBZ has to justify the dismissal? I take the view stated in the *Workers Union v One Rander Steak House, supra,* that, unlike the position at common law, the employer does not F have absolute power to terminate the contract on expiration of the probationary period. Justification of the dismissal of probationary employees is required in much the same way as in the case of any other employee, with the possible proviso that the court may be disposed to accept, in the case of a probationary employee, reasons slightly less compelling than in the case of permanent employees.

G I have already indicated that Mr Kwangwari was duly informed of the deficiency in writing. He was given a reasonable opportunity to remedy it but he obviously did not do so. His position is fairly senior and at a strategic level at CBZ. The nature of the report is crucial in the competitive banking sector. He obviously should be aware of the necessity of market research. As a senior H manager he is also expected independently to assess his problems and to take

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the necessary steps to perform. In this case he had been warned of the A possibility or likelihood of dismissal and given an opportunity to improve. I agree with the decision in the case of *Okereke v Post Office (supra)* that in exceptional cases the warning may be dispensed with in instances where the inadequacy of performance is so extreme that there must be an unredeemable incapacity. In such circumstances, a warning and an opportunity for B improvement are of no benefit to the employee and constitute an unfair burden on the employer. This case does not fall within this exceptional category, so CBZ has to justify the dismissal of Mr Kwangwari.

The proper test of fairness, *in casu*, is whether Mr Kwangwari, the probationary employee, was made aware of his failings and given a last opportunity over a reasonable period to show that he can do the job. In my view, he was made C aware and given a reasonable opportunity to remedy his weakness. He failed to do so. His position was of vital strategic importance to CBZ and, therefore, CBZ was justified, in the circumstances, to dismiss him. The dismissal was fair in the circumstances. He was given sufficient notice and fully paid during the notice period and, therefore, he is not entitled to any further payment according to the evidence before me. D

On the question of the extension of the probation, I have already indicated that Mr Kwangwari did not produce any evidence showing that the parties agreed to convert his status from being a probationary to a permanent one. Can it be said that he became a permanent employee by default? I do not think so. I am unable to find a legal basis for making such a finding. In this case CBZ made E its position very explicit i.e. the probationary period was being extended. The question of a waiver of extension does not even arise because of the timeous communication of its position to Mr Kwangwari in writing. There is no basis for Mr Kwangwari to assume that CBZ abandoned its right to extend or terminate the probationary contract. There is no legal basis to justify an inference of an election to employ Mr Kwangwari on a permanent basis: see F *Bako & Anor v Bulawayo City Council* 1996 (1) ZLR 232 (S). The question of delay or "standby" does not arise here to be taken into consideration in arriving at the conclusion as to whether or not CBZ did or did not lose its rights. Mr Kwangwari cannot claim permanent employment by default or waiver: see *North Eastern Districts Association (Pty) Ltd v Surkhey Ltd &* G *Ors* 1932 WLD 181 at 186. *Medispa (Pty) Ltd v*

Kroebel Tools & Products (Pty) Ltd 1988 (4) SA 415 (W) at 428 F; *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) at 609 B*; Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 643 F-G; a*nd The Law of Contract in South Africa by* Christie 2 ed at page 529. H

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A Accordingly, I find that there is no legal basis for finding that Mr Kwangwari was permanently employed by CBZ. In the light of the above findings, I accordingly dismiss the plaintiff's claim with costs.

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MAVAZA v LAW SOCIETY OF ZIMBABWE 2003 (1) ZLR 566 (H)

2003 (1) ZLR p566

Citation	2003 (1) ZLR 566 (H)
Case No	Judgment No. HH-80-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	20 March 2003; 14 May 2003
Judgment	14 May 2003
Counsel	*E T Matinenga*, for the applicant *E Musakana*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Legal practitioner — *admission — notice to Law Society of intention to apply for admission — certificate by Society that such notice had been given —* C *Law Society intending to oppose application — Society not entitled to refuse to issue certificate — Society not the arbiter of who should be admitted – correct procedure where Society intends to oppose application*

Headnote

The applicant sought admission as a legal practitioner. He submitted to the D Law Society the necessary notice in terms of s 2(1) of the Legal Practitioners (General) Regulations 1999 (SI 137 of 1999) of his intention to apply for admission. The Society intended to oppose his admission, considering that he was not a fit and proper person to be admitted, and did not issue its

certificate that the requisite notice had been given. The applicant sought an order: (a) compelling the Society to E issue the certificate and (b) admitting him as a legal practitioner.

Held, that the Law Society was not entitled to refuse to issue the certificate. The correct procedure was that upon receiving a notice of intention to apply to be registered as a legal practitioner, the Law Society should issue the required certificate and then, after the application for admission had been lodged, opposition may be made at the hearing by a legal F practitioner who has been granted leave by the High Court to oppose the application. It was not for the Law Society to decide that the applicant was not a fit and proper person to be admitted: it is the High Court alone which determines whether or not an applicant may be registered as a legal practitioner.

Held, further, that there was no material on the basis of which the court could G issue an order that the applicant be registered. The court would have to be satisfied that the applicant met all the other requirements for admission set out in the Act.

Chinhengo J

Cases cited A

Chikweche, In re 1995 (1) ZLR 235 (S)

Kaplan v Incorporated Law Society, Tranvaal 1981 (2) SA 762 (T)

Prokureursorde van Transvaal v Landsaat 1993 (4) SA 807 (T)

Legislation considered

B Legal Practitioners Act [*Chapter 27:07*], s 5

Legal Practitioners (General) Regulations 1999 (SI 137 of 1999), s 2

Case information

E T Matinenga, for the applicant

E Musakana, for the respondent

Judgment

C **Chinhengo J:** The applicant wished to apply to this court for registration as a legal practitioner. He notified the respondent in terms of s 2(1) of the Legal Practitioners (General) Regulations 1999 (SI 137 of 1999) ("the regulations") of his intention to do so. The applicant acknowledged receipt of the notice but did not issue a certificate in terms of s 2 of the regulations, nor did it do D anything else. The applicant thought that the inaction by the respondent was an attempt to stop him from lodging his application for registration and to deny him access to the High Court, which is the final arbiter as to whether or not he may be admitted and enrolled as a legal practitioner. The applicant then lodged this application and sought an order that the respondent, through its Secretary, should furnish this court with a certificate stating that the applicant E has given the notice required in terms of the above-mentioned provision of the regulations and that the "applicant be registered without delay". He also sought an order of costs against the respondent.

The respondent opposed the application on the basis that the applicant is not a fit and proper person to be admitted and enrolled as a legal practitioner. That F an applicant must be a fit and proper person before he can be registered as a legal practitioner is a requirement in terms of s 5(1)(f) of the Legal Practitioners Act [*Chapter 27:07*] ("the Act").

It seems to me that the relief sought by the applicant creates a problem that, whilst I may decide whether or not the respondent should furnish the certificate requested, I cannot order that the applicant be registered forthwith. G There is no material placed before me on the basis of which I can issue that order. I would have to be satisfied that the applicant meets all the other requirements in s 5(1) of the Act. Even though the respondent has accepted that the applicant meets those requirements, it would still be necessary for me to be satisfied that those requirements have indeed been met. It is one thing to H compel the respondent to issue the certificate consequent upon a notice of

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Chinhengo J

intention to apply for registration as a legal practitioner and quite another A thing to decide whether or not an applicant for registration should be registered as a legal practitioner.

In order to make the point clear I must make reference to the relevant statutory provisions. Section 4(1) of the Act provides that:

> "Any person who wishes to be registered as a legal practitioner, a notary B public or a conveyancer shall make application therefor to the High Court in the form and manner prescribed in regulations."

Section 5(1) and (3) of the Act provide that:

> "(1) Upon application being made to it in terms of section *four* for registration as a legal practitioner, the High Court may grant the application and direct the Registrar to register the applicant as a legal practitioner if C the High Court is satisfied that the applicant –
>
> (a) has complied with the formalities prescribed in regulations in relation to the application; and
>
> (b) possesses the qualifications prescribed in rules made by the Council for Legal Education in terms of section *forty-nine* and has such D practical experience, if any, as may be prescribed in such rules; and
>
> (c) is normally resident in Zimbabwe or a reciprocating country or has been granted a residential exemption certificate; and
>
> (d) is of or above the age of twenty-one years; and
>
> (e) is not an unrehabilitated insolvent or has not assigned his estate for the benefit of or made a composition or arrangement with his E creditors, which composition or arrangement has not been rescinded or set aside; and
>
> (f) is a fit and proper person to be so registered;
>
> and if the High Court is not so satisfied the High Court shall, subject to subsection (3), refuse the application. F
>
> (3) Upon good cause shown, the High Court, may condone noncompliance with any technical formality in relation to an application in terms of section *four*."

The regulations in s 2(1) provide that:

> "Notice of intention to apply for registration as a legal practitioner, notary public or conveyancer shall be given to the secretary of the Society not G later than thirty days before the application is made, and such notice shall be accompanied by copies of all documents referred to in paras (a) to (d) of subsection (3) together with a fee of fifty dollars, which shall be paid to the Society."

One of the documents which must accompany an application for registration as a legal practitioner is, as prescribed by s 2(3)(e) of the regulations, a H

Chinhengo J

A certificate from the Secretary of the Law Society stating that the applicant has given the notice required by subs (1) of s 2 of the regulations. Section 2(4) of the regulations provides that:

> "Upon the hearing of an application for registration, any registered legal practitioner may request the leave of the High Court to appear as *amicus curiae* to oppose the granting of the application."

B The significance of s 2(4) of the regulations is that the opposition to the granting of an application for registration as a legal practitioner can only be made at the hearing and by a legal practitioner who has been granted leave by the High Court to appear before it and oppose the application. This highlights the remark I have already made that the relief sought by the applicant that he C be admitted forthwith is inappropriate at this stage. I must make it clear that in my view the giving of notice to the Law Society was not intended to constitute the Law Society into an arbiter as to whether an applicant meets the requirements of s 5(1) of the Act. It is the High Court alone which determines whether or not an applicant may be registered as a legal practitioner. In this vein, therefore, the respondent was not entitled to refuse to issue the certificate D referred to in s 2(4) of the regulations. There is a clear distinction drawn between an application for first admission as a legal practitioner and an application by a legal practitioner whose name has been deleted from the register to have his name restored to the register. The former is provided for in s 5 of the Act and in s 2 of the regulations and the latter is provided for in s 32 of the Act. In terms of s 32(2) of the Act, an application for restoration E to the register shall be accompanied by a recommendation in support thereof from the Council of the Society. Not so with the application for first admission. In respect of the latter, all that the Law Society is required to do is to provide a certificate stating that the

applicant has given the notice required by s 2(1) of the regulations. As to the distinction between an F application for first admission and an application for re-admission or restoration to the register, see *Kaplan v Incorporated Law Society, Tranvaal* 1981 (2) SA 762 (T) at 768G-770F. The situation in In re *Chikweche* 1995 (1) ZLR 235 (S) which was referred to by counsel is clearly distinguishable. In that case, it was at a hearing that the learned judge declined to permit the appellant (applicant for registration) to take the oath of loyalty and office because, in the judge's view, G he was not a fit and proper person or he did not satisfy the rule of practice that lawyers should be formally dressed, tidy and well groomed when appearing in court. The correct procedure to adopt is that upon receiving a notice of intention to apply to be registered as a legal practitioner, the Law Society should issue a certificate required in terms of s 2(3)(e) of the regulations and then after an application has been lodged an opposition may be lodged as H contemplated by s 2(4) of the regulations.

2003 (1) ZLR p570

Chinhengo J

The present application was argued before me as if I was also required to A determine the substantive application for registration. That application can only be heard if such has been placed before the court. I could have proceeded to determine the issue whether or not the applicant is a fit and proper person as argued before me but I think that it would be wrong to do so because: (a) the other requirements have not been shown to have been complied with; and B (b) the matter involves a prospective legal practitioner and the Law Society who should both be correct in the procedures which they adopt. I cannot therefore, determine the issue whether or not the applicant is a fit and proper person because there is no application before me for the applicant's admission to the profession. I will however issue part only of the relief sought by the applicant which will result in the respondent issuing the certificate requested C of it.

With regard to the costs of this application, I was referred to the case of *Prokureursorde van Transvaal v Landsaat* 1993 (4) SA 807 (T) in which it was held that where a law society is carrying out its function as a supervisor of attorneys in the interest of the public and the court, it would be wrong to apply the normal civil law rules concerning costs and make an order of costs D against it. I think, however, that the situation in the present case is different. There was no reason at law for the respondent to refuse to issue the certificate in view of the clear provisions of the Act and the regulations which, needless to say, do not empower the respondent to withhold the certificate. A reading of those provisions should have alerted the respondent to the requirement that E it should issue the certificate and that if it or any other legal practitioner wished to oppose the applicant's admission, they could only do so as provided in s 2(4) of the regulations at the stage when the application has been lodged and a hearing is held. As I think that the Law Society was well intentioned the question of costs should be held over for determination at the hearing of the application for registration. I accordingly order that: F

1. The respondent shall, through its Secretary, furnish the High Court with a certificate stating that the applicant has given notice required by s 2(3)(e) of the Legal Practitioners (General) Regulations 1999 (SI 137 of 1999).
2. The costs of this application are held over for determination at the hearing G of the applicant's application for registration.

Musunga & Associates, applicant's legal practitioners

Mapombere & Associates, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/WASTE MANAGEMENT SERVICES (PVT) LTD v CITY OF HARARE 2003 (1) ZLR 571 (S)

WASTE MANAGEMENT SERVICES (PVT) LTD v CITY OF HARARE 2003 (1) ZLR 571 (S)

Citation	2003 (1) ZLR 571 (S)
Case No	Judgment No. S-126-02
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Ziyambi JA
Heard	19 November 2002; 16 May 2003
Judgment	16 May 2003
Counsel	*P Nherere*, for the appellant *A P de Bourbon SC*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

C **Contract** — *termination — cancellation due to breach of contract — notice by wronged party — must be with immediate effect — notice of cancellation to take effect in the future — such notice invalid*

Headnote

The appellant company had entered into a five year contract to provide services to the respondent city council. Dissatisfied with the appellant's D performance, the council, as it was entitled to do under the contract, wrote to the appellant stating that the contract was being terminated with effect from the following day, which was the end of the month in question. The appellant argued that the termination was invalid.

Held (per Sandura JA and Cheda JA, Ziyambi JA dissenting), that the right E to resile from a contract must be exercised *ex nunc*, not from some date in the future. This principle applies to all contracts, not just to contracts of lease. To be valid, a notice of cancellation must clearly and unambiguously inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract as being at an end.

Cases cited F

Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd 1946 WLD 486

Ganief v Hoosen 1977 (4) SA 458 (C)

I I Invstms (Pty) Ltd v Spangenthal 1939 WLD 274

Jackson v Unity Ins Co Ltd 1999 (1) ZLR 381 (S)

G *Kragga Kamma Ests CC & Anor v Flanagan* 1995 (2) SA 367 (A)

Swart v Vosloo 1965 (1) SA 100 (A)

Case information

P Nherere, for the appellant

A P de Bourbon SC, for the respondent

Sandura JA

Judgment

Sandura JA: The legal issue which arises in this appeal is whether a notice A which purports to terminate a contract, not with immediate effect, but with effect from a future date, is effective in the sense that it puts an end to the contract as from that future date.

The factual background is as follows. In August 1997, the appellant and the respondent concluded an agreement in terms of which the appellant undertook B the collection and disposal of domestic and commercial refuse from various locations within the City of Harare. The duration of the contract was a period of five years.

Subsequently, the respondent was not happy with the appellant's performance of the contract. Accordingly, on 30 March 2000, the respondent's Chamber Secretary wrote to the appellant company, notifying it that the respondent had C cancelled the contract with effect from 31 March 2000. Believing that the respondent had no valid basis for the cancellation of the contract and that, in any event, the purported cancellation was ineffective in that it was to occur on a future date, the appellant filed an application in the High Court seeking an order setting aside the purported cancellation, and directing the respondent to perform all its obligations in terms of the contract. D

When the matter was heard, the learned judge in the court *a quo* was satisfied that the contract had effectively been cancelled, but referred to trial the dispute concerning the alleged unsatisfactory performance of the contract because it could not be resolved on the papers. Dissatisfied with the finding that the contract had effectively been cancelled, the appellant appealed to this court. E

Before dealing with the main issue, I wish to dispose of a preliminary issue, which is whether the notice given to the appellant was one which purported to cancel the contract with effect from a future date. I have no doubt that it was.

In this regard, the relevant part of the respondent's letter dated 30 March 2000, in terms of which the appellant was notified of the cancellation, reads as F follows:

> "In the circumstances, you are hereby notified that the contract is cancelled with effect from 31 March 2000."

That letter was received by the appellant in the afternoon of 30 March 2000. Quite clearly, 31 March 2000 was a future date. G

In addition, Mr *de Bourbon*, who appeared for the respondent, made submissions in his heads of argument which indicated that the respondent accepted that the notice purported to terminate the contract with effect from a future date. He submitted as follows:

> "It (ie the letter dated 30 March 2000) gives notice of the unsatisfactory performance, and of the intention to cancel at the conclusion of business H

> A the following day … The letter was delivered on the afternoon of 30 March 2000 … and had the clear and unequivocal effect of bringing to an end the contract at close of business the following day."

It was, therefore, the respondent's understanding that the appellant was to continue performing its obligations in terms of the contract until the end of business on 31 March 2000.

B However, Mr *de Bourbon* submitted that the principle set out in *Ganief v Hoosen* 1977 (4) SA 458 (C), ie that the right to resile from a contract is one that must be exercised *ex nunc*, only applies to a contract of lease. I respectfully disagree.

In my view, what De Kock J said in that case does not suggest that the principle C applies to leases only, although the dispute between the parties concerned the termination of a lease. He said the following at 460A-F:

> "The case put forward on behalf of the plaintiff, both in this court and in the court below, was that the letter (dated 10 February) was a notice strictly in accordance with clause 26 which entitles the plaintiff to give notice on 10 February that he is terminating the lease with effect from 1 D March. The defendant's contention on the other hand is that the letter of 10 February, although it purported to terminate the agreement in terms of clause 26, did not constitute an effective or valid termination of the contract. *The basis of the argument is that a notice of cancellation to be effective must clearly and unambiguously convey to the guilty party the innocent party's election to bring the contract to an end. It must embody* E *an unqualified, immediate and final decision to treat the agreement as at an end. It cannot stipulate for a termination at some future time* … Such a notice, it is urged, which purports to terminate an agreement as

from a future date and which by necessary implication therefore keeps the agreement alive in the interim, cannot in law amount to an effective notice of termination.

F It seems to me that the defendant's contention is sound and must be upheld … *In my view, the right to resile from a contract is one that must be exercised* ex nunc. Support for the views here expressed (is) to be found in the case of *Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd* 1946 WLD 486" (emphasis added).

It is pertinent to note that De Kock J referred to the right to resile from a G contract, and not the right to resile from a contract of lease. Had the intention been to restrict the principle to leases he would have said: "In my view, the right to resile from a contract of lease is one that must be exercised *ex nunc*". In any event, I cannot see any logical basis for restricting the principle to a contract of lease.

H In addition, it is quite clear from the judgment of this court in *Jackson v Unity*

Sandura JA

Insurance Co Ltd 1999 (1) ZLR 381 (S) that the court was of the view that the A principle in *Ganief v Hoosen supra* applied to the cancellation of any contract. At 383A-C, Gubbay CJ, with whom Ebrahim JA and I concurred, said:

"The appellant's argument … was that to be valid a notice of cancellation must clearly and unambiguously inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract as being at an end … B

To my mind, the appellant is correct. His contention derives direct support from the judgment in *Ganief v Hoosen* 1977 (4) SA 458 (C). In that case, *De Kock J considered the very problem debated before this court, namely, whether a notice which purports to terminate a contract, not with immediate effect but as from a future date, is effective in the sense* C *that it puts an end to the contract as from that future date*" (emphasis added).

The learned Chief Justice then quoted with approval part of De Kock J's judgment which I have already set out.

In my view, it is clear from what the learned Chief Justice said that what had been debated before the court was "whether a notice which purports to D terminate *a contract*, not with immediate effect but as from a future date, is effective in the sense that it puts an end to the contract as from that future date". Although the dispute in that case concerned the cancellation of a lease, what the learned Chief Justice said was not restricted to the cancellation of a contract of lease. E

I am, therefore, satisfied that the principle in *Ganief v Hoosen supra* applies to contracts in general, and that the notice of cancellation of the contract given to the appellant cannot in law amount to an effective notice of termination of the contract. It did not embody an unqualified, immediate and final decision to treat the contract as at an end.

Finally, I would like to consider the appropriate order to issue. As already F stated, the duration of the contract was a period of five years, which expired in August 2002. It is, therefore, no longer possible to order the parties to perform their obligations in terms of the contract. I will, however, issue a *declaratur* concerning the notice of cancellation.

In the circumstances, the following order is made: G

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and the following is substituted –

"(a) It is declared that the notice of cancellation of the contract given to the appellant by the respondent did not in law amount to an effective termination of the contract. H

Ziyambi JA

(b) The A applicant's costs shall be borne by the respondent."

Cheda JA concurred.

Judgment

Ziyambi JA: I have read the judgment of Sandura JA. I respectfully disagree B with it. My reasons are as follows.

The appellant and the respondent concluded a contract for the collection and transportation of domestic and commercial refuse from certain specified areas within Harare. The contract was concluded in 1997 and was to endure for a period of five years. In terms of Clause 24.1.(i) of the contract, the respondent could, as a result of unsatisfactory performance by the appellant, after written C notice to the appellant, cancel the contract and perform the appellant's duties itself.

On the afternoon of 30 March 2000, the appellant received from the respondent, through its Chamber Secretary, a letter in the following terms:

> "In terms of Clause 24.1 of the contract you are hereby given notice that as D a result of your failure to comply with the written requirements of the Director of Works (now the Director of Health Services), your breach of the conditions of the contract and your unsatisfactory performance of the contract, the City of Harare has determined to cancel the contract and perform the contractor's duties itself.
>
> You have collected refuse in areas not allocated to your firm in breach of E Clause 5.1. In some areas allocated to your firm, you have not collected any refuse at all in breach of Clause 4.1 and 5.3. You have failed to comply with the written requirements of the Director of Health Services concerning the collection of refuse. You have breached Clause 19 of the Additional Special Conditions of Contract by submitting payment certificates which did not conform with the contract, and which were in fact fraudulent in F that you inflated the number of bins collected and duplicated claims.
>
> The City of Harare cannot continue to prejudice its ratepayers by allowing this contract to continue. In the circumstances you are hereby notified that the contract is cancelled with effect from 31 March 2000."

In response, the appellant's legal practitioners addressed a letter dated 31 March 2000 to the respondent, the relevant part of which reads as follows:

> G "We place on record that our client does not accept your purported cancellation of the contract, effective 31 March 2000. Furthermore, and in any event, it does not accept that any grounds exist which can justify cancellation.
>
> We place on record that our client will continue to tender the service required by it in terms of the contract, and will continue to perform the H work of refuse collection. Should it happen that our client is prevented

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> from performing services in terms of the contract, it reserves its rights to A institute proceedings against the City for damages."

Notwithstanding this letter, the appellant's vehicles were denied access to the respondent's waste disposal site thus, so it was alleged, precluding the appellant from performing its obligations in terms of the contract.

The appellant then filed an urgent application in the High Court on 5 April B 2000 seeking the following relief:

> "It is declared that:
>
> 1. The purported cancellation of the applicant's contract DW9/96 with the respondent effective 31 March 2000 is declared to be unlawful and is hereby set aside; and
>
> It is ordered: C
>
> 2. That the respondent be and is hereby directed to permit the applicant to execute its obligations in terms of the aforementioned contract; and
> 3. That the respondent be and is hereby directed to perform all its obligations in terms of the aforementioned contract; and D
> 4. That the respondent pay the applicant's costs of suit."

The High Court found that the contract was properly cancelled, but referred to trial the dispute on the papers as to the performance of the agreement. The appellant now appeals against the whole judgment of the court *a quo*.

The main argument advanced by the appellant is that the notice of termination E advising of termination on a future date is invalid. For this proposition, the appellant relied on the following remarks of De Kock J in *Ganief v Hoosen* 1977 (4) SA 458 (C) at 486:

> "I do not think that a lessor who has the right of election to cancel, and who wishes to cancel, is entitled to declare the contract cancelled as from some date in the future and to hold the tenant bound by the lease until the arrival F of that date. In my view, the right to resile from a contract is one that must be exercised *ex nunc*. Support for the views here expressed are to be found in the case of *Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd* 1946 WLD 486."

These remarks were approved by Gubbay CJ in *Jackson v Unity Insurance Co Ltd* 1999 (1) ZLR 381 (S) at 383C-E. In both cases, the notice was given in G cancellation of a lease.

The respondent, however, submitted that this principle being a rule of the law of lease, there is no basis for the application thereof to the law of contract. Further, so it was submitted, the letter of termination fulfils the legal requirements for the cancellation of a contract, which are that the notice of H

2003 (1) ZLR p577

Ziyambi JA

A cancellation must be clear and unequivocal (as to which: see *Kragga Kamma Estates CC & Anor v Flanagan* 1995 (2) SA 367 (A) at 375); and that the cancellation takes effect from the time that it is communicated to the other party: see *Swart v Vosloo* 1965 (1) SA 100 (A) at 105.

In *Ganief's* case *supra* the plaintiff had in December 1971 leased certain B premises to the defendant for five years. The defendant not having paid the rent on due date or within seven days thereafter, the plaintiff became entitled to cancel the lease in terms of a clause of the contract. *The sole question before the court was whether the plaintiff had effectively put an end to the contract as he was indeed entitled to do***.** The plaintiff relied on a letter dated 10 February 1975 written to the defendant by his legal practitioners. The letter C purported to cancel the lease with effect from the first day of March 1975. On behalf of the defendant it was submitted that:

> "a notice of cancellation to be effective must clearly and unambiguously convey to the guilty party the innocent party's election to bring the contract to an end. It must embody an unqualified, immediate and final decision to treat the agreement as at an end. It cannot stipulate for a D termination at some future time."

It was clear from the notice, so it was submitted, that the plaintiff intended to keep the lease alive for the rest of February. This contention was upheld by the learned judge who relied for support on the *Alpha Properties* case *supra*.

The *Alpha Properties* case was also concerned with the purported cancellation E of a lease. In that case, the lease provided that if the rent remained unpaid for seven days after it became due the landlord could cancel the lease forthwith. The lease was a monthly one. The rent was not paid for more than seven days and the lessor's agents wrote to the defendant:

> "by reason of the fact that you have failed to pay your rent for this month, we have been instructed to give you one month's notice to vacate the F premises at the end of July 1946."

The defendant through his attorney wrote:

> "My clients note that a month's notice of termination of the monthly tenancy has been given them, to expire at the end of July, 1946. As the tenancy is a monthly tenancy, my clients recognise that it is at any time subject to one month's notice terminating it at the end of a month, but my G clients intend availing themselves of the protection afforded them by reg. 4 of War Measure 89 of 1942 …"

Millin J, at p 490 of the report, had this to say:

> "I think it is trite law that an election to claim a forfeiture should be made in clear and unequivocal terms, so as to leave no room for misunderstanding H by a reasonable man in the position of the defaulting party. The letter of

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2003 (1) ZLR p578

Ziyambi JA

> 28 June, while alluding to the failure to pay the June rent, does not refer A to clause 14 of the lease and does not state that the lease is cancelled or forfeited. On the contrary, having made the allusion to the non-payment of rent as a reason for what follows, it proceeds to give one month's notice to vacate the premises at the end of July."

He held that such a letter was not effective as an election to cancel the lease B for non-payment of rent but was merely a month's notice to terminate the lease in the ordinary course and that the defendant was therefore entitled to the protection afforded tenants by reg. 4 of War Measure 89 of 1942. He drew a distinction between this case and the case of *II Investments (Pty) Ltd v Spangenthal* 1939 WLD 274 where, he said, the learned Judge President came to the conclusion that the intention of the notice was to cancel forthwith and C to give the lessee time to vacate.

In the *II Investments* case *supra*, the lease in question was for five years from June 1938. It contained a clause that gave the lessor, in the event of the rent not having been paid timeously, the

right to cancel the lease "at once". On 10 March 1939, the applicant (lessor), not having received payment of the rent on due date, wrote to the respondent in the following terms: D

> "Please take notice that you must vacate the premises … now occupied by you, by the end of March 1939. Also, please let us have a cheque by return of post for this month's rent, light and water."

Barry AJP held that provided the intention to cancel was made clear to the lessee, the lessor was entitled to exercise his right to cancel and at the same E time give the lessee time in which to vacate, and demand rent for that extended time. At p 278 of the report he said:

> "In the present case, while the notice contained in the letter of 10 March was laconic, elliptic and inconsistent, the reply showed that the respondent had no difficulty in understanding what was demanded in the notice. He clearly understood the notice to mean that the lessor terminated the F lease" (my emphasis).

And finally, in the *Jackson v Unity Insurance Co Ltd* case *supra* the lease contained a clause entitling the lessor in the event of any breach of the contract of lease, to "immediately cancel and terminate the lease, re-enter and take immediate possession of the premises". On 5 December 1997, the appellant having committed a breach of the terms of the lease, the respondent despatched G to him a letter advising him that the lease was to terminate on 31 January 1998. The appellant refused to vacate and continued to pay rent for the premises and perform the other conditions of the lease. An application for his ejectment succeeded in the High Court, but on appeal it was held that:

> "a valid notice of cancellation must clearly inform the guilty party of the H

Ziyambi JA

> A wronged party's unqualified, immediate and final decision to treat the contract as being at an end. The right to resile from the contract must be exercised immediately. What the landlord purported to do was to declare that the contract was to terminate at some future date and hold the tenant bound until that date arrived. The notice of cancellation was therefore invalid."

B It will be seen that all the cases to which were referred were concerned with the cancellation of lease agreements. We have not been referred to any case in which the agreement cancelled was other than a lease agreement. However, I take note that although all the cases were concerned with agreements of lease, there would appear to be some merit in the view that the learned judges, by their use of the word "contract", were referring to contracts in general. I do not wish, C however, in the absence of full argument on the point, to make the distinction urged upon the court by the respondent between contracts of lease and contracts in general. In any event, I am of the view that such a distinction is not necessary to enable me to arrive at a decision in this matter.

Whatever the position, it seems to me that what the learned judges were D concerned with in each case was whether the notice of cancellation was clear and unequivocal so that it left no doubt in the mind of a reasonable man in the position of the defaulting party of the aggrieved party's intention to cancel the contract.

It seems to me that the notice in this case clearly and unequivocally conveyed to the appellant the intention of the respondent to cancel the contract. That the E appellant understood it to be so is evident from the appellant's response – a refusal to accept the cancellation. The letter was received on the afternoon of 30 March and there could have been no doubt in the appellant's mind as to the intention to cancel the contract with immediate effect. (It will be noted that a day is "a period of twenty-four hours as a unit of time, esp. from midnight to F midnight" – *The Concise Oxford Dictionary*). 31 March commenced at midnight on the night of 30 March. What the respondent, in effect, communicated to the appellant on the afternoon of 30 March was that the contract was cancelled.

It cannot, in my judgment, reasonably be read into the notice that the appellant was put under an obligation to do any work in performance of the contract on G 31 March. To do so would place an artificial interpretation on what is, in my view, the clear and unequivocal intention to cancel set out in the notice and understood as such by the appellant. Indeed the appellant, in refusing to accept the cancellation, expressed its intention to continue performance in defiance of the notice of cancellation.

Ziyambi JA

Finally, I cannot, with respect, accede to the view that in the present case the A notice of a few hours would qualify to bring the notice within the class prohibited by *Jackson*'s case *supra*.

Accordingly, it is my view, that the contract was properly cancelled and I would, therefore, dismiss the appeal. B

Gill, Godlonton & Gerrans, appellant's legal practitioners

Kanokanga & Partners, respondent's legal practitioners

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S v NCUBE & ORS 2003 (1) ZLR 581 (H)

Citation	2003 (1) ZLR 581 (H)
Case No	Judgment No. HB-61-03
Court	High Court, Bulawayo
Judge	Cheda J and Ndou J
Heard	2 September 2002; 22 May 2003
Judgment	22 May 2003
Counsel	*T Ndlovu,* for the applicants *Mrs M Cheda,* for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

C **Criminal procedure** — *arrest — resisting arrest — right of police officer to use reasonable force to overcome resistance — what court must consider in deciding whether force used was reasonable*

Criminal procedure — *trial — judgment — what should be in judgment — failure by magistrate to record reasons for decision — effect*

Headnote

D Where a person whose arrest is attempted resists the attempt and cannot be arrested without the use of force, the person attempting to carry out the arrest has the right to use such force as is reasonably justifiable in the circumstances to avert any resistance put up to the arrest. The court must place itself in the shoes of the accused when looking into whether or not E the force applied to effect the arrest was reasonable.

A Judgment should contain a brief summary of the facts found proved and the trial court's appraisal of the credibility of each witness, stating what evidence was accepted or rejected and giving

reasons for its decision. For a magistrate not to record what he considered amounts to a gross irregularity, which will usually result in a conviction being set aside on F appeal or review, although the conviction may still be upheld if the evidence on record supports it.

Cases cited

R v Howard 1966 RLR 318 (A)

R v Karombe & Anor 1958 R&N 469

G *S v Makombe* HH-120-86

R v Ncube 1962 R&N 16 (S)

R v Putter & Anor 1962 R&N 73 (FS)

S v Rusero HH-151-86

2003 (1) ZLR p582

Ndou J

Case information

T Ndlovu, for the applicants A

Mrs M Cheda, for the respondent

Judgment

Ndou J: The appellants were charged with assault with intent to do grievous bodily harm. Notwithstanding their protestations they were convicted and each sentenced to nine months' imprisonment with three months suspended, B on the usual condition of good behaviour. They appeal against both conviction and sentence. We upheld the appeal and quashed the conviction and set aside sentences. Our reasons for doing so are covered in this judgment.

The facts of the matter are the following. The three appellants are members of the Zimbabwe Republic Police stationed at Madlambuzi. On 12 September 2000, at about 2300 hours the appellants and another police detail arrived at C the complainant's residence in Dombodema. The appellants went to arrest the complainant after receiving a report against him by one Godfrey Tshuma and other villagers, that he had been threatening to kill the former and had thrown stones at his home.

It is common cause that the appellants and the other policeman approached the D complainant's homestead under the impression, rightly or wrongly, that he was a violent person. They had previously arrested him for violence. Upon arrival at the complainant's home, they knocked at his bedroom hut and announced their presence. It is common cause that the complainant delayed in coming out. What transpired afterwards when he eventually came out, is hotly disputed. What seems to be beyond dispute is that a scuffle ensued. E

The prosecution case, on the one hand, was that as the complainant was opening the door the appellants flung the door open, grabbed and pulled out the complainant. The appellants' case on the other hand is that when the complainant came out he went straight to the first appellant and grabbed him and they both fell to the ground. The two other appellants came to rescue their colleague and subdued the complainant and handcuffed him. Their case is that F whatever force or assault was perpetrated on the complainant, the objective was to effect the arrest of the complainant and to overcome his apparent resistance. The trial court found in favour of the prosecution version. This finding has resulted in this appeal. In support of its case, the prosecution called the complainant and his wife. The main thrust of their testimony is that when G the appellants knocked at their bedroom, they asked who it was. The appellants forced the door open and started assaulting the complainant. The wife says the complainant was quiet throughout the assault.

From the record, it seems that most issues are common cause. It is beyond dispute that the appellants, in the course of their duties as policemen, received a report of a criminal offence levelled against the complainant by one Godfrey H

2003 (1) ZLR p583

Ndou J

A Tshuma and other villagers. In essence, it was reported that the complainant was accusing Tshuma of being a Movement for Democratic Change supporter and was threatening to kill him and was also throwing stones at his home. The appellants and the other police officers went to the complainant's home believing he was a violent person. They had previously arrested him for acts of violence and their objective was to effect an arrest on him. They knocked B at his door and he came out. From this stage onwards there seems to be conflicting evidence on what transpired. It is, however, beyond dispute that the first appellant assaulted the complainant. The only issue is whether he did so in order to apply reasonable force to effect arrest. As far as the rest of the appellants are concerned, what is at issue is whether they assaulted the C complainant as well or they merely assisted their colleague to subdue the complainant. The main thrust of the issue is whether the complainant was resisting lawful arrest. Resisting arrest is itself an offence: see s 42(1) and 101(1)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and *Putter & Anor v R* 1962 R&N 73 (FS). It is trite that if a person whose arrest is attempted resists the attempt and cannot be arrested without the use of force, D the person attempting to carry out the arrest has the right to use such force as is reasonably justifiable in the circumstances to avert any resistance put up to the arrest: see *Criminal Procedure of Zimbabwe* by John Reid Rowland at 5- 17(g) and also *R v Howard* 1966 RLR 318 (A); *R v Ncube* 1962 R&N 16 (S) and *R v Karombe & Anor* 1958 R&N 469. The court must place itself in the shoes of the accused when looking into whether or not the force applied to E effect the arrest was reasonable. In this case, the violent character of the complainant was known to the appellants and the other police officers. The offence for which they intended to effect the arrest was threats of death directed at Tshuma (his neighbour) and throwing stones at his homestead. The complainant, according to evidence, was an abuser of dagga. His wife confirmed this in her testimony. The State concedes that the "Police went to F the complainant's home believing he was a violent person". It is common cause that the police had previously arrested the complainant for violence. The evidence establishes that when the appellants knocked at the door of the complainant's bedroom he emerged therefrom naked. The evidence of the appellants is that the complainant rushed out of his bedroom and immediately G attacked the first appellant. It is common cause that before the complainant emerged naked the appellants had knocked on his bedroom door and announced that they were police officers. This occurred at night with moonlight being the only source of light. The State alleged that the complainant lost two teeth as a result of the assault. The judgment of the court *a quo* is scant and at times very difficult to follow. The trial court did not make findings of credibility in H respect of the various witnesses who testified except the complainant and to

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some extent the appellants. There was no finding of credibility in respect of A witnesses Godfrey Tshuma, Bhekinkosi Mabhena and Doctor Ogundipe. The testimony of these witnesses impacts on the credibility of the complainant. Mabhena's account is as follows:

> "I remained at a spot about 4-5 metres away. Ncube (first appellant) knocked; there was no answer. Later, a female voice was heard answering. B A match was lit and put out. The complainant came out holding his pair of trousers and was naked. The complainant *came out hurrying and they fell down together.* Ncube then assaulted accused once (complainant) with a baton stick. Sibanda (second appellant) and Dungeni *then joined assisting in arresting the complainant. After they had arrested the complainant,* I then gave them his clothes to wear … *First accused struck the complainant when they were on the ground. The accused 2 and 3 did* C *not assault the complainant. I did not notice any injuries on the complainant's body*" (my emphasis).

Under cross-examination by the public prosecutor, this witness further stated:

> "A – Ncube (first appellant) was trying to free himself from the complainant … D
>
> Q – But you did not say the complainant grabbed the accused so what was he freeing himself from?
>
> A – I said the complainant was hurrying and grabbed him."

Godfrey Tshuma said:

> "Police knocked. We saw a person *coming out and he grabbed the police* E *officer … after grabbing each other they fell each other* (sic) *to the ground.* I noticed the police officer hitting (complainant) with a baton stick. There were four police officers; *only complainant and one officer grabbed each other.*"

The testimony of these two witnesses is consistent with the appellants' defence yet the court a quo made no findings thereon. Are we to discern from F the judgment that the trial court made adverse findings on their credibility? Further, the complainant was examined by Dr Ogundipe. He testified:

"I found multiple bruises on the back and thighs. He had loose teeth and fractured ones. Wounds were fresh. He was still bleeding from the mouth."

Ex-facie, this testimony supports the complainant's story. A closer scrutiny, G however, will show that that is not the case. The alleged assault occurred on the night of 12 September 2000. Dr Ogundipe only examined the complainant on 21 September 2000. Could he still be bleeding and having fresh wounds after so many days? There is a doubt that the wounds that Doctor Ogundipe saw have anything to do with the incident of 12 September 2000. The trial H

2003 (1) ZLR p585

Ndou J

A court did not do the basics in arriving at its decision. It did not follow the steps that a trial court should take and the techniques it should follow in reaching a decision. I think the words of the learned author John Reid Rowland in *Criminal Procedure in Zimbabwe* are instructive in this regard. At pp 24-10, the learned author remarked:

"Essentially, the judgment should contain a brief summary of the facts B found proved and the trial court's appraisal of the credibility of each witness, stating what evidence was accepted or rejected and giving reasons for its decision. It is of no help simply to outline the evidence of all the witnesses and make bald comments such as —

'The state witnesses gave their evidence well and the accused gave his badly. Accordingly, I found the accused guilty": see *Magistrates* C *Handbook* pp 81-82.

Where there are questions of law, the application of the law to the facts found proved should then be dealt with."

What is required is a complete and meaningful judgment touching on all material evidence led during the trial. Magistrates should always bear in mind D that in criminal trials the giving of judgment or reasons for conviction is a very important part of the trial, the purpose of which is to avoid creating the impression that the decision is arbitrary or capricious. For a magistrate not to record what he considered amounts to a gross irregularity, which will usually result in a conviction being set aside on appeal or review, although the conviction may still be upheld if the evidence on record supports it: see *S* v E *Makombe* HH-120-86 and *S v Rusero* HH 151-86. *In casu*, the court *a quo* failed to give a brief summary of the facts it found proved and its appraisal of the credibility of witnesses Tshuma, Mabhena and Dr Ogundipe. The testimony of these witnesses is material. Their evidence is consistent with appellants' defence and contradicts the complainant's version in several material respects. This failure by the trial court amounts to a gross irregularity. The other F evidence on record does not support the prosecution case. On the contrary, the bulk of the evidence should have created a doubt in the mind of the trial magistrate and the appellants should have been given the benefit thereof.

The appellants' defence raised a question of law i.e. whether the appellants were justified in assaulting the complainant in the face of evidence that he was G resisting arrest. There is no application of the provisions of s 42(1) of the Act to the facts of the case. It should be borne in mind that it is the State that should prove its case beyond a reasonable doubt and not the other way around.

In light of the foregoing, it is our view that the conviction is not safe. We, therefore, upheld the appeal on 2 September 2002, and quashed the convictions H and set aside the sentences imposed.

2003 (1) ZLR p586

Ndou J

Cheda J concurred A

Cheda & Partners, appellants' legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/S v NYATHI 2003 (1) ZLR 587 (H)

S v NYATHI 2003 (1) ZLR 587 (H)

Citation	2003 (1) ZLR 587 (H)
Case No	Judgment No. HB-60-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	22 May 2003
Judgment	22 May 2003
Counsel	Details not supplied
Case Type	Criminal Review
Annotations	Link to case annotations

Flynote

Criminal procedure (sentence) — *general principles — multiple counts —* C *cumulative effect*
Criminal procedure (sentence) — *rape — multiple counts*

Headnote

The accused raped his daughter ten times over a period of eighteen months. The magistrate imposed a complex sentence which worked out at 30 D years' imprisonment.

Held, that the cumulative effect was excessive and that an effective total sentence of 18 years would be appropriate.

Cases cited

S v Chirwa HH-79-94

E *S v Coetzee* 1970 (4) SA 83 (RA)

S v Hassim 1976 (2) PH 58 (N)

S v Makurira 1975 (3) SA 83 (R)

S v Matanhire & Ors HH-18-02

S v Mavhundura 2002 (1) ZLR 598 (H)

S v Mundowa 1998 (2) ZLR 392 (H)

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

S v Sherman S-117-84

S v Sawyer 1999 (2) ZLR 390 (H)

S v Sifuya 2002 (1) ZLR 437 (H)

S v van der Merwe 1974 (4) SA 523 (N)

S v van Zyl 1974 (1) SA 113 (T)

G *S v Young* 1977 (1) SA 602 (A)

Judgment

Ndou J: The accused was charged with ten counts of rape of his juvenile daughter. Despite his protestations the regional magistrate in Gweru, sitting in the Central Region, found him guilty on all the ten counts. He was convicted after a lengthy trial, for the greater part of which he was legally represented.

2003 (1) ZLR p588

Ndou J

Considering the quality of the evidence adduced during the trial, the findings A of guilt cannot be faulted. The assessment of the testimony and the facts of the case by the learned regional magistrate is admirably in terms of the principles of criminal procedure.

The accused was sentenced as follows:

> "Count 1 and 2 as one:10 years' imprisonment B
>
> Count 3: 7 years' imprisonment
>
> Counts 4 to 8: 10 years' imprisonment
>
> Count 9: 7 years' imprisonment
>
> Count 10: 10 years' imprisonment
>
> Further count 3 ordered to run concurrently with counts 1 and 2. Count C 9 to run concurrently with counts 4 to 8. Total 30 years' imprisonment."

This is mathematics in sentencing. *In casu,* although the individual sentences imposed in each count are in no way excessive, their cumulative effect is so excessive as to call for interference: see *S v Hassim* 1976 (2) PH H58 (N). It is trite that there are no hard and fast rules dictating whether a court should D treat a number of counts separately or together for the purpose of sentence. A trial court has a very wide discretion and, provided that discretion is exercised on reasonable grounds, an appeal court or review judge will not interfere: see *S v Coetzee* 1970 (4) SA 83 (RA). The sentence must, of course, fall within the court's jurisdiction: see *S v Makurira* 1975 (3) SA 83 (R). Where multiple counts are closely connected or similar in point of time, nature, seriousness E or otherwise, it is a useful way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect not too harsh on the accused. Nevertheless, the practice is undesirable and should only be adopted by lower courts in exceptional cases: see *S v Young* 1977 (1) SA 602 (A); *S v van Zyl* 1974 (1) SA 113 (T) and *S v van der Merwe* 1974 (4) SA 523 (N).

Trial magistrates must adopt this approach sparingly and only in exceptional F instances in the interests of the accused. Once this approach is, however, adopted then the principles set out in *S v Chirwa* HH-79-94 and *S v Sifuya* 2002 (1) ZLR 437 (H) must be followed. In the *Chirwa* case, Garwe J (as he then was) said at p 3 of the cyclostyled judgment:

> "The position is now fairly well settled that in cases involving multiple G counts, the correct approach to sentence is either to take all counts as one for the purposes of sentence and then impose a globular sentence which the court considers appropriate in the circumstances or alternatively to determine an appropriate sentence for each count taken singly so that the seriousness of offence is properly reflected. The court would then determine a realistic total which it considers appropriate in the H

2003 (1) ZLR p589

Ndou J

> A circumstances and where necessary the severity of the aggregate sentence on all the counts taken together may be palliated by ordering some counts to run concurrently with others."

It seems to me that the learned trial magistrate adopted a combination of the two approaches. The trial magistrate erred by failing to palliate the aggregate sentence in order to come up with a realistic total. The sentence of 30 years' B imprisonment is manifestly excessive and is in excess of the outer limit our courts would ordinarily impose – see *S v Sherman* S-117-84. In this case, McNally JA remarked:

> "How does one begin to measure the outer limits of a sentence in a case of this magnitude? One may say that even murder with actual intent often C attracts a sentence of 16-18 years. One may ask – what sentence would be appropriate where a quarter of a million dollars is stolen and nothing is recovered? What sentence would be appropriate where two or six million dollars is involved? These considerations and suggestions suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such crimes."

D See also *S v Sawyer* 1999 (2) ZLR 390 (H)

At p 440 F in *Sifuya*'s case *supra*, Guvava J remarked:

> "In *S v Chikanga* S-123-93, the Supreme Court commented that it knew of no reported case in South Africa or Zimbabwe, whether for only one offence or more, where a man has been sentenced to more than 25 years' E imprisonment. The court took the view that life imprisonment rarely exceeds 16 years in Zimbabwe and by statute more than one term of life imprisonment is served concurrently."

In casu, the sentence of 30 years' imprisonment is well above the outer limit calling for interference. The sentence imposed here is so excessive that it is viewed as being disturbingly inappropriate. Whilst accepting that sentence is F pre-eminently a matter for the discretion of the trial court I find that the exercise of such discretion *in casu*, was tainted with misdirection: see *S v Ramushu & Ors* S-25-93; *S v Matanhire & Ors* HH-18-02; *S v Mundowa* 1998 (2) ZLR 392 (H) and *S v Mavhundura* 2002 (1) ZLR 598 (H).

The aggravating feature of this matter is that, after divorcing her mother, the G accused remained raping their sixteen year old daughter. He is the natural father of the complainant. The accused has other two wives in his polygamous family. He raped his daughter ten times over a period of around one and half years. Force was used to achieve the rapes. Offences of this kind are prevalent and expose children to extreme trauma and incurable diseases. The learned H trial magistrate was at least correct in regarding lengthy imprisonment as being

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Ndou J

appropriate. Save for what I said above about the length of imprisonment, I A otherwise agree with him.

I, accordingly, confirm the convictions in all the ten counts. I, however, set aside the sentence by the trial court and the following is substituted:

> "Counts 1 and 2 treated as one: 10 years' imprisonment
>
> Count 3: 7 years imprisonment B
>
> Count 4 to 8 treated as one : 10 years' imprisonment
>
> Count 9: 7 years' imprisonment
>
> Count 10: 8 years' imprisonment
>
> It is ordered that the sentences in counts 1 and 2, 3, 4 to 8 and 9 are to run concurrently. Effective sentence is 18 years' imprisonment." C

Cheda J concurred

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/S v MUNGA 2003 (1) ZLR 591 (H)

S v MUNGA 2003 (1) ZLR 591 (H)

Citation 2003 (1) ZLR 591 (H)

Case No	Judgment No. HB-68-03
Court	High Court, Bulawayo
Judge	Ndou J and Assessors
Heard	23 May 2003
Judgment	23 May 2003
Counsel	*H Ushewokunze III*, for the State *L Nkomo,* for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal law — *defences — insanity — non-pathological incapacity — when* C *might succeed as a defence — cautious approach to be taken to such defence*

Headnote

The defence of non-pathological incapacity has to be treated with great caution as it can be raised easily by the accused but is very difficult for the state to refute. The courts should not allow this defence to succeed D easily otherwise the criminal justice system would quickly become discredited. A brief emotional disturbance would not satisfy the defence, although an act preceded by a very long period of months or years in which the accused's level of emotional stress increased progressively might do so.

Cases cited E

S v Arnold 1985 (3) SA 256 (C)

R v Benjamin 1968 (1) RLR 126 (G)

S v Calitz 1990 (1) SACR 119 (A)

S v Campher 1987 (1) SA 940 (A)

F *S v Chitiyo* 1987 (1) ZLR 235 (S)

S v Chretien 1981 (1) SA 1097 (A)

R v Moyo 1969 (1) RLR 162 (G)

S v Sibiya 1984 (1) SA 91 (A)

S v Smith 1990 (1) SACR 130 (A)

S *v Taanorwa* 1987 (1) ZLR 62 (S)

Case information

G *H Ushewokunze III*, for the State

L Nkomo, for the accused

Judgment

Ndou J: Before us is a young man aged 21 who has brutally caused the death H of his wife. The manner in which the accused brought about the death of his

Ndou J

wife is common cause. His defence is one of criminal incapacity. What is not A clear from his defence is whether this alleged incapacity is on account of insanity or is non-pathological. I will deal with this issue later in the judgment.

The salient facts of this case are that on 10 March 2000 the accused took the deceased to his rural home at George Zingwa's homestead, Sianungu Village, Kanyangwe area in Binga. He introduced the deceased to his relatives as his B wife. He lived with her at his elder brother's above-mentioned homestead. This extended family lived together happily save for one minor dispute between the accused and the deceased. 18 April is Independence Day in this country. Like many Zimbabweans, on 18 April 2000, the George Zingwa extended family, inclusive of the head of the family, George, his wife Ivies, the accused and the deceased, proceeded to the venue of the celebrations. At the celebrations, the C accused did not drink alcohol, or at least the evidence before us shows that he was not seen drinking and there were no symptoms of alcohol consumption. The family returned home in the evening and shared the evening meal. The sole witness, Ivies Zingwa, who testified, did not observe any beer at the homestead. She stated that there was no beer at the homestead. It can safely be inferred from her evidence that until the time that she retired to bed at around 2000 D hours the accused was sober and normal. According to Mrs Zingwa the accused was not a habitual drinker. She had, however, seen him once showing some effect of alcohol consumption. But certainly on the fateful day there was nothing unusual about his sobriety. She has known the accused as a child from the time he was in primary school right through until he did his grade 7. He was E staying with her at the same homestead as he is a young brother to her husband. She described the accused as a very reserved and quiet character. According to her description of the accused's personality, he was an introvert but he was normal. He had not suffered any mental illness during the time she had known him. She knew the accused person very well.

Coming to the events of the fateful day, she had reason to be close to the F couple's bedroom hut. She heard the deceased's voice in normal conversation with the accused. She did not hear the accused at he usually speaks softly. This was around 0600 hours. She later heard the deceased screaming loudly, calling her saying some words to the effect – "Mai Priscillah". The deceased's voice emanated from the couple's bedroom and sounded frightened. She ran to the G couple's hut and heard the deceased crying, "Maye ngafa" loosely translated "Oh mother, I am dying". She tried to open the couple's closed bedroom hut door by pushing it but failed as it was locked or bolted from the inside. She peeped through a gap in the door. She saw the deceased lying face-down on the floor and her head full of blood. The deceased was bleeding so profusely that the witness ended up crying. The accused continued to swing the hammer H

Ndou J

A which he was wielding upwards and with full force struck the deceased several times on her head. At some point, the deceased stopped crying. After some time, George Zingwa arrived and forced the door open. He actually chopped it with an axe. At that stage, the accused had set the couple's clothes on fire. The deceased was breathing heavily. George went to report to the police and seek medical assistance. When George was away, and before the police and the B ambulance personnel arrived, the accused was quiet. He took a blanket and covered the deceased. Mrs Zingwa testified that at that time she formed an opinion that the accused had not taken alcohol. He was not drunk. The accused did not smoke. The police arrived and the accused was arrested. As the accused was being led into the ambulance, the accused told Mrs Zingwa that he C assaulted the deceased because she was no longer listening to him but instead was listening to her. He said this in response to bad words to him emanating from Mrs Zingwa and others who were present. At that time, the accused was still locked inside with the deceased and those outside were shouting why he was killing someone's child, the accused uttered words to the effect – "If anyone comes in, that person is no more."

D From the undisputed testimony of Mrs Zingwa, we are satisfied that the accused was not under the influence of alcohol. She knows the accused very well and would have observed it if he was drunk. She did not smell alcohol and at that time of the day the accused would not have started drinking in any event. All we can discern from his defence outline and what he told the specialist psychiatrist is that, if indeed he consumed alcohol and smoked two dagga E cigarettes, it would have occurred

between 2000 hours of 18 April 2000 and 0600 hours of 19 April 2000. This, in our view, is far fetched and a fabrication. In his extra-curial statement he did not give drunkeness or insanity as a reason for the assault. When everything was still vivid in his mind he gave a coherent and understandable explanation for the assault. He said he assaulted her F because of disobedience. He ordered her to go and fetch water to mould bricks to build a house. Not only did the deceased decline to do so, she further stated that the house "was not hers". During our deliberations, it became clear that such a response might be taken in a very serious light in a rural set up where women are not expected to disobey marital instructions of their husbands. To further state that the house is not hers can infuriate a man in the accused's G position. This is consistent with what he told those who were present at the time: that he assaulted her because she no longer listened to him but instead listened to Mrs Zingwa. This is also consistent with what he stated in his extracurial statement.

In the circumstances, the accused's rage and actions subsequent to that have H to be viewed in that context. Mr *Nkomo,* for the accused, rightly conceded that

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2003 (1) ZLR p594

Ndou J

this whole issue of drinking beer and smoking two dagga cigarettes is an A afterthought. A year later, when he was seen by the specialist psychiatrist, the accused must have tried to give a plausible explanation for the assault and in the process deviated from the truth. We do not agree that when the accused killed the deceased he was labouring under such a defect of reason, from a disease of the mind, that he did not know the nature and quality of what he did B and that what he did was wrong. From the expert evidence of Dr Poskotchinova, the accused was free from any psychotic symptoms. He was orientated in all respects and there was no evidence of cognitive impairment. He denied any delusions and hallucinations of any kind. The doctor opined that due to the alcohol and drugs that he had consumed the accused was in a state of diminished responsibility at the time of killing. We have already indicated that C the alleged intake of alcohol and cannabis is a mere fabrication exposed as such by the credible testimony of Mrs Zingwa. This fabrication, unfortunately, does impact on the conclusion arrived at by the psychiatrist. The opinion would be correct if the accused told her the truth. He did not, so the opinion is affected thereby.

In our view, the accused's mental condition at the time of the offence does not D satisfy the requirements of insanity. We may at most be dealing with a case of abnormal condition and as such the accused is legally responsible for the offence and must be convicted. So, even if we accept the findings of the psychiatrist that there was diminished responsibility, the accused would still be convicted. Diminished responsibility reduces the accused's moral E blameworthiness and not guilt: see *S v Sibiya* 1984 (1) SA 91 (A) at 97; *S v Chitiyo* 1987 (1) ZLR 235 (S) at 239 and *Criminal Procedure in Zimbabwe* by John Reid Rowland at 12-12 to 12-13.

In our view, in light of the findings of fact about the allegation of intake of alcohol and drugs, the issue of diminished responsibility does not arise. The only other issue that we have to consider is one of non-pathological criminal F incapacity. The evidence shows that the accused is a very quiet person. The cause of mental inability seems to emanate from anger linked to mental or physical exhaustion resulting from a perceived disobedient wife. This strained the accused's powers of self-control until these powers snapped: see *S v Arnold* 1985 (3) SA 256 (C). What is important is not the cause or the G description of the cause but the inability itself: see *Criminal Law* by C R Snyman 3 ed at pp 152-3. This defence has to be treated with great caution as it can be raised easily by the accused but is very difficult for the State to refute. Non-pathological incapacity as a complete defence ought not to succeed easily. Our courts should not allow this defence to succeed easily otherwise our criminal justice system would easily become discredited: see *S v Chretien* H

2003 (1) ZLR p595

Ndou J

A 1981 (1) SA 1097 (A) at 1105H and 1106D. *In casu*, the emotional disturbance was only for a brief moment before or during the act and as such its chances of success as a defence are almost non-existent. According to Snyman *supra* on p 154, 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, the accused's act was preceded by a very long period of months or years in which B his level of emotional stress increased progressively: see also *S v Campher* 1987 (1) SA 940 (A); *S v*

Calitz 1990 (1) SACR 119 (A) and *S v Smith* 1990 (1) SACR 130 (A) at 135. This was not the case *in casu.*

The burden of proving a defence of the kind raised by the accused lies on the accused: see *R v Moyo* 1969 (1) RLR 162 (G) at 163 and C *R v Benjamin* 1968 (1) RLR 126 (G) at 127 and *S v Taanorwa* 1987 (1) ZLR 62 (S) at 66. With this in mind, one would have thought the accused would have found it prudent to testify under oath to establish a foundation for his defence. He chose not to do so. Fortunately, the State adduced evidence of the specialist psychiatrist. Having regard to the totality of the evidence and our findings, the accused has not established a defence of non-pathological incapacity either. We hold the D view that the accused appreciated what he was doing. His utterances during and after the assaults are consistent with a husband who was annoyed with a wife who did not follow his instructions or "command" as the psychiatrist recalls it in her report. This is a case of domestic rage. The accused should be held criminally responsible for his act. The accused used a hammer weighing 2.11kg. The length of its head is 12.5 cm and circumference of the head E 18.9 cm. The length of the handle is 29 cm and the circumference of the handle is 10 cm. He aimed his blows indiscriminately about her head. She was defenceless. According to the post-mortem report, the cause of death was multiple skull and jaw fractures and violent murder. Whilst we accept that the accused's emotional state has to do with the assault, we find that the proven F facts establish the crime of murder with legal intent. This is not a case were the accused had successfully established diminished responsibility entitling him to the reduction of his conduct to one of culpable homicide.

We accordingly find the accused guilty of murder with constructive intent.

G *Attorney-General's Office*, applicant's legal practitioners

Webb, Low & Barry, accused's legal practitioners

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Source:
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S v MUKURA & ORS 2003 (1) ZLR 596 (H)

Citation	2003 (1) ZLR 596 (H)
Case No	Judgment No. HH-20-03
Court	High Court, Harare
Judge	Hungwe J
Heard	28 May 2003
Judgment	28 May 2003
Counsel	Details not supplied
Case Type	Criminal Review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *general principles — suspended sentence — community service order conjoined with a custodial sentence suspended* C *on condition of restitution — condition must be reasonably capable of fulfilment*

Headnote

Where an accused is sentenced to a term of imprisonment suspended partly on condition of the performance of community service and partly on D another condition, that other condition must be reasonably capable of fulfilment. Where that other condition is one of restitution, and no enquiry has been made as to the accused's ability to repay, and it seems improbable that he will be able to repay, it is a misdirection to impose such a condition.

Cases cited E

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

S v Chirara & Ors 1990 (2) ZLR 156 (H)

S v Gorogodo 1988 (2) ZLR 378 (S)

S v Lamb 1969 (2) RLR 193 (A)

S v Malunga 1990 (1) ZLR 124 (H) F

S v Manzini 1984 (1) ZLR 33 (H)

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

Judgment

Hungwe J: The above records were dealt with by the same provincial magistrate. They all raise the same point. G

The point raised is the propriety of a community service order conjoined with a custodial sentence suspended on condition of restitution. In other words, is it proper where a court imposes a community service order to suspend another portion of the sentence on condition of restitution?

In the case of *S v Tawanda Mukura*, the accused, a vendor, pleaded guilty to theft by conversion of property valued at $30 000 after he was given stock H

Hungwe J

A valued at $38 910 to vend. He was sentenced as follows:

> 20 months' imprisonment with labour which is wholly suspended on condition hereunder —
>
> (a) 12 months' imprisonment with labour are suspended on condition the accused completes 420 hours community service at Ardbennie Primary School with effect from 15 April 2002. It shall be done on B Monday to Friday excluding public holidays from 8 a.m. to 1 p.m. and 2 p.m. to 4 p.m. and until it is complete it shall be done to the satisfaction of the supervisor.
>
> (b) 8 months' imprisonment with labour are suspended on condition the accused compensates the complainant in the sum of $30 002 through the clerk of court Mbare on or before 30 May 2002."

C When the matter was placed before me on review, I enquired of the trial magistrate what would happen if the probationer failed to make full restitution before or on the appointed date. As I feared, the terse reply was that he would go to prison.

Herein lies the irony.

Is restitution, a real option to grant a probationer when there is no prospect of his living up to a condition?

D In the remaining cases, similar sentences were imposed. There are two conditions of suspension, the first relates to performance of community service by the offender and the second relates to making full restitution E through the Clerk of Court on or before a specified date. There is no Payment Record Sheet commonly referred to as the Time to Pay Sheet. Only in the case of *S v Nyawata* is this sheet filed with the probationer's particulars.

[*The learned judge then summarised the facts in the remaining cases.*]

As I have pointed out above in these seven cases, the issue is:

F Is it proper to conjoin a community service order with a prison sentence suspended on condition of restitution?

It is trite that community service is aimed at avoiding sending to prison the non-serious offenders. The object of community service is summarised by J Reid-Rowland in *Criminal Procedure in Zimbabwe* at p 25-48 as follows:

> G "The object of community service is to enable non-serious offenders — that is those who would otherwise have been sentenced to a term of imprisonment of twelve months or less — to benefit the community by doing useful work. The fiscus benefits by not having to pay for the upkeep of the person in prison. The offender benefits by being able, if he is employed, to continue in his employment and to avoid the destructive H effect of a short term of imprisonment."

Hungwe J

This objective was recognised by the court in *S v Antonio* 1& Ors 998 (2) ZLR 64 (H) when Chinhengo J stated: A

> "Community Service is a statutorily sanctioned non-custodial sentencing option which it is competent to impose as a direct form of punishment or as an alternative to the payment of a fine or imprisonment" (at p 69G).

Dealing with a similar situation, Waddington J in *S v Manzini* 1984 (1) ZLR 33 (H) at 35H-36H: B

> "In the view I take of the matter, the propriety of the magistrate suspending four months' imprisonment with labour, on condition that the accused repays a sum which he clearly will never be able to repay, is open to the most serious doubt. It has been held on a number of occasions that there must be a real likelihood that this type of condition is reasonably capable C of fulfilment for otherwise the object of the condition, namely, to keep the accused out of prison or to reduce the length of the prison term imposed and to compensate the complainant, could be defeated. In *R v Lamb* 1969 (2) RLR 193 at 196A-C; 1969 (3) SA 149 (R) at 151 Quenet ACJ said:
>
> > 'When a court considers that part of a sentence of imprisonment should be suspended, subject to stated conditions, it does so in the hope and D expectation that the conditions will be fulfilled. If it is reasonably clear that the conditions are incapable of fulfilment, there is no point in granting a suspended sentence. In a word, one must not ask the impossible of a person in whose favour a suspended sentence is granted, just as one must not, when imposing a fine, impose a fine of such severity that it cannot be paid. In such circumstances, the condition is wholly unrealistic, E and bears no relation to the desire — the sincere desire, possibly — of the offender to comply with the condition. The condition must be reasonably capable of fulfilment. If it is not, then it is not the kind of condition which should be made a condition of suspension.'
> >
> > These sentiments were echoed some years later by Gubbay J (as he then was) in *S v Zumbika* 1978 (3) SA 155 at 156D-F. The learned judge there F observed:
> >
> > 'The objects of a condition of this type were considered by Cillie JP in *S v Tshondeni*; *S v Vilakazi* 1971 (4) SA 79 (T) at 82H-83F and were stated to be: (a) to prevent the offender serving a sentence of imprisonment (either in its entirety or in part); (b) to cause the offender to appreciate fully the consequences of his irresponsible criminal conduct; and (c) to G compensate the injured party for the loss suffered.
> >
> > The condition must be reasonably capable of fulfilment. If it is reasonably clear that it will not be met, there is no point in granting a suspended sentence, for the first and third objects of the condition will be frustrated and also the second to a great extent. The offender will then serve imprisonment on account of his poverty and not because of any *mala* H

Hungwe J

> A *fides* or negligence on his part: see *R v Lamb* 1969 (3) SA 149 (RA) at 151A-C; *S v Magkise* 1973 (2) SA 493 (O) at 494D-F.'

In the present case, having regard to the exiguous assets of the accused and his miserable employment prospects, it is difficult in the extreme to see what justification there was for the imposition of a condition which from the outset must have constituted an impossible hurdle for the accused. B Properly advised, in my view, the trial magistrate should not have imposed the condition."

I am in total agreement in so far as the condition of restitution has been imposed in the seven cases in question in this review.

A community service order in these cases has been imposed as an alternative C to imprisonment. Imposition of such an order is a clear indication by the trial court of its assessment of the accused as one eligible to benefit from it. It is a clear manifestation that a court has decided to spare an accused the rigours of prison.

It is usual, where a prison term has been set, and a decision taken to suspend a portion of that sentence on condition that community service is performed, D to suspend a further portion on condition of good behaviour. This reflects the standard practice of suspending a portion of any sentence imposed on a first offender. It is said that it deters the offender from repeating his offensive conduct well after the sentence has been served. It also reduces the actual period that an accused serves. It therefore, has a dual purpose. This is the reason why it has been held that unless there are compelling reasons a portion E of any custodial sentence imposed on a first offender ought to be suspended on condition of good behaviour: see *S v Mpofu (2)* 1985 (1) ZLR 285 (H); *S v Gorogodo* 1988 (2) ZLR 378 (S); *S v Malunga* 1990 (1) ZLR 124 (H); *S v Chirara & Ors* 1990 (2) ZLR 156 (H).

It has been the practice of the courts therefore, to attach the condition to all F cases involving first offenders.

Where however, a court intends to impose a further suspension of a custodial term, care must be taken in selecting the appropriate conditions of suspension. The sentencing court does have a wide discretion as set out in the Criminal Procedure and Evidence Act [*Chapter 9:07*] to choose what sentence to G impose. It can elect to suspend a custodial term on any condition that is appropriate to that case. However, the court must exercise that discretion judiciously. It is not a judicious exercise of that discretion to settle on a sentencing option which destroys, on the turn, the benefits conferred on the probationer by a community service order.

Where a court considers suspending part of the sentence, subject to the stated H conditions, it must not ask the impossible of the person in whose favour the

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suspension is granted, just as one must not, when imposing a fine, impose a A fine of such severity that it cannot be paid. In such circumstances, the condition is unrealistic and bears no relation to any desire by the offender to comply with it. The condition must be reasonably capable of fulfilment. If it is not, then it is not the kind which should be made a condition of suspension: see *R v Lamb* 1969 (2) RLR 193 (A). B

There is no point in imposing an order for the performance of community service and at the same time impose another condition suspending the balance of the custodial sentence whose fulfilment is unlikely.

In all these cases, there has been no enquiry with the accused to establish whether any one of them is able to make restitution within the stipulated time. Although a desire to comply may have been expressed by the accused, the C sentencing court has to satisfy itself that an accused can make restitution before it imposes restitution as a condition of suspension together with an order of community service. To fail to do so, is a misdirection.

The portion of the sentence relating to community service is confirmed. The subsequent portions are amended to read as follows for each case. D

[*The learned judge deleted the conditions relating to restitution and substituted in each case a condition that the accused is not during the period of suspension convicted of any offence involving dishonesty.*]

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/RWODZI v CHEGUTU MUNICIPALITY 2003 (1) ZLR 601 (H)

RWODZI v CHEGUTU MUNICIPALITY 2003 (1) ZLR 601 (H)

Citation	2003 (1) ZLR 601 (H)
Case No	Judgment No. HH-86-03
Court	High Court, Harare
Judge	Mavangira J
Heard	14 May 2003; 4 June 2003
Judgment	4 June 2003
Counsel	*A A Debwe*, for the applicant *A M Gijima*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administrative law — *review — grounds for— breach of audi alteram partem* C *rule — disciplinary proceedings — steps to be taken to ensure audi alteram partem rule complied with*

Headnote

Where disciplinary charges are brought against an employee, there are several steps to be taken to ensure that the *audi alteram partem* rule is observed:

(1) The D employee should be given reasonable notice of the impending hearing. The reasonableness of the amount of notice given will depend on factors such as the seriousness and complexity of the case.

(2) The hearing must precede the decision, to ensure that the employee has an opportunity to lead evidence in rebuttal of the charge and to challenge the assertions of his accusers. E

(3) The hearing must be timeous, to ensure that the hearing takes place when the facts are still fresh in the minds of the parties and their witnesses. However, where the employee requires time in order to prepare for the hearing or to arrange for representation, he should be given a reasonable opportunity to do so.

(4) The employee must be informed of the charge(s) against him, to meet the F need for adequate preparation.

(5) The employee should be present at the hearing, but if he refuses to attend the hearing without good cause or has absconded the employer may be entitled to proceed with a hearing in his absence.

(6) The employee must be permitted representation. G

(7) The presiding officer must be impartial.

Cases cited

Ford v Law Soc, Rhodesia 1977 (2) RLR 40 (A)

Trantscheizer v Robert Skok Welding (Pty) Ltd (1991) 12 ILJ 1099 (IC)

Mavangira J

Case information

A A Debwe, for the applicant A

A M Gijima, for the respondent

Judgment

Mavangira J: This is an application for an order setting aside the respondent's decision to dismiss the applicant from employment and reinstating the applicant with full benefits. B

The application, being one for review, was filed outside the time limit prescribed by r 259 of the High Court Rules. The application was made for condonation of the late filing of the application, there having been a delay of about 23 days. Both the main application and the application for condonation were opposed by the respondent.

The circumstances of this matter are, in my view, such that, should the C applicant's complaint, *inter alia,* that the respondent did not observe the rules of natural justice in its handling of the case be substantiated, it would not be necessary for the court to delve any further but to grant the applicant the appropriate relief in the circumstances, such relief relating to both the issue of condonation as well as the main application. D

The applicant was employed by the respondent. On 24 March 2002, at around 8.00 p.m., the applicant was served with a notice to attend "an Inquiries Meeting" to be held on 25 March 2002 at 10.30 a.m. The letter also stated: "At the meeting you will be asked to answer charges which resulted in you being sent on forced leave." The charges were not specified in the letter.

On 25 March, the applicant delivered at the respondent's office a letter E requesting sufficient time to prepare his defence. He also indicated that he wished to be represented by a legal practitioner at such meeting.

On 26 March 2002 the applicant's erstwhile legal practitioners, Mangwana, Chirairo and Tivaone, wrote to the respondent requesting that a mutually convenient date for the meeting be arranged. F

On 10 April 2002 the applicant was served with a letter of dismissal which reads:

> "I refer to the invitation sent to you to attend the Inquiries Committee Meeting on 25 March 2002. You failed to attend the meting on the scheduled date and no satisfactory explanation was given. The Inquiries G Committee therefore proceeded to determine the matter on (*sic*) your absence. You were found *GUILTY* of absenting yourself from work for 7 days from 10-19 December 2001 without permission, so thus you have been accordingly dismissed from Council employment with effect from 27 March 2002.
>
> Please be advised that Council at its meeting held on the 27th March 2002 *RESOLVED* to adopt recommendation of the Inquiries Committee H

Mavangira J

> A [item 72.4.5.iv] to dismiss you from employment with effect from 27 March 2002."

The applicant's complaint is that the *audi alteram partem* principle, one of the two principles of natural justice, was not adhered to by the respondent.

G Feltoe in *A Guide To Zimbabwean Administrative Law* 3ed (1987) deals B with the topic of natural justice thus:

> "The principles of natural justice embody fundamental notions of procedural fairness and justice. As applied to administrative decisions, these principles seek to ensure that such decisions are only taken after fair and equitable procedures have been adhered to. In essence natural justice tries to guarantee that the parties who will be affected by the decisions receive a C fair and unbiased hearing before the administrative tribunals reach their decisions. By required adherence to standards of procedural fairness, not only is justice seen to be done, but also these principles assist tribunals to reach substantively correct decisions. If the principles are observed, decisions are reached only after the tribunals have been informed of facts

relevant to their determinations and decisions are reached on an objective evaluation of the evidence …" (at p 23).

D One of the requirements of the *audi alteram partem* principle is that a person should be given reasonable notice of an impending hearing. The reasonableness of the amount of notice given in any particular case will depend on factors such as the seriousness and complexity of the case: see *Ford v Law Society of Rhodesia* 1977 (2) RLR 40 (A).

E The *audi alteram partem* principle requires that the party or parties involved in the matter should be given a proper opportunity to present their cases before the administrative decision-maker decides the case (Feltoe *op cit* p 23).

In Riekert's *Basic Employment Law* 2ed, the learned author states that procedural fairness is the yardstick against which the employer's pre-dismissal F actions are measured. It requires the employer to act judicially before imposing a disciplinary penalty on an employee. He further states that the rules of natural justice require no more than that a domestic tribunal act according to the common-sense precepts of fairness. Of the rules of natural justice, he states that the most important is enshrined in the maxim *audi alteram partem.* The requirements of which include the following.

G The hearing must precede the decision. This is meant to ensure that the employee has an opportunity to lead evidence in rebuttal of the charge, and to challenge the assertions of his accusers before an adverse decision is taken against him.

The hearing must be timeous. This is meant to ensure that the hearing takes H place when the facts are still fresh in the minds of the parties and their

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witnesses. However, where the employee requires time in order to prepare for A the hearing or to arrange for representation, he should be given a reasonable opportunity to do so. In this regard, the learned author cites *Trantschweizer v Robert Skok Welding (Pty) Ltd t/a Skok Machine Tools* (1991) 12 ILJ 1099 (IC) as an example where the dismissal of a senior managerial employee was ruled unfair because, amongst other things, he had been given only 15 minutes notification of the pre-dismissal enquiry. B

The employee must be informed of the charge(s) against him. This is meant to meet the need for adequate preparation.

The employee should be present at the hearing. This is meant to achieve fairness. However, if an employee refuses to attend the hearing without good cause or has absconded, the employer may be entitled to proceed with a C hearing in his absence.

The employee must be permitted representation. Besides giving the employee normal support, this ensures that the scales are tipped less steeply against him. It also ensures that justice is seen to be done.

The presiding officer should be impartial. D

In this case, the applicant was served with a notice of hearing at 8.00 p.m., about 14½ hours before the time of the hearing with only about 2½ hours of business or office hours before the hearing. In my view, this cannot, by any stretch of the imagination, be said to be reasonable notice. Further, and to compound it all, the applicant's request for more time to prepare his defence E and to arrange for legal representation, which was communicated before the hearing, was disregarded. The respondent thus proceeded to make a determination on the matter without hearing the applicant's version. The applicant was found guilty and the penalty of dismissal was imposed in these circumstances. The charges on which he was found guilty were not specified in the letter inviting him to a hearing. They are stated in the letter advising the F applicant of the determination made.

It is very clear on the facts of this matter that not only was the applicant not heard, he was denied a hearing. He was also denied representation. Equally, if not more, glaring is the fact that he was not advised of the charges that he was facing when he was invited for a hearing. G

In my view, the above indicates a blatant and unconscionable disregard of natural justice principles, which permeates the whole matter with the irresistible consequence that for these very same

reasons, not only should condonation for late filing of the application for review be granted, but the relief sought in the application for review itself should also be granted in favour of the applicant.

In the result, it is ordered as follows: H

2003 (1) ZLR p605

Mavangira J

A It is ordered:

1. That the application for condonation of the late filing of the application for review be and is hereby granted.
2. That the respondent's decision to dismiss the applicant from employment be and is hereby set aside. B
3. That the applicant be and is hereby reinstated with full benefits.
4. The respondent shall pay the costs of suit.

Ashton Ashilly Debwe, applicant's legal practitioners

Zamchiya Costa, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/S v MAJARIRA 2003 (1) ZLR 606 (H)

S v MAJARIRA 2003 (1) ZLR 606 (H)

2003 (1) ZLR p606

Citation	2003 (1) ZLR 606 (H)
Case No	Judgment No. HH-88-03
Court	High Court, Harare
Judge	Chinengo J
Heard	4 June 2003
Judgment	4 June 2003
Counsel	Details not supplied
Case Type	Criminal Review
Annotations	No case annotations to date

Flynote

Criminal law – *common law crimes – culpable homicide – role of negligence* C *in culpable homicide – need to show what steps accused could reasonably have taken to prevent death*

Headnote

The concept of negligence in culpable homicide has two components: (1) the issue of foresight that death would be a consequence of the conduct in question, because the accused's blameworthiness arises from a failure to D foresee the death in circumstances where the reasonable man would have foreseen it; (2) an assessment of what should have been done in order to safeguard against the death occurring. To arrive at the conclusion that the accused negligently caused the death, it must be determined what steps should reasonably have been taken to prevent the death and whether the E accused in fact took those steps, because it is the accused's failure to take those reasonable steps which determines that the accused was negligent in bringing about the death.

Lay persons often have difficulty in understanding these concepts, which should be carefully explained in the event of a plea of guilty. F

Cases cited

S v Machokoto 1996 (2) ZLR 190 (H)

S v Richards 2001 (1) ZLR 129 (S)

Judgment

Chinhengo J: The accused pleaded guilty to a charge of culpable homicide. G She was duly convicted and sentenced to twelve months' imprisonment which was suspended on condition that she performed or completed 420 hours of community service at Budiriro Primary School with effect from 31 October 2002. The record of proceedings was submitted for review on 7 April 2003 and placed before me on 19 May, 2003.

The facts of this case as admitted by the accused were that — H

Chinengo J

"1. The A accused person resides at 745-200th Close, Budiriro 1, Harare, and is not employed.

2. On 6 May 2002, the accused person was in charge of Talent Mukono aged 2 years at 2088, Budiriro 1, Harare.

3. Due to her negligence, the accused person left the bathroom unattended and there was hot water in a tin. B

4. The now deceased person Talent Mukono approached the hot tin of water and went inside it resulting in her death.

5. The deceased sustained burns all over the body.

6. The deceased was admitted to hospital on the same date and passed away on 9 May 2002 as a result of the burns. C

7. The deceased was examined by a Pathologist who confirmed the death was caused by severe burns.

8. The accused had no right to negligently leave a child unattended and hot water unattended."

It is not clear from these facts why the accused who resided at house number 745 - 200th Close, Budiriro 1 was in charge of the child at a different house D at number 2088 Budiriro 1. It is not clear where the bathroom in which the tin with hot water was in relation to where the child was. It can be asked : was the child in the bathroom where the tin was when the accused left the child and the hot water tin? When it is said that the child approached the hot water tin and went inside it, is it being suggested that the tin with the hot water and the E child were left by the accused in the bathroom? If the child was outside the bathroom, was there a door to the bathroom which the child opened to gain entry or was there no such door? When it is said that the accused had no right to negligently leave the child and the hot water unattended, what exactly did she do, or omit to do, in the circumstances which constituted the negligence alleged against her?

F I think that the magistrate was aware of the insufficiency of the facts alleged because in putting across to the accused the elements of the offence the proceedings went as follows:

"Q. Is it correct that you left some hot water in a bathroom unattended?

A. Yes. G

Q. You were in charge of the deceased at the time?

A. Yes.

Q. The deceased then went into the bathroom and fell into the bucket which had hot water?

A. Yes. H

Q. You agree that it was because of your negligence which caused the

Chinengo J

accused to be burnt by the water because you left it unattended? A

A. Yes.

Q. You agree the deceased died as a result?

A. Yes.

Q. Any lawful right?

A. None. B

Verdict : Guilty."

The facts put across to the accused by the magistrate are in some material respect different to those in the Outline of the State Case. The third question put to the accused by the magistrate suggests that the child was outside the bathroom and that the child walked into the bathroom and fell into the bucket C with the hot water. This is not stating the same fact as contained in the Outline of the State case where the suggestion is strong that the accused left the child and the tin of hot water together in the bathroom.

The regional magistrate referred the matter for review because he considered that the sentence was so lenient as not to be in accordance with real and D substantial justice. It seems to me that although this was the only criticism of the proceedings by the regional magistrate, he too understood the facts in a different way. In his letter of reference he stated that —

> "Accused who is aged 23 with two children was left in charge of a 2 year old child. She left the child in a bathroom with boiled water in a tin nearby. The child got into the tin and got scalded. The child died three days later from scald injuries sustained". E

The regional magistrate's appreciation of the factual position was that the accused left the child together with the hot water bucket in the bathroom and the child then climbed into the bucket and sustained the burns from which the child later died.

I have highlighted the lack of clarity in the facts of this case because the F accused's conviction depended on the prosecution establishing that she was negligent. Negligence is not a concept that is readily understood by a lay person especially one, as the accused, who is not represented by a legal practitioner at her trial. Negligence requires that the prosecution establishes that the accused did not live up to that standard of care expected of all citizens. G Negligence is not much concerned with personal moral blameworthiness but imposes liability to punishment on the careless person. He is punished regardless of the reasons why he did not meet the standard expected of all citizens. In Milton's *South African Criminal Law and Procedure* Vol II, 3 ed at 365 it is stated that —

> "(4) The role of negligence in culpable homicide is thus to determine H

Chinengo J

> A whether the killing was an accident (and thus not punishable) or an unlawful (albeit unintended) killing which is deserving of punishment. The test of negligence is formulated in such a way as to investigate whether in the circumstances the conduct of the actor bringing about the death of the deceased complied with established social norms of care in undertaking an activity which carries a risk of harm to B other persons. In other words, the law —
>
> > 'turns the criminality of [negligent] actions entirely on a calculus of utilities; how great the probability that life will be lost, how socially important the purposes served by the action, and how feasible the use of less risky measures to achieve the same purpose…[Unlike intended killings] these utilitarian assessments are the standard factors in judging C unintended killings. [S H Kadish '*Respect for Life and Regard for Rights in Criminal Law'* (1976) 64 Columbia LR 871 at 893].
>
> (5) The test of negligence is formulated in terms of the notion of the 'reasonable man', a figure who is 'the embodiment of all the qualities we demand of the good citizen, a device whereby to measure the [criminal's] conduct by reference to community valuations' [Fleming 2 ed at 118]",

D The concept of negligence and its role in culpable homicide cannot easily be understood by an unrepresented lay person. The accused in this case, being a lay woman and unrepresented, was more likely to and I have no doubt she did confuse the personal moral/social blameworthiness arising simply from causation of death (in layman's terms) with the legal requirement that her

conduct must be such as to have departed from that expected of a 'reasonable E man'. The accused must have felt a sense of responsibility (not legal but social) for the death of the child so that when she was asked whether it was her negligence that caused the death of the child, she readily admitted so.

The magistrate should have explained to the accused what was meant by "negligence", that is to say, the magistrate should have given her an explanation F of what negligence in law meant. The magistrate could also have investigated fully how, what appeared to have been an accident, actually occurred. Questions such : where was the child when you left the bucket of hot water in the bathroom? Was the door to the bathroom, if any, closed when you left? Where were you going and how long were you going to be away? Such questions would, in my view, have assisted in determining whether in all the G circumstances the accused acted negligently. Other questions such as to the relationship of the child to the accused and why she was in charge of the child away from her usual place of residence would also have been of some assistance. The accused's offence, if any, was really one of negligent omission. The magistrate should have done more to investigate the circumstances in H which the child fell into the bucket of hot water. What the magistrate did was

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in fact to seek to prove the negligent omission by merely making the allegation: A "You agree it was because of your negligence which caused the deceased to be burnt by the water you left unattended".

The concept of negligence in culpable homicide has two components — the issue of foresight that death would be a consequence of the conduct in question, because the accused's blameworthiness arises from a failure to B foresee the death in circumstances where the reasonable man would have foreseen it. The second component requires an assessment of what should have been done in order to safeguard against the death occurring. To arrive at the conclusion that the accused negligently caused the death it must be determined what steps should reasonably have been taken to prevent the death and whether the accused in fact took those steps, because it is the accused's C failure to take those reasonable steps which determines that the accused was negligent in bringing about the death: see Milton *op. cit*. at p 365. Negligence as a concept has a "certain chameleonic quality", to borrow Milton's words, which make it difficult for a lay person to fully understand.

I am satisfied that the failure by the magistrate to investigate the facts and the D full circumstances leading to the death of the child in this case renders it unsafe to uphold the accused's conviction even though she pleaded guilty to the charge. Her plea of guilty was not an informed one because there is no indication that she fully understood the charge and in particular the concept of negligence. The duty of the magistrate to explain the charge and the elements of the offence in a way calculated to inform the unrepresented E accused of the nature of the charge in sufficient clarity and detail as will suggest to him whether he has any defence to offer has often been emphasized: see *S v Machokoto* 1996 (2) ZLR 190 (H) per Gillespie J at 200 G - 201 F. In my view the accused was prejudiced by the magistrate's failure to discharge her duties as expected of her and by reaching a verdict based on a plea of guilty to a charge which was not sufficiently explained and in respect of which the F accused was not fully informed. I hold that there has been a serious miscarriage of justice. I would quash the conviction and set aside the sentence.

In setting aside the sentence however, I do not consider that the regional magistrate's criticism of it as lenient is valid. In *S v Richards* 2001 (1) ZLR 129 (S) the Supreme Court stated the principle that in culpable homicide G based on negligence, the accused is not being punished for his evil intent, for he had no intent at all, but for being careless, and that the function of punishment in such a situation is not so much to punish wrong-doing as to inculcate caution in the citizenry and encourage and foster attentiveness to the safety of others. It went on to say that the function of the crime of culpable homicide is as much educative as it is coercive. In that case the Supreme Court H

A altered the punishment from an order to serve 245 hours of community service in lieu of a suspended sentence of imprisonment, to a fine of $4 000 or in default of payment one month's imprisonment.

If the conviction was proper I would have had no hesitation in confirming the sentence. In the result the conviction is quashed and the sentence is set aside. I would have ordered that this case be remitted to the magistrates court for a B retrial were it not for the fact that the accused has already served the sentence.

Mungwira J concurred.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/CITY OF MUTARE v MUTARE RESIDENTS' AND RATEPAYERS' ASSOCIATION 2003 (1) ZLR 612 (S)

CITY OF MUTARE v MUTARE RESIDENTS' AND RATEPAYERS' ASSOCIATION 2003 (1) ZLR 612 (S)

Citation	2003 (1) ZLR 612 (S)
Case No	Judgment No. S-13-03
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Malaba JA
Heard	24 March 2003; 5 June 2003
Judgment	5 June 2003
Counsel	*L T Biti*, for the appellant *R M Fitches*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Local government — *urban council — rates and charges — objection to* C *— procedure for dealing with objections — need for majority of total membership of council to agree on rates — when majority can be said to have agreed — requirement to submit all objections — not enough to send a summary of the objections*

Headnote

The respondent ratepayers' association objected to certain increases in the D rates and charges set by the appellant urban council. Objections had been submitted, and numerous signatures were included in a booklet. The town clerk did not attach the booklet to the agenda for the council meeting, but circulated the booklet among the councillors present at the meeting. The council meeting to deal with the objections was convened E at short notice, when six out of 17 members were unable to be present. Six of the councillors present spoke in favour of the increases; none spoke against the increases. It was resolved that the increases be ratified.

The High Court held, in an application brought by the association, that the strict provisions of s 219(3) of the Urban Councils Act [*Chapter 29:15*] F had not been complied with, in that a rates

increase should not come into effect 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. The High Court also held that s 219(4) of the Act had not been complied with, in that a copy of each objection had not been sent to councillors before G the meeting; it was not enough to send part of the objection. On appeal:

Held, that the requirement to take a vote would apply where there was disagreement amongst the councillors present at the meeting. In that situation, a vote must be taken in order to determine whether a majority of the total membership of the Council is in favour of the resolution. Here, however, there was no such disagreement and the practical need for H

Sandura JA

A voting did not exist. In the circumstances, the resolution was unanimously passed by the eleven councillors and there was no need for a vote. The resolution was, therefore, passed by a majority of the total membership of the Council as required by s 219(3) of the Act.

Held, further, that the court *a quo* was correct in holding that s 219(4) had not been complied with. However, in acting as it did, the Council was B following an earlier *ex tempore* ruling by another judge of the High Court, who had ruled that it was not necessary to send the booklet with all the signatures to the Council. The Council could not be faulted in this regard, and this would justify the issue of a declaratory order without setting aside the increased charges.

Legislation considered C

Urban Councils Act [*Chapter 29:15*], s 219(3) and (4)

Case information

L T Biti, for the appellant

R M Fitches, for the respondent

Judgment

D **Sandura JA:** In a judgment handed down on 25 September 2002, the High Court declared that the owners rates, charges and levies set by the appellant for the year 2001 were of no force and effect. * Aggrieved by that decision, the appellant instituted this appeal.

The factual background is as follows. On 10 and 17 November 2000, the E appellant ("the Council") advertised its proposed increases in the owners rates, charges and levies for the year 2001 in two local newspapers and called for objections, if any, to be lodged on or before 11 December 2000. Thereafter, the respondent ("the Association") submitted a petition signed by over 2 500 residents objecting to the proposed increases. In addition, over 35 companies F objected to the increases.

After the objections had been submitted, a special meeting of the Council was called for 14 December 2000 to consider the objections. The notice which was sent to the councillors informing them of the special meeting was accompanied by a summary of the objections set out in the Association's petition, and a statement to the effect that the petition had been signed by more than 2 500 G residents. However, the booklet containing the signatures of the more than 2 500 residents did not accompany the notice, although it was later circulated to the councillors at the meeting on 14 December 2000.

Sandura JA

The special meeting was attended by eleven of the seventeen councillors. A About six councillors spoke in favour of the confirmation of the proposed increases, and no councillor spoke against it. At the end of the meeting, the councillors resolved to confirm the increases as they were of the view that the objections which had been submitted and considered at the meeting did not justify a reduction of the charges. B

Aggrieved by that decision, the Association filed a court application in the High Court seeking an order nullifying the Council's budget for the year 2001. That order was subsequently granted by the learned judge in the court *a quo*. The Council has now appealed against that order.

The learned judge granted the order sought by the Association because, in his view, the Council had failed to comply with the provisions of subsections (3) C and (4) of s 219 of the Urban Councils Act [*Chapter 29:15*] ("the Act"). Those subsections, in relevant part, read as follows:

> "(3) If … objections to the proposed tariffs, charges or deposits are lodged —
>
> (a) by thirty or more persons who are voters or who are users of the D service to which the tariff, charge or deposit relates; or
>
> (b) …;
>
> such tariffs, charges or deposits shall be reconsidered by the council, together with the objections 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 … E
>
> (4) The notice to councillors of any meeting at which the proposed tariffs, charges or deposits are to be reconsidered for the purposes of subsections (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."

Dealing with subs (3) the learned judge said: F

> "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 have 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. In order to ascertain whether that test has been G passed, a vote must be taken. It is not sufficient for the respondent (the Council) 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 219(3) requires that in the circumstances specified therein, (the) proposed tariffs and charges *shall not come into operation* unless the resolution has been H

Sandura JA

> A passed by a majority of the total membership of the Council. That means that a vote must be taken and the number of votes 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 the case, the proposed new tariffs and charges cannot come into operation."

B In my view, what the learned judge said would apply where there is disagreement amongst the councillors present at the meeting. In that situation, a vote must be taken in order to determine whether a majority of the total membership of the Council is in favour of the resolution.

However, where there is no such disagreement the practical need for voting does not exist. That was the position in the present case. The total membership C of the Council was seventeen. Eleven of the seventeen councillors attended the special meeting on 14 December 2000. According to the minutes of that meeting, six of the councillors present spoke in favour of the confirmation of the increased levies and charges, and no councillor spoke against the confirmation. No-one, therefore, dissented.

D In addition, the minutes of the meeting indicate that immediately before the resolution was passed the following occurred:

> "The Executive Mayor requested the Deputy Mayor to summarise *what Council had agreed upon*.
>
> In response, the Deputy Mayor commented that *Council had agreed to* E *reaffirm its position on the 2001 budget* because the objections received did not warrant a review of the charges" (emphasis added).

It was then resolved by the Council that the 2001 budget be reaffirmed, and it was.

In the circumstances, there can be no doubt that the resolution was unanimously passed by the eleven councillors. As the decision was a unanimous one, there F was no need for a vote. The resolution was, therefore, passed by a majority of the total membership of the Council as required by s 219(3) of the Act.

With regard to s 219(4) of the Act, the learned judge said the followin

> "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 G 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 2 000 people. Therefore any copy of that objection should also contain 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 H of what the other part of the objection consists of."

2003 (1) ZLR p616

Sandura JA

I entirely agree with those comments. However, by nullifying the increases on A the ground that the Council had not complied with s 219(4) of the Act the learned judge overlooked the fact that when the Council sent "a copy of part of the objection together with an explanation of what the other part consisted of" it was acting on an erroneous direction given to it in an *ex tempore* judgment of the High Court in an earlier application brought by Mr White, the B Chairman of the Association, in 1998 for the nullification of the 1996 budget. The learned judge in that case said:

> "In July and August of 1996, the respondent advertised in the newspaper various rates and other tariff increases. A petition objecting to the proposed increases was lodged with the respondent. There were two thousand (and) five hundred signatures on the petition. Section 219(4) of C the Urban Councils Act provides that [the] notice to councillors of any meeting at which proposed tariffs and charges are to be reconsidered shall contain a copy of all objections lodged unless councillors have been previously circulated with a copy thereof …
>
> The Acting Town Clerk says in his affidavit that it was practically impossible to circulate all the two thousand (and) five hundred objections D before the date of the meeting.
>
> *It was of course the gist of the petition and the fact that it contained two thousand (and) five hundred signatures (that) had to be notified to the councillors. Not all the signatures"* (emphasis added).

The judgment, of which the above passage is a part, was given on 2 June 1999. It is quite clear from the judgment that the learned judge was of the firm view E that it was not necessary to send the booklet containing the 2 500 signatures to the councillors. I have no doubt in my mind that that is an incorrect interpretation of s 219(4) of the Act.

Nevertheless, in the present case the Council proceeded in terms of what had been directed by the learned judge to be the best way of satisfying the F requirements of s 219(4) of the Act. In doing so, the Council cannot be faulted. In my view, this is a special feature in this case which would justify the issuing of a declaratory order without setting aside the increased levies and charges, which have been operational since 2001.

Finally, I wish to point out that the owners' rates are not dealt with in terms of s 219 of the Act, but in terms of s 274 which does not provide for objections G to any increases. For that reason, the increased owners' rates should not have been set aside.

As far as the costs of appeal are concerned, since the appellant Council did not comply with the provisions of s 219(4) of the Act, there will be no order as to costs, notwithstanding the fact that the appeal has been successful. However, H

2003 (1) ZLR p617

Sandura JA

A the costs in the court *a quo* stand on a different footing because there is no reason why the respondent Association should not be awarded its costs of suit.

In the circumstances, the following order is made:

1. The appeal is allowed with no order as to costs.
2. The order of the court *a quo* is set aside and the following is substituted:

> B "a. It is declared that the respondent did not comply with the provisions of s 219(4) of the Urban Councils Act [*Chapter 29:15*].
>
> b. The respondent shall pay the costs of the application, including the costs of the application for the rescission of the default judgment."

C Cheda JA & Malaba JA concurred.

Bere Brothers, appellant's legal practitioners

Henning Lock Donagher & Winter, respondent's legal practitioners

* See *Mutare Residents' and Ratepayers' Association v City of Mutare* 2002 (2) ZLR 361 (H), a judgment of Smith J — *Editor*

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S v TSVANGIRAI & ORS 2003 (1) ZLR 618 (H)

Citation	2003 (1) ZLR 618 (H)
Case No	Judgment No. HH-92-03
Court	High Court, Harare
Judge	Garwe JP
Heard	2 June 2003; 3 June 2003; 9 June 2003
Judgment	9 June 2003
Counsel	*B Patel*, for the State *G Bizos SC*, with him *J C Andersen SC*, for the defence
Case Type	Application for variation of bail conditions
Annotations	No case annotations to date

Flynote

Criminal procedure — *bail — conditions — alteration of — addition of further conditions — further offences allegedly committed while on bail* C *— no charges brought in respect of those offences — not competent to add conditions relating to those offences*

Headnote

The three accused were on trial on charges of treason. They had been granted bail, and had not breached any of the conditions. The State applied to have further conditions added. It alleged that the accused had indulged D in activities which occurred after the grant of bail and which were unlawful and "bordered on" treason. No charges were being brought in respect of those alleged activities.

Held, that the grant of bail is a consequence of the arrest and remand of an accused person on a specific charge. The nature of the offence charged E and other relevant considerations are factors to be taken into account in determining the grant or refusal of bail and, where such bail is granted, the conditions to be attached to the recognisance. Any conditions attached or added to a recognisance must have some bearing on the offence of which the accused is charged, in particular the need:

(a) to secure his attendance; F

(b) to ensure that he does not interfere with the evidence; and

(c) to ensure that he does not commit further offences whilst awaiting trial.

Held, further, that conditions added to the recognisance cannot refer to some other allegation that the accused person may possibly face in future and in respect of which he has not been charged. G

Held, further, that what the State wanted was to prevent the accused from conducting themselves unlawfully. It could not do so through conditions added to bail. H

Garwe JP

Cases cited A

S v Budlender & Anor 1978 (1) SA 264 (C)

Trope & Ors v A-G 1925 TPD 175

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 116, 118 & 126

Case information

B *B Patel*, for the State

G Bizos SC, with him *J C Andersen SC*, for the defence

Judgment

Garwe JP: The three accused in this matter have been undergoing trial on C a charge of treason before this court. Following their arrest in the year 2002, bail was granted by consent in the sum of $3 million in respect of the first accused and $1 million in respect of the second and third accused. By consent, it was further ordered that they were to report to the Police and to surrender their travel documents. Although the reporting conditions were altered after their indictment for trial in this court, the accused have remained on the same D conditions since then.

The current application is for the variation of their bail conditions in terms of s 126 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. There is no suggestion that the accused have breached any of the conditions previously set. What the State seeks is the inclusion of two additional conditions. These are: E

(a) that each accused shall refrain from inciting the public to engage in unlawful activities and illegal demonstrations; and

(b) that each accused shall refrain from making inflammatory statements likely to lead to public disorder.

In seeking these additional conditions, the State relies on an affidavit by the F Minister of Home Affairs, Kembo Mohadi. In the affidavit, the Minister says the accused have since January 2003 been advocating and urging the public to engage in mass action and unlawful demonstrations to oust, through unconstitutional means, the President and government from power. In particular, the Minister says they have encouraged the masses to revolt through illegal demonstrations, by organising, arranging press conferences and flighting G advertisements vilifying and demonising the Head of State and Government and by promoting acts of hostility towards the government. By way of example, the Minister has drawn attention to the mass action organised in March this year which resulted in numerous acts of violence, banditry and damage to property. The alteration of the bail conditions in the present H application is intended to ensure that the accused are barred from inciting the

Garwe JP

public to engage in unlawful activities and illegal demonstrations and making A inflammatory statements likely to lead to public disorder until such time as their trial is completed.

In their opposing affidavits, the three accused deny that they have encouraged the masses to revolt against the government. They admit calling for peaceful demonstrations as part of the democratic process to force the President to B discuss with the MDC the crisis facing the country. They deny that any damage that may have ensued following stay-aways organised by the Movement for Democratic

Change (the "MDC") was occasioned by members of their party. They all claim that the present application has been brought about to stifle their political activities.

As already noted, the present application is based not on a breach of the bail C conditions currently in place, but rather on activities by the accused which occurred after the grant of bail and which the State says are unlawful and border on treason. The State advised that although the accused could have been charged in respect of these activities, the decision was taken not to do so, as the impression would have been created that they were being victimised or D that their rights were being violated. To this date, no charges have been formally preferred in respect of these allegations against any of the accuseds. However, it is on the basis of these same activities that the State is applying to have additional conditions included on their current bail.

In order to do justice to this application, one must have regard to the relevant provisions in the Criminal Procedure and Evidence Act. The relevant sections E are 116, 118 and 126. Section 116(1) provides that a person may be admitted to bail or have his conditions of bail altered in respect of any offence at any time after he has appeared in court on a charge and before sentence is imposed. Subsection (7) provides that in cases where the judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person to bail if he considers it likely that if such person were admitted to bail he would: F

(a) not stand trial i.e. abscond;

(b) interfere with the evidence against him; or

(c) commit an offence.

The subsection makes it clear that a judge or magistrate may refuse to admit G an accused person to bail for any other reason which to him seems good and sufficient. Subsection (3) of s 118 provides a list of the conditions that may be added to the recognisance in those cases where the application for bail is granted. These include the surrender of travel documents, reporting to the police, prohibition against communication with any witness, places where the accused is forbidden to go and, most importantly, any other matter relating to H

Garwe JP

A the accused's conduct. Section 126 allows a judge or magistrate, if he is of the opinion that it is necessary or advisable in the interests of justice that the conditions of a recognisance should be altered or added to, to so alter or add.

The issue that arises is: what is the purpose of bail and specifically is there any correlation between the offence of which the accused is charged and conditions added to the recognisance? The grant of bail has been defined in the *South* B *African Criminal Law and Procedure* Volume V by Lansdown and Campbell as:

> "the entering into of a contract for the setting at liberty of an accused person who is in custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, for his appearance at the place C and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned" (at p 311).

It is clear that for bail to be granted with or without conditions, criminal proceedings must actually have been incepted. For this reason, a court has no power to grant bail to a person who anticipates arrest: see *Trope & Ors* v D *Attorney-General* 1925 TPD 175. It is also clear from the provisions of s 116(1)(a) of the Act that bail is granted in respect of an offence after the accused has appeared in court.

It is clear from what I have said above that the grant of bail is a consequence of the arrest and remand of an accused person on a specific charge. The nature of the offence charged and other relevant considerations are factors to be taken E into account in determining the grant or refusal of bail and where such bail is granted the conditions to be attached to the recognisance. The point to be made is that any conditions attached to a recognisance must have some bearing on the offence of which the accused is charged.

The position is clear that in granting bail the court may add to the recognisance F any of the conditions provided for in s 118(3) as well as any other matter or condition relating to the accused's conduct that the court considers necessary. Those conditions must, however, have a bearing on the offence of which the accused is charged and in particular the need:

(1) to secure his attendance G

(2) to ensure that he does not interfere with the evidence and

(3) to ensure that he does not commit further offences whilst awaiting trial.

My considered view is that s 126 of the Act must be interpreted in this light. That section specifically provides that:

> "Any judge or magistrate *who has granted bail to a person in terms of this* H *Part* may, if he is of the opinion that it is necessary or advisable in the

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Garwe JP

> interests of justice, that the conditions of a recognisance entered into by A that person should be altered or added to or that that person should be committed to prison, order that the said conditions be altered or added to …" (my emphasis).

Bail granted in terms of Part IX must, as already noted, relate to a specific charge. If bail is granted, the conditions added to the recognisance cannot refer B to some other allegation that the accused person may possibly face in future and in respect of which he has not been charged. There may be good reasons why the conditions of a recognisance may need to be altered or added to. For example, there may be need to increase the number of times that the accused reports to the police. There may be need to add conditions that he should not go to certain places or speak to certain persons. There are many other examples C that one could think of. Whatever conditions are added to or altered, these must relate to the offence in respect of which the accused is charged before the court.

The present case is, however, different. There is no suggestion that the accused have breached any of their conditions as would justify the alteration of their current bail conditions. The application is predicated on activities that have D taken place during the course of this year but in respect of which no charges have been preferred by the State. The State, during submissions, told the court that the activities complained of are unlawful. As a corollary, the accused could therefore have been charged with various offences arising out of these activities. However, this has not been done. What the State seeks however is E the addition of conditions to their recognisance to control these activities.

The activities forming the basis of the present application may well form the basis of separate charges. If that is the case, the State should prefer appropriate charges in respect of these activities. When the accused are brought to court the question of bail and in particular the conditions to be added to any recognisance can then be considered. At that stage, issues such as whether F there is evidence to justify placing the accused on remand and if so whether bail should be granted would also be considered.

The court would have to determine what conditions, if any, should be added to the recognisance. The court can only do so at that stage, but not before. One may give an example. An accused person facing a charge of theft is granted bail G on the usual conditions. Thereafter suspicion arises that he is involved in money laundering which is an offence under the Serious Offences (Confiscation of Profits) Act [*Chapter 9:17*]. However, no formal charge is preferred against the accused. Should the prosecution in these circumstances be entitled to approach the court and seek the alteration of bail conditions on the basis that the accused is suspected, but without being formally charged, of being H

Garwe JP

A involved in money laundering activities? My view is that the State is not and should not be entitled to do so. The State should, if there is *prima facie* evidence, charge the accused under the Act. Once that is done, the question of bail and the conditions that should attach to such bail would arise. In considering bail in these circumstances, the court would necessarily take into account the fact that the accused is already on remand on a charge of theft. That B would be a relevant consideration in determining whether bail should be granted on the new allegation and, if so, the conditions to be added to such bail. I will give a further example. An accused person is facing a charge of theft of a motor vehicle. Halfway through the trial the prosecution approaches the court to have his bail cancelled on the basis that he is suspected of committing a further similar offence. However, at that stage no formal charges are preferred C against the accused. Would the court cancel his bail on that

basis? I think not, unless a proper factual basis is provided for such cancellation. Such a factual basis is normally provided when an accused person appears in court on initial remand

It seems to me that the correct procedure in the two examples just given would D be for the State to prefer charges, after which the accused's entitlement to bail or otherwise would then be considered in the light of a number of factors. These would include the fact that he is currently facing a similar offence, that he may commit similar offences, that he may abscond, etc.

Different considerations would of course apply if, having been placed on E remand on a further charge, the court dealing with the original charge is asked to review the bail conditions previously granted in respect of that charge. That court would be entitled to take into account that the accused is now on remand on another criminal charge in determining whether or not he should remain on bail on the original charge.

The accused in this case have not been charged in part with the offences arising F from the conduct complained of. I am satisfied that the procedure followed in the instant case is improper and irregular.

There is a further matter which calls for comment. It is clear from the submissions made by the State that the intention in seeking the alteration is to prevent the accused from conducting themselves unlawfully. I am not G persuaded that the State can seek to do so through conditions added to bail. In effect what the condition would be saying is that the accused should not act unlawfully. This is superfluous and in my view unnecessary. Such a condition would be stating the obvious. As remarked by Van Zyl AJP in *S v Budlender & Anor* 1978 (1) SA 264 (C), it is not a condition which can be said to induce an accused to stand trial or to prevent the occurrence of or persistence in H unlawful conduct. The judge in my view correctly summarised the position

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2003 (1) ZLR p624

Garwe JP

when he said: A

> "In fact, all it says is that the appellant must not act unlawfully. The law says that and there is no need to say it again. And if he does act unlawfully, and is arrested on that account, he will lose his freedom. And if he has lost his freedom and wants to regain it, he will have to ask for bail again. And then, of course, that application will be judged in the light of the new B offence and in the light of the offence on which he is still awaiting trial. These are circumstances that can be dealt with if and when they occur.
>
> Certainly, not now" (at p 271).

I do not believe I can put it any more elegantly. The conduct that is envisaged in s 118(3) of the Criminal Procedure and Evidence Act is conduct that would ensure that the attendance of an accused person is secured, that there is no C interference with the prosecution evidence and that he does not commit similar offences whilst on bail. It is unprecedented for a court to add as a condition of bail that the accused should not commit theft, or commit a similar offence or any other offence for that matter. The consequences that befall a person in the event he commits other offences whilst on remand on other offences go without saying. The person will be charged and his entitlement or otherwise D to bail would have to be considered in the light of the new charge.

My remarks should not be interpreted to mean that in considering bail a court should not concern itself with an accused person's future criminal conduct pending the conclusion of the trial. That is not the position. Indeed, in granting bail one of the considerations is the future conduct of the accused. For this E reason, where it is clear that the accused may commit further offences bail may justifiably be refused. However, a court cannot in these circumstances impose as one of the conditions that the accused shall not commit a criminal offence. A court seeks to control future criminal conduct through the imposition of appropriate conditions, such as, for example, that the accused should report to the police or that he should not visit certain places. F

I am satisfied that the State has followed the wrong procedure in the instant case. The State may well have a case for wanting some conditions to be imposed. In the light of the conclusion I have reached there is no need for me to make a finding in this regard. If the correct procedure had been followed the necessity for some conditions to be attached to any recognisance would certainly have had to be considered. But that is not the position. G

In view of the above conclusion, there is no need for me to consider the other submissions made during this application.

The application must therefore be dismissed.

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

Atherstone & Cook, accuseds' legal practitioners H

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IN RE GWEKWERERE 2003 (1) ZLR 625 (S)

Citation	2003 (1) ZLR 625 (S)
Case No	Judgment No. S-14-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	22 May 2003; 11 June 2003
Judgment	11 June 2003
Counsel	*B Mufadza*, for the applicant
Case Type	Constitutional reference
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe, 1980 — Declaration of* C *Rights — s 24(2) — reference of constitutional question to Supreme Court — question arising in administrative proceedings before ad hoc tribunal — whether tribunal may refer question*

Words and phrases — *court — Constitution, s 24(2) — whether proceedings of administrative inquiry headed by magistrate are "proceedings in a* D *court".*

Headnote

A provincial magistrate instituted an administrative inquiry, presided over by a junior magistrate, to determine whether the applicant had shown himself unsuitable to perform the duties as messenger of court and whether, as a result, he should be suspended in terms of s 10 of the E Magistrates Court Act [*Chapter 7:10*]. At the commencement of the inquiry the applicant's legal practitioner raised a constitutional issue. The presiding magistrate referred it to the Supreme Court in terms of s 24(2) of the Constitution, which allows the reference of constitutional questions that arise "in any proceedings in the High Court or in any court subordinate to the High Court".

F *Held* that the inquiry was not a judicial proceeding conducted in any court, even though it happened to be presided over by a magistrate; it was purely administrative in nature and had nothing to do with the courts. The question should not therefore have been referred to the Supreme Court in

terms of s 24(2), though the applicant might have raised it in an G application under s 24(1) of the Constitution.

Legislation considered

Constitution of Zimbabwe 1980, s 24(2)

Case information

H *B Mufadza*, for the applicant

2003 (1) ZLR p626

Sandura JA

Judgment

Sandura JA: This matter was referred to this court in terms of s 24(2) of A the Constitution of Zimbabwe ("the Constitution").

The factual background is as follows. The applicant is a messenger of court stationed at Chitungwiza. He is presently charged with murder, the allegation being that at about 8.30 pm on 6 October 2002 he unlawfully shot and killed a man at a restaurant in the suburb of Mount Pleasant in Harare. It is not alleged B that the murder was committed when the applicant was on duty. However, his trial has not yet commenced.

Believing that the applicant had conducted himself in a manner inconsistent with the discharge of his duties as a messenger of court, the Provincial Magistrate for Harare decided to act in terms of subs (6) and (7) of s 10 of the Magistrates Court Act [*Chapter 7:10*] which, in relevant part, read as follows: C

> "(6) A messenger who —
>
> (a) – (c) …;
>
> (d) conducts himself in any manner … inconsistent with the discharge of his duties as a messenger; or
>
> (e) for any other reason is, in the opinion of the provincial magistrate, D unsuitable or unable to perform his duties;
>
> may be suspended by the provincial magistrate
>
> (7) The provincial magistrate shall forthwith report to the Minister any action he has taken under subsection (6) and the Minister may, after consideration of the report, set aside the suspension or confirm it and dismiss the messenger from his office." E

However, before suspending the applicant and reporting the matter to the Minister the Provincial Magistrate adopted a cautious approach by instituting an inquiry into the applicant's conduct. The inquiry was to be presided over by a junior provincial magistrate.

Subsequently, on 14 November 2002 and just before the inquiry commenced, F the applicant's legal practitioner objected to the inquiry and raised constitutional issues which were not clearly articulated. However, what I can gather from the record of the proceedings is that the objection was based on the contention that if the inquiry preceded the murder trial, the applicant's right to a fair trial in respect of the murder charge, guaranteed by s 18(9) of the Constitution, would G be prejudiced in that the applicant's evidence at the inquiry would enable the prosecution witnesses in the murder trial to make suitable adjustments to their evidence before the trial commenced.

In the circumstances, the applicant's legal practitioner suggested that the matter be referred to this court for the determination of the constitutional issues he had raised. The matter was then referred in terms of s 24(2) of the H

2003 (1) ZLR p627

Sandura JA

A Constitution.

Subsection (2) of s 24 of the Constitution, in terms of which the matter was referred, reads as follows:

> "If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration B of Rights, the person presiding in that court may, and if so

> requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

It is pertinent to note that the only question which may be referred to this court in terms of s 24(2) of the Constitution is one which arises "in any proceedings C in the High Court or in any court subordinate to the High Court" and concerns a contravention of the Declaration of Rights.

The question which now arises is whether the inquiry instituted by the Provincial Magistrate falls into the category of "proceedings in the High Court or in any court subordinate to the High Court". In my view, it does not.

The inquiry was an administrative one designed to determine whether the D applicant had conducted himself in a manner inconsistent with the discharge of his duties as a messenger of court or was, for any other reason, unsuitable for that post. It was not a judicial proceeding conducted in any court. The fact that it was presided over by a provincial magistrate and that it was to be conducted in the magistrates court building made no difference to its nature. E It could have been presided over by a person who was not a magistrate and could have been conducted in one of the offices of the Ministry of Justice, Legal and Parliamentary Affairs. It was purely administrative in nature and had nothing to do with the courts.

That being the case, the matter should not have been referred to this court in terms of s 24(2) of the Constitution.

F However, that does not mean that the applicant did not have any avenue through which he could have sought redress for his grievances from this court. He could have made a direct approach to this court by filing an application in terms of s 24(1) of the Constitution which, in relevant part, reads as follows:

> "If any person alleges that the Declaration of Rights has been, is being or G is likely to be contravened in relation to him … that person … may … apply to the Supreme Court for redress."

Whether such an application could have been successful is a matter on which I do not wish to express an opinion at this stage.

In the circumstances, as the matter should not have been referred to this court,

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Sandura JA

it was not properly before us and is, therefore, struck off the roll. A

Chidyausiku CJ, Cheda JA, Ziyambi JA and Malaba concurred.

Mufadza & Associates, applicant's legal practitioners B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 1/MUDEHWE NO & ANOR v DEMBAREMBA & ORS 2003 (1) ZLR 629 (S)

MUDEHWE NO & ANOR v DEMBAREMBA & ORS 2003 (1) ZLR 629 (S)

Citation	2003 (1) ZLR 629 (S)
Case No	Judgment No. S-15-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Ziyambi JA

Heard 5 May 2003; 11 June 2003

Judgment 11 June 2003

Counsel *J C Andersen SC,* for the appellants
L T Biti, for the respondents

Case Type Civil Appeal

Annotations No case annotations to date

Flynote

Local government — *city council — standing committee of council — membership of — tenure of such membership — member not having security of tenure — may be replaced when council conducts review of committee's work*

Headnote

Following their election as city councillors in 1999, the four respondents were appointed as chairmen of various standing committees of the council. In 2001 a meeting was called at which the membership of the various committees was reviewed. New appointments were made at that meeting. The respondents argued that they could not be replaced as chairmen during their tenure of office as councillors.

Held, that Section 96(8) of the Urban Councils Act [*Chapter 29:*15] provides for review of the work of a standing committee in the previous year. When this is done, the council can either re-appoint the same members to the standing committee or elect new and different members. This means that those who were on the committee cease to be members of the standing committee concerned and revert to positions of ordinary councillors. It is not correct to say that members of standing committees must be replaced at each such meeting; the same people can be re-appointed. It is also incorrect to suggest that membership of a standing committee only ceases after the general election held for the council. A member of such a committee does not have tenure of office.

Legislation considered

Urban Councils Act [*Chapter 29:15*] ss 92(3) 96(8)

Case information

J C Andersen SC, for the appellants

L T Biti, for the respondents

2003 (1) ZLR p630

Cheda JA

Judgment

Cheda JA: The first appellant is the duly elected executive mayor for the City of Mutare. The second appellant is the City of Mutare, established in terms of the Urban Councils Act [*Chapter 29:15*] ("the Act"). The respondents are all councillors of the second appellant who were elected in 1999.

Following their election as councillors, the respondents were appointed to various committees as follows:

1. The first respondent was appointed chairperson of the Public Works and Town Council Committee;

2. The second respondent was appointed/was elected chairperson of the Environmental Management Committee;
3. The third respondent was elected chairperson of the Finance Committee; C and
4. The fourth respondent was elected chairperson of the Housing, Education and Community Services Committee.

On 25 August 2001 the first respondent circulated a notice of a meeting to be held on 30 August 2001. Part of the agenda of that meeting was to consider D the election of the deputy mayor and review appointments of standing committees.

The respondents later learnt that the meeting would also elect new councillors to sit on standing committees. On 29 August 2001 the respondents filed an urgent court application to stop the election of councillors to the various committees. E

It was later agreed that the application be set down as an opposed application. On 24 July 2002 a judgment was handed down by the High Court in which an order was made setting aside the appointments to the standing committees which had been made by the appellants whilst the matter was pending.

This appeal is against that judgment. F

The main issue raised in this appeal concerns the interpretation of ss 92 and 96 of the Act.

The respondents, having been elected chairpersons of standing committees, became members of the executive committee of the council. The main question is whether they can be replaced as chairpersons of standing committees during G their tenure of office as councillors.

Section 96(8) of the Act provides as follows:

> "(8) At every meeting referred to in subsection (1) of section *one hundred and three* a council which has appointed standing committees shall review the work of each standing committee during the previous year and H

Cheda JA

> A shall re-appoint such standing committees or appoint different standing committees in terms of subsection (1)."

The respondents' view, as gathered from the first respondent's founding affidavit, is that:

> "… once a person has been appointed as a member of a standing committee, his membership only ceases after a general election or when that particular B member ceases to be a councillor".

This view is wrong. It seems this results from a misunderstanding of s 92(3), which reads:

> "(3) A member of an executive committee shall hold office as such until the end of his current term of office as mayor or councillor or *when he* C *ceases to be chairman of a standing committee*." (The emphasis is mine)

The underlined part of the section shows that even while he is still a councillor if he ceases to be a chairperson of a standing committee, for whatever reason, he ceases to be a member of the executive committee but remains an ordinary councillor.

D Section 96(8) of the Act provides for review of the work of a standing committee in the previous year. When this is done, the council can either reappoint the same members to the standing committee or elect new and different members. Again this means that those who were on the committee cease to be members of the standing committee concerned and revert to positions of ordinary councillors.

E It is not correct to say that members of standing committees must be replaced at each such meeting. The same people can be re-appointed.

It is also incorrect to suggest that membership of a standing committee only ceases after the general election held for the council.

There are therefore three ways in which a councillor ceases to be a member of F a standing committee. These are:

(a) if he has served his full term and elections of councillors are held (ss 92(3) and 96(7)(a)); or
(b) if for some other reason he ceases to be a councillor (s 96(7)(b)); or

(c) if, after reviewing the work of the standing committee, the council decides G to elect different persons to that standing committee (s 96(8)).

It seems that the different views expressed by the appellants' legal practitioners and the Secretary for Local Government and National Housing contributed to the confusion as to the correct position.

The Secretary for Local Government and National Housing was wrong in H advising that once appointed the chairpersons of standing committees had

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2003 (1) ZLR p632

Cheda JA

tenure of office until the next general election, as there is provision for a A different committee to be appointed after a review of the work of the current committee in the previous year.

The other issue raised was that the work of standing committees was not reviewed, as provided by s 96(8) of the Act. The court *a quo* decided that some exercise or motion aimed at justifying retention or re-appointment of the B standing committees ought to have been gone through before new members were elected to such committees. It concluded that the appointments to the second appellant's standing committees in August 2001 were premature and irregular and set aside the appointments.

The council Minutes of 30 August 2001 reflect a lengthy discussion on the question whether the council could proceed to review the work of the standing C committees and conduct elections of members to those committees. The Minutes also show that views were expressed showing concern about how the appointment of the town clerk had been handled by the executive committee, and the fact that the councillors expressed displeasure at the work and composition of the standing committees. According to the Minutes, there was D consensus and the council conducted elections of members of various committees.

In his opposing affidavit, Dr Morgan Chawara, the town clerk, says that the council duly proceeded to review the work of the standing committees and elections were held and new members elected. This has not been shown to be untrue. E

The answering affidavit of Ms Pinto, in which she says:

> "I, however, confirm that the second respondent (now the second appellant) did not review the work of committees but simply proceeded in appointing newly constituted committees",

cannot be taken seriously because the Minutes show that she left the meeting F and elections were eventually conducted in her absence.

On the other hand, discussions on how the appointment of the town clerk had been handled and the displeasure expressed by councillors occurred in her presence.

It should be noted that the Minutes are a summary of the discussions held and G not a verbatim reflection of everything that was discussed.

Further to that, this court is not reviewing how the "review" was carried out but simply whether there was a review or not.

The fact that councillors expressed displeasure at the performance of the committees and decided to appoint new committees points to a review of their work having been done. H

2003 (1) ZLR p633

Cheda JA

A In conclusion, the council made substantial compliance with the requirements of the Act, in that no matter how the review was carried out, at least it was carried out.

Following that review and the displeasure expressed by councillors, new committees were appointed in accordance with the Act.

B Accordingly the appeal should succeed. The order of this court is that the decision of the court *a quo* is set aside and the following order is substituted:

> "1. The application is dismissed with costs."

Chidyausiku CJ and Ziyambi JA concurred

C *Mandizha & Co*, appellants' legal practitioners

Honey & Blanckenberg, respondents' legal practitioners

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Source:
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S v NDLOVU 2003 (1) ZLR 634 (H)

Citation	2003 (1) ZLR 634 (H)
Case No	Judgment No. HB- 66-2003
Court	High Court, Bulawayo
Judge	Ndou J
Heard	12 June 2003
Judgment	12 June 2003
Counsel	Details not supplied
Case Type	Criminal Review
Annotations	Link to case annotations

Flynote

Criminal law — *common law crimes — indecent assault — not specifically* C *replaced by Sexual Offences Act— anomaly where accused a juvenile — defence available to juvenile offenders in the Act not available to a juvenile charged under the common law — where juvenile offender more appropriate to charge under the Act*

Criminal law— *statutory offences— Sexual Offences Act [Chapter 9:12]— specifically protects young persons of both sexes* D

Criminal procedure (sentence) — *indecent assault — adult male indecently assaulting male child — appropriate sentence*

Headnote

The accused, aged 25, was convicted of two counts of indecent assault on a boy of five years of age. He was sentenced to an effective term of 18 E months' imprisonment. On review it was queried whether the accused might not have been more appropriately charged under the Sexual Offences Act, and whether the sentence was appropriate.

Held, that it might have been more appropriate to have charged the accused with contravening s 3(1) of the Sexual Offences Act [*Chapter 9:12*]. However, as the Act did not specifically replace the common law crime, F and as the accused was aged over 16, it was proper to charge him under the common law.

Held, further, that the Act is designed to protect all young persons, not only females.

Held, further, that the sentence was too lenient. Sexual abuse of children of G either sex should be viewed in a very serious light. An effective sentence of five to six years would have been appropriate. There is no logical reason for sentencing abusers of boys more leniently than abusers of girls.

Semble, that the Sexual Offences Act [*Chapter 9:12*] creates defences which are available to accused persons who are under 16 years of age. The H

Ndou J

A legislature could not have intended to create an anomaly where, if charged under the common law, such defences would not be available to a juvenile accused.

Cases cited

B *Oos-Randse Administrasieraad en 'n Ander v Rikhoto* 1983 (3) SA 595 (A)

R v Moodley 1971 (1) SA 320 (N)

Rogut v Rogut 1982 (3) SA 928 (A)

S v Matanhire HH-18-02

S v Mavhundwa HH-91-02

S v Musindo &Ors HH-25-02

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

Spinnaker Invstms (Pty) Ltd v Tongaat Group Ltd 1982 (1) SA 65 (A)

Legislation referred to

Sexual Offences Act [*Chapter 9:12*], ss 2, 3(1)(b) & 3(2)(a)

Judgment

D **Ndou J:** The accused person was aged 25 at the time of the trial. He was charged with, and subsequently convicted of two counts of, indecent assault in Inyathi Magistrates Court. He was sentenced to 12 months' imprisonment on each count. Of the total 24 months, six months was suspended on condition of good behaviour. I queried whether these acts were not covered by the Sexual E Offences Act [*Chapter 9:12*] (hereinafter referred to as the "Act"). I also queried the appropriateness of the sentence. The learned trial magistrate responded:

> "1. The complainants in this matter are male juveniles and the accused ejaculated in between the legs and there was no penetration. My reading F of the Sexual Offences Act makes me form the view that (the) *Act protects young girls but leaves the young boys."* (the emphasis is mine)

Although the learned trial magistrate confidently alleges that he read the Act, he seems not to have done so. The Act categorically states that it is applicable to the protection of young persons of both sexes. The interpretation clause in section 2 defines "a young person". It is stated that a young person *"means* G *a boy or girl under* the age of sixteen years."

The salient facts of this case are: That the victim of these two fiendish crimes is a boy aged five years. On 14 November 2002 at about 1100 hours, the accused person passed the complainant's homestead and called him to his own place of abode. The accused person took the boy into his hut. Whilst H seated on a sofa, he removed the boy's pair of pants, inserted his male organ

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Ndou J

between the boy's legs and made sexual movements until he satiated his lust A and emitted semen around the boy's thighs. He repeated this ordeal on 19 November 2002. No medical evidence was adduced during the accused person's summary trial. From these facts the accused person should have been charged with contravening s 3(1)(b) of the Act which states:

> "3. Subject to subsection (2), any person who commits an immoral or B indecent act with or upon a young person shall be guilty of an offence and liable, subject to section *sixteen,* to a fine not exceeding fifty

thousand dollars or to imprisonment for a period not exceeding ten years or both such fine and such imprisonment."

The Act, however, does not state explicitly that s 3(1)(b) has substituted the common law crime of indecent assault. The problem I discern in such cases is C with respect to accused persons who are under the age of sixteen years. Such a juvenile accused person, if charged under common law, cannot raise the defence created by s 3(2)(a) of the Act. Section 3(2)(a) provides:

"It shall be a defence to a charge under subsection (1) for the accused person to satisfy the court that he was under the age of sixteen years at the time of the alleged offence …" D

If, however, he is charged under the statutory office in s 3(1)(b) he is entitled

to this defence. In my view, the legislature could not have intended such an anomaly. In interpretation of statutes, reason and logic are ascribed to the legislature. Interpretation of legislation necessitates logical reasoning as far as the application of its provisions to concrete situations. Any interpretation E of legislation which leads to an absurdity must, as a matter of course, be avoided: *interpretatio quae parit absurdam, non est admitta: s*ee *Spinnaker Investments (Pty) Ltd v Tongaat Group Ltd* 1982 (1) SA 65 (A) 76; *R v Moodley* 1971 (1) SA 320 (N); *Rogut v Rogut* 1982 (3) SA 928 (A) and *Oos-Randse Administrasieraad en 'n Ander v Rikhoto* 1983 (3) SA 395 (A). This anomaly would, however, not arise if the Attorney-General decides, as a matter course, F not to prosecute anyone under the age of sixteen with indecent assault; that is all accused persons under sixteen being charged under s 3(2) of the Act. This absurdity does not arise *in casu* because the accused is aged over sixteen years. In the circumstances the common law crimes of indecent assault are proper and I, accordingly, confirm the convictions G

On the question of sentence, I accept that it is pre-eminently a matter for the discretion of the trial court. I should be careful not to erode such discretion. I should only interfere when the sentence is viewed as being disturbingly inappropriate: see *S v Ramushu & Ors* S-25-93; *S v Matanhire* HH-18-02; *S v Mavhundwa* HH-91-02 and *S v Musindo & Ors* HH-25-02. I regard the sentence imposed *in casu* as being very lenient. But is it disturbingly H inappropriate? I think so.

2003 (1) ZLR p637

Ndou J

A Sexual abuse of children is viewed in a very serious light. This type of conduct is very common, thus exposing children to untold trauma and incurable diseases. Contrary to the view held by the learned trial magistrate, the Sexual Offences Act protects children equally, be they girls or boys. The definition of young person in section 2 clearly states that this means a boy or girl under the age of sixteen. Some of the old cases give the impression that abusers of B boys should be treated more leniently than abusers of girls. It is clear that in those days the abuse of boys was not as prevalent as that of girls. In this day and age I do not find any legal basis for the distinction. Sexual abuse of all children is prevalent and should be viewed in a very serious light. *In casu*, the child victim was aged five years. Within a short space of five days the accused had abused him twice. He ejaculated semen around his thighs. The age C difference between the accused and the child victim is twenty years. He was not asked why he committed the offences; maybe it was because this was partly obvious from the facts. The accused person's moral blameworthiness is so high that an effective sentence in the region of five to six years' imprisonment was called for.

D In light of the above factors I confirm the convictions. I am, however, unable to certify the sentence imposed as being in accordance with true and substantial justice. On that account I withhold my certificate.

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Source:
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NTINI v MASUKU 2003 (1) ZLR 638 (H)

Citation	2003 (1) ZLR 638 (H)
Case No	Judgment No. HB- 69-2003
Court	High Court, Bulawayo
Judge	Cheda J & Ndou J
Heard	20 January 2003; 12 June 2003
Judgment	12 June 2003
Counsel	*K I Phulu*, for the appellant The respondent in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Customary law — *marriage — division of property on dissolution of* C *marriage — basis of division — unjust enrichment — reform of law — need for reform to protect rights of wives*

Customary law — *marriage — property rights — tacit universal partnership — whether applicable*

Courts — *reform of law — need for courts to make law to remedy injustice* D

Family law — *divorce — division of assets — basis of division — unjust enrichment — intangible contributions by spouse — need to take into account*

Headnote

The majority of marriages in Zimbabwe are unregistered and are therefore governed by customary law. As a result of urban migration, a sizeable E number of people find themselves caught between a web of customary practices on the one hand and, on the other, urban demands which require them to lead western life-styles. In these confused and confusing matrimonial scenarios, African women find themselves shifted to backward and meaningless positions, even where they contribute F commercially to their households. The time has come for the courts to take a positive and progressive approach in addressing the inequities of our legal system, where practically possible, in order to assist women in their endeavour to find justice.

Upon the dissolution of the parties' unregistered customary-law marriage, a community court awarded the wife a quarter share in immovable property G which the parties had acquired during their marriage and which was registered in the husband's name. The court based its award on the principle of tacit universal partnership. The husband appealed against the award, contending that a customary-law marriage does not give rise to a tacit universal partnership.

Held, that an unregistered customary-law marriage on its own does not entitle H

Cheda J

A a party to claim property under the principle of tacit universal partnership. To establish such a claim the party must lay a foundation under the general law and show that the requirements for such a partnership were fulfilled. Those requirements were not met in this case.

Held, further, that although the courts have a duty to apply the law as it is, it is now generally accepted that judges have an inherent duty to make law, B as they are required to contribute meaningfully to law reform and development.

Held, further, that unjust enrichment is an appropriate basis on which to divide matrimonial property in cases such as this, where the spouses were married in an unregistered customary-law union and there was no tacit universal partnership.

C *Held*, further, that for the purpose of dividing property at the dissolution of a marriage, a spouse's contribution should not be confined only to tangibles but should extend to intangibles where possible. The fact that a woman has married a man should in itself be regarded as a meaningful contribution, as should the fact that she has carried out household chores D and engaged in other tasks directed at the development or upkeep of the home.

Held, further, dismissing the appeal, that the respondent's contributions to the marriage justified the award of a quarter share in the immovable property.

Cases cited E

Chapeyama v Matende & Anor 1999 (1) ZLR 534 (H)

Mashingaidze v Mashingaidze 1995 (1) ZLR 219 (H)

Mtuda v Ndudzo 2000 (1) ZLR 710 (H)

Case information

F *K I Phulu*, for the appellant

The respondent in person

Judgment

Cheda J: The appellant appeals against the decision of the community court, Bulawayo, handed down on 27 July 2000 in which the court awarded the G respondent a quarter share of the value of stand 518 Mahatshula, Bulawayo.

The parties were married to each other under customary law in 1995. In 1996 they acquired stand 518 Mahatshula (hereinafter referred to as "the property") and it was registered under the appellant's name. The appellant paid a deposit of $4 000 and the balance was paid in instalments. The union has since been H dissolved. The appellant was gainfully employed throughout the union whil

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the respondent was formally employed only for a couple of months. It is not A disputed by the appellant that the respondent was involved in cross-border trading and used to sew seat covers for sale. It is her argument therefore that during her formal and informal employment she contributed $14 300 towards the construction of the property; this of course is denied by the appellant.

The court *a quo* awarded her a quarter share of the value of the property. This B award, according to the court, was based on the principle of tacit universal partnership. It is this finding that Mr *Phulu* attacks, as he is of the view that it does not apply to an unregistered customary-law union. This view is indeed correct. The principle of tacit universal partnership is part of our law and generally in order for it to apply the following requirements must be fulfilled:

1. each of the parties must bring something into the partnership or must bind C himself or herself to bring something into it, whether it be money or labour or skill.
2. The business to be carried out should be for the joint benefit of the parties.
3. The objective of the business should be to make a profit; and
4. The agreement should be a legitimate one. D

These requirements were clearly laid down by Garwe J (as he then was) in *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H). An unregistered customary-law union on its own does not entitle a party to successfully claim his/her right under the principle of tacit universal partnership. A party so claiming must lay a foundation under general law in order for such a claim to succeed. It is upon E the establishment of a legal foundation that the court can then assess the claim and thereby make its determination.

Mr Phulu has argued that the respondent did not substantially contribute towards the purchase of the stand and therefore to accord her a quarter share of the house is evidently exceeding her contributions. It was the respondent's F evidence that she contributed $14 300,00 towards the construction of the property. She raised $14 000 from sewing and selling seat covers, was employed as a till operator for three months and was earning $1 500 per month. During the construction period she used to go to Botswana to purchase building materials for the construction of this property

The appellant admitted that the respondent was at one time both formally and G informally employed but further argues that her income was used for buying food, cosmetics and maintenance of her hair. He therefore denies that she made any meaningful contribution to the purchase and development of the property. He then offered her $14 000 as her contribution towards the construction of the property. H

Cheda J

A It is a fact that the majority of marriages in Zimbabwe are unregistered, and are therefore governed by customary law. For a number of decades there has been a significant inflow of the African population from the rural areas to the urban centres. As a result of this migration, a sizeable number of people find themselves caught between a web of customary practices, on the one hand, and urban demands, on the other, which require them to lead western life-styles. B This has ushered in confused and confusing matrimonial scenarios to people's daily lives. It is in this confusion that African married women, by virtue of their customary and religious background, still find themselves being shifted to backward and meaningless positions in society, even where they now commercially contribute to their households.

C Gauging by the number of claims coming before these courts, brought by the impoverished and desperate women against their husbands, the time has come, in my view, for the courts to take a positive and progressive approach in addressing the inequities in our legal system, where practically possible, in order to assist women in their endeavour to find justice. The increased number of cases coming before these courts is a clarion call by these members of our D society for judicial intervention. Garwe J (as he then was) in *Mtuda supra* at p 717D-E stated:

> "Notwithstanding the fact that s 7 of the Matrimonial Causes Act [*Chapter 5:03*] applies only in cases where the marriage has been solemnised, various decisions of this court have recognised the need for the woman to be afforded protection at the time of dissolution of a customary union. A E woman who is married according to customary law is now entitled to inherit from a deceased husband's estate. Yet the same woman faces an uphill struggle to get a share of the matrimonial property in the event that her customary marriage is terminated."

The purpose of a law is to serve the interest of the people where it is just to do F so. Where the people it is supposed to serve regard it as an unjust, in many instances the said law falls into disuse. Although the courts have a duty to apply the law as it is, it is however now generally accepted that judges have an inherent duty to make law as they are required to meaningfully contribute to law reform and development. In *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 (H) at 225D Robinson J drove the last nail to the coffin regarding the need G for judges to play their role in the law development when he stated,

> "The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the *interests of the country* (my emphasis) may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial H precedents which obstructs the taking of such a course. If judges hold to

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Cheda J

> their precedents too closely, they may well sacrifice the fundamental A principle of justice and fairness for which they stand."

The pertinent question is whether or not the respondent has laid a foundation or established a cause of action which entitled her to claim under the principles of a tacit universal partnership. In *Mtuda supra*, the court was of the view that the cause of action can either be that: B

1. the parties were in a tacit universal partnership, or
2. she was in a joint ownership with her husband; or

3. it is on the basis of unjust enrichment.

In the present case it is clear that there was no tacit universal partnership and no joint ownership. The only basis which I find to be appropriate is unjust C enrichment. The appellant admits that he was married to the respondent and that she contributed to the development of the property and, recognising that, offered her $14 000 in full and final settlement. He clearly does not recognise her meaningful contribution to the marriage. In my view, and I hope I am correct, the fact that a man is married, that on its own changes his social status and he derives comfort therefrom and as such it should be regarded as a D meaningful contribution by the wife who would have chosen not to marry him after all. The fact that a woman carries out all the household chores and is also sent on various errands geared towards either the development or upkeep of the home should be regarded as a contribution which should be considered at the dissolution of any marriage. Contribution should not only be confined to E tangibles but should extend to intangibles where positively possible. Failure to do so in my view, will result in unjust enrichment. Unjust enrichment on its own is a cause of action which is one of the requirements under the principle of tacit universal partnership. Although an unregistered customary marriage is not regarded as a marriage under general law to an extent of recognising the contribution made by a spouse in such a union, I hold the view that time has F come that such a marriage union should be recognised as the marriage institution for all interests and purposes as it serves the same purpose as the registered marriage.

In *Chapeyama v Matende & Anor* 1999 (1) ZLR 534 (H) Chinhengo J held that where a customary-law marriage is dissolved, even where a tacit universal G partnership has not been pleaded, a division and distribution of property acquired during the subsistence of the customary union is possible. I fully and comfortably associate myself with this reasoning.

In the present case I find that the principle of unjust enrichment is indeed present and it is on this basis that a cause of action is founded which entitles the respondent to a share in the property. The appellant admits that the H

Cheda J

A respondent contributed to the development of the property although he insists that the contribution was negligible and therefore the respondent should be awarded $14 000 only. Such award is according to him adequate to cater for her contributions to the development of the property. The respondent was no ordinary rural woman whose job was to carry a bucket of water, fetch firewood and bear children, as it were. She had one leg in the rural areas where she B subscribed to customary dictates but at the same time had another leg in the urban centre where she was employed both formally and informally, thus contributing to development and upkeep of this property.

It will be unjust for her to leave a home which she was attached to and which she probably thought was hers for life with such a meagre figure of $14 000. C As pointed out above and in various cases which have come before these courts, there is a need to come to the rescue of women in our society who continue to be down-trodden by men who take advantage of laws which have remained stagnant in a male-dominated society. The present injustice in the system clearly manifests itself in different approaches in the distribution of property after the death of a husband on the one hand and the distribution of D property upon dissolution of the marriage. There is therefore a need for uniformity in approach, namely that it should not be an issue whether the distribution of property is necessitated by the death of a husband or dissolution of a marriage.

The appeal is accordingly dismissed with costs and the following order is E made:

1. Appellant is ordered to pay 25 per cent of the net value of the proceeds of the sale of stand 518 Mahatshula, Bulawayo to the respondent.
2. That the stand be valued by a reputable estate agent.
3. Appellant to pay the costs.

F Ndou J concurred

Coghlan & Welsh appellant's legal practitioners

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S v LABUSCHAGNE 2003 (1) ZLR 644 (S)

Citation	2003 (1) ZLR 644 (S)
Case No	Judgment No. S-21-03
Court	Supreme Court, Harare
Judge	Gwaunza JA (in chambers)
Heard	18 June 2003
Judgment	18 June 2003
Counsel	*M Mahlangu*, for the applicant *R Tokwe*, for the respondent
Case Type	Application for bail
Annotations	No case annotations to date

Flynote

Criminal procedure — *bail — pending appeal — onus — on appellant to show that justice will not be endangered and that there is a reasonable* C *prospect of success*

Headnote

The applicant was convicted by the High Court of murder and sentenced to fifteen years' imprisonment. The trial judge granted him leave to appeal but refused to grant bail pending the appeal. He then applied to the Supreme Court for bail. D

Held, that the mere fact that leave to appeal has been granted does not, *per se,* entitle a convicted person to be allowed out on bail. The onus of establishing that justice will not be endangered and that there is a reasonable prospect of success is upon the applicant. It is improper to allow people convicted of serious crimes to be walking in the streets E instead of serving their sentences when the prospects of success are non existent. Society would lose faith in the system and revolt.

Held, further, that, on the evidence, the applicant had not proved that there were positive grounds for granting him bail pending appeal. He had not discharged the onus of establishing that justice would not be endangered and that there was a reasonable prospect of success. F

Cases cited

S v Isolano 1985 (1) ZLR 62 (S)

R v Mthembu 1961 (3) SA 468 (D)

S v Tengende 1981 ZLR 445 (S) G

Case information

M Mahlangu, for the applicant

R Tokwe, for the respondent

Judgment

Gwaunza JA: At the conclusion of the hearing of this matter, I dismissed the application – which was for bail pending appeal – and indicated the full reasons for the judgment would follow. These are the reasons. H

Gwaunza JA

A The applicant was convicted in the High Court of murder with constructive intent. He was sentenced to fifteen years' imprisonment. He applied to the same judge for, and was granted, leave to appeal to this court against his conviction and sentence. His subsequent application for bail pending the appeal was dismissed. He has now filed this application in terms of s 5(1) of the Supreme Court of Zimbabwe (Bail) Rules SI 290 of 1991. Given the B provisions of ss 121 and 122 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the application is in effect an appeal against the refusal by the High Court to admit the applicant to bail pending appeal.

A consideration of the background to the application is pertinent. The applicant was charged with murder, it being alleged that he caused the death C by drowning of Wilson Mudimba. After assessing the evidence placed before him during the trial, the learned judge *a quo*, relying mostly on the evidence of the State witness, Siansole Muchimba ("Muchimba"), accepted as proved that:

(i) The applicant, who on the day in question was driving his speedboat along Sinamwenda River in Binga, came upon the deceased and his D friend, Muchimba, who were in a fishing canoe in the middle of the same river, 35-40 metres from the riverbank and in water that was 9-10 metres deep.

(ii) The applicant then firstly cut the fishing nets previously set by Muchimba and the deceased, and then rammed his speedboat into the side of their E canoe, capsizing it.

(iii) Muchimba and the deceased were thrown into the river, forcing the latter shortly thereafter to swim to the speedboat and cling with both hands to its side. With the assistance of his co-accused who held the deceased by one hand, the applicant used the oar from the capsized canoe to hit the deceased on and about the head and body, causing him to again fall into F the river.

(iv) During the process in which the applicant was assaulting the deceased, one intended blow missed its target (the deceased) and landed on the speedboat, resulting in the oar breaking into two.

(v) The deceased swam to a tree stump in the river and clung to it. After G unsuccessfully trying to catch Muchimba, who had started to swim towards the shore, the applicant drove the speedboat towards where the deceased was and rammed it into him.

(vi) The deceased lost his grip on the tree stump, shouted to Muchimba that he was "dying" and sank into the river.

Gwaunza JA

(vii) The deceased did not emerge from the river. His body was, in fact, never A recovered, the assumption being that he had drowned.

(viii) The applicant was seen by Muchimba seemingly, and briefly, searching for the deceased, after which he sped away.

The court *a quo* was satisfied on the evidence of Muchimba, Mwindo (the deceased's brother-in-law) and Makore, that after the applicant had sped away B these three approached one Michael Shaw ("Shaw") for assistance. They wanted him to radio news of the deceased's disappearance into the river to the police at Binga. Mr Shaw was reluctant to accede to the request without first speaking to the applicant. He asked the trio to come back the following day. They duly did so early in the morning and observed, as they approached Shaw's house, the applicant leaving the same house. Having received no co C operation from Shaw, the three decided to go to the river and locate the

deceased's body. They canoed to the tree stump to which the deceased had clung and all noticed traces of blood on it. After failing to locate the body, the three went to a place called Chibuyu to telephone the police at Siabuwa.

In the course of the next few days, when the police and the sub-aqua unit went D to the river to examine the deceased's canoe and search for the deceased's body, a cap that the applicant had worn on the day in question, and which he had lost, as well as one part of the oar that had broken into two during the attack on the deceased, were recovered. The appellant was eventually arrested.

The learned trial judge was impressed by Muchimba as a witness. He found E him to be consistent, honest and credible in his evidence, despite the lengthy cross-examination that he was subjected to. The learned judge also found that despite some minor differences – essentially matters of detail – in the evidence of Muchimba, Mwindo and Makore, their evidence had been credible. More importantly, the learned judge found the evidence of Mwindo and Makore, on the blood seen on the tree stump to which the deceased had clung, corroborated F that of Muchimba.

The learned judge was not impressed with the evidence of Shaw, whom he described as a "reluctant" witness. He found, however, that albeit reluctant and obviously trying not to incriminate the applicant, Shaw had, perhaps without meaning to, corroborated the evidence of Muchimba that the applicant had rammed into the deceased's canoe, capsizing it, and that of the two G occupants of the canoe, only one had swum to the river bank and escaped. The one was Muchimba. Shaw's evidence was that this was what the applicant had told him.

Contrary to this evidence, the applicant had tried to convince the court that the H

Gwaunza JA

A two, Muchimba and the deceased, had scrambled onto the riverbank and disappeared into the bush upon seeing him approach in his speedboat.

It is trite that in the absence of a misdirection on the part of the trial court, this court will not interfere with the lower court's finding on credibility: see *S v Isolano* 1985 (1) ZLR 62 (S).

B The applicant avers in effect that the learned trial judge misdirected himself in finding that Muchimba was a reliable witness, especially given the facts that the case against him had been based on the evidence of a single witness, i.e. Muchimba, and that there were "material" discrepancies between his oral evidence and that contained in the outline of the State case, his warned and cautioned statement to the police and the evidence of Mwindo, Shaw and C Makore.

I am not persuaded by this averment.

Firstly, while Muchimba may have been a single witness, his evidence was corroborated in very material respects by the evidence of Mwindo, Makore and Shaw. The evidence of Mwindo and Makore that they saw traces of blood on D the tree stump in the river supported the evidence of Muchimba, not only in respect of the deceased's having clung to that stump, but also in respect of his having sustained injuries from which he bled. The injuries, according to Muchimba, were inflicted on the deceased by the applicant, either when he hit him about the head with the oar or when he rammed into him as he clung to the tree stump. Muchimba's evidence was also corroborated, albeit unwittingly, E by Shaw. As the learned trial judge found, Muchimba, Mwindo and Makore had no reason to lie against the applicant. Mr Shaw was, in fact, at great pains not to incriminate the applicant.

Other evidence to support Muchimba's evidence was the part of broken oar and the applicant's cap recovered not far from the scene of the attack. The F broken oar served to disprove the evidence of the applicant that Muchimba and the deceased ran away upon seeing his boat approaching. I am satisfied that the totality of Muchimba's evidence, and the corroboration it received from Makore, Mwindo, Shaw and the recovery of the broken oar and the applicant's cap, left little or no room for doubt concerning the credibility of Muchimba's evidence.

G I am, in the result, unable to find that the learned trial judge misdirected himself on his finding on the credibility of the State witnesses.

The applicant is clearly mistaken in his averment that he was found guilty of murder with constructive intent, bordering on culpable homicide. The evidence before me shows the applicant

made the same submission in his application H for bail pending appeal in the court *a quo*. The learned trial judge, in his ruling

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2003 (1) ZLR p648

Gwaunza JA

on the matter, made it clear such had not been his finding. He noted as follows A on p 2 of his judgment:

> "The submission is clearly wrong. At no stage did the court find that the constructive intent bordered on culpable homicide. The State may have accepted the view held by the defence but that did not bind the court. So no such finding was made in the court's judgment. Instead, the constructive intent in the matter is closer to actual intent than culpable homicide." B

In the light of this statement, the applicant's submission that there is every prospect that this court on appeal might acquit him of murder or impose a conviction of culpable homicide holds little merit.

The applicant submits further that even if the court were to find he did ram his boat into the deceased as he clung to the tree stump, it is likely to conclude he C had no intention to commit murder, especially in light of Muchimba's evidence that he had looked for the deceased after he fell into the river. The learned trial judge addressed this submission, and I find no fault with his conclusion, which was that the probabilities favoured a finding that the applicant had searched for the deceased in order to further assault him. This, D he found, was evidenced by the fact that the applicant was bent on harming, not rescuing, the deceased and Muchimba. He had assaulted the deceased while he clung to his (the applicant's) speedboat; he had chased after Muchimba and would have harmed him had he not made good his escape; and he had then rammed his boat into the deceased as he clung to the tree stump. I accordingly find to be unassailable the learned trial judge's conclusion that E the evidence before the court supported a finding that rescuing either of his victims on that day was not uppermost in the applicant's mind rather, the opposite.

The applicant also submitted that he had hitherto established a good record in terms of complying with his bail conditions and not absconding. He submitted that he "religiously and conscientiously" attended court and adhered to his F bail conditions from December 2000 when he was admitted to bail; that he continued to do this even after he had been indicted for trial and also after his application for discharge at the close of the State case was dismissed.

The learned trial judge correctly pointed out that these submissions had clearly "lost sight" of the fact that the applicant now stands convicted of G murder, and has been sentenced to a long term of imprisonment. He therefore, the learned judge noted, had enough reason to want to abscond.

The learned judge's finding finds support in the following *dictum* of Baron JA in *S v Tengende* 1981 ZLR 445 (S) at 448, which I have relied on in reaching the decision I have in this matter: H

2003 (1) ZLR p649

Gwaunza JA

> A "… But bail pending appeal involves a new and important factor: the appellant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal, the position is not, even as a matter of practice, that bail will be granted in the absence of positive B grounds for refusal; the proper approach is that in the absence of positive grounds for granting bail, it will be refused."

Henochsberg J in *R v Mtembu* 1961 (3) SA 468 (D) at 471 addressed his mind to the specific situation where, like *in casu*, leave to appeal had been granted, and noted:

> "The mere fact that leave to appeal has been granted does not, *per se,* entitle C a convicted person to be allowed out on bail – it seems to me that the onus of establishing that justice will not be endangered and that there is a reasonable prospect of success, is upon the applicant."

Having considered all the evidence placed before me, and based on the authorities cited above, I do not find that the applicant has proved there are positive D grounds for granting him bail pending appeal. I am also not satisfied he has discharged the onus of establishing that justice will not be endangered by his admission to bail, nor that he enjoys reasonable prospects of success on appeal. I would in this latter respect echo the words of the learned trial judge in the last paragraph of his judgment:

> "… I wish to reiterate what has been repeatedly stated by our courts and E indeed by courts in other jurisdictions, that it is improper to allow people convicted of serious crimes to be walking in the streets instead of serving their sentences when the prospects of success are non-existent. Society would lose faith in the system and revolt. This is a proper case, in my view, where the applicant should prosecute his appeal while serving his sentence."

F Hence, my dismissal of the application.

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

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

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S v TSVANGIRAI 2003 (1) ZLR 650 (H)

Citation	2003 (1) ZLR 650 (H)
Case No	Judgment No. HH-100-03
Court	High Court, Harare
Judge	Mavangira J
Heard	11 June 2003; 12 June 2003; 13 June 2003; 19 June 2003
Judgment	19 June 2003
Counsel	*G Bizos SC, with him J C Andersen SC and E T Matinenga,* for the applicant *M Nemadire, with him N Musona*, for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Criminal procedure — *bail — criteria for granting/refusing bail — conditions which may be imposed* C

Headnote

The applicant was on remand on allegations of treason. He applied for bail. The State opposed the application, not on the grounds that he might abscond or interfere with witnesses, but because it was feared he might commit a similar offence while on bail.

Held, that the State's concern could be met by appropriate bail conditions. D Bail granted.

Cases cited

Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S)

Attorney-General v Phiri 1987 (2) ZLR 33 (H) E

Banana v Attorney General 1998 (1) ZLR 309 (S)

In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

R v Farid Adams & Ors Special Criminal Court, Pretoria 29 March 1961

S v Aitken (2) 1992 (2) ZLR 463 (S)

S v Budlender & Anor 1973 (1) SA 264 (C)

S v Chiadzwa 1988 (2) ZLR 19 (S) F

S v Looij 1975 (2) RLR 27 (A)

Case information

G Bizos SC, with him J C Andersen SC and E T Matinenga, for the applicant M *Nemadire, with him* N *Musona,* for the respondent

Judgment

Mavangira J: The applicant was placed on remand at the magistrates G court, Harare on 10 June 2003, on allegations of treason alternatively, incitement to public violence alternatively, contravening s 19(1)(b) of the Public Order and Security Act [*Chapter 11:17*]. On the same day, the present application was filed with this court. H

2003 (1) ZLR p651

Mavangira J

A The parties had prior to the hearing advised the judge in chambers, that although initially issue was being taken with the placing of the applicant on remand, that position no longer pertained. The only outstanding matter in issue was that of whether or not the applicant was entitled to be admitted to bail.

At the outset of the hearing, the applicant's counsel addressed the court on the B headline of *The Herald*, a national daily newspaper, of that date. The headline read "Tsvangirai denied bail". A copy of the newspaper was produced as an exhibit, as well as a copy of the newspaper's placards for that date, which also read "Tsvangirai Denied Bail". The court's attention was also drawn to a cartoon at page 10 of the same newspaper, apparently showing, in the third C segment of the cartoon, the applicant counting his days as a prisoner until July. It was submitted that this grossly violates the *sub judice* rule which prohibits comments upon *sub judice* proceedings. Further, that this constitutes contempt of court and was done with malice. Reference was made to the case of *Banana v The Attorney-General,* 1998 (1) ZLR 309 at 320C (6) where Gubbay CJ, under the heading "The capacity of trial judges to disabuse their minds of D extraneous and prejudicial matter" stated:

> "Unlike the situation where jurors are the sole arbiters of factual issues, in a criminal trial in the High Court the judge has a voice in the decision of any question of fact. It is necessary, therefore, to consider whether there is any realistic potential on his or her part for the existence of partiality following upon the pre-trial publicity to which the applicant was the E victim.
>
> Counsel for the applicant contended that the powerful impact of the media with the public perception of guilt and expectation of a conviction cannot ever be discounted on the part of our judges. Not only are they susceptible to it but also to the opinions of relatives, friends and colleagues who have been influenced. Reliance was placed on these words of Lord Widgery CJ F in *A-G v Times Newspapers Ltd* [1972] 3 All ER 1136 (QBD) at 1142C-D:
>
> > 'It is widely recognised that a professional judge is likely to be unaffected by temperate comment on the case before him, even though that comment is one sided, but we should not, in our judgment, too readily accept the proposition that a judge sitting alone is not open to prejudice of this kind. G Unfortunately, the comments made on pending proceedings are not always temperate, and, indeed, they may in some instances be so strong as to amount to a threat to the judge that if he does not follow the arguments there put forward, he may be severely criticised, if not pilloried subsequently.'
>
> H These observations are pertinent and demand respect. I am inclined to

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2003 (1) ZLR p652

Mavangira J

think it is a fallacy to assume that trial judges cannot be affected by A persistent outside information of a prejudicial nature. Judges are mortals with human frailties. Yet it is my firm conviction that only a remote possibility exists of a judge, imbued with basic impartiality, legal training and power of objective thought, being consciously or subconsciously influenced by extraneous matter."

Although not highlighted in the submission, the learned Chief Justice, B continued thus:

"Even such a possibility has been refuted. In *R v Horsham Justices,* ex p *Farquharson & Anor* [1982] 2 All ER 269 (CA) Lord Denning MR at 287F stated emphatically that:

'at a trial judges are not influenced by what they may have read in the newspapers.' C

The Canadian Courts are equally definite that the training and experience of judges equip them to dismiss from their minds any media publicity adverse and hostile to the accused they are trying. In *Regina v Hubbert* (1975) 11 OR (2d) 464 (Ontario Court of Appeal) at 477, the following *dictum* from an earlier decision was approved: D

'I have not heard it suggested that a trial judge who had heard about a case is not competent to decide it, and I do not think that his capacity to reject what he had heard before is unique'."

It was submitted by the applicant's counsel that it was however not being contended that this court is incapable of hearing the application. The complaint was, *inter alia,* that the *Herald's* headline, the placard, the cartoon and the E editorial purport to give directions to the judiciary as to how to handle the applicant.

Regarding the bail application itself, the following was the effect of the applicant's counsel's submissions:

The main trial involving the applicant and others on a charge of treason started F on 3 February 2003. The applicant is, in relation to that trial, on bail involving substantial amounts of money and other conditions. The trial has reached a stage where one substantial witness is under cross-examination and there are three or four other witnesses who will be giving short and not highly controversial evidence. The trial has thus reached a stage where they should G now start preparing for the applicant's defence if the applicant is called to his defence. It is thus of absolute importance that he remains on bail during this period when he has to prepare his defence. Much of the preparation has to be done outside office hours and generally the facilities for consultation and arrangement of viewing of videos which play an important part in the trial, are not available in cells which are generally very small and badly lit. As there are H

A three accused persons in the trial, two of whom will be at liberty and one presently in custody, this will result in duplication leading to difficulties and additional expenses in the conduct of the defence case.

The applicant's counsel submitted that the offence in the main trial is supposed to have taken place as a result of clandestine action and that the B gravamen of the offence is that the President was going to be murdered. Bail was granted in that matter. A comparison should be made between that for which bail was granted and the present allegations which arise from editorialised allegations from newspaper cuttings of what are now alleged to be offences of treason and the two alternative charges. If the applicant could safely be admitted to bail on the charges in the main trial, there is no good reason why C he should be kept in custody pending investigation of the current allegations.

The applicant's counsel proceeded to address the court in an endeavour to show the allegations against the applicant as being baseless. For reasons I will explain later in this judgment, I do not consider it necessary to dwell at length on the reasons advanced save to set them out as advanced by counsel.

It was submitted that in the State allegations against the applicant there is not D a single statement in which the applicant's precise words are used. In this regard, reference was made to the papers used by the State in an application for variation of bail conditions made before the Judge President in the main trial, which application was opposed and dismissed. It was submitted that the bits of newspaper reportage relied on by the State were not fact but a matter E of editorial deduction that the applicant meant that there must be a revolt, violent conduct or breakdown of law and order. It was submitted that on the other hand, the best evidence of what the purpose of the stayaway was intended to be and how it was going to be conducted must be what the Movement for Democratic Change (MDC) itself publicly disseminated in its own name. The court's attention was drawn to

Annexures "C" and "D" at pages 15 and 16 of the applicant's papers. These are statements or advertisements apparently emanating from, and disseminated by, the MDC. Attention was drawn to the fact that nowhere do these statements, which have been largely ignored by the State, advocate or encourage that there must be violence or a revolt or breakdown of law and order or any treasonous conduct of any description. On the contrary, participants are urged to be peaceful, disciplined, vigilant, courageous. Participants are told not to be provoked but to exercise maximum restraint.

Reference was also made to the affidavit of Kembo Mohadi, the Minister of Home Affairs, particularly at paragraph 6 where he deposed as follows:

> "While the MDC purports to urge its supporters to be peaceful during t

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> demonstrations, experience has shown that each time they take to the streets, ugly scenes of violence have always ensued. There are numerous documented reports of destruction of property, assault on innocent civilians and general intimidation of the public."

This was highlighted in contradistinction to para 3(a) of the same affidavit, where, in laying the basis for the application for variation of bail conditions, the Minister stated:

> "Since January 2003, the MDC through its leadership has been advocating and urging the public to engage in mass action and 'final push' to the State House to oust the President and his government through the following unlawful means:
>
> (a) organising and addressing country-wide star rallies urging people to revolt against the Head of State and government through illegal mass stay-aways and demonstrations."

It was submitted that the use of the word "revolt" by the Minister was a thumbsuck as the word appears nowhere in the applicant's papers. The description of stay-aways as illegal had also been made by the Commissioner of Police when he applied for an interdict. However, the Director of Public Prosecutions had, in the proceedings before the Judge President, conceded that stay-aways were not unlawful activity.

It was submitted that, armed with the information for which it has now placed the applicant on remand, the State's first action or reaction was to apply for an order meant to gag the applicant and his co-accuseds. The order that was sought in the failed application for variation of bail conditions reads:

> "1. Each respondent is ordered not to incite the public to engage in unlawful activities and illegal demonstrations.
>
> 2. Each respondent is ordered not to make inflammatory statements likely to lead to public disorder."

It was submitted that, in the circumstances, the present charges are an afterthought. Further, that there was no allegation that the applicant had disobeyed or breached the bail conditions on which he was released in relation to the charge relating to the main trial. It was in the application for variation of bail conditions that the numerous newspaper reports referred to were attached in support of the allegations against the applicant. It was submitted that if any people are alleged to have committed crimes in response to calls for violence by the applicant, such calls are and were non-existent and there is thus no principle by which the applicant ought to be denied bail. In their respective affidavits, the Minister of Home Affairs, in the application for variation of bail conditions, and the Commissioner of Police, in the application for an interdict, do not seem to have the present treason charge in mind. The

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present charge seems to arise when attempts to silence the applicant, his coaccuseds and the MDC failed.

It was submitted that this new treason charge is not borne out by what the applicant, his co-accuseds or the MDC said: the State picked passages from a newspaper and preferred the charges without indicating what it is that was said by the applicant that constitutes treason.

It was submitted by the applicant's counsel that in opening the main trial, the Deputy Attorney-General described the offence as a political offence. The applicant's counsel referred the court to the

case of *S v Budlender & Anor* 1973 (1) SA 264 (C), a case involving a contravention of the South African Riotous Assemblies Act, 17 of 1956, which was described as a political C offence.

It was submitted that this court does not have to decide whether the applicant is guilty or not guilty of the offence on which he has presently been put on remand. The inquiry is on the facts, on the strength or lack of it, of the State case; whether he is likely to commit offences. The statement in the State's Request for Remand Form 242 that the applicant has a propensity for D committing crimes when out of custody was said to be baseless and tending to show that the State seems to have lost sight of the presumption of innocence. He distinguished the applicant's circumstances from a case in which, for example, a serial killer faces numerous counts and there is substantial proof against him even though final guilt has not been proven, thus justifying the E allegation that the accused has a propensity to commit crimes.

The court's attention was drawn to the affidavit of the investigating officer at p 126 of the papers and to the fact that the investigating officer does not say that he fears that the applicant will not stand trial. The court's attention was also drawn to a lengthy schedule at p 72 of the papers which purports to set out what is supposed to have been done by the MDC and all its office bearers. F In the preamble to the schedule, it is twice stated that the MDC has been urging or calling on the people to "revolt". It was submitted that the court could not place any reliance on the schedule as it was not identified by anyone, particularly regarding who compiled it and from what information. The word revolt is obviously an interpretation of that information, a conclusion come to G by an unknown person who has not taken the court into his confidence as to why he came to that conclusion.

The court was painstakingly taken through many of the incidents and details reflected on the schedule in an endeavour to show that such did not support the allegation against the applicant. Some of the incidents related to the H distribution of pamphlets regarding people joining a mass-stayaway. The

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schedule highlights, for example, the following words on the pamphlets in A question: "Jesus is coming, the signs are here, Action for National Survival". Stayaways being not unlawful, this does not support the allegations against the applicant. Some of the columns give the names of "accused persons", apparently being perpetrators of various alleged criminal acts. However, there is no allegation as to how these named persons are linked to the applicant or B to the MDC, it was submitted. Some of the columns describe the accused persons or perpetrators as, for example, "three unknown MDC youths", "a group of unknown MDC youths", "unknown group of MDC youths", "unknown", "group of 15 MDC supporters". The schedule is at pp 72-96. Page 97 is a schedule showing the reported number of disturbances in the various provinces of the country. It was submitted that no allegation is made C that these were done on behalf of the MDC.

The court's attention was drawn to page 98 of the papers, a schedule showing dates, times and venues of meetings at which the applicant made various statements as reported on the schedule. It was submitted that not only was the document compiled without much care, in that the schedule documents events D as from 25 January 2003, whereas the allegations he faces are based on events as from 3 May 2003, but also no one has verified that that was said or where the information comes from. No witness has been alluded to even though the statements are alleged to have been made at public meetings. It was submitted that what emerges from the applicant's and his co-accuseds' papers is that there was straightforward ordinary political discourse, even though it may E have been in strong language, but there was no incitement to violence.

It was submitted that the Commissioner of Police, in his application for an interdict, attached the schedules at pp 100, 101 and 102 of the papers, in none of which there is any allegation of violence. Significantly, the Commissioner of Police also attached a document by the MDC headed "Week of Action", which calls for peaceful demonstrations. This is at page 103 of the papers. The F Commissioner also attached the document at p 104 which again calls for Zimbabweans to be "peaceful, disciplined, vigilant and courageous". This information, it was submitted, can hardly be said to support a charge of treason and the decision to oppose bail must have been made without a proper reading or understanding of the information that has been put before the court. G

The court's attention was drawn to the fact the State had produced two summaries of the allegations being laid against the applicant. One summary was attached to the Request for Remand Form 242 on Saturday 7 June 2003, when the applicant was first taken to the magistrates court. The second

summary was placed before the magistrate when the applicant was finally placed on remand on 10 June 2003. The two summaries read differently in a H

Mavangira J

A number of respects, with some aspects altered in the second summary, to tally with the textbook definition on treason. It was submitted that this was a change of the factual allegations and the court should thus not accept the allegations of fact set out therein. The two summaries appear at pp 11 and 113 respectively. The question was posed as to why the information in these two summaries was not placed before the Minister, as that would be the explanation as to why he B credited the MDC with his statement that it propagated peace.

The applicant's counsel produced as exhibits 3 and 4 excerpts from the newspapers, *The Standard* and *The Daily News*, headlined "Ignore Court Order: MDC" and "MDC Presses On". It was again submitted that the content of the articles do not support a charge of treason.

C It was submitted that the court cannot rely on any of the documents and schedules before the court as none are supported by any evidence. It was also submitted that the State had no regard to the usual procedure of having the investigating officer tell the court what evidence he has in support of the serious charge and that he has decided to charge the accused and bring him before a magistrate. This must also be viewed together with the absurdity of D the absence of an allegation that the applicant may not stand trial.

The court was referred to *S v Looij* 1975 (2) RLR 27 (A) especially at 41C-F where the judge stated:

> "No matter how scurrilous, defamatory or grossly offensive a written or verbal attack on a government may be, such an attack is not subversive E unless it is an attack on the system of government as distinct from the government operating for the time being under the system. The right of members of the public to criticise, even in scathing terms, the action of a government elected for the time being under a democratic constitution is one of the cornerstones of democracy. Subversion is an extremely serious offence. So serious that it is only committed when the statements alleged F to be subversive are established beyond reasonable doubt to be made with the intention of undermining not merely the government for the time being but the system or constitution under which that government was elected and operates: see *R v Malianga,* 1963 (4) SA 226 (FSC); *R v Mugabe,* 1965 (1) SA 514 (R, AD); *R v Ngwenya,* 1965 (1) SA 243 (R, AD); *S v Mutasa,* 1970 (4) SA 610 (R, AD)."

G The court was also referred to the case of *S v Aitk*en (2) 1992 (2) ZLR 463 (S) in support of the proposition that the strength of the State case is a salient factor in deciding whether to admit an applicant to bail.

Reference was made to the case of In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) which sets out the importance of fundamental freedoms. It was submitted H also that with regard to the State contention that stay-aways and demonstrations

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may lead to violence, the other side of the coin is that history shows that if the A regime puts a lid on demonstrations and the like, this may lead to the use of violence. Putting a lid on demonstrations of any type may be completely counterproductive. These submissions were being made in a bail application because, it was submitted, the purpose of the applicant's arrest and the opposition to bail was to silence him. The fact that there is no fear of him not B standing trial is sufficient proof of that. The State's fear is said to be that the applicant will commit similar offences.

It was also submitted that the State's opposition to bail is an attempt to introduce what the *Herald* in its editorial called "protective custody", when it probably meant preventive detention. The effect of denying the applicant bail would be that a person has only got to be charged with a political offence; C he makes a speech over which there is dispute as to whether it was correctly reported; before he is convicted on that charge and at the whim of a police officer he could be charged with another offence and bail is opposed. It would start a downward trend of the court's power to grant bail and will be abused to keep political opponents of the government in prison. D

It was submitted that the court ought to grant the applicant bail in this matter and that in so doing the court ought to avoid the imposition of conditions which will silence the applicant, as this would set a dangerous precedent, because political opponents who have an important role to play in any

country will be silenced and thus deprived of the right of freedom to assemble and the right of freedom of expression and other such rights. In matters of this nature E the courts must stay out of politics and apply the law on proven facts.

A video recording was shown to the court of a meeting on 24 May 2003 at which the applicant addressed a rally. This meeting is referred to on p 12 para 5.9; p 114 para 10 and p 99. At p 12 para 5.9, it is reported thus:

> "5.9 On 24 May 2003, Morgan Tsvangirai addressed his supporters F urging them to be courageous in their fight to remove President Mugabe from power through violent demonstrations."

At p 114 para 10, it is reported thus:

> "On 24 May 2003, the accused addressed his supporters at Chibuku Stadium, Chitungwiza and urged them to be courageous in their fight to remove the President and government from power through violent mass G demonstrations."

At p 99, it is reported thus:

"Date/Time:	24/05/2003
Venue:	Chibuku Stadium, Chitungwiza
Statement:	He said that this is the final year for pushing the Government H

A out and the time is drawing nearer, and nearer."

A transcript of the English translation was later produced as well as an affidavit by one Gift Chimanikire, the Deputy Secretary General of the MDC who video filmed the applicant's speech at the said rally. It was pointed out that at no stage did the applicant advocate violence but on the contrary he urged people to shun violence and be peaceful.

B The court was referred to the case of *R v Farid Adams & Ors,* a judgment of the Special Criminal Court, Pretoria "as read out to court by the Presiding Judge, Mr Justice F.L.H. Rumpf on Wednesday 29 March 1961", in response to the State's contention that violence was not a necessary element for the crime of treason to be committed.

C In the main these, were the applicant's submissions.

For the State, Mr *Nemadire* submitted the following.

While it is true that at the commencement of the main trial on 3 February 2003, the Acting Attorney-General remarked that treason is a political offence, he went further to say that any citizen of Zimbabwe can aspire to occupy the D highest political office in the land. It is the means which are used in endeavouring to get to that post that are at issue because if the means are unlawful the offence is committed.

It was submitted that, for the offence of treason to be committed, it is not necessary that it be violent or revolutionary. It could be peaceful and yet still be treason as the essential elements are an overt act which is unlawfully E committed by a person who owes allegiance to the State which possesses *majestas* and that overt act is done with hostile intent. Reference was made in this regard to Hunt's *South African Criminal Law and Procedure* 2 ed, vol 2 at pp 14-29.

In response to the applicant's counsel's submissions, that nowhere in the F newspaper articles did the applicant advocate violence, it was submitted that he might not have said that but nonetheless he committed treason as it is not necessary that the act *per se* manifest hostile intent. Neither does

one need to physically participate, mere incitement being sufficient. Furthermore, even contemplating an unlawful change of government constitutes treason, hence there is no crime of attempted treason.

G State counsel then proceeded to explain that, as a party to these proceedings, the Attorney-General's Office endeavours to persuade or convince the court to perceive the matter in the manner in which the Attorney-General perceives it just as the applicant's counsel is seeking to do the same. The decision does not lie with the Attorney-General's Office. Any suggestion therefore that the H Attorney-General's Office labours under the impression that it determines

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bail is unfortunate. The Attorney-General's Office presents its case and, if A aggrieved, it appeals against the decision concerned in the same way that the applicant would. This was in response to Mr *Bizos'* submission that there are people in the Attorney-General's Office who believe it is their prerogative to determine whether someone gets bail or not.

With regard to the newspaper articles that the court was referred to Mr B *Nemadire* submitted that the Attorney-General's Office has no working relationship with the *Herald.* Neither does it control what goes on at the *Herald* or any other media house. Further, as to the applicant's fears that this court could be influenced by the articles, it was submitted that the Attorney- General's Office had no such fear as that would be too simplistic an approach to adopt in the circumstances. C

In an exposé with regard to arrests and remands, the court was referred to s 13(1) and (2) of the Constitution, dealing with the protection of the right to personal liberty, particularly at subpara (2) (e).

It provides:

> "(1) No person shall be deprived of his personal liberty save as may be D authorised by law in any of the cases specified in subsection (2).
>
> (2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorised by law –
>
> …
>
> (e) upon reasonable suspicion of his having committed, or being about E to commit, a criminal offence."

Reference was also made to the Criminal Procedure and Evidence Act [*Chapter 9:07*] with particular emphasis on Part V which deals with arrests. An arrest is provided for by the Criminal Code. It is not an unregulated act that the police may invoke willy nilly. The next stage is the remand stage, at which an accused person has the right to challenge the remand, which did not happen F in this case. It was submitted that there seemed to be confusion in this regard as the applicant appeared to want to challenge his remand before this court, that is in a bail application.

It was conceded that there is a presumption of innocence in favour of the applicant as is the case with any other person. G

Reference was made to s 116(7) of the Criminal Code which deals with bail. It provides:

> "Subject to subsection (4) of section 13 of the Constitution, in any case in which the judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person to bail if he considers it likely that if such person were admitted to bail he would – H

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> (a) not A stand his trial or appear to undergo the preparatory examination or to receive sentence; or
>
> (b) interfere with the evidence against him; or
>
> (c) commit an offence;
>
> but nothing in this subsection shall be construed as limiting in any way the power of the judge or magistrate to refuse to admit an accused person B to bail for any other reason which to him seems good and sufficient."

It was submitted that ours is a society with a legal system where people must comply with the law in the interests of peace, law and order. Further, that it is not possible to have rights without

corresponding duties. For example, if one has a right to demonstrate, one must comply with the law regarding C demonstrations.

It was submitted that in opposing the applicant's application for bail the State is relying on the provision in s 116(7) of the Criminal Code that it is feared that the applicant might commit an offence while on bail. Mr *Nemadire* categorically stated that it was not part of the State's case that the State feared that the applicant would not stand trial or that he would interfere with evidence.

D The court was referred to the case of *Attorney-General v Phiri* 1987 (2) ZLR 33 (H), as to the principles governing bail, with particular emphasis on 35D where Reynolds J said:

> "The fundamental principle governing the court's approach for bail is that of upholding the interest of justice. This requires the court, as expeditiously E as possible, to fulfil its function of safeguarding the liberty of the individual, while at the same time protecting the administration of justice and the reasonable requirements of the State. As it was expressed by Innes CJ more than eighty years ago in *R v McCarthy* 1906 TS 657 at 659:
>
> 'The court is always desirous that an accused should be allowed bail if it is clear that the interest of justice will not be prejudiced thereby ...'."

F Although not highlighted by State counsel, Reynolds J proceeded further at 35E:

> "The principle was further expounded by Diemont J in *S v Mhlawli & Ors* 1963 (3) SA 795 (C) at 796B as follows:
>
> > '... the court must strike a balance between protecting the liberty of the G individual and the administration of justice'."

The case of *S v Chiadzwa* 1988 (2) ZLR 19 (S) was also referred to. It discusses the importance of personal liberty as against the administration of justice. Also referred to was the case of *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S), where the Supreme Court upheld the High Court's decision in H dismissing an appeal against the refusal of bail by the magistrate on the

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grounds that, given the seriousness of the alleged offences and the severity of A the punishment that they would receive if convicted, there was a reasonable possibility that the appellants would abscond or interfere with the investigation of the case against them.

It was submitted that these cases indicate that the onus shifts to the applicant to show that he satisfies the court that his admission to bail will not prejudice B the interests of justice. It was further submitted that although the offence was serious, it had to be conceded that seriousness itself is not a determinant factor. It had to be looked at together with other factors. It was submitted that in this matter, a treason trial has already commenced involving the applicant and the current offences are offences he is alleged to have committed while on bail. The State is thus restricted to the one ground of fearing that he will C commit other offences.

State counsel submitted that, like Mr *Bizos,* he also found quite laughable that on the schedules referred to by Mr *Bizos,* which schedules were alleged to have been part of the State papers in the application for variation of bail conditions, there are recorded details like, for example "3 unknown MDC youths", and D other such descriptions. He submitted that it must not be ignored that there are also instances where the names of perpetrators of crimes are stated. Further, when the State sought to produce the very same schedule in the application for variation of bail conditions, it was vehemently opposed and was rejected. It was therefore, baffling how the applicant's counsel was now relying on it.

It was submitted that the State's allegation against the applicant is that he E engaged in unlawful demonstrations intended to remove the head of State or the current government. It was conceded that stay-aways are not illegal. However, s 24 of the Public Order and Security Act [*Chapter 11:17*] was not complied with regarding the demonstrations. The section provides:

> "**24. Organiser to notify regulating authority of intention to hold public gathering** F
>
> (1) Subject to subsection (3), the organiser of a public gathering shall give at least four clear days' written notice of the holding of the gathering to the regulating authority for the area in which the gathering is to be held:
>
> Provided that the regulating authority may, in his discretion, permit G shorter notice to be given.
>
> (2) For the avoidance of doubt, it is declared that the purpose of the notice required by subsection (1) is –

(a) to afford the regulating authority a reasonable opportunity of anticipating or preventing any public disorder or a breach of the peace; and H

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(b) to A facilitate co-operation between the Police Force and the organiser of the gathering concerned; and

(c) to ensure that the gathering concerned does not unduly interfere with the rights of others or lead to an obstruction of traffic, a breach of the peace or public disorder.

B ...

(6) Any organiser of a public gathering who fails to notify the regulating authority for the area of the gathering in accordance with subsection (1) shall be guilty of an offence and liable to a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

The crux of the matter, it was submitted, is that notice was not given in terms C of the Public Order and Security Act, not that demonstrations are unlawful.

Regarding the discrepancies highlighted in the two State summaries, it was submitted that one was prepared by the police and the other was prepared by State counsel who normally prepare their own summaries. He submitted that it was largely a question of punctuation, grammar, phraseology and diction but D does not change the essence and that it is within the Attorney-General's right to do so. Neither is it catastrophic that the discrepancies are there. The intention to unlawfully remove the government of the day remains.

It was also submitted that the pending election petition filed by the applicant in these courts is a lawfully allowed process. But to want to change the E government by any other means outside what is legally provided is against the law and that is where the applicant's problem is.

It was submitted that the question before the court was whether, if granted bail, the applicant would reoffend. If it is so likely, then the court ought to refuse to admit the applicant to bail.

It was also submitted that the court need not place any weight on the video F cassette and affidavit of Chimanikire as it does not affect the matter before the court. Further, that would be delving into the merits of the case. There are issues that have to be addressed including such as who video-recorded the meeting and why, is it the original, was it not interfered with, is it authentic and a host of other issues, all of which is unnecessary at bail stage. Even G though the applicant was not heard, on the video-tape, to encourage violence, it could have been said at some stage and then edited out.

In response to the court's question as to the State's response in relation to the applicant's counsel's submissions regarding conditions should bail be granted, Mr *Nemadire,* submitted that the Attorney-General's Office had not H meticulously considered the issue of bail conditions. He however submitted

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that in *S v Aitken* 1992 (1) ZLR 249 (S), where there is a good discussion on A bail conditions, it is stated that even with the strictest conditions, an applicant could still abscond, interfere with evidence or reoffend.

These were the State's submissions in the main.

It is important that the whole issue and purpose and law relating to bail be set out and understood. B

Landsdown and Campbell in *South African Criminal Law and Procedure* Vol V state at p 311:

"the entering into a contract for the setting at liberty of an accused person who is in custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, for his appearance at the place C and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned."

Sections 116, 118 and 126 of the Criminal Code deal, *inter alia,* with the powers of the court to admit an applicant to bail, including the grounds on which bail may be refused and the imposition of

appropriate conditions where D necessary. These sections are generally underlined by the existence of the court's discretion which must, of course, be exercised judiciously.

Generally, case authorities indicate that the courts tend to lean in favour of the liberty of the subject: see for example Burchell and Hunt's *South African Criminal Law and Procedure* Vol 1 at p 317, where the learned authors state: E

> "… In its endeavour to protect the administration of justice, the court should not lose sight of its duty to safeguard the liberty of the subject, and a balance should be struck between these two interests. While most reluctant to consider the merits of, or to say anything which might savour of prejudging the case, the court will consider all the circumstances with a view to deciding whether the grant of release is likely to prejudice the ends of justice." F

This is a matter which, because of its nature and circumstances, has attracted and received a lot of media publicity, both nationally and internationally. Diverse and various comments and commentaries have been made. However, the court's function is to consider the facts before it, examine the applicable law and apply the law to the facts before it in arriving at a decision. In my view, G that is trite.

As will be apparent from an examination of the applicant's counsel's submissions, great efforts were made and a lot of time was spent in making submissions to the effect that the State did not have any reasonable basis justifying the raising of the charges in question against the applicant. "Where is the treason in this statement?" or "where is the call for violence in this H

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A statement?" or words to such effect were a common refrain, as the court was taken through the various documents that the State was said to have relied on in the application for variation of bail conditions and in the application by the Commissioner of Police for an interdict.

In this regard, it is, in my view, of absolute significance that the remand of the applicant by the magistrate was not challenged. It was accepted. That, in my B view, amounts to a concession that the applicant should be placed on remand. The correctness or otherwise of the applicant's being placed on remand is not an issue before this court. Consequently, it is not necessary for this court to make any findings or assessments regarding the merits of the charges the applicant is facing.

C In my view, the question for determination is rather, whether, having been placed on remand, which remand was not challenged, the applicant should now be placed on bail.

It is also, in my view, of great significance, that State counsel categorically stated that it is not the State's contention that, if granted bail, the applicant will not stand trial or that he will interfere with evidence or investigations into his D case. The State's apprehension is that, if granted bail, the applicant is likely to commit or influence his supporters to commit similar crimes; that the applicant has a propensity to commit such crimes when out of custody. This concession by the State is, in my view, of great significance in view of the fact that failure to stand trial is one major factor that the courts consider in deciding E whether or not to grant bail, and particularly so in matters involving political offences: see for example *S v Budlender & Anor supra* at 268G, where van Zijl AJP stated:

> "… There is a greater incentive for political offenders to avoid standing their trials than there is in cases in which there is general moral opprobrium attached to the offence …"

F In view of the State's concession stated above, are the State's concerns, which concerns are in my view not unreasonable, only capable of being catered for by the deprivation of the applicant's liberty? Do the interests of the administration of justice outweigh the interests of the liberty of the applicant? In this regard, it is in my view, significant to note that s 118(3) of the Criminal G Code empowers the court that has granted an application for bail to add to the recognisance any of the conditions provided for therein, including any other matter relating to the accused's conduct. Thus the court is empowered to seek to control future criminal conduct through the imposition of appropriate conditions. It is of some, though maybe limited, relevance to note that in this matter there is no allegation that the applicant breached or disobeyed any of H the conditions on which he was granted bail for the offences in the ongoing

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trial. A

It is also of importance, in my view, to note that the applicant is undergoing trial. There is no verdict yet in that matter. In the eyes of the law, he is still an innocent or law-abiding citizen. The same presumption of innocence also operates in his favour even in relation to these new charges. I am aware of no authority, nor has any been brought to the court's attention, that where an B applicant for bail faces other charges previously preferred against him and for which he has not been convicted, that by itself is a reason for denying him bail. It cannot however be said that the State's concerns are totally unfounded. The applicant is on remand for advocating the unlawful removal of a constitutionally and democratically elected President and Government of the day. Armed with the information giving rise to these allegations, the State, on 2 June 2003 about C nine or so days before this hearing, applied to have his bail conditions in the other matter varied by the imposition of conditions requiring the applicant and his co-accused "not to incite the public to engage in unlawful activities and illegal demonstrations" and "not to make inflammatory statements likely to lead to public disorder". The application was unsuccessful, mainly for the reasons that the applicant and his co-accused were not alleged to have D breached any of their bail conditions and that the application was predicated on activities that had taken place during the course of the year but in respect of which no charge had been preferred by the State. Significantly, the stated conditions would, if granted, have catered for or met the State's concerns. In this regard it is, in my view, also significant to note that the allegations against E the applicant relate to events of the period stretching from March 2002 to June 2003. The allegations are not confined to the period from 31 May to 6 June 2003, the date of his arrest. This is confirmed by the investigating officer in his affidavit, that is, Annexure D to the State papers. It is noted that on 31 May 2003 the Commissioner of Police obtained a provisional order interdicting the applicant and MDC from proceeding with their planned mass demonstrations F and stay-away scheduled for 2-6 June 2003. However, no submission was made to this court by the State counsel regarding the breach or otherwise of the interdict. Of further significance is the fact that State counsel did not specifically respond to the applicant's counsel's submission that the present allegations were only an afterthought conceived after the State had failed in its application for variation of bail conditions and that if such variation had G been granted the present allegations would impliedly not have arisen.

In my view, the circumstances of this case are such that the court can strike a balance between the interests of the liberty of the subject and the interests of the administration of justice by admitting the applicant to bail with appropriate conditions. The court has unfortunately not been favoured with any submissions H

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A by State counsel regarding possible conditions. The court is therefore at liberty to impose such conditions as it sees fit. The court is, however, not satisfied that the submissions made by the applicant's counsel in relation to such, adequately cater for the interests of the administration of justice.

In the circumstances it is my view that the applicant should be admitted to bail, B in terms of which he is to deposit with the Registrar of this court a cash deposit of $10 000 000. In view of the inflationary conditions in the country, I do not consider that this would be an excessive sum in the circumstances of this case. The applicant's counsel proposed that this court may impose conditions which would prohibit the applicant from making any statement which advocates the removal by violence or other unlawful means of the State President. As C such conditions are consistent with the law, I have no reason not to accede to the applicant's counsel's submissions in that regard. A further condition will be that the applicant be ordered to provide substantial surety.

In the result, I order as follows:

The applicant is admitted to bail on the following conditions:

1. The D applicant deposits with the Registrar of the High Court a cash deposit of $10 000 000.
2. The applicant provides as surety, immovable property or properties with a total minimum value of $100 000 000 by surrendering the Title Deeds of such property or properties to the Registrar of the High Court. E
3. The applicant does not make any statement, which —
   (a) advocates the removal of the State President or the Government from office by violence or other unlawful means or;

(b) encourages or incites his supporters or other members of the public to try to remove the State President or the Government from office by violence or other unlawful means.

F *Atherstone & Cook*, for the applicant

Attorney-General, for the respondent

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S v VHERA 2003 (1) ZLR 668 (H)

Citation	2003 (1) ZLR 668 (H)
Case No	Judgment No. HB-74-03
Court	High Court, Bulawayo
Judge	Ndou J and Assessors
Heard	19 September 2002, 24 September 2002, 27 September 2002, 20 December 2002; 20 June 2003
Judgment	20 June 2003
Counsel	Mrs *D Malunga,* for the State *T Mutandi,* for the accused
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

Evidence — *circumstantial — when may be said to have established guilt of accused — approach to be taken to individual items of evidence*

Evidence — *identity — factors to be considered in assessing reliability of evidence of identity — approach when witness and accused previously* C *known to each other*

Headnote

Direct evidence of identification based upon a witness' recollections of a person's appearance is dangerously unreliable unless supported by other evidence. It is not uncommon for a credible witness to make a genuine error on the question of identity. The accuracy of such evidence depends D upon the trustworthiness of the witness's observation, recollection and narration. These elements are affected by various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result E of identification parades, if any; and the evidence by or on behalf of the accused. Where the accused and the witness were previously known to

each other, the questions of identifying marks, of facial characteristics and of clothing are much less important than in cases where there was no previous acquaintance. What is important in such cases is to test the F degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.

The cogency of circumstantial evidence usually arises from the number of independent circumstances which all point to the same conclusion. The court can convict on wholly circumstantial evidence provided it is sufficient to preclude every reasonable inference of the innocence of the G accused. Where the accused tells lies, the court may infer that there is something which he wishes to hide; but it is not entitled to say that because he has been proved to be a liar, he is therefore likely to be a criminal. It is not necessary that every piece of evidence must be tested in isolation and found to be proved beyond reasonable doubt. Each item of evidence should be looked at in the context of the evidence as a whole. H

Ndou J

Cases cited A

Broadhurst v R [1964] AC 441; [1964] 1 All ER 111

Maharaj v Parandaya 1939 NPD 239

Mawaz Khan & Anor v R [1967] 1 AC 454; [1967] 1 All ER 80

McGreevy v Director of Public Prosecution [1973] 1 All ER 503 (HL)

R v Dladla & Ors 1962 (1) SA 307 (A)

B *R v Gani* 1958 (1) SA 102 (A)

R v Harry [1952] NZLR 111

S v M 1963 (3) SA 183 (T)

S v Marange & Ors 1991 (1) ZLR 244 (S)

S v Mehlape 1963 (2) SA 29 (A)

R v Mputing 1960 (1) SA 785 (T)

C *R v Mtembu* 1950 (1) SA 670 (A)

S v Mthetwa 1972 (3) SA 766 (A)

R v Nel 1937 CPD 327

R v Onufrejczyk [1955] 1 ALL ER 247 (CA)

S v Shoniwa 1987 (1) ZLR 215 (S)

D *R v Sibanda* 1963 (2) R&N 601; 1963 (4) SA 182 (SR)

Case information

Mrs *D Malunga,* for the State

T Mutandi, for the accused

Judgment

Ndou J: The 27 year old accused person is before us on a charge of murder. E He appeared before us at the Gweru High Court Circuit. The accused person pleaded not guilty to the charge. Most facts seem to be common cause. The only issue is the identity of the deceased person's assailant. The salient facts are that the deceased was aged 23 at the time he met his untimely death. The accused and the deceased person were known to each other during the lifetime of the deceased. The accused person resided and was employed by one Leon F Pieter Burger at Sherwood Park Estate in Kwekwe as a crop guard. The deceased resided and was employed at Machakwi Estate in Kwekwe. Sherwood Park and Machakwi Estates are next to each other. Sometime in October 1999 the accused and deceased had a misunderstanding at a football match and as a result the deceased assaulted the accused resulting in the latter sustaining G injuries. The accused made a report to the Kwekwe Rural

Police who advised the deceased to pay a deposit fine of $250 for his offence. On 10 December 1999, the deceased left his home proceeding to Kwekwe Rural Police Station to pay the deposit fine in respect of the assault charges upon the accused. The deceased did not reach the police but instead was shot dead on the way. He was shot and killed as he approached Sherwood Road turn-off. The place where

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deceased was shot is some two kilometres from where the accused was A carrying out his duties as crop guard.

The accused was armed with a shotgun on the day in question. The State, on the one hand, alleges that it is the accused who shot the deceased. The defence, on the other hand alleges that the accused was not at the scene and, therefore, did not shoot the deceased. B

STATE CASE

The state called a number of witnesses in support of its case. We propose to name them, highlight the material aspects of their testimony and our findings on their demeanour.

Sinanzeni Moyo C

She was the deceased's wife of three years. She stated that she knew the accused as crop guard at Sherwood Park Farm. She stated that there was bad blood between the deceased and the accused as a consequence of an incident that occurred at a football match. During the match, the accused assaulted the deceased saying the Ndebele speaking people should go back to Bulawayo D where they apparently came from. This did not go down well with the deceased who retaliated and overcame the accused. After being defeated by the deceased, the accused ran away saying he was going to his house to get a gun and come back to shoot the deceased. The accused did not get the gun and upon his return he proceeded to the clinic for treatment and later to the police to report the assault. The police did not immediately come but after about four E months they came back on 9 December 1999 in the evening around 2100 hours and collected the deceased and took him to the accused's place. The deceased returned the same evening and said the police imposed a $250 deposit fine on him for the assault on the accused. Early the following morning at around 0530 hours, the deceased left for Kwekwe to pay the $250 fine. He also had $100 F to buy paraffin and a 10 litre empty container. Under cross examination, she stated that she had seen the accused wearing a "Nike" hat similar to exhibit 6. This witness was subjected to some determined and meaningful cross examination. She was, in our view, not shaken under cross examination. She did not seem to exaggerate the sour relationship between the deceased and the accused. She satisfactorily explained the source of the bad blood between the G two. We hold the view that she is a credible witness.

Michael Gutuza

He knows the accused very well. They are neighbours and they attend church together and indeed socialise together. He stated that the accused had previously worked for his family herding cattle. He, however, only knew the H

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A deceased by sight. He did not attend the football match on 31 October 1999 where the accused was assaulted by the deceased. He received a report from the accused's wife and he consequently followed the accused to the clinic. He met the accused by the gate of the clinic. The accused told him that a certain young man had assaulted him on the head with a log/stick. They proceeded together to the accused's employer and found he had already summoned an B ambulance. The accused was ferried to the hospital. Upon his return from the hospital, the accused came and informed him a case of assault was being handled by the police. The accused then pointed in the direction of the deceased's house and uttered "I will shoot him in the head". He advised the accused that that would not help; he would rather leave the matter in the hands of the police as he had already done. He did not take this utterance seriously C as he thought that the accused made it in

the heat of the moment due to anger. On 10 December 1999, he heard about the death of the deceased. The accused person was taken by the police in the course of their investigations in the morning. In the evening when he (i.e. the witness) and four others were at the beer-hall the accused joined them. The accused told him that he had $300 to D spend on the beer. He asked the accused where he got the money from. The accused informed him that he had got the money from his employer. The accused exhibited his generosity by purchasing about eight litres of opaque bear at a cost of $20 per 2 litre container. Under cross examination he was asked if the accused was a violent person. He responded: "I would not say so, but he used to be involved in certain misunderstandings. He paid fines for E fighting twice or thrice" He conceded that he did not see the $300 cash that the accused announced that he had in his possession. He said that there was nothing unusual in the manner the accused purchased the beer nor the fact that he got the $300 from his employer. Our unanimous finding is that this witness is credible. He did not seek to paint the accused in a bad light. He conceded F a lot of facts favourable to the accused under cross examination.

Mathew Mandaza

He is a member of the Zimbabwe Republic Police stationed at Kwekwe Rural Police Station. He testified that on the night of 9 December 1999 he was on night duty. He had reason to investigate a docket in which the now deceased was charged with the assault on the accused person. He, as a result, visited G Sherwood Park Farm at around 2100 hours. At Sherwood Park he located the accused who confirmed that he was indeed the victim of an assault perpetrated upon him by the deceased person. The accused person directed him to the deceased's place of abode. He traced the deceased and took him to the accused, who confirmed that the deceased was indeed his assailant. In the presence of H the accused person, he informed the deceased person to come and pay a $250

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deposit fine for the assault and that he should arrive the following morning A before 0800 hours. He then left. The deceased did not show up the following day as instructed until his dismissal from duty at 0800 hours. This officer was briefly cross examined. We are of the view that he gave his evidence well.

Foreman Bhebhe

This witness resides in Mbizo township, Kwekwe, and cycles to his place of B employment at Sherwood Park Estates. He is employed there as a tailor. He knows the accused very well as he had worked at Sherwood Park Farm for eight years. He stated that on 10 December 1999 he left home for work at around 0500 hours. He got to Sherwood turn-off at about 0545 hours. As he was cycling he observed a person by the road side. When this person greeted C him he noticed that it was the accused person. The accused was about six metres from him when they exchanged greetings. As a person he knows well he was able to identify the accused person as visibility was good although it was before sunrise. He saw that the accused person was putting on a yellow raincoat and clutching a bag. Under the raincoat, he could only see something dark but was not sure whether it was a pair of trousers or overalls. He then D proceeded with his journey and after cycling for about five hundred metres, he met the deceased person going in the direction where he had met the accused person. The deceased was holding a green five litre container. He could not recall the deceased person's attire. They exchanged greetings and he proceeded with his journey. After about five hundred metres, he saw a woman by the roadside. He greeted her and proceeded to work. At about 1000 hours or 1100 E hours, he later learnt of the death of the deceased person. We are also satisfied that this witness is credible. We, however, cautioned ourselves against the possibility of mistaken identity. It is not uncommon for a credible witness to make a genuine error on the question of identity. The accuracy of such evidence depends upon the trustworthiness of the witness' observation, F recollection and narration. These elements are affected by various factors. The relevant factor, *in casu*, is the circumstances in which this witness allegedly saw the accused: the state of the light, how far away he was, whether he was able to see from an advantageous position and how long he had the accused under observation: see *South African Law of Evidence* by Hoffmann and Zeffertt 3 ed at pp 478-479, *R v Mputing* 1960 (1) SA 785 (T); *S v Mehlaphe* G 1963 (2) SA 29 (A) and *S v M* 1963 (3) SA 183 (T) at 185E. Mr Bhebhe stated that although it was before sunrise he met the accused around 0545 hours. As this incident occurred in summer (i.e. 10

December), we took judicial notice of the fact that at that time it would normally be clear unless it was a cloudy and overcast day. He was cycling along a tarred road and the accused was about six metres away according to his estimation but in essence the accused was on H

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A one side of the road while he was cycling on the other. The question of proximity has to be considered in this case. The accused is well known to the witness. He and the accused person have been in Sherwood Park Farm for a number of years. The accused holds a prominent position of a security guard. All these factors reduce the danger of mistaken identity. We recognise that direct evidence of identification based upon a witness' recollections of a B person's appearance is dangerously unreliable unless supported by other evidence. In *S v Mthetwa* 1972 (3) SA 766 (A) at p 768, Holmes JA stated:

> "Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, C and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable D in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities."

From what we alluded to earlier on, it is clear that we have found witness Bhebhe to be honest. What remains is the reliability of his observation. From the above list articulated by Holmes JA some are relevant for the determination E of this question of identity. Lighting is the first one. According to the witness, he met the accused at around 0545 hours. At that time, there must have been sufficient light. He was able to describe the accused's attire. Not only that, but he met the deceased person soon after meeting the accused person and observed that he was carrying a plastic five litre container. The latter evidence F was confirmed by that of the deceased's wife and other witnesses who saw this container.

It is clear that visibility was good at the time. Further, he had an opportunity to observe the accused person at the time they exchanged greetings. There was nothing between the observing witness and the object of the observation (i.e. the accused). The two were on opposite sides of the same road. The accused G and this witness were previously known to each other so the questions of identifying marks, of facial characteristics and of clothing are much less important than in cases where there was no previous acquaintance. What is important in such cases is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in

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which it was made: see *R v Dladla & Ors* 1962 (1) SA 307 (A) at 310. The A accuracy of Bhebhe's observation is, therefore, reliable.

Bhebhe's original impression cannot be doubted. Time-lag is not a problem as he gave his statement to police relatively soon after the incident. This was an unusual incident which made it likely that Bhebhe's impression would be preserved. The same day that he had met the accused person and the deceased B person he, within four to five hours, became aware that the deceased was killed in the general vicinity of the area where he met them. In such circumstances, his recollection cannot be doubted. Mr Bhebhe gave an ungarbled account of what he saw and he was doing so honestly.

Lameck Mahachi

He has known the accused for between two to three years. They are both C security guards. He was on duty on 9 December 1999, when the police came looking for the deceased person and the accused person. He indicated the deceased person's house to them. On the following day, i.e. 10 December 1999, police came and showed him a hat. He identified the hat as belonging to the accused person. He also made a statement to the police to the effect that D the accused told him that he was going to injure the deceased person before Christmas. The accused person made these utterances on the day he was assaulted by the deceased person at the game of football and on

several subsequent days. The accused spoke harshly or aggressively and as such he did not ask for any elaboration on these utterances. He, under cross examination, E stated that the accused person was a violent character who assaulted many people in the area. He also confirmed that the accused person was Michael Gutuza's friend and the two drank beer together. He denied that he was falsely incriminating the accused person out of jealousy because the latter was liked by their employer and has the use of a shot gun in carrying out his duties whereas the former and other security guards used baton sticks. He was F adamant that the accused person uttered the above mentioned statements and that the hat exhibited belonged to him. Having weighed his merits as a witness against factors which militate against his credibility, we make a positive finding on his trustworthiness. We see no reason why he would lie about the hat and the utterances. As he worked with the accused person his identification of the latter's hat is reliable. G

Leon Pieter Burger

He stated that he employed the accused as a security guard. He issued the accused with a shotgun to use in the course of his duties. On the night of 10 December 1999, the accused was on night duty and armed with the single barrel shot gun, exhibit 4. He was issued with "SSG" catridges for the shotgun. H

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A Although he was not certain of the number of catridges issued to the accused on that day he however testified that he usually issued the accused with four catridges. He, however, indicated that he did not keep a reliable record of the catridges issued to the accused. He stated that he was not sure whether or not he gave the accused money on that day. He confirmed what other witnesses said, that the accused was not a popular person because of the number of B arrests that he effected. He recalls that the accused was dressed in blue overalls and a long black raincoat i.e. the standard issue for security guards. He however, could not recall whether the accused was wearing a hat. He testified that he could not remember whether on 10 December 1999 the accused handed over the shotgun to him because at times the accused handed the shotgun but there were instances where he took the shotgun to his place of abode. The C accused was, however, in charge of the shotgun most of the time. He agreed that it is possible that "LG" catridges could be used in that shotgun as long as they are 12 bore calibre. He stated that it was not possible to hear the shotgun fire from the scene of the deceased's killing if one is at his homestead on account of the distance between the two points. The evidence of this witness D was not challenged in any material respects. This is not surprising considering that it does not seem to take the case any further.

Jonifasi Muguzumbi

He is aged 64 years. He was the cook at the Burger homestead at the time of the murder. He did not know the deceased person in his lifetime. E On 10 December 1999, he went to work at 0600 hours. He found the accused at the Burger homestead. He recalls that the accused was wearing overalls. He exchanged greetings with the accused. After that, the accused said to him "Uncle I have done a bad thing. I killed someone". He responded by telling the accused that he did not want to hear such utterances. He was scared by these utterances. He stated he, unlike other people on the farm, enjoyed good F relations with the accused. They treated each other like relatives. He denied suggestions that he was improperly influenced by the police to testify against the accused. He was subjected to determined and tactful cross examination. We are of the view that this old man gave a truthful account of what transpired. He is, in our view, a credible witness. He was not shaken under cross examination and has no motive to lie against the accused. He and the accused G got along very well like relatives. It is common cause that the accused was unpopular on the farm but this witness was one of the few people who related well with the accused person.

Japhet Ndlovu

He is a member of the Zimbabwe Republic Police stationed at Kwekwe Rural.

H He knows the accused as a member of the Neighbourhood Watch Committee

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attached to their police station. He did not know the deceased in his lifetime. A On 10 December 1999, he attended the murder scene in the company of Sergeant Nhepera. They arrived at the scene around 0800 hours. At the scene, he observed blood on the tarmac and a blood drag trail. He followed the drag marks up to a point where he traced the deceased's body about six metres from the spot on the tarmac where there was blood. The pool of blood was mainly B located almost at the centre of the tarred road. Next to the body, he observed and retrieved a khaki sun hat inscribed "Nike" i.e. exhibit 6 and a black pair of shoes, exhibit 7. The deceased was wearing on a white striped shirt and he could not recall the colour of his trousers. His shoes had been removed and one of the trouser pocket had been pulled inside out indicating that the contents had been emptied. He observed that the deceased had wounds on his neck and C head. He searched the scene and retrieved circular papers used in catridges with "LG" inscriptions. These circular papers were scattered by the impact of the shot and got scattered in the area where the catridges was fired. He also saw a plastic container. He approached the deceased's wife and she stated that the pair of shoes did not belong to the deceased. He later arrested the accused and handed him to details at the Criminal Investigations Department for further D investigations. He also confirmed the testimony of Mr Burger that the "LG" catridges, like "SSG" catridges are 12 bore shotgun calibre used by the firearm that the accused had in his possession. In fact, "LG" and "SSG" are brand names of the same calibre catridges. We are satisfied that this evidence by Ndlovu is credible. Most of it is in any event beyond dispute. E

Sauro Mdiki Moyo

He knew both the accused and the deceased as they worked in the same place. On 10 December 1999, he left home going to work in the company of David, Ben and others. They got to the scene of the murder and received a report from a certain woman. They saw the plastic container, the blood and followed the F blood trail and the drag marks up to where they saw the deceased person's body. By the time the police arrived at the scene, they had already left the scene. He said he knew the accused as aggressive or violent to others and used to arrest them for poaching fish on the farm. He was arrested in this case after the accused implicated him after his (i.e. accused's) arrest. He stated that the accused had told the police that he (i.e the witness) had assisted him to drag G the deceased's body from the road. He was, however, released after they were taken to the local public prosecutor after the accused indicated to the latter that he (the witness) was innocent and that he had only implicated him under duress as the police were torturing him. He stated that although he was not assaulted by the policeman, they however threatened him and pushed him around. Most of this testimony is common cause. We will not attach any H

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A weight to the fact that the accused implicated him as this was done under circumstances of duress by the police.

Biton Longwe

He is a detective with Kwekwe (CID) police. He is the investigating officer. He was assigned the matter on 23 December 1999. He proceeded to Sherwood B Park and located witness Bhebhe and recorded a statement from him. He was also present at the scene and witnessed when Detective Sergeant Chinhondo recorded indications from the accused. He took the hat and the shoes to Sherwood Farm. Lameck Mahachi identified the hat as belonging to the accused. He denied assaulting the accused or threatening witness Moyo. We hold the view that he is not being truthful in this regard. We prefer the C testimony of Sauro Moyo who seemed to be unbiased.

Tendai Mufazembe

She knew both the deceased and the accused only in connection with this case. She arrived at Sherwood/Sebakwe Farm junction at about 0500 hours to wait for the bread delivery vehicle. She saw a person at a distance from where she D was, pacing up and down crossing the road. The person would stand up from the rock on which he was sitting, cross the road and cross back to where he was sitting. She observed this person make about three such crossings to and from before

the deceased person arrived. She spoke to the deceased and asked him if he had seen the bread delivery vehicle. He said he had not. She stated that she saw the deceased at around 0530 hours. The deceased then walked in the E direction of the person who was making the crossings and sitting on the rock. The deceased met with another person cycling in the opposite direction. Thereafter the deceased got to where the "crossing" person was. The deceased and this "crossing" person "sort of stopped". She thereafter saw them walking together down the slope. After that, she "then heard a sound like a tyre burst". F Thereafter, certain young men came running towards Sherwood Clinic. She proceeded to the scene and saw the plastic container and blood but she did not get close to the body because of fear and shock. She stated the distance between where she was and the scene was about 500-600 metres. We should point out that she had some difficulty in indicating the distance on account of her lack of familiarity with the town of Gweru where we are sitting.

G The issue of identification arises here. It was put to her that when she saw the deceased it must have still been dark. Her undisputed testimony seems to point to the existence of sufficient light. As previously pointed out at 0530 hours in summer there would be sufficient light. It would be a clear morning. We are fortified in this regard as the witness was able to clearly recognise the H deceased's attire. She stated that he had a white shirt, red vest and darkish pair

of trousers. Surely for her to make such an observation on the deceased's attire A there must have been sufficient light. We appreciate she had another opportunity to see the deceased's attire at the time she went to the scene. She, however, categorically stated that when she got to the scene of the murder she saw the plastic container and the pool of blood she was too shocked to follow the blood or drag marks, as it dawned to her that the person she had spoken to a B few minutes earlier had been harmed. This aspect of her testimony is beyond dispute. She conceded that from where she was she was unable to say whether the "crossing" person was male or female.

DEFENCE CASE

Job Vhera (i.e. the accused) C

He admitted the fight with the deceased at the football game. The deceased assaulted him resulting in him making a report to the police the same day i.e. 31 October 1999. From that time up to 9 December 1999, he did not make any follow-up on the case. He stated that he was waiting for police instructions. During this period, he met the deceased many times at the beer-hall and around the village. He did not talk to the deceased because he had made a report to the D police and he was afraid that if he spoke to him the latter would attack him. He confirmed that he met witness Gutuza on 31 October 1999 after the assault. He told Gutuza how he got injured. He denied that he told Gutuza that he would kill the deceased. He disputed that when the police brought the deceased to him after the latter's arrest on 9 October 1999, he heard them E instruct him to come to Kwekwe Rural Police to pay a deposit fine of $250 the following morning before 0800 hours. All the police did was to ask him to identify the deceased as his assailant. He responded positively and they said they were placing the deceased under arrest. He said the police did not mention the time that the deceased was supposed to pay the deposit fine in his presence. He stated that on the fateful day he was wearing "a part of black overalls", F green jersey, a shirt with red and white stripes, light green track suit bottom, a green hat and combat shoes commonly referred at "MAZ" and a black rain coat as it was cloudy. It was not raining. He was armed with the shotgun, exhibit 4. He had been issued with four cartidges but on that morning he had only three cartidges as he had used one cartidge some two weeks prior to this incident. They were red in colour and "SSG" type. He stated that in his three G years as a security guard he never used "LG" type cartidges. He also disputed that the hat produced belonged to him or that he wore it on 10 December 1999. He stated that he did not fire the shotgun in the morning of this day. He confirmed that he met witness Jonifasi Muguzumbi and exchanged greetings around 0605 hours. He denied ever making any further utterances about having H

A killed a person to this witness. He did not hear the gunshot. He disputed Bhebhe's testimony that he met him around the murder scene and spoke to him. He said up to the time of his arrest for this

case he related well with Bhebhe. He has no idea why Bhebhe would falsely incriminate him. He conceded that he used to be friends with witness Michael Gutuza and also had no idea why he was falsely implicating him. The same applied to witness B Lameck Mahachi. He conceded that he had a history of fighting others on the farm. He categorically denied killing the deceased. He was extremely evasive on what the police said on the night of 9 December 1999 about the deposit fine by the deceased. Generally, we hold the view that accused did not tell the truth. We make a negative finding on his credibility.

C **ASSESSMENT OF EVIDENCE**

In this case, the State is relying on circumstantial evidence. In the circumstances, the issues cannot simply be resolved by making findings on the demeanour of the witnesses. The approach to circumstantial evidence is captured by the learned authors Hoffman and D T Zeffertt *supra* in the following terms on p 464:

> D "The possibility of error in direct evidence lies in the fact that the witness may be mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the court may be mistaken in its reasoning. The inference which it draws may be a *non sequitur,* or it E may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It sometimes happens that the trier of fact is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred. In *R v Blom* 1939 AD 188 at 202-203, Watermeyer JA referred to 'two cardinal rules of logic' which govern the use of circumstantial F evidence in a criminal trial:
>
> '(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
>
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other G reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'
>
> The second rule in *R v Blom* is, of course, a statement of the criminal standard of proof'.'

From the above, it is clear that the cogency of circumstantial evidence usually H arises from the number of independent circumstances which all point to the

same conclusion. Further, Korsah JA in *S v Marange & Ors* 1991 (1) ZLR 244 (S) at 249 referred to an English case as follows: A

> "Lord Normand observed in *Teper v R* [1952] AC 480 at 489 that:
>
> > 'Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another … It is also necessary before B drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are not other co-existing circumstances which would weaken or destroy the inference'."

The court can convict on wholly circumstantial evidence provided it is sufficient to preclude every reasonable inference of the innocence of the accused – see *S v Shoniwa* 1987 (1) ZLR 215 (S) at 218F; *R v Onufrejczyk* C [1955] I ALL ER 247 (CA); *R v Harry* [1952] NZLR 111; *McGreevy v Director of Public Prosecution* [1973] 1 All ER 503 (HL).

In casu, the proved facts are:

(a) **Motive** – Around five weeks prior to killing of the deceased, the latter had assaulted the accused at a football ground where a game of soccer was D taking place. Prior to this, it is common cause that the accused had been involved in many fights on the farm where he was the resultant victor. In his fight with the deceased he came out second best. In fact, he lost badly in front of the locals and ended up in hospital. He did not speak to the deceased thereafter. That he harboured animosity towards the deceased is beyond dispute. On the day of the assault, he pointed at the deceased's E place of abode and declared to Michael Gutuza that he was going "to shoot the deceased in the head". The latter advised him to leave the matter in the capable hands of the police. The accused also made repeated utterances to fellow security guard Lameck Mahachi that he was going to injure the deceased before Christmas. Mahachi stated that the accused was harsh or aggressive each time he made these

utterances. These utterances were F made after the accused was assaulted by the deceased at the football game.

(b) **Accused's presence at the scene** Foreman Bhebhe saw the accused at the scene of the murder at around 0545 hours. They exchanged greetings. About five hundred metres from where Bhebhe met the accused, he met the deceased going in the direction of the point where he had seen the G accused. Further, the accused's hat was found next to the deceased's corpse soon after the murder.

(c) **Accused's utterances soon after the murder** – Soon after the murder, i.e. within thirty minutes of the murder, the accused told Jonisafi Muguzumbi: "Uncle I have done a bad thing. I have killed someone" Muguzumbi, aged 64 years, is someone the accused confided in and H

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A regarded as a relative.

(d) **Person observed crossing up and down the road by Tendai Mufazembe** – The actions of this person is consistent with someone waiting. The person would cross the road to and from, sit down on a rock, stand up and repeat the crossing. Mufazembe saw and spoke with the deceased as he passed where she was seated. She later observed the B deceased sort of talking to former. The two walked together and shortly thereafter, she heard a tyre burst type of sound. She went to the scene and saw what happened.

(e) **Circular papers inscribed "LG" used for securing pellets in 12 bore shotgun rounds found at the scene** – This shows that a 12 bore shotgun C was fired at the scene and "LG" pellets used. The "LG" indicates that the crime cartridge was loaded with LG buckshot pellets, which, according to ballistic evidence are 9mm in diameter.

(f) **Forensic ballistic evidence** – Firearms Examiner Haley found that the shotgun that the accused had on the day in question had in fact, been fired because the barrel had been fouled. He examined this shotgun some four D days after the shooting of the deceased. He was, however, unable to determine when the shotgun was fired.

(g) **Post Mortem Report by Dr P Mandava** – Dr Mandava removed two pellets from the deceased's corpse. From the examination, the doctor concluded that the cause of death was severe head injury secondary to gun E shot wounds.

(h) **The accused's false evidence –** The accused lied on a number of material respects. It is trite that in the face of such lies we may infer that there is something which he wishes to hide. But, we are not entitled to say that because he has been proved to be a liar, he is therefore likely to be a F criminal: see *R v Nel* 1937 CPD 327 at 330; *R v Gani* 1958 (1) SA 102 (A) and *Broadhurst v R* [1964] AC 441, [1964] I ALL ER 111 at 119-20B. It is possible that an innocent person may put up a false story because he thinks that the truth is unlikely to be sufficiently plausible: see *Maharaj v Parandaya* 1939 NPD 239. These lies, however, constitute an additional factor against the accused that has to be taken into consideration with all G other relevant evidence. Such lies are a relevant fact which we will take into account: see *Mawaz Khan& Anor v R* [1967] 1 AC 454, [1967] I All ER 80.

In our view, the cumulative effect of these various proved facts all point to same conclusion of guilt of the accused. The evidence before us as a whole furnishes H sufficient proof of guilt: see *R v Sibanda* 1963 (4) SA 182 (SR) at 188. The

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accused was armed with a shotgun, the shotgun was fired more or less at the A time. The deceased was killed by gun shots. The accused's hat was found next to the body of the deceased. He was seen by a person who knows him very well about 500 metres from where the deceased was last seen alive. He harboured confessed animosity towards the deceased after losing to him village or farm compound heroism. He told a confidant that he had killed someone within 30 B minutes of the killing of the deceased. He knew that the deceased was going to Kwekwe Police early in the morning to go and pay a deposit fine for the assault that the deceased inflicted upon his person. He must have been the person seen pacing from one side of the road and back if one takes the evidence of Foreman Bhebhe and Tendai Mufazembe cumulatively. There are two facts which the accused's counsel highlighted as being consistent with innocence. C First, the "LG" paper shotgun wad indicated

that deceased was shot with 12 bore shotgun pellets of "LG" brand name. The evidence of Burger is that he usually uses pellets with the "SSG" brand name. He however, did not discount ever using pellets with the "LG" brand name but stated that he would have done so a long time ago. If the accused planned to kill the deceased from the time he became aware that he would be going to Kwekwe Police he would have been D prudent to cover his tracks. "LG" and "SSG" pellets do not only differ in brand names, they also differ in the colour of the paper wad. He obviously chose a different colour from the one that he commonly used. Second, a black pair of shoes was found at the scene. The investigation could not establish who the shoes belong to. They certainly did not belong to the deceased according to E his widow. None of the witnesses linked the pair to the accused and he obviously denied that they were his.

While the shoes were not linked to the accused, that does not necessarily mean he did not introduce them at the scene of the murder. The existence of the pair of shoes does not necessarily contradict any of the evidence led. This court is not obliged to consider these two factors in isolation. They must be considered F in the context of the evidence as a whole. In *R v Mtembu* 1950 (1) SA 670 (A) at 679-80, Schriener JA explained the approach in the following terms:

> "I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected, then a verdict of guilty means that such G evidence must have been accepted or rejected, as the case may be beyond reasonable doubt. Otherwise, the verdict could not properly be arrived at. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied. I am not satisfied that the possibilities as to the existence of facts from which inferences may be H

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> A drawn are not fit material for consideration in a criminal case on the general issue whether guilt has been established beyond reasonable doubt, even though, if the existence of each such fact were to be treated by the test of reasonable doubt, mere probabilities in the Crown's favour would have to be excluded from consideration and mere probabilities in favour of the accused would have to be assumed to be certainties."

B Having considered all the facts in this matter, the evidence as a whole furnished sufficient proof of guilt of the accused beyond reasonable doubt. We, therefore, find the accused person guilty of murder with *actual intent.*

Attorney-General, State's legal practitioner

C *Chakanetsa & Associates*, accused's legal practitioners

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USAYI v USAYI 2003 (1) ZLR 684 (S)

Citation	2003 (1) ZLR 684 (S)
Case No	Judgment No. S-11-2003
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Ziyambi JA
Heard	8 May 2003; 24 June 2003

Judgment 24 June 2003

Counsel *A Gijima*, for the appellant
M V Chizodze, for the respondent

Case Type Civil appeal

Annotations Link to case annotations

Flynote

Family law — *husband and wife — divorce — property division following* C *divorce — housewife — how to quantify contribution by non-earning housewife during subsistence of long marriage*

Headnote

The appellant and the respondent had been living together for nine years before their marriage, which subsisted for 35 years thereafter. By the time of the divorce, the respondent was over 60 years of age. She continued D to be responsible for one of the children, who was handicapped. She was financially dependent on the appellant, had no income and no prospects of being able to earn any.

In granting the decree of divorce, the High Court awarded the respondent a fifty percent share in the matrimonial home, which was situated in a low density suburb in Harare. The appellant appealed against this order, E arguing that the effect of it was to place the respondent in the position of a joint owner of the property, not merely that of a person benefiting by virtue of her matrimonial relationship with the owner of the property. He claimed that his offer of a fifteen percent share, alternatively, ownership of a house in a high density suburb, was reasonable.

Held, that s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*] enjoins the F court, in making an order as to the division, apportionment or distribution of the assets of the spouses following a divorce, to endeavour to place the parties, as far as it is possible, in the position they would have been in had the marriage subsisted. In so doing the court can take account of, *inter alia*, "the direct or indirect contributions made by each spouse to G the family, including contributions made by looking after the home and caring for the family and any other domestic duties".

Held, further, that it is not possible to quantify in monetary terms the contribution of a wife and mother who for many years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, and day and night nurse for her husband and children. It is not possible H

Ziyambi JA

A to place a monetary value on the love, thoughtfulness and attention to detail that she put into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy; nor can one measure in monetary terms the creation of a home and an atmosphere from which both husband and children can function to the best of their ability. In the light of these many and various B duties, one cannot say, as is often remarked: "throughout the marriage she was a housewife. She never worked." It is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the "direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties".

C *Held*, further, that the proper approach is to presume that in the majority of marriages the spouses assume equivalent, though different, duties which are equally beneficial to the welfare of the family. On this basis, the decision by the High Court was the correct one.

Legislation considered D

Matrimonial Causes Act [*Chapter 5:13*], s 7(4)

Case information

A Gijima, for the appellant

M V Chizodze, for the respondent

Judgment

E **Ziyambi JA:** This appeal is against an order of the High Court granting to the respondent one half share of the sale price of the matrimonial home. The appellant and the respondent were married in 1961 after having lived together as husband and wife from 1952. In 1995, they stopped living together due to certain differences which had arisen between them.

F The parties lived in the low density suburb of Marlborough. Divorce proceedings were commenced in 1996 when the respondent issued summons. Shortly thereafter, the appellant sold and transferred the matrimonial home to a third party, notwithstanding a prior order by the High Court interdicting him from disposing of the matrimonial property pending the determination of the divorce proceedings. The transferees of the property sought to evict the G respondent who obtained another order from the High Court preventing her eviction pending the determination of the divorce proceedings.

The main contention advanced by the appellant before us was that the court *a quo* misdirected itself by awarding the respondent a fifty per cent share in the matrimonial home when she made no contribution to the acquisition H thereof. It was submitted that the effect of such an award was "to place the

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respondent in the position of a joint owner of the property in question, and not A merely a person benefiting by virtue of her matrimonial relationship with the owner of the property". It was submitted further that the appellant had acted reasonably in offering the respondent a fifteen percent share in the property or, in the alternative, a full house which he had purchased in Highfield. The appellant was quick to add, however, that by the time the matter was heard by B the High Court, the Highfield property had been disposed of.

Section 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] (the Act) allows the court, in granting a decree of divorce, judicial separation or nullity of marriage to make an order dividing, apportioning or distributing the assets of the spouses. Section 7(4) of the Act provides as follows:

> "7(4) In making an order in terms of subsection (1), an appropriate court C shall have regard to all the circumstances of the case, including the following —
>
> (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each D spouse and child has or is likely to have in the foreseeable future;
>
> (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
>
> (d) the age and physical and mental condition of each spouse and child; E
>
> (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
>
> (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which each spouse or child will lose as a result of the dissolution of the marriage; F
>
> (g) the duration of the marriage;
>
> and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses." G

It will be seen that the court must endeavour, in making such an order, to place the parties in so far as is possible in the position they would have been in had the marriage continued to subsist.

The respondent is over 60 years of age. The marriage was of considerable duration. There is no allegation or suggestion that she did not perform, to the best of her ability, her duties as wife to the appellant and mother to the parties' H

Ziyambi JA

A four children, two of whom are now deceased. She continues to be responsible for their handicapped son, of whom the appellant makes no mention. The matrimonial home was situated in Marlborough, a low density suburb, and the respondent has not the means to obtain similar accommodation for herself and her son.

The appellant, on the other hand, has a well developed communal home at B Chishawasha and has the option of utilising the land for agricultural purposes in order to generate income therefrom. In addition, he has business interests from which he earns income the full particulars of which he chose to withhold from the court. It seems clear from the evidence that the appellant did not disclose his financial affairs to the respondent. She had no idea of how much C income he earned nor was she aware that, during the subsistence of the marriage, he had purchased a house in Highfield. She learnt of this house through her legal practitioners after summons for divorce had been issued. Since leaving the matrimonial home the appellant has been resident in Sunningdale. He advised the court that this is rented accommodation but this evidence is coloured by his failure to be honest with the court about his D income.

What the evidence as a whole shows is that the appellant is in a far better position than he would have been in had the marriage subsisted. He has the proceeds of the matrimonial home as well as that of the Highfield house. He has his well developed home in Chishawasha. He has his business, the success E of which he has played down to the court.

The respondent, on the other hand, is in a worse position. Having been financially dependent on the appellant, she has no income and no prospects of being able to earn any for the maintenance of herself and their handicapped son. She has no home and no prospects of being able to acquire one. The offer of 15 percent of the sale price of the house would go nowhere near enabling F her to obtain a house to live in. The learned judge considered this and awarded her a 50 percent share of the sale price. In my view, the award made by the court *a quo* cannot, in the circumstances of this case, be faulted.

The conduct of the appellant in selling the matrimonial home despite an order of the High Court restraining him from doing so was correctly found by the G court *a quo* to be deserving of censure. We are advised by counsel for the respondent that an application is pending before the High Court for the setting aside of that sale. For this reason, the respondent withdrew the cross appeal which sought that the property in question be resold and that the respondent be awarded 50 percent of the new sale price.

H Mr *Gijima*, who appeared for the appellant, was persistent in his submission

Ziyambi JA

that the respondent, having made no financial contribution to the acquisition A of the house, was not entitled to an award of 50 percent of the sale price. Having regard to the provisions of s 7(4) of the Act, this submission is unsound. The Act speaks of direct and indirect contributions. How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic B worker, house keeper, day and night nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and the creation of an atmosphere therein from which both husband and children can C function to the best of their ability? In the light of these many and various duties, how can one say, as is often remarked: "throughout the marriage she was a housewife. She never worked"? In my judgment, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the "direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for D the family and any other domestic duties". A fair approach is that set out by Professor Ncube in his book *Family Law in Zimbabwe*. At p 178 he said:

> "Our courts, when formulating a legal approach to the re-allocation of property on divorce, should not attempt to attach a monetary value to the intangible and unquantifiable domestic contributions of a housewife. As Gray aptly puts it: E

> 'A just and realistic evaluation of her efforts depends instead upon the avoidance of the absolute terms of cash value in preference for the relative approach of differential equality between financial and nonfinancial contributions to the acquisition of matrimonial assets.'
>
> Thus the evaluation process should not seek to determine how much a F housekeeper is worth in comparison with, for example, a university lecturer, nor should the process seek to determine the value of a wife's cooking, washing and rearing of children as compared to, say, a government minister's work. The proper approach would be to presume that in the majority of marriages the spouses assume equivalent, though different, duties which are equally beneficial to the welfare of the family." G

The learned judge adopted this approach. At p 110 of the record, she said:

> "This, in my view, is a proper case in which to adopt the approach set out by Professor Ncube in his book whereby it should be presumed that the plaintiff assumed equivalent, though different duties, which were equally beneficial to the welfare of the family. It is she who for many years was left at the communal home as sole custodian of the children, in charge of H

Ziyambi JA

> A the family. In that role, she enabled her husband, the defendant, to engage in the academic pursuits abroad which placed him a in position to improve the family's standard of living. It is her contribution on the domestic front which freed her husband to work outside the home. But for her efforts, the home and family may not have remained intact. Such a contribution cannot be undervalued. She is over 60 years of age and has no income of B her own. By virtue of her age and lack of training, she has no prospects of obtaining employment."

In my view, no basis has been shown for altering the judgment of the High Court. The appeal is therefore dismissed with costs.

C Chidyausiku CJ & Cheda JA concurred.

IEGM Musimbe and Partners, appellant's legal practitioners

M V Chizodza-Chineunye, respondent's legal practitioners

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S v MLAMBO 2003 (1) ZLR 690 (S)

Citation	2003 (1) ZLR 690 (S)
Case No	Judgment No. HB-72-2003
Court	High Court, Bulawayo
Judge	Cheda J
Heard	26 June 2003
Judgment	26 June 2003
Counsel	Details not supplied
Case Type	Criminal Review
Annotations	No case annotations to date

Flynote

Criminal procedure — *trial — confession — "admission of guilt" fine previously paid to police — circumstances indicating that such admission* C *not genuine — admission to be disregarded*

Headnote

The accused was charged with a traffic offence, and subsequently signed an admission of guilt and paid a deposit fine. The circumstances in which he did so were questionable, and it appeared that he had been coerced by D the police. He was later charged in court with the offence.

Held, that an admission which was not made by the accused exercising his own free will could not be held against him, and that the trial should thus be continued without regard to the admission.

Cases cited

R v Coetzee 1954 SA 571 (O)

R v Cowan 1969 (1) RLR 18 (G) E

S v Ruiter & Ors 1962 (1) SA 161 (O)

Judgment

Cheda J: The accused was charged with contravening s 51(1) of the Road Traffic Act [*Chapter 13:11*], commonly referred to as "Driving without due care and attention". He pleaded not guilty. In his defence, he advised the court F that he had been made to pay an admission of guilt fine, as a result of misrepresentations made by the police.

At his trial, accused gave the following as his defence:

> "I was driving along the mentioned road and I was just about to speed considering I was approaching a give way. I heard a bang on the rear of my G vehicle by the vehicle which was following. After I had been hit, I stopped there. After I had stopped, I sat of board after applying my hand brakes. I went to the other party, the complainant in the company of another, alighted from my vehicle and approached me. I asked the complainant why he had collided with me. Initially, he apologised, when we continued talking he change his story to say I was reversing my vehicle. The person H

Cheda J

> A who was in that car indicated that he also saw me reversing. He pin pointed to have been a person who was in that car. We called the police and Sgt Nelson attended the scene. We were then taken for a breath test. I left my vehicle at the scene and my passenger. This person who has indicated that he was an independent witness, he followed driving the complainant's car behind the police truck. At Emakhandeni robots, he picked another police B officer.
>
> After the Emakhandeni robots, the police stopped the car and told us it was late and we were to report on Monday to traffic West. On Monday, I went to Mpopoma, I saw an officer who was on duty. After having given them my story, they pulled out some papers which they indicated that I was the accused. They asked me to deposit a fine of $180. I told them I had C $150 only. They went to talk to their boss and I was asked to pay the $150.
>
> I asked them why I was paying the fine since I was the one who had been hit. They said the person who had attended the accident said I was the one who was wrong. I denied but they persuaded me to pay. During that time, I was going for an external operation. I paid the deposit fine. Then I went for the operation. I came back on time off.
>
> D I found the letter from an insurance company which was claiming $15 000. I was surprised. I went back to the police. I queried why they had … that once I paid the fine it was the end of the matter yet they knew I was supposed to pay the damages.
>
> I then requested to see the officer in charge because I had been forced to pay the fine yet I was not wrong. He then asked them to pull out the traffic E accident book. After perusing the TAB, he saw that I was innocent. He asked to make an affidavit putting all the details pertaining to the matter. I have the

affidavit statement and I brought it to court. I was then informed to go and hand-over the affidavit to the insurance company."

On hearing this explanation, the learned trial magistrate referred the matter to me for directions. It is trite law that if an accused admits his guilt, he is allowed F to pay a fine. This procedure applies to certain offences as stipulated by the relevant law, and in the present case the said offence is one of them. The said fine is assessed by a designated officer only. Nothing turns on this procedure.

The question before me is whether the admission made by the accused to the police was a proper admission, to the extent that he should be regarded as G having pleaded guilty to the offence in question. An admission of guilt should be made after an accused person has been properly informed of what he is being charged with. In the event that he gives an explanation which casts reasonable doubt on his admission of guilt, such admission should no doubt be viewed with suspicion, and therefore, he should be given the benefit of a full trial. It is an accused person's right to be tried fairly by a competent court. H In other words, wherever there is reasonable doubt, irrespective of its magnitude,

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such doubt should be to the accused's benefit until the State proves beyond A reasonable doubt that he is indeed guilty. In *S v Ruiter & Ors* 1962 (1) SA 161 (O), the court, although it did not set aside the conviction, however, emphasised the need to lean in favour of the accused where there is likelihood of a miscarriage of justice. The court did not set the conviction aside, as it held that it had not been shown "that in all probability a miscarriage of justice had B occurred". In a similar case, *R v Coetzee* 1954 SA 571 (O), the court held that it could not set aside the conviction as there was no irregularity in the proceedings, and that even on the merits, there was nothing before the court to show that the accused should not have been convicted.

The approach, therefore, in my view, should be that an accused seeking to set aside a conviction, should show on the merits that the facts indicate that he C should not have been convicted, due to doubt occasioned either by misrepresentation or misunderstanding. In *R v Cowan* 1969 (1) RLR 18 (G) at 21A, Davies J stated:

> "In my view, the test applied in *Coetzee*'s case is preferable. Where a conviction has followed a plea of guilty which is not genuine, then it D seems to me that, in the interest of justice, such conviction should be set aside if the court is satisfied that there is a reasonable possibility that the accused was wrongly convicted."

In the present case, the accused was made to pay a fine under circumstances which are not convincing. It is clear that he paid a fine because of the coercion and/or persuasion by the police, and that, coupled with the fact that he was due E for a medical operation, renders such admission of guilt not genuine.

In my view, it would not be in the interest of justice to hold that the admission of guilt was made where the accused avers that there was coercion or persuasion by the police. It seems that the accused did not exercise his free will in admitting this offence.

The following order is therefore, made: F

1. The admission of guilt made by the accused on 5 September 2000, made on ticket number 185904, is cancelled, and the amount of $150 should be refunded to the accused.
2. The matter is referred back to the same magistrate for the continuation of the trial, and in the event that he is convicted the trial court should not G sentence him to a fine exceeding $150.

Ndou J concurred

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