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S v SITHOLE & ANOR 2003 (2) ZLR 1 (H) *

Citation	2003 (2) ZLR 1 (H)
Case No	Judgement No. HH-101-03
Court	High Court, Harare
Judge	Guvava J
Heard	2 July 2003
Judgment	2 July 2003†
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) *—general principles — community service* C *— hours to be performed — need for court to fix hours — accused attending school — need for court to fix hours so that accused may continue to attend school*

Headnote

When imposing a sentence of community service, a court must state the hours D which the offender must work and the times when the service should be commenced and completed. It is for the court, not the head of the institution concerned, to decide those times, and it is incumbent on the court, after due inquiry, to impose conditions that are appropriate to the offender. If the hours fixed by the court become inconvenient either to the institution or the offender, the court must be approached to vary the E conditions of the community service order; the head of the institution does not have authority to amend the order but must seek an amendment from the court.

The accused persons, having been convicted of an offence by a magistrate, were sentenced to perform a specified number of hours of community service. Although the magistrate was told the accused were scholars at a F secondary school, he directed that they should perform the community service during weekdays and at times when they would normally be at school. He apparently believed that it was for the accused persons to arrange with the head of the institution where they were to perform the work, to be given time off to attend school.

G *Held,* that the magistrate should have taken into account the fact that the accused persons were scholars and should have specifically excluded work during school days.

2003 (2) ZLR p2

Guvava J

Cases cited A

S v Gambiza HH-81-00

S v Gumbo 1995 (1) ZLR 163 (H)

S v Mumbamarwo HH-161 -97

Legislation considered B

Criminal Procedure and Evidence (Community Service) Regulations,1998 (SI 12 of 1998), ss 12, 14 & 15

Judgment

Guvava J: The accused persons pleaded guilty and were convicted of housebreaking with intent to steal and theft. They were sentenced as follows: C

> "Each 18 months' imprisonment of which nine months' imprisonment are suspended for five years on condition accused does not within that period commit an offence involving dishonesty and for which accused is sentenced to imprisonment without the option of a fine. The remaining nine months' imprisonment are suspended on condition accused completes 300 hours of community service at Gwenzi Secondary School with effect from 26/ 02/03 as from 0800-1300 and 1400-1600 hours excluding weekends and D holidays. To report to the Headmaster of Gwenzi Secondary School."

The facts which gave rise to this matter are that on the night of 6 December, 2002 the two accused persons broke and entered the complainant's house and stole various items of household property valued at $93 000. On 17December 2002 the accused were arrested and property valued at $61000 was Recovered. E

The conviction is proper and is hereby confirmed.

In respect to the sentence imposed, whilst I had no difficulty with the term of the sentence, I had some misgivings with regard to the conditions set out in the Community Service Order. The accused persons, in mitigation had told the court that they were students and attending school at a nearby secondary F school. One of the accused persons was writing his "O" level examinations at the end of the year.

I queried the trial magistrate on why he had ordered the accused persons to perform community service during weekdays when it was apparent from the record that the accused were students and attending school. I also pointed out that the community service officer who had recommended

community service G for the accused persons had also suggested that they perform their sentence during weekends so that it would not interfere with their attendance at school.

The magistrate responded to my query as follows:

> "Kindly place the above matter before his Lordship with the following comments: H

2003 (2) ZLR p3

Guvava J

1. During interview A by the community service officer, scholars are informed in full that during school days they have to do their community service on weekends and holidays.
2. In fact they liaise even with Heads of institutions who can allow them time off on good grounds shown.
3. It is therefore not expected that a Head of an institution can refuse B accused persons who are scholars to attend to their sentence on weekends and holidays.
4. I stand guided."

In my view, the response by the trial magistrate indicates that there is a general lack of understanding of the purpose of orders imposed for community service C and the role of the magistrate when imposing such orders, as a number of cases which have been submitted on review present similar problems.

Where a trial court decides to impose a sentence of community service on an accused person, the court must be guided by the Criminal Procedure and Evidence (Community Service) Regulations 1998, published in SI 12 of 98 ("the Community Service Regulations"). The trial court must inquire into the D full circumstances of the accused person so that an appropriate order befitting the circumstances of the accused may be made. Section 12 of the Regulations makes it mandatory for the court to conduct such an inquiry. In this case, the trial magistrate properly conducted the inquiry and obtained the relevant information pertaining to the accused persons.

E The trial court, however, did not utilize the information gathered to impose an appropriate order. Where atrial court, during the course of inquiry, ascertains that the accused person is employed or is a student it becomes incumbent upon the trial magistrate to take guidance from the *S v Gumbo* 1995 (1) ZLR 162 where Bartlett J said at 168E:

> "It is important for magistrates to be innovative and, where a person is in F employment, to allow community service to be carried out over week-ends or after working hours, by arrangement with the institution concerned."

The sentiments expressed in this case, whilst relating to accused persons who are in employment, are in my view, particularly apt for students who will be attending school. It is pointless to order that they perform the community G service during normal working hours as this will obviously result in them being thrown out of school.

Where the trial court, has decided to order that the community service be performed after hours or at weekends he must reduce the number of hours ordered otherwise the sentence will be excessive. (See *S v Mumbamarwo* H *HH-161-97; S v Gambiza HH-81-2000)*

2003 (2) ZLR p4

Guvava J

Thus, in my view, it is the duty of the trial magistrate when imposing the A community service order to state the hours which the accused must work and the times when the service should be commenced and completed. This is in accordance with s 14 of Community Service Regulations 1998 which provides as follows:

> "14. A community service order shall specify - B
>
> (a) the total number of hours the offender is required to render community service;
>
> (b) the days on which work is to be performed;
>
> (c) the hours of work per day;
>
> (d) the place where the work is to be performed;
>
> (e) C
>
> (f) ...."

The trial magistrate in his response appears to place the responsibility of deciding the times when the offenders should attend to community service work on the head of the institution concerned. This approach is clearly misguided. D

As the trial magistrate in this case intended that the accused persons should continue to attend school, then he was wrong to take the view that he can order community service to be performed every day for a full day and that it is for the offender to then liaise with the head of the institution for time off on good grounds shown. The Community Service Guidelines clearly stipulate that the E head of the institution may only grant time off for matters which come up unexpectedly, for example when an accused has to attend a funeral or when he is sick. Where the hours fixed by the court have become inconvenient either to the institution or to the accused, then the court must be approached to vary the conditions imposed in the order (see s 15 of the Regulations). This provision presupposes that there has been a change in the accused's situation F which was not present at the time of sentence which calls for an amendment to the order. In any event s 15 of the Regulations does not grant the head of the institution the authority to amend the order of the court, but he must seek an amendment of the order from the court. Clearly, therefore it is incumbent upon the trial magistrate, when making the community service order, to impose G conditions which are appropriate to the offender after due inquiry.

In this case, the trial court accepted the recommendation by the community service officer that the accused persons, being scholars, should perform the community service during weekends. The sentence imposed by the trial court should have therefore taken this into account and specifically excluded work during the school days. H

2003 (2) ZLR p5

Guvava J

A The sentence was imposed on 24 February 2003 and was to take effect from 26 February 2003. The accused have in all probability completed their sentence by now and any amendment to the conditions of the order would be purely academic.

I therefore decline to certify the proceedings as being in accordance with real B and substantial justice.

Chinhengo J concurs.

* *Editor's Note:* An appeal was noted against this judgement.
† *Editor's Note:* This decision has only recently become available

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Source:
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BARKER v AFRICAN HOMESTEADS TOURING & SAFARIS (PVT) LTD & ANOR 2003 (2) ZLR 6 (S)

2003 (2) ZLR p6

Citation	2003 (2) ZLR 6 (S)
Case No	Judgment No. S-18-03
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Malaba JA

Heard 9 June 2003

Judgment 7 July 2003

Counsel *E W W Morris,* for the appellant
A P de Bourbon SC, with him *P Nherere,* for the first respondent
No appearance for the second respondent

Case Type Civil appeal

Annotations Link to case annotations

Flynote

Exchange control—*Exchange Control Regulations 1996 (SI 109 of 1996)* C *— s 11 B payment by Zimbabwean resident in foreign currency to non- resident — need for both agreement to pay and payment itself to be authorised by exchange control authorities*

Headnote

The respondent company entered into an agreement to buy a property from the D appellant, who had emigrated from Zimbabwe. Part of the total price was to be paid in Zimbabwean currency and part in US dollars. The appellant sought to resile from the contract as he had subsequently had a better offer. The respondent obtained an order from the High Court restraining the appellant from selling the property to anyone else. On appeal:

Held, that in terms of s 11(1)(a) and (b) of the Exchange Control Regulations, E as read with s 11(2), both an actual payment and an agreement to make payment outside Zimbabwe require authorization by the exchange control authority, except where the act is done by an individual (as opposed to a company, for example) with free funds available to him at the time of the act concerned. There being so such authorization, the F agreement was illegal and unenforceable. In addition, there was no question of the terms of payment of the purchase price of in Zimbabwean currency being severable.

Cases cited

International Who's Who Ltd v Bernstein Clothing (Pvt) Ltd S-28-99 G

Macape (Pvt) Ltd v Executrix, Est Forrester 1991 (1) ZLR 315 (S)

Legislation considered

Exchange Control Regulations 1996 (SI 109 of 1996), ss 10(1)(a), 11 (1) & (2) H

Sandura JA

Case information

A *E W W Morris,* for the appellant

A P de Bourbon SC, with him *P Nherere,* 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 confirmed a provisional order granted in favour of the first respondent and B interdicting the appellant from selling or transferring his immovable property situate in Harare ("the property") to anyone other than the first respondent.

The factual background is as follows. The appellant ("Barker"), who, at the relevant time, had emigrated to Australia, is the registered owner of the property. After emigrating, he instructed his Estate Agents, Robert Root & Co C (Pvt) Ltd ("Robert Root") to sell the property on his behalf.

In June 2001, Mr Robert Bailey ("Bailey"), a director of the first respondent ("African Homesteads"), contacted Robert Root and spoke to Mr Patrick Kennan ("Kennan") and Mrs Pat Brogan ("Brogan"). He informed them that he was interested in purchasing the property through one of his companies, which he later specifically identified as African Homesteads. However, D according to Barker, the first time he knew that the prospective purchaser was African Homesteads was when he received the draft agreement of sale on 28 June 2001. Before that date, he was under the impression that the prospective purchaser was Bailey.

Nevertheless, on 12 June 2001 Bailey made a specific offer by e-mail to Robert E Root to purchase the property for Z$20 000 000. On the same day, Robert Root, by e-mail, acknowledged receipt of Bailey's offer.

Two days later, on 14 June 2001, Bailey by e-mail confirmed his earlier offer and indicated that it would lapse at 3 p.m. on 25 June 2001.

Following further discussions between Bailey and Brogan during the following F week, Bailey sent another e-mail to Robert Root on 22 June 2001 confirming what he had said on 14 June 2001 and requesting Robert Root to urgently advise Barker of the finality of the offer.

Three days later, on 25 June 2001, Bailey received a telephone call from Barker, who was calling from Australia, indicating that he had been notified of the offer and was keen to accept it but required an extension of the deadline G by twenty four hours. The requested extension was granted. It was also agreed that Bailey would pay to Barker in Australia US$32 500 in respect of Z$5 000 000 of the purchase price of $20 000 000. In other words, part of the purchase price was to be paid in Australia in United States dollars, and the other part, i.e. Z$15 000 000, was to be paid in Zimbabwe.

H On the following day, 26 June 2001, Barker telephoned Bailey from Australia

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Sandura JA

advising him that he was accepting his offer to purchase the property, and that A he would confirm his acceptance of the offer with Robert Root. This is, however, denied by Barker. Nevertheless, on the same day Bailey, after the telephone conversation with Barker, contacted Robert Root and spoke to Kennan who informed him that he had been contacted by Barker and that Barker had confirmed his acceptance of the offer. Barker had also instructed Kennan to draft the agreement of sale. B

Subsequently, the agreement of sale was drafted by Kennan and e-mailed to Barker on 28 June 2001. Thereafter, on 1 July 2001 Barker responded by e-mail advising that he had received the agreement of sale, that it looked in order, that he was sending a copy of the agreement to Mr Tim Johnson ("Johnson") for perusal, and that if Johnson was happy with it Robert Root should sign it C on his behalf.

Eight days later, on 9 July 2001, Bailey received a telephone call from Robert Root informing him that Barker had decided to sell the property to someone else at a better price.

In the circumstances, African Homesteads filed an urgent chamber application D in the High Court seeking a provisional order and an interim interdict restraining Barker from selling the property to anyone other than African Homesteads. The order sought was granted on 19 July 2001, and was subsequently confirmed by the High Court on 19 June 2002. Aggrieved by the result, Barker appealed to this court.

Although Barker relies upon a number of grounds set out in his notice of E appeal, in my view this appeal can be disposed of on the basis of one of those grounds, which is that the alleged oral agreement relied upon by African Homesteads was illegal and unenforceable. That is so because in terms of s 11(1) of the Exchange Control Regulations 1996 ("the Regulations"), published in SI 109 of 1996, African Homesteads could not make any payment F outside Zimbabwe, nor could it incur any obligation to make a payment outside Zimbabwe, unless it had been authorized to do so by the exchange control authority.

Subsections (1) and (2) of s 11 of the Regulations read as follows:

"(1) Subjectto subsection (2), unless otherwise authorized by an exchange control authority, no Zimbabwean resident shall - G

(a) make any payment outside Zimbabwe; or

(b) incur any obligation to make a payment outside Zimbabwe.

(2) Subsection (1) shall not apply to -

(a) any act done by an individual with free funds which were available to him at the time of the act concerned; or H

2003 (2) ZLR p9

Sandura JA

A (b) any lawful transaction with money in a foreign currency account".

The term "free funds" is defined in s 2 of the Regulations as:

"money which is lawfully held outside Zimbabwe by a Zimbabwean resident and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe".

B In my view, there is no doubt that in terms of the alleged oral agreement African Homesteads incurred an obligation to pay to Barker, a *fo*reign resident, the sum of Z$ 15 000 000 in Zimbabwe, and the sum of US$32 500 in Australia.

Whilst the agreement to pay Z$15 000 000 to or for the credit of Barker in Zimbabwe would not be unlawful, the actual payment would be unlawful C unless authorised by the exchange control authority. That is so because of the wording of s10(1) (a) of the Regulations which reads as follows:

"Unless otherwise authorised by an exchange control authority, no person shall, in Zimbabwe -

(a) make any payment to or for the credit of a foreign resident".

D However, payments and agreements to make payment outside Zimbabwe stand on a different footing. That is so because in terms of s 11(1) (a) and (b) of the Regulations, as read with s 11 (2), both the actual payment and the agreement to make payment outside Zimbabwe require authorization by the exchange control authority, except where the act is done by an individual (as opposed to a company, for example) with free funds available to him at the time of the E act concerned.

The difference between s 10(1) and s 11(1) of the Regulations was stated by this court in *Macape (Pvt) Ltd v Executrix, Estate Forrester* 1991 (1) ZLR 315 (S) at 320B-D where Mcnally JA said:

"The essential point to be noted is that there is a clear difference between F ss 7 [now s 10] and 8 [now s 11]. The former proscribes only the actual payment. The latter proscribes both the payment and the underlying agreement to pay.

In other words, when one is concerned with payments *inside* Zimbabwe it is perfectly lawful to enter into the agreement to pay. But, without authority from the Reserve Bank, the actual payment may not be made. By G contrast, when dealing with payments *outside* Zimbabwe, it is unlawful even to enter into the agreement to pay, without first obtaining the authority of the Minister, whose powers have been delegated to the Reserve Bank".

More recently, in *International Who's Who Ltd v Bernstein Clothing (Pvt) Ltd* S-28-99 (unreported), this court considered the effect of failing to comply H with the provisions of s 8 of the Exchange Control Regulations 1977

2003 (2) ZLR p10

Sandura JA

(now s 11 of the Regulations). The facts in that case were these. The appellant A was a company registered in England, and the respondent company was registered in Zimbabwe. On 16 November 1995 the appellant and the respondent concluded an agreement in terms of which the appellant was to place two one-page entries in its directory, advertising the respondent's business. The respondent was to pay a fee of 20 540 Swiss francs in South B Africa for onward transmission to Switzerland. Later that day the respondent purported to cancel the contract, but the appellant was not prepared to accept the cancellation, and proceeded to publish the entries in its directory as agreed earlier.

Subsequently, the appellant instituted legal proceedings against the respondent in the High Court claiming payment in terms of the agreement. At the hearing C of the matter the High Court upheld a point *in limine* taken by the respondent and dismissed the claim with costs. The point *in limine* was

that, as the agreement to make payment outside Zimbabwe had not been authorized by the exchange control authority, as required by s 8(1) (a)(ii) of the Exchange Control Regulations, 1977 (now s 11(1) (b) of the Regulations), it was illegal and unenforceable. A subsequent appeal to this court was dismissed with D costs.

In the present case, as the alleged agreement to pay the sum of US$32 500 to— Barker in Australia had not been authorised by the exchange control authority, *cadit quaestio.* That is the end of the matter. The agreement is illegal and unenforceable. In addition, there is no question of the terms of payment of the E purchase price of Z$20 000 000 being severable.

In the circumstances, the appeal is allowed with costs, which costs shall be paid by the first respondent. The order issued by the court *a quo* is set aside and the following is substituted :

"The provisional order issued by the High Court on 19 July 2001 is discharged with costs." F

Ziyambi JA and Malaba JA cocurred.

Wintertons, appellant's legal practitioners

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

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/AIR ZIMBABWE CORPORATION & ORS v ZIMBABWE REVENUE AUTHORITY 2003 (2) ZLR 11 (H)

AIR ZIMBABWE CORPORATION & ORS v ZIMBABWE REVENUE AUTHORITY 2003 (2) ZLR 11 (H)

Citation	2003 (2) ZLR 11 (H)
Case No	Judgment No. HH-96-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	17 June 2003
Judgment	9 July 2003
Counsel	*A P de Bourbon SC,* for the applicants *P Nherere,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Practice and procedure — *parties—company — authority to represent and to sign founding affidavit — need for evidence to show that deponent is authorised to sign — deponent having represented company in previous dealings with other party — effect*

D **Revenue and public finance** — *taxpayer — failure to pay taxes — liability to pay interest on taxes not paid — not liable to pay interest unless specific provision for it — not liable to pay interest as well as penalty*

Headnote

The applicant companies had failed to pay withholding tax as required by the E Income Tax Act [*Chapter 23:06*]. The Revenue Authority assessed that the applicants were each liable to pay penalties and interest in respect of withholding taxes which they did not pay or which they paid late. The applicants sought an order that the Authority was not entitled to charge interest because they had not been notified when the tax was due, but during the hearing the argument became that the respondent was not F entitled to charge interest at all, whether under the, Act because no provision is made to that effect, or under the common law. The respondent argued that the failure to give notification was irrelevant to the charging of interest and that the withholding taxes become due and payable in terms of para 2(1) of each of the relevant schedules as read with s 71(1) of the Act. After further argument, the issue turned out to be whether the G respondent was entitled to charge *mora* interest at common law when there was no provision for him to do so under the Act. The applicants argued that the legislature, except in very specific instances, such as provided in para 8(1) of Schedule 27, imposed either a penalty only or interest only in respect of unpaid or overdue tax, but not both.

H The applicants' founding affidavit was signed by a chartered accountant who

Chinhengo J

was dealing with their tax affairs and who had negotiated with the A Authority on those matters. The respondent challenged the accountant's authority to represent the applicants, averring that no resolution or supporting affidavit by any of the applicants was attached to the founding affidavit to show that the accountant was authorised to make the application on behalf of the applicants.

Held, that where there is nothing before the court to show that an artificial B person has duly authorised the institution of a court application, the respondent may object to the agent's authority. Here, the prior dealings between the accountant's firm and the Authority provided sufficient evidence that when the accountant instituted the proceedings he was acting on the authority of the applicants. C

Held, further that tax legislation in this country has since 1918 proceeded on the assumption that *mora* interest at common law was not payable by either the taxpayer or the Commissioner of Taxes. From that time the question of interest has been dealt with exclusively in terms of the tax legislation. The fact that interest is specifically provided for indicates that it is not otherwise due. D

Held, further, that a taxpayer who defaults in paying any tax due is subjected either to a penalty or to the payment of interest but not both except in the instances specifically provided for in the Act. This general design seeks to compensate the Authority by way of interest only or, alternatively, by way of penalty only, where he has been deprived of the use of money by E a defaulting taxpayer. In the case of withholding taxes in respect of dividends, and/or royalties, and or interest and/or fees the Authority is limited to compensation for the deprivation of the use of the money by way of a penalty only.

Cases cited F

Bopoto v Chikumbu & Ors 1997 (1) ZLR 1 (H)

Coffee, Tea and Chocolate Co Ltd v Cape Trading Co 1930 CPD 81

CoT v F Kristiansen (Pvt) Ltd 1994 (1) ZLR 412 (S)

Direct Response Marketing (Pvt) Ltd v Shepherd 1993 (2) ZLR 218 (H)

Ellis NO v CoT 1994 (1) ZLR 423 (S)

Gudza v University of Zimbabwe HH-85-95 G

Kadir & Sons (Pvt) Ltd v Panganai & Anor 1996 (1) ZLR 598 (S)

Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C)

Mashave & Ors v Zupco & Anor 2000 (1) ZLR 478 (S)

Mobil Oil Zimbabwe (Pvt) Ltd v Travel Forum (Pvt) Ltd 1990 (1) ZLR 67 (H)

Prosser & Ors v ZISCO HH-201-93 H

Chinhengo J

Legislation considered A

Income Tax Act [*Chapter 23:06*], ss 71, 72 and 73; Schedule 27

Case information

A P de Bourbon SC, for the applicants

P Nherere, for the respondent

Judgment

B **Chinhengo J:** The applicants are all limited liability companies incorporated and carrying on business in Zimbabwe. They all are obliged, from time to time, to pay dividends and/or interest and/or fees and/or royalties to non-resident persons in terms of ss 26, 29, 30 and 32 and the schedules thereto of the Income Tax Act [*Chapter 23:06*] ("the Act"). The dividends, C interest, fees and royalties are subject to withholding taxes payable in terms of the schedules to the above mentioned sections of the Act - Schedules 9, 16, 17 and 19. Over the years from 1998 to 2000 the applicants failed to pay withholding taxes to the respondent. The respondent assessed that the applicants were each liable to pay penalties and interest in respect of withholding taxes which they did not pay or which they paid late. In this D application, the applicants are concerned only with the demand by the respondent that they pay interest on the withholding taxes from the date(s) on which they should have been paid. They contend that the respondent is not entitled to claim interest on those amounts at all. From my quick addition of the amounts claimed by the respondent, the applicants would owe, by way of E interest, a total of $85011 844.14. The amounts owed by each of the applicants appear in the founding affidavit. The applicants' contention is that no provision is made in the Act for interest to be paid on the amounts concerned.

The respondent avers that it is entitled to charge interest on withholding taxes that are not paid on due date. The due date in terms of Schedules 9,16,17 and 19 of the Act is thirty days of the date of distribution of the dividend or the F payment of the fees, interest or royalties. It is not in dispute that the applicants failed to pay the withholding taxes with in the prescribed period. The respondent contends that at common law *mora* interest starts to run as soon as a debt is due and payable and that the taxes that remain outstanding have become debts owed to the State. The respondent says that it is entitled to *mora* interest G because there is no statutory provision to the contrary.

There are certain contentions made by the parties which have become irrelevant because of concessions made at the hearing. One such contention was that whereas the respondent purports to have claimed from the applicants *mora* interest in terms of the common law, it had in fact claimed statutory H interest in terms of the Act at the rate prescribed in the Income Tax Regulations.

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At the hearing, Mr *Nherere* conceded that the claim as originally made by the A respondent was indeed for statutory interest at 35 per cent *per annum*. He said that the opposing affidavit, however, clearly indicates that the claim is for mora interest in terms of the common law at the prescribed rate of interest of 30 per cent *per annum* in terms of the Prescribed Rate of Interest Act [*Chapter 8:10*]. The other contention was whether the respondent was entitled to charge B statutory interest on unpaid withholding taxes. It became common cause at the hearing that he was not entitled to charge such interest at all. The issue before me, therefore, is simply whether the respondent is entitled to charge *mora* interest in terms of the common law on overdue payments of withholding taxes.

At the hearing the applicants amended the order which they seek. The amended C order reads:

> "It is ordered:

1. That it is declared that the Respondent is not entitled to charge interest on the late payment of withholding taxes that was payable by the applicants. D
2. That the Respondents pay to the Applicants any amounts received by or paid to the Respondent in respect of interest charges allegedly due to the Respondent by the Applicants in respect of the Applicants' failure to pay withholding tax on dividends and/or interest and/or royalties and/or fees paid to non-resident persons.
3. That the Respondents pay interest at the prescribed rate from the date E of receipt to the date the amount is refunded in full.
4. That the Respondent pay the Applicants' costs."

The deponent to the applicants' founding affidavit is a tax director of Ernst & Young, a firm of chartered accountants, which was employed to assist the applicants with their tax affairs. Ernst & Young had dealt with the respondent F on behalf of the applicants in respect of their withholding tax assessments and alleged liabilities. Ernst & Young had negotiated with the respondent with regard to those matters. It had written letters of objection to the respondent on behalf of some of the applicants. It had obtained the details of the amounts claimed as interest by the respondent from the respondent. It had therefore acted on behalf of the applicants in its dealings with the respondent. The G respondent, however, challenged, in this application, the applicants' deponent's authority to represent the applicants, averring that no resolution or supporting affidavit by any of the applicants was attached to the founding affidavit to show that the deponent to the founding affidavit was authorised to make the application on behalf of the applicants. The respondent relied on several cases as supportive of its challenge of the authority of the deponent to the H

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A applicants' affidavit: *Direct Response Marketing (Pvt) Ltd v Shepherd* 1993 (2) ZLR 218 (H); *Mall (Cape) (Pvt) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C); and also on *Prosser and Others v Zimbabwe Iron & Steel Co Ltd* H-201-93, *Gudza v University of Zimbabwe* H-85-95 and *Mashave & Ors v Zupco & Anor* 2000 (1) ZLR 478 (S). *Kadir & Sons (Pvt) Ltd v Panganai & Anor* 1996 (1) ZLR 598 (S) was also cited as supportive authority. Nowhere B in *Kadir & Sons* does the judge deal with the *locus standi* of any of the parties. It is quite possible that counsel for the respondent picked on that case simply because it is referred to (albeit in a different context) in the *Direct Response* case above.

It is accepted that a company does not function on its own but through an agent C authorised by it to do so and that where there is nothing before the court to show that an artificial person has duly authorised the institution of a court application, the respondent may take objection to the agent's authority. The agent's authority is proved by a resolution passed by the company which he represents and if challenged in that regard the agent should produce it. In *Mall (Cape) supra* Watermeyer J in this regard said at 351G-352B:

> D "There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example *Lurie Brothers Ltd v Arcache* 1927 NPD 139, and other cases mentioned in Herbstein and van Winsen *Civil Practice of the Superior Courts of South* E *Africa* at pp 37 & 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence must be placed before the court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an F attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court G must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court, then I consider that a minimum of evidence will be required from the applicant *(Parsons v Barkly East Municipality* 1952 (3) SA 595 (E); *Thelma Court Flats (Pvt) Ltd v McSwigin* 1954 (3) SA 457 (C)" H

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This passage was quoted with approval in *Direct Response (supra).* In all the A cases referred in the respondent's heads of argument the emphasis is placed on the quantum of evidence placed before the court to show that the applicant has resolved and authorised to institute the proceedings. The emphasis is not on the fact to be proved. In the present case, the deponent averred that Ernst & Young have acted as agents for the applicants in negotiations with the B respondents on their tax affairs and that it obtained all information it required to help the applicants in these affairs from the respondents. It averred that the respondents became aware that Ernst & Young was acting for the applicants and would thus have no legitimate reason to object to their representative capacity or their authority to institute the present proceedings on behalf of the applicants. That averment would appear to have been weakened to some extent C by the sixth respondent, which dissociated itself from the application. Significantly, though, the sixth respondent did not allege, as one would have expected, that it had not authorised Ernst & Young to institute the proceedings on its behalf. The dissociation was made by counsel orally at the hearing. In the answering affidavit, the applicants' deponent undertook to produce affidavits from each of the applicants if the respondent persisted in its D objection. Indeed, at the hearing of the application, Mr *de Bourbon* was in possession of affidavits from eight of the applicants to the effect that Ernst & Young was authorised to institute the proceedings. He also indicated that affidavits from the remaining applicants, except the sixth applicant, could be obtained if required. The prior dealings between Ernst & Young and the E respondent provides sufficient evidence that when Ernest & Young instituted the present proceedings it was acting on the authority of the applicants. Its authority to do so was also proved by the affidavits from some of the applicants filed pursuant to the undertaking made by the applicants' deponent in para 3.4 of the answering affidavit. I am quite satisfied that the deponent to the applicants' affidavit was, on the evidence placed before me, authorised to F make the application on behalf of the applicants. I do not attach weight to the sixth applicant's dissociation because the sixth applicant did not give reasons for doing so nor did it specifically allege that the deponent was not authorised by it to act on its behalf. Its reasons for dissociating itself from the application remained unclear. Evidence was led from the bar as to the sixth respondent's dissociation but I also do not attach any weight to that evidence. I may in G passing observe that it is often that litigants take objection to the other party's *locus standi* to institute proceedings. I do not think that it is proper for any litigant to do so especially where, from prior dealings, he should be aware that the challenge to his adversary's *locus standi* will not succeed.

I now proceed to deal with the merits of the issue arising for determination in H this application. I must first note that the issue as identified by the applicants

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A in their founding affidavit was whether the Commissioner is entitled to charge interest on unpaid withholding taxes where he has not notified the applicants of the due date of the taxes as required s 71 of the Act. In para 16.2 of the founding affidavit it is stated:

> "The Applicants contend that the Respondent is not entitled to claim interest at all because it is common cause that the Respondent did not B notify any of the Applicants of the date that the tax became due and payable as required by s 71 of the Act. The applicants contend that failure to notify them of the said date prevents the Respondent from recovering interest."

This averment would be a concession that the respondent was otherwise entitled to claim interest on the unpaid taxes if only he had notified the C applicants about the date when the taxes became due and payable. That this was the issue as perceived by the respondent is reflected in para 1 of the draft order where the relief originally sought was:

> "That it is declared that the Respondent is not entitled to charge interest on the late payment of withholding taxes that was payable by the applicants *because of the Respondent's failure to notify the Applicants and specify* D *in that notification a date on which the taxes became payable* " (emphasis is my own).

In the opposing affidavit, in para 22, the respondent correctly pointed out that s 71 (2) has no application to the withholding taxes claimed by the respondent. He also pointed out that his failure to give notification was irrelevant to the E charging of interest. He further correctly pointed out that the withholding taxes become due and payable in terms of para 2(1) of each of the relevant schedules as read with s 71 (1) of the Act. The respondent then went on to give the legal basis on which he purported to claim interest. He stated in para 22.8 of the opposing affidavit that:

> "From the foregoing, it is quite clear that withholding taxes become due and payable as per the schedules and a notification from the Commissioner is not necessary or required to make the withholding taxes due and payable. Once they are due and payable the withholding taxes become a debt owed to the State. At common law, *mora* interest starts running as soon as a debt is due and payable. Notification by the Commissioner is not necessary in order for interest to start running. There is a presumption in our law that the legislature is taken not to intend to alter the common law unless this emerges quite clearly from the legislation."

In the answering affidavit the applicants pointed out that the respondent had not claimed *mora* interest in terms of the common law but statutory interest in terms of the Act and the regulations made thereunder.

The parties to this application do not appear to have thought through the

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relevant issues from the very beginning. The respondent does not dispute that its claim as originally made against the applicants in respect of interest was for interest at the rate prescribed by the Act. Yet in its answering affidavit it states that it was claiming *mora* interest in terms of the common law and gives the impression that that had been its claim right from the beginning. It is significant, however, that it was the respondent who brought to the fore the question whether or not the respondent is entitled to claim *mora* interest in terms of the common law. The applicants also changed course when in their heads of argument and at the hearing they conceded that the position which they had adopted in their affidavits was not correct. They submitted that the issue was not whether the respondent was disentitled from claiming interest on withholding taxes not paid because he did not notify the applicants about the dates when those taxes became due and payable: it was that the respondent is not entitled to charge interest at all, whether under the Act because no provision is made to that effect, or under the common law. As I have already stated, the issue before me turned out to be this: whether the respondent is entitled to charge *mora* interest at common law when there is no provision for him to do so under the Act.

Counsel for the respondent submitted that the applicants had abandoned the cause of action as set out in the founding affidavit and the relief as set out in the draft order and for that reason their application must be dismissed. For this submission respondent's counsel relied on the following cases: *Coffee, Tea & Chocolate Co Ltd v Cape Trading Co* 1930 CPD 81 at 82; *Mobil Oil Zimbabwe (Pvt) Ltd v Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 69-70 and *Bopoto v Chikumbu & Ors* 1997 (1) ZLR 1 (H). Indeed these cases lay down the principle that an applicant stands or falls on his or her founding papers and may not raise a different cause of action in his or her answering affidavit. In *Mobil Oil supra* Reynolds J said at 70C-E:

> "It is a well established general rule of practice that new matter should not be permitted to be raised in an answering affidavit: the cause of action must be fully set out in the founding affidavit. This has been the settled practice of our courts at least since the matter was adverted to in Coffee, *Tea & Chocolate Co Ltd v Cape Trading Co* 1930 CPD 81 at 82. As remarked by Samatta J, however, in *Milton v Alcock NO & Ors* HH-21-87 at p 7 of the cyclostyled judgement:
>
> > 'It is, like other procedural rules, subject to the overriding discretion of the court. In the exercise of such discretion, the court would, obviously, only sanction a departure from the general rule on good cause shown."

The position of the applicants in this case would appear to be worse than the position in the cases cited above, because, unlike in the cases cited above where new-matter was introduced or the cause of action was changed in the

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answering affidavit, in the present case the new cause of action was not at all raised in the answering affidavit but only in the heads of argument. This would provide a point of distinction between this case and those referred to above. The case which the applicants made in the heads of argument and in the submissions to the court was different from the case which they had made in the affidavits. I do not however think that the application should be dismissed for this reason. The respondent is the one who brought to the fore the real issue for determination in this application. Having done so it would, in my view, be an improper exercise of the discretion reposed in me to dismiss the application for the reason that the applicants argued a different case to the one made in

their affidavits. I am satisfied that the proper exercise of discretion calls for a determination of the issue not only as placed before me by the respondent C himself by way of the opposing affidavit but also as canvassed in the heads of argument by the parties and argued by them in court.

It was conceded by both parties that s 71 (2) of the Act is not applicable to this case. I agree. The issue for determination is whether the respondent is entitled to charge *mora* interest in terms of the common law where this is not provided D for in the Act. The issue was dealt with from a different angle in *Commissioner of Taxes v F Kristiansen (Pvt) Ltd* 1994 (1) ZLR 412 (S) where the court decided that whilst under the common law there is no immunity for the fiscus from payment of interest, the legislation relating to income tax in Zimbabwe imposed an obligation on a taxpayer to pay interest on unpaid tax but did not impose an obligation on the Commissioner of Taxes to pay interest on refunds. E The court *(per* Gubbay CJ) disapproved of the reasoning of the judge in the court *a quo* and said at 419C-G:

> "The learned judge a *quo* reasoned as follows. Under the common law interest is payable where there is an agreement to pay it or if there is a default or mora on the part of the defendant; the sections of the Income Tax Act which make provision for the repayment of excess tax, and in F particular s 37 (1) pursuant to which the Commissioner repaid the amount of $12 535.70, are silent on interest payable to the taxpayer; and if the lawmaker had intended that the taxpayer should be deprived of the payment of interest, which constitutes an alteration of the common law, it would have done so expressly and not relied upon implication. Cited in support of the well accepted rule that a legislative intention to amend or G modify the common law must not be presumed but must be obvious from the plain words used were the cases of *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823; *Seluka v Suskin & Salkow* 1912 TPD 258 at 263; *Glen Anil Finance (Pvt) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liq)* 1981 (1) SA 171 (A) at 181H- H 182D.

2003 (2) ZLR p20

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> The difficulty with that line of reasoning lies in the existence of a clear A distinction in the Income Tax Act between the provisions of s 60(2), which expressly states that interest on unpaid tax *shall be payable by the taxpayer,* and the provisions in ss 37 and 39 and elsewhere in the Act, which provide for the refund to the taxpayer by the Commissioner of overpayments.
>
> The omission of any mention of interest in the latter two sections is thus B not colourless, as otherwise it might be. The fact that one of the two parties in the tax relationship, i.e. the taxpayer, is required to pay interest, while there is no reference to the other party, the Commissioner, having to do so, is *prima facie* a strong indication that it is not intended that the Commissioner be liable to pay interest on overdue refunds".

The learned Chief Justice then traced the history of tax legislation in this C country. He observed that The War Taxation Ordinance 20 of 1918 made no provision for the payment of interest by either the taxpayer or the Commissioner of Taxes. Ordinance 12 of 1922 altered the position by amending s 58 of the 1918 Ordinance to allow the Commissioner of Taxes to charge interest at eight per cent *per annum* on unpaid or overdue tax but it did not change the position D to provide for the payment by the Commissioner of Taxes of interest on the refund due by him on the overpayment of tax. The 1938 legislation [*Chapter 134* of the 1939 Edition of Statutes] maintained the distinction. The Federal Income Tax Act 16 of 1954 also maintained the distinction. The present Act maintained the same distinction. He then said at 420H-421 B:

> "Thus, for the last 72 years the income tax legislation in this country has E consistently differentiated between the obligation of the taxpayer with regard to interest, and the obligation of the Commissioner in that regard.
>
> The differentiation was specifically introduced in 1922. If it had been assumed that by common law both the fiscus and the taxpayer were liable to pay interest, it would not have been necessary to make the amendment. It must have been considered that neither party was liable to pay interest F under the 1918 Ordinance. So the amendment was introduced for the purpose of making the taxpayer liable. The failure to make any similar provision in relation to the Commissioner was thus pointed and manifestly deliberate."

The decision in *Kristiansen 's* case on this point was based on an interpretation of legislative enactments since 1918. The position, as it emerges from this case G is, therefore, that under the tax legislation of this country the taxpayer was required from 1922 to pay interest on unpaid overdue tax whereas the Commissioner was not required to pay interest on the refund due on the overpayment of tax. It also emerges that since that time it has been accepted that neither the Commissioner of Taxes nor the taxpayer was required to pay H

2003 (2) ZLR p21

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A mora interest in terms of the common law on any amount due by him to the other. Mr *de Bourbon* relied on *Kristiansen's* case, above, for the contention that the question of interest has always been dealt with in terms of the Act to the exclusion of the common law and that, as such, there was no basis for the same reasoning not to be applied to the present case. He submitted that if the common law applied and the taxpayer was required to pay *mora* interest then B it would not have been necessary for the taxpayer's liability for interest to be expressly set out in ss 71 (2), 72(6), 73(3) and Schedule 27 of the Act. He also submitted that if it had been intended that the taxpayer should pay interest on unpaid or overdue tax in other cases where the time for payment is fixed by the Act then that should have been specified.

C Mr *de Bourbon* also submitted that the legislature, except in very specific instances, such as provided in para 8(1) of Schedule 27, imposes either a penalty only or interest only in respect of unpaid or overdue tax and not both. He cited s 71, 72 and 73 of the Act as specific instances where no penalty is provide when interest is.

Mr *Nherere* submitted that *mora* interest in terms of the common law is due D and payable on any debt from the time that such debt becomes due and payable and that in this case mora interest is payable from the time that the withholding taxes were not paid after they became payable. He countered Mr *de Bourbon's* argument about s 71 (2, 72(6) 73(3) and para 8(1) of Schedule by saying that those sections are concerned with statutory interest as fixed by the Minister E by Statutory Instrument. That he says does not exclude *mora* interest in those cases where no rate of interest has been fixed by statute.

In my view, I do not think that Mr *Nherere* fully appreciate the basis of the decision in *Kristiansen's* case above. From the passages I have quoted in this judgment it is clear that the Supreme Court approached the matter in this way: Before the enactment of the 1918 Ordinance the position was that both the F Commissioner and the taxpayer were, or may have been, required to pay *mora* interest at common law. On its enactment, the 1918 Ordinance did not provide for the payment of interest either by the taxpayer or the Commissioner. The 1918 Ordinance was amended in 1922 by Ordinance 12 of 1922 and it disregarded the position a common law. It, as it were, proceeded on the assumption that *mora* interest at common law was not payable by either the G taxpayer or the Commissioner of Taxes. From then on the question of interest has been dealt with exclusively in terms of the tax legislation of this country. In terms of that legislation the taxpayer has been required to pay tax on unpaid oroverduetax in specified instances. Where the legislation has not specifically required the taxpayer to pay interest the position remains what it has been H since 1918, i.e. that the taxpayer does not pay *mora* interest at common law.

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The whole matter therefore must be viewed against the analysis of the tax A legislation made in *Kristiansen's* case *supra* and the decision reached therein that "If it had been assumed that by common law both the fiscus and the taxpayer were liable to pay interest, it would not have been necessary to make the [1922] amendment. It must have been considered that neither party was liable to pay interest under the 1918 Ordinance. So the amendment was B introduced to make the taxpayer liable."

It is logical then to say that after the 1992 amendment the taxpayer became liable to pay interest only in those instances where he is specifically required to do so by legislation. I am satisfied that if the common law were to apply then it would not have been necessary for liability for interest to be expressly provided for in s 71 (2), 72(6), 73(3) and Schedule 27 of the Act, albeit that this C liability is for statutory interest.

An additional comment which supports the view that I have taken of this matter is that the amendment to s 71 (1) which was introduced by s 15 of the Finance Act 18 of 2000 only dealt with the question when tax becomes due and payable. That section now provides that tax becomes due and payable on a date D as may be fixed or prescribed under the Act or on a date as may be notified by the Commissioner. In ss (2) of s 72 provision is made for a taxpayer who is in default of payment of tax to pay interest at the statutory rate but only in the situation where he had been notified by the Commissioner about the tax having become due and payable. It seems to me that the legislature may have inadvertently omitted to carry through the purpose of the amendmentto s 71 (1) E of the Act when it did not amend s 71 (2) to require the taxpayer to pay interest. at the

statutory rate on unpaid or overdue tax where that tax becomes due and payable by operation of law. If that was not an inadvertent omission, then quite clearly the legislature did not intent that a defaulting taxpayer should pay interest, whether at common law or under statute, on late payments.

At the hearing of this matter I invited counsel for both parties to make F additional submissions on the point as to whether there were any instances in which the respondent was entitled to levy penalties as well as to charge interest in respect of unpaid or overdue taxes. The only instances that were brought to my attention were those provided in ss 71 and 73 as read with para 10 of the 13th Schedule and para 8 of the 27th Schedule to the Act — respectively G concerning unpaid tax where the Commissioner has given notification in terms of s 71(1), employees' tax and the demutualisation levy.

It seems to me that the general design under the Act is that a taxpayer who defaults inpaying any tax due is subjected either to apenalty or to the payment of interest but not both except in the instances specifically provided for in the Act. It seems to me that this general design seeks to compensate the H

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A Commissioner by way of interest only or alternatively by way of penalty only where he has been deprived of the use of money by a defaulting taxpayer. In the case of withholding taxes in respect of dividends, and/or royalties, and or interest and/or fees the Commissioner is limited to compensation for the deprivation of the use of the money by way of a penalty only.

Counsel for both parties did not specifically address the question of interest B to he paid on the sums that will be due to the applicants as a result of this judgment. I do not think, however, that it would be fair to order the Commissioner to pay interest on those amounts. The applicants did not advance any good reasons as to why they failed to pay the taxes. They gave various reasons such as inadvertence, ignorance and inability to source foreign currency. I do not C think these reasons should in the absence of substantiation be accepted as valid for all the applicants or for any one of them. For this reason I will not order the respondent to pay interest on the amounts which will be due to the applicants as a result of my decision despite the decision in *Ellis NO v CoT* 1994 (1) ZLR 423 (S).

In respect of costs, again not much was placed before me on which to make an D informed decision. I have noted elsewhere in this judgment that both the applicants and the respondent altered their cases — the applicants in regard to the cause of action as appears from their affidavits and the respondent in regard to whether what he claimed originally was statutory interest or *mora* interest. The applicants only raised the real issue between the parties in the E heads of argument and I think they have sufficiently benefited from my exercise of the discretion reposed in me in their favour. Their papers were also deficient in a number of respect e.g. the failure by the instructing attorney to sign the court application (which did not become a matter of moment, hence I have not dealt with it in this judgment) and the lack of timeous substantiation of their deponent's authority to institute these proceedings. If the applicants' F legal practitioners had attended to these matters with the presence of mind necessary in these matters much of the time devoted to argument on these issues would have been saved and my judgment would not have had to deal with them. I will mark my disapproval of the manner in which they handled this application by denying costs to the applicants even though they have succeeded on the merits.

G On the authority of *Kristiansen's* case supra and in reliance on what I think is the general scheme of things under the Act and for the reasons I have given I make the following order:

> "1. That it is declared that the Respondent is not entitled to charge interest on the late payment of withholding taxes which were or are H payable by the Applicants.

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> 2. That the Respondent pay to the applicants any amounts received by A or paid to the Respondent in respect of interest allegedly due to the Respondent by the applicants in respect of the Applicants' failure to pay withholding taxes on dividends and/or interest and/or royalties and/or fees paid to non-resident persons. The Respondent shall not be required to pay interest on these amounts unless he fails to pay them within 30 days of the date of this judgement in which event the B Respondent shall

pay interest on those amounts at the prescribed rate of interest from the date of this judgment to the date the amount is refunded in full.

3. Each party shall pay its own costs."

Atherstone & Cook, applicants' legal practitioners C

Kantor & Immerman, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/MEDIX PHARMACIES (PVT) LTD & ORS v COMMISSIONER-GENERAL, ZRA & ANOR 2003 (2) ZLR 25 (H)

MEDIX PHARMACIES (PVT) LTD & ORS v COMMISSIONER-GENERAL, ZRA & ANOR 2003 (2) ZLR 25 (H)

Citation	2003 (2) ZLR 25 (H)
Case No	Judgment No. HH-102-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	7 April 2003; 23 April 2003
Judgment	9 July 2003
Counsel	*A P de Bourbon SC,* for the applicants *P Nherere,* for the respondents
Case Type	Opposed urgent application
Annotations	No case annotations to date

Flynote

C **Revenue and public finance**—*income tax — employer — liability to withhold and pay employees' tax — reduction of salaries — scheme to reduce employees' tax burden — when genuine — tax — recovery of — Revenue Authority's right to appoint taxpayer's bank as its agent — when tax due — salary or tax liquidated or readily ascertainable — Authority entitled* D *to act under s 58 of Income Tax Act [Chapter 23:06]*

Headnote

The applicant companies set up a scheme to reduce the tax burden on their higher level employees. The scheme involved the employees accepting a lower direct salary, but having the balance of their former salaries paid into an investment scheme, from which they would receive a loan, which E was taxed at a lower rate than salaries would be. There was a close relationship between the applicants and the company administering the investments. The respondent, the Zimbabwe Revenue Authority (ZRA), took the view that the arrangement was a tax evasion scheme. It invoked s 58 of the Income Tax Act [*Chapter 23:06*], appointed the applicants' F bank as its agent and uplifted the amounts from the applicants' bank accounts on the grounds that the applicants

had failed to withhold the correct amount of PAYE from the employees. The amounts taken included a penalty and interest.

The applicants contended that (1) the ZRA was not entitled to invoke its powers under s 58 until or unless it has been determined that any tax is G due by an employer; (2) the scheme was a legitimate method by which the applicants' employees were able to take advantage of favourable tax provisions in the Act; (3) the salary sacrifice made by the employees was permissible, as was the payment of the loan subsidy by the employer in order to enable the employee to obtain a loan at a non-taxable rate of H interest; (4) if the ZRA's action were not declared to be unlawful, it

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would result in double taxation of the employees as they would be taxed A on the income which they are said to have received and on the investment income which they received in terms of the scheme; (5) the ZRA's calculations were erroneous; (6) the ZRA should have awaited the outcome of the consultations which were ongoing before it uplifted monies from the bank.

The ZRA argued that (1) it had the option to proceed in terms of s 58 and B recover unremitted tax by way of a garnishee order or to proceed by court action in order to recover the tax; (2) the scheme was a tax evasion scheme, the purported salary sacrifice being actually just a salary split resulting in only one part of the salary going through the payroll.

Held, that the amount of the salary sacrifice made by employees assumed the C appearance of investment income and was given that label when it was ultimately paid to and received by the employees, but the loan transactions were not genuine.

Held, further, that the ZRA was entitled to resort to the use of s 58 where tax was due. There are two types of amounts in respect of which an employer becomes personally liable to the ZRA. The first arises from a failure by D the employer to withhold employees' tax either because he has not calculated what it is or because he has simply neglected to withhold it even though he was aware what that amount was. The second type arises from a failure by the employer to pay or remit the employees' tax to the Commissioner-General after he had withheld it, i.e. after he has deducted E it from the employees' salary. This type is invariably always readily ascertainable as the employer will have already determined what it is and has deducted it from the employee's salary but has for some reason, or for no reason at all, simply failed to pay or remit it to the ZRA. In respect of this type the ZRA may act in terms of s 58 of the Act to recover it from the employer. The amount would be sufficiently liquidated such that the F ZRA could obtain summary judgment on it.

Held, further, that the ZRA had erred in its calculation of what was due to it. The employees had paid tax on the "loans", although that tax was at the lower rate applicable to investment income rather than the higher rate applicable to salaries. Consequently, the ZRA was not entitled to act on the basis of the employees having paid no tax at all on the sacrificed G portion of their salaries.

Cases referred to

Edgars Stores Ltd v CoT 1996 (2) ZLR 747 (S)

Endeavour Foundation & Anor v CoT 1995 (1) ZLR 339 (S) H

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Legislation considered A

Income Tax Act [*Chapter 23:06*], s 58 & 73; Thirteenth Schedule, paras 3, 10&12

Case information

A P de Bourbon SC, for the applicants

B *P Nherere,* for the respondents

Judgment

Chinhengo J: The applicants in the above-cited cases adopted a system known as the Integrated Remuneration System (IRS) to incentivise and retain their higher level employees by increasing the amount of money in their pockets. This they sought to do by taking advantage of certain provisions of C the Income Tax Act [*Chapter 23:06*] ("the Act"). The applicants were, and still are, of the view that the IRS is permissible under the Act. Each of the applicants maintains banking accounts with the second respondent ("Barclays Bank").

The first respondent ("the Commissioner-General") held a different view D about the IRS. His view was that the IRS is a tax evasion scheme which was adopted by the applicants for the purpose of avoiding their having to withhold a portion of the tax payable by the employees (PAYE) which, in the absence of the IRS, they would have been required to withhold and to pay to the Commissioner-General.

After adopting the IRS, the applicants withheld lesser amounts of PAYE E which were commensurate with the reduced remuneration of the employees. The Commissioner-General took action in terms of s 58 of the Act and availed himself of some of the applicants' funds held by Barclays Bank. In the case of Meikles Africa Ltd and Tanganda Ltd, the Commissioner-General's officers uplifted from their accounts with Barclays Bank the sums of $ 13 261 F 175.55 and $46 817 107.43 respectively. In the case of Medix Pharmacies (Pvt) Ltd and Ernst and Young Chartered Accounts, the Commissioner-General's officers could not uplift any amount because their banking accounts were in overdraft.

For the reasons that will appear later, the applicants contended that the Commissioner-General was not authorised to act in the manner he did. The G applicants accordingly sought:

(a) a declaration that the Commissioner-General is not entitled to issue an assessment in respect of any alleged indebtedness by the applicants for payment of PA YE said to be payable in terms of the 13th Schedule as read with s 73 of the Act;

H Alternatively

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that the Forms P12 issued by the Commissioner-General are not A assessments issued in terms of Part V of the Act and that the Forms ITF 227 also issued by the Commissioner-General are invalid and of no force and effect;

(b) an order that, in respect of Meikles Africa Ltd and Tanganda Ltd, the Commissioner-General forthwith pay to Barclays Bank the sums of B money uplifted from their accounts together with interest at the prescribed rate of interest calculated from 4 April 2003.

The applications were placed before me on an urgent basis. I acceded to the urgency of the applications at the preliminary hearing on 7 April 2003 and I gave my reasons for doing so. I shall not state those reasons now because none of the parties took issue with that decision. At the same hearing, the parties C agreed that I should finally determine these matters and not merely determine whether or not I should grant a provisional order as initially requested of me. At the resumed hearing on 23 April, these matters were fully argued after the parties had filed the necessary affidavits and the heads of argument.

The Integrated Remuneration System D

It is necessary that I clearly outline the nature of IRS and its implementation. Such an outline will provide a basis for a proper appreciation of the causes of this application and in particular the conduct of the Commissioner-General.

The applicants adopted the IRS between May 2001 and February 2003. The parties involved with the IRS entered into various agreements as follows. E

(a) The Integrated Remuneration System Agreement

This was an agreement entered into between an employer being any one of the applicants and Twinsburg Investments (Private) Ltd trading as Remserve ("Remserve"). This agreement was motivated by the employer's wish to assist certain of its higher level employees to obtain loans at concessionary rates. In F terms of this agreement, Remserve agreed to make loans to employees

nominated by the employer on the conditions that *Remserve* sourced funds at or below a rate agreed with the employer ("the agreed rate"); the employee signed a loan agreement with Remserve, in terms of which the employee obtained the loan and agreed to invest the whole of the amount of the loan in debentures issued by Rebuttal Trading (Pvt) Ltd ("Rebuttal") and to cede to G Remserve his rights in the debentures; Remserve agreed to grant loans to the employees at an interest rate of 16 per cent *per annum.* The employer agreed to pay to Remserve as a loan subsidy an amount equal to the difference between the agreed rate and 16 per *cent per annum* ("the subsidy payment"). Remserve also agreed to certain other obligations which were in line with its H

A general obligation, assumed in terms of the agreement, to administer the IRS on behalf of the employer. These other obligations encompassed the obligation to —

(i) invest on behalf of the employee the loan amount in debentures;

(ii) ensure that valid debenture certificates were issued in favour of the employee; B

(iii) retain the debentures as security for the loan;

(iv) receive payment of interest earned on the debentures on behalf of the employee,

(v) deduct from the interest earned on the debentures the amount due to Remserve as interest on the loan and pay the balance to the employee; C

(vi) redeem the debentures on their maturity on behalf of the employee and use the proceeds to repay the employee loan; and

(vii) provide the employee in each year with a tax certificate detailing the interest income earned by the employee in respect of the debentures for the previous income tax year.

The other provisions of the agreement such as those relating to the rendering D of other assistance to the employee upon request by such employee, the payment by the employer of an administration fee, the payment by the employee of the normal fee for the management of the investment, the indemnities granted to some parties involved in the IRS, the termination of the agreement and dispute resolution are not directly relevant to the determination of the issues before me. It is important to appreciate that the IRS is administered E by Remserve on behalf of the employer in terms of this agreement.

(b) Employee Loan Agreement

An employee who was nominated by the employer as a beneficiary of the IRS entered into a separate agreement with Remserve. This agreement contained general terms on which the loan was granted by Remserve to the employee. The F amount of the loan, its period, the draw-down date, repayment date, interest payment frequency and date were provided for in this agreement. In brief, the agreement provided that the employee was granted a specified amount as a loan, which he ceded to Remserve as security for the loan his/her rights in terms of the debentures or other acceptable security. Remserve invested the G full amount of the loan in debentures on the employee's behalf. These conditions also complied with the terms of the agreement entered into between the employer and Remserve referred to in (a) above.

(c) Investment Agreement

Where an employee elected that Remserve shall invest the amount of the loan H granted to him, as he was required to do for all intents and purposes, the

employee entered into an investment agreement with Rebuttal in terms of A which the employee invested with Rebuttal the amount of the loan granted by Remserve and Rebuttal issued debentures in respect of that amount. It is really just an investment agreement containing details about the debentures -their date of maturity, issuance, interest payments, transfer, registration, cancellation, redemption and their summary repayment. What is significant about this B agreement is that in terms of clause 3,8 and 12, the employee is bound to invest the loan amount with Rebuttal through Remserve.

(d) Agreement between Employer and Employee

The IRS was seemingly adopted for the benefit of the employee. In order to secure the employee's consent, the employer wrote to the employee along the C following lines:

> "Subsidised Loan Facility
>
> The Board of Directors of [Employer] has resolved to subsidise loans for members of staff:
>
> The salient features of the loan facility are as follows:
>
> 1. The loan will be advanced directly to you by [Remserve] a registered D moneylender. A copy of Remserve's standard loan conditions is attached.
> 2. The Company has arranged that the Remserve loan will be made available to you at an interest rate of 16 per cent per *annum.*
> 3. Remserve will advance the loan on the condition that you provide E acceptable security.
> 4. Interest on the Remserve loan will be payable at the end of each month. The loan will be repayable after 11 months or earlier in the event of termination of your employment or at your request.
>
> I am pleased to inform you that the Company is prepared to subsidise your loan facility from Remserve to the extent of [$....] per month. If you elect F to take up the offer of this loan facility, you will be required to accept a reduction in your monthly salary equivalent to the amount of the subsidy. The facility will be conditional upon your acceptance of Remserve's standard loan conditions.
>
> The Company has been advised that while the loan facility is a benefit taxable in your hands in terms of s 8(1)(f) of the Income Tax Act, no tax G arises unless the interest rate of the loan is less than a specified rate, currently 16 per *cent per annum.* The Company has also been advised that any income earned from the Investment of the loan proceeds will be taxable in your hands, currently at an effective rate of 30.9 per cent. However, neither the Company nor its advisors accept responsibility for this advice and you should consult your own advisors to ascertain the tax H

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> A implications of the loan facility. The Company also does not accept responsibility for any additional liability that may arise from a change in tax legislation.
>
> Should you wish to accept the offer, please complete the attached Form of Acceptance and return it together with the attached copy of this letter to me as soon as possible.
>
> B Also attached is a copy of the Standard terms and conditions for an investment in fixed rate debentures issued by Rebuttal Trading (Private) Limited ("Rebuttal") for a period matching the term of the Remserve loan facility. Should you elect to invest the full proceeds of your loan in debentures issued by Rebuttal, the debenture certificate will be accepted as adequate security by Remserve. Rebuttal will deduct from your C investment income and invest on your behalf the amounts necessary to ensure that you are in a position to pay the tax due on the income from your investment in the debentures."

In accepting the terms of the above letter the employee signed a standard acceptance letter which reads:

> "Form of Acceptance in Respect of the IRS Loan Facility ("the Loan D Facility")
>
> To. The Board of Directors
>
> [Company]
>
> I the undersigned, confirm that I have full legal capacity and hereby irrevocably accept the offer of the Loan Facility made to me in the attached E letter.
>
> I acknowledge that the Loan Facility will be governed by the standard terms of a loan agreement with Remuneration Services (Private) Limited and the provisions of a loan subsidy agreement between [company/ Employer] and Remserve, a copy of which is available from the Company on request.
>
> F I agree that as a result of my acceptance of the Loan Facility, my monthly salary and pension contributions thereon will be reduced by (X dollars).
>
> I accept that all and any liability for tax arising from the Loan Facility or the investment of the amount of the loan, including any such liability arising from a change in legislation or tax practice, shall be for my account and confirm that I have taken such steps as I consider appropriate to G ascertain my liability for tax."

The above-mentioned agreements clearly show that the employer entered into two agreements, one with the employee in respect of the salary sacrifice and subsidisation of the loan and the other with Remserve for the administration of the IRS. The employee also entered into two other agreements, one with H Remserve, (the loan agreement) and the other with Rebuttal for the investment

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of the loan amount. All these agreements are fully documented. In my view the A whole IRS is a package arrangement involving the employer, the employee, Remserve and Rebuttal. The effectiveness of the IRS depended entirely on all the agreements being implemented as a package.

The Relationship between the Employer and Remserve and between Remserve and Rebuttal B

The employer's relationship with Remserve is contractual it being mainly to do with the administration of the IRS. The relationship between Remserve and Rebuttal is that Rebuttal is supposed to provide the funds with which Remserve is able to make the loans to the employee. In turn Rebuttal receives the loan amounts from Remserve as an investment by the employees and issues debentures. C

The Commissioner-General commented at length on the relationship between Remserve and Rebuttal. He sought to show that the two companies were not dealing at arms length with each other. He noted that they have common directorships and common bank account signatories. He noted that no money actually changed hands between Remserve and Rebuttal and, as a result, asked D the court to examine the substance of the transactions between these companies with a view to unravelling the nature of the IRS. I will revert to this matter later on in this judgment.

Action by the Commissioner-general

From the time that the applicants adopted the IRS pursuant to the agreements E to which I have referred above, the applicants withheld PAYE from the employees who had subscribed to the IRS and sacrificed a portion of their salaries so much as was in line with their new salary. This prompted the Commissioner-General to invoke s 58 of the Act, appoint Barclays Bank as its agent and uplift the amounts from the applicants' bank accounts on the grounds that the applicants had neglected, failed or refused to withhold the F correct amount of PAYE. In broad terms, the Commissioner-General was of the view that the IRS was a tax evasion scheme by means of which the applicants sought to reduce the amount of PAYE payable by their employees to the prejudice of the fiscus. He said that the IRS was merely one way of paying the employees a portion of their salaries not through the payroll but G through a tax evasion mechanism. In a letter to each of the applicants dated 3 April 2003 the Commissioner-General advised as follows:

> "Failure to comply with Provisions of the 13th Schedule of the Income Tax Act
>
> a) Information held indicates that your organisation has failed to deduct and remit PAYE on amounts paid to some members of staff. H

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> b) It is my A opinion that the failure by your organisation was planned and deliberate in order to evade PAYE payable on those amounts.
>
> c) Corrective action is now being taken in order to minimise losses to the fiscus and to recover lost revenue.
>
> d) Find attached schedules showing my estimates of the debt arising from the tax evasion. B
>
> e) (not relevant)"

This was followed by standard letters (Forms P12) dated 4 April 2003 in terms of which the Commissioner-General advised the applicants about the amount owing by each of then arising from what he considered to be an evasion scheme. Medix Pharmacies was adjudged to owe the sum of $96 551 142.85 C being as to principal — $50 590 096-27; penalty (100 per cent) — $39 419 271.11 and, interest—$6 541 775.47. Tanganda Ltd was adjudged to owe the sum of $75 928 720.24 broken down as follows: principal — $35 462 717.61 penalty (100 per cent) — $5 003 285.01 and interest — $35 462 717.61, Meikles Africa Ltd was adjudged to owe $780 572 683.81 broken down as follows: principal—$371261 510.01 penalty (100 per cent) D — $325 334 837.13 and interest —$83 976 336.67.

On the same day that the applicants were advised of the amounts allegedly owing by them, the Commissioner-General appointed Barclays Bank as its agent in terms of s 58 of the Act in order to garnishee the amounts concerned see the ITF 227 Forms. This resulted in the upliftment of the amounts I have E mentioned at the beginning of this judgment from the bank accounts of Tanganda

Ltd and Meikles Africa Ltd. By letters dated 7 April the applicants protested to the Commissioner-General against the action taken. In those letters the applicants denied that the IRS was a tax evasion scheme. They indicated that the applicants implemented the IRS for the benefit of their employees and that they themselves did not benefit from it. They stated that F they had not failed to withhold PAYE as none was to be deducted after the employees had made salary sacrifices in terms of the IRS. They reiterated their understanding, which they had reached after consulting their tax advisers and legal practitioners, that the IRS was a legitimate and proper method of allowing the employees to take advantage of those sections of the Act which confer favourable treatment to benefits in the form of subsidised loans. They G took issue with the legality of the action taken by the Commissioner-General, the calculations of the principal amounts said to be due and the penalties imposed. They complained that the amounts uplifted from their accounts were vital to the continued operations of their companies. They requested that the garnishee orders issued to Barclays Bank be withdrawn until the matter was H determined by the court.

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The contents of the applicants' letters of protest to the Commissioner-General A formed much of the content of the founding affidavit in this application.

The applicants' case as made in the affidavits

In addition to what I have already stated, the applicants contended in their affidavits that the Commissioner-General is only entitled to exercise the powers vested in him by s 58 of the Act if it has already been determined that B any tax is due following upon an assessment by the income tax department or upon a judgment of a competent court. They contended that in the present case the Commissioner-General had taken action before any determination was made that any tax was due by the applicants. They averred that the Commissioner-General has no power to make an assessment in respect of C employees' tax said to be due by the employer because an assessment is *per* definition "the determination of taxable income and of the credits to which a person is entitled" and it is a concept which is not applicable to the levying of employees' tax against an employer. In the view of the applicants' the remedy available to the Commissioner-General in the circumstances of this case was to sue the employer for payment of employees' tax and not to take unilateral D and unlawful action and seize the applicants' moneys which had not been found to be due.

The applicants averred that they were entitled to the relief which they sought on the following further grounds:

a) the obligation on the employer to deduct PAYE arises if the employer E pays any amount by way of remuneration to an employee. In this case the employer, through Remserve, had extended loans at 16 per cent interest to the employees and, because in terms of s 8(1) (f) of the Act, a loan is deemed to be a taxable benefit only if the rate of interest payable by the employee is less than 16 per cent, the applicants were not obliged to deduct PAYE in respect of the amounts which they had paid to Remserve F as loan subsidy payments.

b) the Commissioner-General had in any case, wrongly calculated the amount that could possibly be due. He took the subsidy payment made in each case to Remserve, "grossed it up" to arrive at the pre-tax income that would leave, after tax, in the hands of the employee the same amount as G the subsidy payment. The Commissioner-General then calculated the tax due on the grossed up amount and claimed that figure as the employees' tax that should have been deducted. Such a calculation could not be correct as the employer has no obligation to the employee to meet a tax that is not due.

(c) The Commissioner-General had ignored the fact that the loans have been H

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A applied to earn investment income on which tax is, in any case, payable. This has the effect of imposing a double taxation to the extent that tax will be paid on the" investment income.

(d) The Commissioner-General had acted in an unconscionable fashion in that he had been aware of the IRS since early 2002 when his investigation section requested and was immediately given all documentation relating B to IRS. He had commenced detailed investigations into IRS in March or April 2002. He had promised to disclose the outcome of his investigations in

February 2003. Further efforts had been made by the promoters of the IRS in March 2003 to address his concerns but these had been rebuffed. Despite all these efforts, the Commissioner-General had gone ahead and C garnished the applicants' funds.

I may summarise the applicants' case as follows: the Commissioner-General is not entitled to invoke s 58 powers until or unless it has been determined that any tax is due by an employer; the IRS is a legitimate method by which the applicants' employees are able to take advantage of favourable tax provisions in the Act; the salary sacrifice made by the employees is permissible and so is D the payment of the loan subsidy by the employer in order to enable the employee to obtain a loan at a non-taxable rate of interest of 16 per *cent per annum;* if the Commissioner-General's action is not declared to be unlawful, it would result in double taxation of the employees as they would be taxed on the income which they are said to have received and on the investment income E which they received in terms of the IRS; the calculations by the Commissioner- General are erroneous as they are based on a grossed up amount; the Commissioner-General acted unconscionably as he should have awaited the outcome of the consultations which were ongoing before he uplifted monies from Barclays Bank.

The Commissioner-General's Case

F The position adopted by the Commissioner-General is that this application is an attempt by the applicants to prevent him from exercising the powers vested in him by s 58 of the Act and to prevent Barclays Bank from giving effect to a garnishee lawfully issued. The Commissioner-General averred that the IRS is simply a tax evasion scheme. The so-called salary sacrifice by the employee G was in fact an unlawful reduction of the employee's salary so as to evade the payment of PAYE on a portion of the employee's salary. The Commissioner- General expressed concern that the IRS was a gigantic tax evasion scheme which was adopted by more than 160 companies and that the scheme had the potential to deprive the fiscus of about $7 billion per year. He averred that he H held a totally different view from that of the applicants about the IRS. He said

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that he had conducted an audit of the IRS which had shown that – A

a) the IRS does not faithfully reflect the real intention of the parties or the relationship of the participating entities;

b) the applicants relied on the tax opinion of Ernst and Young Chartered Accountants and Ernst and Young Tax Consultants (Pvt) Ltd who were interested parties in the tax evasion scheme; B

c) the claim by Remserve that it borrowed money from Rebuttal with which to make the loans was not true as the only transactions between them were paper entries with no actual movement of funds. This was shown by the fact that Remserve purported to borrow money from Rebuttal but once the loans were made, the beneficiaries were obliged to invest the whole C amount of their respective loans with Rebuttal. Both companies had no money to their credit and as such the transactions between them were paper entries only;

d) the only cost incurred by the applicants was the payment to Remserve of an implementation fee.

In regard to Remserve and Rebuttal the Commissioner-General stated in para D 6.5 of the opposing affidavit that -

> "The inescapable conclusion is that the two companies had no financial capacity to advance the loans they allege to have granted to various employees. This is supported by the *contra* entries referred to above, which are merely disguised paper entries. In essence the transaction is E dishonesty in that the parties to it did not really intend it to have, as between them, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between them. The transaction is *in fraudem legis* and must be interpreted in accordance with what the facts, as stated above, reveal and not what applicant says it is."

The Commissioner-General averred that the employees who opted to participate F in the IRS incurred a compulsory reduction of their salaries which in his view is illegal as it is an unfair labour practice. I do not think that this particular averment was fair or justified. The employees signed contracts with their employers with Remserve and Rebuttal. The reduction in salary which they took was voluntary. Any suggestion of illegality cannot be justified. G

In dealing with the nature of the salary sacrifice, the Commissioner-General averred that the employees' salaries were reduced from the time that they opted to participate in the IRS and their PAYE was proportionately reduced because of the re-direction of part of their salaries to Remserve. In his opinion, the purported salary sacrifice was actually just a salary split resulting in only one part of the salary going through the payroll. He therefore rejected the H

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A contention that the amount of the salary sacrifice which was, in turn, paid by the employer as a loan subsidy payment was anything other than an amount which must be subjected to PAYE in terms of s 8(1)(b) of the Act.

The Commissioner-General justified his resort to s 58 of the Act on the grounds that there was a potential leakage of revenue of enormous proportions and if the IRS was not arrested the fiscus would continue to be prejudiced. He B also said that the tax evasion as represented by the IRS was deliberate and calculated. The Commissioner-General averred that the employees' tax which he sought to recover became due and payable at the time that the salary split occurred. He contended that employers, on his behalf, determine the PAYE due by each employee and as such the concept of assessment as defined in s C 2 of the Act was applicable to the levying of employees' tax with the result that the Form P12 and schedules attached thereto, which he issued, constituted assessments of income tax due. He asserted that he had the option to proceed in terms of s 58 and recover unremitted tax by way of a garnishee or to proceed by court action in order to recover the tax.

Coming to the relationship of some of the entities involved in the IRS, the D Commissioner-General averred that Remserve, Rebuttal and Ernst and Young were not dealing at arms length: they shared directorship and bank account signatories; Rebuttal did not declare a profit for the year ended December 2001 yet it was supposed to be charging market rates on the amounts which it loaned to Remserve. In general, the Commissioner-General's view of the E relationship between Remserve and Rebuttal was that the two entities were involved in sham transactions. It is important to consider his view in some detail.

It is common cause that the employee made a salary sacrifice in terms of his agreement with the employer. It is common cause that the employer made a loan subsidy payment to Remserve and F the amount of the salary sacrifice,was the amount paid by the employer as such subsidy. So money actually moved from employee to employer and from employer to Remserve. There is some difficulty in clearly understanding the transactions between Remserve and Rebuttal. It is said that Remserve borrowed funds from Rebuttal for onward lending to the employees. The borrowing by Remserve seems to me to be nominal as no actual funds were transferred from Rebuttal to Remserve. But G in order for the borrowing to appear to be real, Rebuttal purported to advance monies to Remserve and Remserve purported to lent those monies to the employees. The employees agreed to invest the full amount of the loans with Rebuttal which then issued debentures to the employees. The debentures issued by Rebuttal were then surrendered to Remserve and retained by it as H security for the loans. It seems to me that there was no actual movement of

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money from the lender (Rebuttal) to Remserve and from Remserve to the A employee. The whole transaction consisted of what has been described by the Commissioner-General as "contra entries", with the result that at the end of the day the amount of the salary sacrifice made by employees assumed the appearance of investment income and was given that label when it was ultimately paid to and received by the employees. This is evident from the following facts as stated by the Commissioner-General: B

(a) there is no actual movement of cash from Rebuttal to Remserve and from Remserve to the employee. The paper trail is that Rebuttal purports to lend money to Remserve which purports to lend the same money to the employee. The employee purports to have received a loan and then he purports further to have invested the full amount of the loan with Rebuttal. C Debentures are then issued to the employee. These debentures mature at the end of the period of the loan. On their purported maturity the debentures are submitted by Remserve to Rebuttal and purportedly redeemed thereby procuring the full payment of the capital amount of the loan, which had not in reality ever existed. In the meantime, interest is calculated on

the loans purportedly invested and the employee is paid as D income from investment of the loan funds an amount approximating to the amount which he sacrificed. The employee benefits from this arrangement in that had the same amount been taxed in terms of s 8(1)(b) of the Act as income from employment, it would have been taxed at a higher rate whereas, as investment income, it is taxed at a much lower rate in terms of s 8(1) (f) of the Act. E

(b) The books of accounts of both Rebuttal and Remserve did not show that any of them had any funds with which to make the purported loans. It seemed to me that the applicants had some difficulty in shedding light on the transactions between Remserve and Rebuttal. This is evident from the averment in para 9 of the answering affidavit where the deponent states:

> "... *I am not personally aware of the details of Remserve's source of* F *funding nor am I aware of any dealings between Remserve, Rebuttal and their bankers. I have been under the impression* that the level of the subsidy interest payments made by the applicants is set out with reference to interest rates at the time that fixed rate loans are extended to employees and that employees are offered fixed rate investment in the form of debentures issued by Rebuttal." (emphasis is mine) G

Again in para 26 of the answering affidavit the applicants were unable to shed light on the genuineness of the transactions between Remserve and Rebuttal or between Remserve and the employee. The deponent said:

> "I am unable to comment on the various allegations concerning Ernst and Young and Rebuttal contained in para 26 of Mugari's affidavit but I am H able to confirm

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26.1 that the A dealings of the applicants with Remserve were undertaken at arms length;

26.2 that the applicants in no way are related by ownership or otherwise to either Remserve and Rebuttal; and

26.3 that there was actual movement of the subsidy payments made by cheque to Remserve by the Applicants and the payment of net interest B into the employees bank accounts."

The same caginess is shown in para 29:

> "It is, with respect, quite incorrect to say that the documents show that the alleged 'commercial interest' are non existent. Payments were made by the Applicants to Remserve. The monies were then *manifestly* dealt with C as envisaged by the agreements which are before the Court. Employees accounted for the tax in respect of interest earned by them. Rebuttal and Remserve each earned income and were liable to tax in respect of profits earned." (emphasis is mine)

It is quite apparent that the applicants only confirmed those aspects of the IRS which were not in contention i.e. that the employees made salary sacrifices D which were paid to Remserve as loan subsidies and that the employees received interest on investment and paid tax on that income. Obviously the Commissioner-General was not concerned with these non-contentious aspects of the IRS. He had taken issue with the fact that no loans were in reality advanced by Rebuttal to Remserve or by Remserve to the employees. The applicants did not confirm that loans were actually advanced in such a way that E any money would have been transferred from one party to the next. It seems to me that there is substance to the Commissioner-General's objection to the whole of the IRS being a genuine system to achieve the stated objectives. I do not for a moment believe that reputable companies, such as the applicants are or appear to be, would have dealt with Remserve and Rebuttal without any knowledge as to whether they had the necessary funds with which to make the F loans. It seems to me that the loan transactions were window-dressing transactions. Annexures "J" to "N2" at pp 134-156 of the papers support this point of view. Annexure J is itself a clear indication that the bankers of Remserve and Rebuttal did not advance any credit to them.

The Commissioner-General also disclosed that Remserve and Rebuttal had G not renewed their money-lending licences for the year ended December 2003 and that they were therefore operating illegally. I do not think that this disclosure, even if true, is relevant to my decision. In regard to the applicants' contention that it was wrong for the Commissioner-General to gross up the amounts in the manner already stated, the Commissioner-General curtly H averred that he had reasonable grounds for doing so and that he was open to

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receive any objections which the applicants may have. He stated further that A he had undertaken a thorough investigation of the IRS from early 2002 and that the action he had taken had been well considered and not rushed.

The Submissions by the Parties

It was accepted by the parties that the Commissioner-General can utilise the provisions of s 58 of the Act to require an agent to pay any tax, including B employees' tax due from moneys held by that agent. Section 58 clearly authorises the Commissioner-General to do so. It reads:

> "The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent of such other person for the purposes of this Act, and, C notwithstanding anything contained in any other law, may be required to pay any tax due from any moneys in any current account, deposit account, fixed deposit account or savings account or from any other moneys, including pension, salary, wages or any other remuneration, which may be held by him for, or due by him to, the person whose agent he has been declared to be."

The decision in *Edgars Stores Ltd v CoT* 1996 (2) ZLR 747 (S) supports the D proposition that the Commissioner-General may utilise s 58 of the Act for the purposes mentioned above. The position was different before the Act was amended by the Finance Act 4 of 1996 which repealed the definition of tax and substituted it with a definition which included the phrase "employees' tax referred to in section 73 and any additional or other penalty under this Act". E The decision in *Endeavour Foundation & Anor v CoT 1*995 (1) ZLR 339 (S) was, as correctly conceded, overtaken by that amendment.

The applicants submitted that the issues for determination in these matters were these —

(a) whether the sums claimed by the Commissioner-General were taxes due F by the applicants, thereby justifying his resort to s 58 of the Act. They argued that the sums claimed were not due as they could only become due after an assessment or in terms of the law or an order of court. In this regard the applicants submitted that para 10(1) of the Thirteenth Schedule to the Act makes it clear that the employer is liable to pay an amount equal to the amount of the employees' tax which he failed to withhold and not the G employees' tax itself. This called upon the Commissioner-General to determine, by way of making an assessment, the exact amount which was not withheld in respect of each employee and only then could he recover from the employer the amount so determined. The applicants submitted that on the basis of para 10(2) of the Thirteenth Schedule to the Act the Commissioner-General must, if he has not made an assessment of the H

A amount allegedly owed, sue for it in a court of law and only then can he recover it in terms of s 58 of the Act;

(b) whether the IRS is a legitimate method of taking advantage of certain provisions of the Act; and

(c) whether, assuming the Commissioner-General was correct in the action B he took, the grossing up of the amount was justified.

The Commissioner-General appears to have agreed that these were the issues to be determined by the court. I think however that it is important decide on the legality of the IRS so far as it is relevant to the proper determination of the issues before me. It seems to me that this application hangs on the legality or otherwise of the IRS. Had the parties not finally agreed that I should deal with C this matter, I may not have had to deal with the legality of the IRS. If the IRS is not a legitimate system for taking advantage of certain favourable provisions of the Act, then the salary sacrifices should not have been made and the amounts of the subsidy payments should have remained a part of the income from employment which is subject to taxation in terms of s 8(1)(b) of the Act.

D I think I have already sufficiently shown why I am of the view that the loan transactions between the employees and Remserve and between Remserve and Rebuttal were not genuine transactions: no money actually passed or was intended to pass between them nor were the lenders possessed of any money to make the loans. That, to me, leads to the conclusion that the IRS cannot be the device for taking advantage of the provisions of the Act which it was E purported to be. This disposes of the issue in para (b) above.

The next issue as in (a) above is whether any tax was due to justify a resort to s 58 by the Commissioner-General. Section 73 of the Act provides the manner in which employees tax is payable i.e. in accordance with the provisions of the Thirteenth Schedule. The section provides in subs (3) that -

> F "If any amount of employees tax is not paid in full within the period prescribed for payment thereof by subparagraph (1) of paragraph 3 of the Thirteen Schedule, interest shall, unless the Commissioner having regard to the circumstances of the case otherwise directs, be paid by the employer at a rate to be fixed by the Minister, by statutory instrument, on so much of such amount as from time to time remains unpaid by the employer during the period beginning on the next day following the last day of the G period prescribed as aforesaid and ending on the day such amount is paid in full."

The clear meaning of this provision is that as from the date that the amount of employees' tax is due, if not paid as provided, interest shall be charged thereon. It postulates that the amount has been withheld by H the employer but the employer has just not remitted it. This provision therefore has nothing

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directly to do with the issue whether or not the employer has in fact withheld A the amount. If he has not withheld the amount different provisions of the Act apply. In terms of para 3 of the Thirteenth Schedule ("the Schedule") the amount which an employer must withhold as employees' tax shall be determined in accordance with such deduction tables as may be prescribed or as provided in other paragraphs of the Schedule. The employer is required to ascertain B from the Commissioner-General the amount to be withheld in respect of employees' tax. The failure or refusal by the employer to withhold or remit employees' tax is penalised by the provisions of para 10 of the Schedule which provide that:

> "10(1) Subject to the provisions of paragraph 11, an employer who fails to withhold or to pay to the Commissioner any amount of employees' tax as C provided in paragraph 3 shall be personally liable for the payment to the Commissioner, not later than the date on which payment should have been made if the employees' tax had been withheld in terms of paragraph 3, of—
>
> (a) the amount of employees' tax which he failed to withheld [*sic*] or to pay to the Commissioner; and D
>
> (b) a further amount equal to such employees' tax.
>
> (2) The amounts for the payment of which an employer is liable in terms of subparagraph (1) —
>
> (a) shall be debts due by the employer to the State; and
>
> (b) may be sued for and recovered by action by the Commissioner in E any court of competent jurisdiction."

It seems to me that para 10 of the Schedule is concerned with two types of amounts in respect of which an employer becomes personally liable to the Commissioner-General. The two types differ, depending on how they have arisen. The first type arises from a failure by the employer to withhold employees' tax either because he has not calculated what it is or because he F has simply neglected to withhold it even though he was aware what that amount was. The second type arises from a failure by the employer to pay or remit the employees tax to the Commissioner-General after he had withheld it, i.e. after he has deducted it from the employees' salary. The second type is invariably always readily ascertainable as the employer will have already G determined what it is and has deducted it from the employee's salary but has for some reason, or for no reason at all, simply failed to pay or remit it to the Commissioner-General. In respect of this second type, I can see no reason why the Commissioner-General may not act in terms of s 58 of the Act to recover it from the employer. The amount would be sufficiently liquidated such that the Commissioner-General could obtain summary judgment on it. The employer H

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A would not be able to justify his failure to pay it to the Commissioner after deducting it from the employee's salary.

The first type may or may not be readily ascertainable. If the employer had calculated the amount to be deducted as PAYE but neglected to withhold or deduct it from the employee's salary, that amount would, in all respects, be similar to the second type. The employer would be aware of the amount which B he should have deducted from the employee's salary but failed to effect the

deduction. Where however the employer has not even calculated or determined how much each employee should pay as PAYE, some difficulty arises. The employer would not be aware of how much he should deduct or withhold. The Commissioner-General would also not know how much the employer should C have deducted. This situation arises only where the employer has not complied with para 3 of the Schedule, that is to say, he has not at all determined the tax payable by the employee. In this situation not only will the employer not know how much should be paid but the Commissioner-General too has no way of knowing how much the employer should have withheld by way of PAYE. It is this kind of situation which Mr *de Bourbon* must have had in mind when D he submitted that the Commissioner-General cannot have recourse to s 58 of the Act to exact payment of the employees' tax allegedly unpaid. His argument, however, seemed to encompass the two types of payments for which an employer is made liable for under para 10 of the Schedule. His general submission was that tax is due when it has been determined by "an assessment or in terms of law or by a court order". He submitted that a distinction must E be made between tax which an employee is liable to pay, tax which the employer is liable to deduct and an amount which the employer is liable to pay should he fail to make a deduction. He went on to say that in terms of para 10(1) of the Schedule an employer is liable for an amount equal *t*o the employees' tax itself. He found support for these submission in para 12 of the Schedule F which permits an employer to recover the amount paid to the Commissioner- General under para 10(1) of the Schedule from the employee except for any amount paid as a penalty. In his view, the Commissioner-General must, in all cases of failure to withhold or to pay employees' tax, determine by way of an assessment the exact amount not withheld in respect of each employee before he can require the employer to pay, otherwise the employer will not be in a G position to exercise his right of recovery in terms of para 12 of the Schedule. He also submitted that, whereas in terms of para 10(2) of the Schedule any amount for which the employer is liable becomes a debt due by him to the State and in respect of which the State can sue the employer, the recovery by the Commissioner-General of any such amount can only be by way of action in a H court of law and not through unilateral action, based on an estimate of the

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amount due as employees' tax, which is what he did in this case. He submitted A that the only instances when the Commissioner-General is allowed to make estimates of tax payable are those specified in ss 37(4) and 45 of the Act, none of which are applicable to this case.

I cannot agree with Mr *de Bourbon*'s interpretation of para 10 of the Schedule. I have shown how the amounts for which an employer is liable under that B paragraph may arise. I am quite satisfied that where an employer has determined the employee's tax payable or has gone a step further and deducted that amount from the employee's salary and has not paid it, such amount is readily ascertainable and the Commissioner-General would be fully entitled to proceed in terms of s 58 to recover it from the employer. The employer in that situation would have no cause either not to deduct an amount he has C determined as being employee's tax payable or not to pay it after deducting it from the employee's salary. It must be borne in mind that para 10 of the Schedule is concerned not with the employee's liability but with that of the employer and that liability arises from the employer's failure to withhold or to pay employees' tax to the Commissioner-General. And where he has failed to withhold or to pay an amount which he is aware of, his liability for that D amount is clearly provided for and that liability does not, to my mind, depend on whether the employer has correctly, in every detail, calculated the amount which is payable as PAYE by the employee. The correct amount is determined when an assessment is made which may result in an overpayment or underpayment of the tax due on the employee's remuneration. E

In the situation where the employer has not even determined the amount payable by way of employees' tax, the matter may be handled differently for none of the parties, i.e. the employer or the Commissioner-General, will know what amount should have been withheld. I do not intend to pronounce myself as to what course of action the Commissioner-General would take, but I may express the view that this may be the situation where Mr *de Bourbon's* F argument may be valid. I have decided not to determine this issue because I think it does not arise in this case. The employees in this case were receiving certain salaries before they joined the IRS and sacrificed a portion of their salaries. The amount which they had paid as PAYE was known. There is no suggestion that their salaries were increased during the period of the loans or G the period in question. In the month following their joining the IRS, there was an immediate reduction of the PAYE which had hitherto been withheld from their remuneration by the employers and paid to the

Commissioner-General. All else being equal, which appears to be the position, the difference between what had been deducted as PAYE in the month before joining the IRS and the amount which was actually deducted in the month after joining the IRS is the H

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A amount which the Commissioner-General should be claiming from the employer in addition to any penalty charges. That amount is readily ascertainable and it is an amount which, in my view, the Commissioner-General can recover by utilising the provisions of s 58 of the Act. Whilst it remains to be determined whether that is the amount actually claimed by the Commissioner-General, I can, for the moment, say that since the IRS was a system devised by the B applicants to circumvent the obligation to pay the full amount of PAYE, the Commissioner-General was entitled to use his powers under s 58 to recover the amounts concerned i.e. the difference between what was paid before and after the IRS was implemented.

From the foregoing, it must be apparent that I, at least, agree with Mr *de* C *Bourbon's* submission that in terms of para 10(1) of the Schedule the employer is liable to an amount equal to the amount of employees' tax which he failed to withhold and not to the employees' tax itself. I do not however agree with his further submission that because in terms of para 12 of the Schedule the employer can recover the amount paid to the Commissioner- General from the employee except for the penalty, the Commissioner-General D must determine the exact amount which was not withheld in respect of each employee otherwise the employer cannot exercise his rights under para 12 of the Schedule. This, to me, is a *non sequitur.* The employer's liability is separate from that of the employee. It is the employee who has to pay an exact amount of PAYE. The employer's right to recover the amount is not dependant on whether there has been an assessment to establish the exact amount owing E by the employee but on the fact of his having paid the amount to the Commissioner. I also agree with Mr *de Bourbon*'s general submissions as to what an assessment is and when it must be made. That, however, is not relevant to employees' tax which must be withheld by the employer. The positions of the employee and the employer in so far as assessment is concerned are F different. The employer is required by law to withhold employees' tax, which by the definition in para 1 of the Schedule is "any amount required to be withheld by an employer in terms of paragraph 3" of the Schedule. Its determination is made in terms of sub-para (1) of the para 3 of the Schedule which provides that:

> "(1) Every employer (whether or not he has registered as an employer in G terms of subparagraph (1) of the paragraph (2)) who pays or becomes liable to pay any amount by way of remuneration to any employee shall, unless the Commissioner has granted authority to the contrary, withhold from that amount by way of employees' tax an amount which shall be determined in accordance with such tax deduction tables as may be prescribed or as is provided in subparagraph (2), (3) or (4) of this H paragraph or in subparagraph (2) of paragraph 20, whichever is applicable,

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> in respect of the liability for income tax of that employee *and shall* pay A the amount so withheld to the Commissioner within fifteen days, or within such longer period not exceeding twenty-one days as the Commissioner may for good cause allow, after the end of the month during which the amount was withheld ...." (my emphasis).

The determination of the PAYE due is made by the employer. The employer therefore makes an assessment (for lack of a better word) of the PAYE before B a proper assessment as defined in the Act is done by the Commissioner- General.

Subpara (1) of para 3 of the Schedule also seems to me to be supportive of Mr *deBourbon* 's submission in para 7 of his heads of argument that a tax becomes due "in terms of law". He did not pursue this submission so as to indicate when C a tax is due "in terms of law" in the same way that he pursued the submission that a tax becomes due when it has been determined by an assessment or by a court of law. Subparagraphy(1) of para 3 of the Schedule is, in my view, an instance when a tax becomes due "in terms of law". I therefore agree with Mr *Nherere's* submission that tax is due from the date that it is payable.

The Commissioner-General stated in his letter of 3 April (quoted above) that D he was "estimating the debt arising from the tax evasion". Mr *de Bourbon* made much of this statement. In my view, he should not have done so. In context, all that the Commissioner-General must have meant was that

he was taking action to recover amounts which he believed were due by the applicants following upon the adoption by the applicants of the IRS, a system which he E believed was a tax evasion scheme. I do not read much into the statement because the context in which it was made is clear. The first sentence in the letter of 3 April reads:

> "Information held indicates that your organisation has failed to deduct and remit PAYE on amounts paid to some members of your staff.

This clearly laid the basis for the action he intended to take and whether or not F the IRS was a tax evasion or a tax avoidance scheme seems to have been of little importance to him. Neither counsel specifically referred to s 98 of the Act as relevant to this case perhaps because such reference would have had no effect on the outcome of this case. Section 98 deals with tax avoidance and empowers the Commissioner-General, where he is of the opinion that any G scheme was a tax avoidance scheme, to "determine the liability for any tax and the amount thereof' as if the scheme had not been entered into and to take such action as he considers necessary to prevent such avoidance. Although it seems to me that at worst the IRS was a tax avoidance scheme, I will not deal with this matter and its implications any further because I was not addressed in detail on it nor was it raised in the papers. I may, however, say that, in my view H

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A and having regard to the particular facts of this case, if the IRS was indeed a tax avoidance scheme and the Commissioner-General had been of that opinion, he would still have "determined" the liability for any tax and would have perhaps arrived at the same determination which he made in this case.

The Commissioner-General conceded that his calculation of the amounts owing by the applicants may be wrong for the reason that the form P12 is an B estimate or for the reason that his officers "grossed-up" the amounts. He said that he was open to consider applicants' objections in this regard - see paras 35 and 36 of the opposing affidavit. This concession and the arguments made on behalf of the applicants on the estimates or the grossing-up do not preclude me from making an appropriate order to resolve this dispute. In the same vein C the arguments made in respect of the applicants' legitimate expectations do not preclude me from issuing an appropriate order. I do not consider that it is necessary for me to deal with these matters in any detail.

In the result, I will issue an order that declares the Commissioner-General's entitlement to utilise the provisions of s 58 of the Act to recover, in the circumstances of this case, the employees' tax which was not withheld by the D applicants following their adoption of the IRS and ordering that the amounts specified in the P12 forms be adjusted in order to take into account the fact that some tax had been paid by the employees, albeit at the rate applicable to investment income, and other relevant considerations. The applicants have also pointed out that in any event the Commissioner-General's calculations E overstated the amounts by at least 46%. The Commissioner-General did not dispute that this may be so. The order which I will issue will reflect this concession. I think that the appropriate order in this case is one which takes into account the finding that the IRS was not a genuine scheme in the respects I have outlined and that the Commissioner-General by his own admission claimed more than what he was entitled to. The applicants have substantially F failed in this case and they should pay the costs. In the result it is ordered that —

1. It is declared that the respondent is entitled to recover the amount of employees' taxes which the applicants failed to withhold and to pay to him after the applicants implemented the Integrated Remuneration System. G
2. It is declared that the Commissioner-General was not required to issue an assessment in respect of the alleged indebtedness by the applicants for the payment of PAYE as that indebtedness is determined in terms of the 13th Schedule as read with s 73 of the Income Tax Act [*Chapter 23:06*] and the order sought by the applicants in paragraph (a) of the draft order is accordingly dismissed.

Chinhengo J

3. Subject to paragraph 4 hereof, the respondent shall in the interim claim A only 46 per cent of the amount claimed from each of the applicants and in respect of Meikles Africa Ltd and Tanganda Ltd the respondent shall refund any amount to the extent that it exceeds 46 per cent

of the amount claimed and shall pay interest on that amount, if any, at the prescribed rate of interest calculated from 4 April 2003 to the date of payment. B

4. Without derogation from any right which, the respondent may have to charge penalties and interest on the amount due by the applicants, the applicants and the respondent shall jointly determine within thirty days of this order the amount due by the applicants as employees' tax not withheld taking into account any error in calculation of the amount due as a result of "grossing-up" by the respondent, the tax paid by the C applicants' employees on the purported investment income derived from the Integrated Remuneration System, and adjust the percentages referred to in para 3 hereof in order to arrive at the amount for which the applicants are actually liable.
5. The applicants shall pay the costs of this application jointly and severally, D the one paying the others to be absolved.

Kantor & Immerman, legal practitioners for the applicants.

Gill, Godlonton & Gerrans, legal practitioners for the respondents. E

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MACHEKA v MOYO 2003 (2) ZLR 49 (H)

Citation	2003 (2) ZLR 49 (H)
Case No	Judgment No. HB-78-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	23 June 2003
Judgment	10 July 2003
Counsel	*C P Moyo,* for the applicant *T Makonese,* with him Ms *P Rusike,* for the respondent
Case Type	Urgent application
Annotations	Link to case annotations

Flynote

C **Court** — *contempt of — committal for prison for — when appropriate — procedure — onus on parties — what must be shown*

Practice and procedure — *judgment — enforcement — committal for contempt of court — when committal procedure appropriate — what applicant must show*

Headnote

D A judgment ordering a debtor to do or to refrain from doing any act is enforceable against the person of the debtor by way of committal for contempt of court, not by execution against his property. Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. The principal object of civil contempt proceedings is to compel, by means of personal attachment and committal to gaol, the performance E of the court's order. The imprisonment imposed is very often suspended pending fulfilment by the defaulter of his obligations. The court is loath to restrict the personal liberty of the individual in matters of this kind: committal to gaol is a very severe and rigorous way of achieving performance in respect of a civil order of the court and should not lightly F be resorted to. When resorted to, committal achieves two objectives: (1) enforcing compliance and (2) protecting and upholding the dignity and respect of the court. In respect of latter objective, the applicant acts an informer who brings the contempt to the attention of the court. Before holding the respondent to have been in contempt of court, it is necessary for the court to be satisfied both that the order was not complied with and G that the non-compliance was wilful on the respondent's part. The onus is on the applicant to show a disobedience of the court's order. Once this is shown, wilfulness is, in such circumstances, inferred and the onus moves to the respondent to rebut the inference of wilfulness on a balance of probabilities. The court should not lightly deprive the offending party H of the right to be heard in this regard. Proven inability to comply with the

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court's order affords a respondent protection against a committal for A contempt.

Cases cited

Allan v Allan 1959 (1) R & N 499 (SR); 1959 (3) SA 473 (SR)

Campbell v Herbert (1908) 18 CTR 22 B

Cape Times Ltd v Union Trades Directories (Pty) Ltd & Ors 1956 (1) SA 105 (N)

Consol Fish Distributors (Pty) Ltd v Zive & Ors 1968 (2) SA 517 (C)

Culverwell v Beira 1992 (4) SA 490 (W)

Food & Allied Workers' Union v Sanrio Fruits CC & Ors 1994 (2) SA 486 (T) C

Hadkinson v Hadkinson [1952] 2 All ER 567 (CA)

Haddow v Haddow 1974 (1) RLR 5 (G); 1974 (2) SA 181 (R)

Harare West Rural Council v Sabawu 1985 (1) ZLR 179 (H)

Höltz v Douglas & Associates (OFS) CC en Andere 1991 (2) SA 797 (O)

Jackman v Jackman 1969 (2) RLR 534 (G)

Jeanes v Jeanes & Anor 1977 (2) SA 703 (W) D

Lindsay v Lindsay 1995 (1) ZLR 296 (S)

Naidu & Ors v Naidoo & Anor 1993 (4) SA 542 (D)

Naude en 'n Ander v Searle 1970 (1) SA 388 (O)

Protea Hldgs Ltd v Wriwt & Anor 1978 (3) SA 865 (W)

Sabawu v Harare West Rural Council 1989 (1) ZLR 47 (H) E

Scheelite King Mining Co (Pvt) Ltd v Mahachi 1998 (1) ZLR 173 (H)

van Biljon v van Biljon 1960 (1) PH F28 (O)

Case information

C P Moyo, for the applicant

T Makonese, with him Ms *P Rusike,* for the respondent F

Judgment

Ndou J: On 21 May 2003 in HC 986-03 my brother Chiweshe, granted an *ex parte* order in favour of the applicant for the return of his goods that had allegedly been removed from his home by the respondent, within 24 hours of the service of the said order. The said order was properly served on the respondent on 22 May 2003. G

The respondent has not taken any steps to have the said order set aside Having obtained a judgment in his favour, the applicant wants to obtain satisfaction of it from the respondent A judgment, as the one *in casu,* ordering the debtor to do or to refrain from doing any act is enforceable against the person of the debtor by way of committal for contempt of court, not by execution against his H

A property — see *Jeanes v Jeanes and Anor* 1977 (2) SA 703 at 705F-G and *Food & Allied Workers' Union v Sanrio Fruits CC & Ors* 1994 (2) SA 486

(T).

It is common cause that the respondent did not return the property identified in the order within 24 hours of service of the court order on her. A month later she still has not complied with the order. The question is whether the B respondent is in contempt of this court. Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court—see *Holtz v Douglas & Associates (OFS) CC en Andere* 1991 (2) SA 797 (O) at 802C and *Civil Practice of the Supreme Court of South Africa* 4 ed by L Van Winsen, A C Cilliers and C Loots at p 815. It is trite that the principal object of civil C contempt proceedings is to compel, by means of personal attachment and committal to gaol, the performance of the court's order. The imprisonment imposed is very often suspended pending fulfilment by the defaulter of his obligations: *Haddow v Haddow* 1974 (1) RLR 5 (G);1974 (2) SA 181 (R); *Naidu & Ors v Naidoo &Anor 1*993 (4) SA 542 (D) at 544J and *Harare West Rural Council v Sabawu* 1985 (1) ZLR 179 (H). A court, however, is loath to D restrict the personal liberty of the individual in matters of this kind: *Protea Holdings Ltd v Wriwt & Anor* 1978 (3) SA 865 (W) at 872B. Committal to gaol is a very severe and rigorous way of achieving performance in respect of a civil order of the court and should not lightly be resorted to. When resorted to, committal achieves two objectives, namely, firstly, enforcing compliance and, secondly, protecting and upholding the dignity and respect of the court E In respect of latter objective, the applicant acts an informer who brings the contempt to the attention of the court - see *Naude en ' n Ander v Searle* 1970 (1) SA 388 (O); *Cape Times Ltd v Union Trades Directories (Pvt) Ltd& Ors* 1956 (1) SA 105 (N) at 124E and 126B and *Scheelite King Mining Co (Pvt) Ltd v Mahachi* 1998 (1) ZLR 173 (H) at 178.

F Before holding the respondent to have been in contempt of court, it is necessary for me to be satisfied both that the order was not complied with and that the non-compliance was wilful on her part: *Lindsay v Lindsay* 1995 (1) ZLR 296 (S) at 299B.

In casu, the court order requires the respondent to return the applicant's listed property within 24 hours of the service of the order. The order was properly G served on her on 22 May 2003. By the time these proceedings were launched on 18 June 2003, the respondent had not returned the property subject matter of the proceedings. She has not taken any steps to assail the said order. So she has clearly not complied with the order. The only issue left is whether she did so wilfully. Romer LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA) H stated:

> "It is the plain and unqualified obligation of every person against, or in A respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged... The first is that anyone who disobeys an order of the court... is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to court by such person will be entertained until he has purged himself of his contempt." B

This approach was followed in our jurisdiction. See *Allan v Allan* 1959 (1) R & N 499 (SR); 1959 (3) SA 473 (SR) and *Sabawu v Harare West Rural Council* 1989 (1) ZLR 47 (H). The second consequence authored by Romer LJ *(supra)* does not arise in this case as the applicant submitted that he does not object to the respondent being heard. In the circumstances I exercised my C discretion in favour of her being heard. In any event, even if the concession was not made by

applicant I am of the view that in exercising such a discretion a court should not lightly deprive a party of his right to be heard. As admirably pointed out by Denning LJ in the *Hadkinson* case *(supra):*

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by a grave consideration of public policy. It is a step D which a court will only take when the contempt itself impedes the course of justice and where there is no other effective means of securing his compliance".

See also *Jackman v Jackman* 1969 (2) RLR 534 (G).

In the present case the respondent has given the reason that she did not remove E the property in question from the applicant's residence. In her opposing papers she has made a bare denial of taking, and having, in her custody the property in question. In these proceedings the applicant has filed a supporting affidavit of the parties' neighbour one, Ms Charlene McKop. The main thrust of her evidence is that she went to the applicant's house and saw three men busy loading furniture into a white Mazda van. The respondent's Nissan F Sunny vehicle was also in the yard. The Mazda drove away and soon thereafter the respondent drove out in her Nissan Sunny. She stopped the respondent and spoke to her. The respondent was with her daughter. She observed that the respondent had some property on the back seat of her vehicle and she managed to recall a cellular phone set and a heater. The respondent had many other things in the vehicle. The respondent told her about the altercation that she had G had with the applicant. It seems to me that this is the only explanation for the disappearance of the property. At a later stage the respondent returned the cellular phone to the applicant at Donnington Police Station. She does not proffer any explanation on how the property of this kind disappeared. What seems beyond dispute is that after the altercation between the parties, the respondent remained in the house. This is clear from her opposing affidavit in H

Ndou J

A para 3 (c) and 3 (d) where she states:

> 3 (c) "I never saw the deponent in my yard There was no Mazda pick up truck ...
>
> 3 (d) This never happened because there was no truck in my yard."

Bearing in mind that property included a fridge, sound system, a 34 inch B television set, a table and chairs, microwave oven, car fridge etc one requires at least a truck to transport the same. She remained in the house. This property went missing. She cannot explain how it went missing. She is adamant that there was no Mazda truck/van in the yard. She can only be sure if she was present. It is apparent that the property was taken in her presence. She is not being candid in this regard when she ventured some attempt at explanation. C Her explanation is generally unsatisfactory and does not withstand scrutiny. Mr *Makonese,* her legal practitioner, did not help her situation either. In his submissions at chambers he dwelt more on the marginal issues which are not contained in the opposing affidavit and papers. One such issue is the ethical conduct of the applicant's legal practitioner Mr *Moyo.* This tended to cloud the issue of contempt. I will deal with this issue later. In the circumstances, the D wilfulness of the respondent is, in my view, indisputable. If her protestations of good faith were true, then her explanation would have clearly and factually shown where she was when the property was taken and why she is not aware who took such bulky property in broad daylight without people noticing. The respondent, who had the benefit of professional legal advice throughout, E understood the order granted by Chiweshe J. She deliberately and knowingly disregarded it. The requisites for granting an order for committal exist in this case. First, an order *ad factum prastandum* (i.e. an order to do, or abstain from doing a particular act, or to deliver a thing) was granted against the respondent. This is common cause. Second, it is common cause that the respondent was served with order. Third, it is common cause that the respondent either F disobeyed the order or neglected to comply with it. As alluded above, in general, all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside: see *Culverwell v Beira* 1992 (4) SA 490 (W). In my view, the onus is on the applicant to show a disobedience of the court's order. He has discharged this onus. That being the case wilfulness is, in such circumstances, inferred and the onus is now on the G respondent to *re*but the inference of unwilfulness on abalance of probabilities. The latter onus is on the respondent because as a defaulting or intransigent party, she must by such default be regarded as having intended the natural consequences of her action, i.e. to bring the administration of justice into contempt - *Haddow v Haddow (supra); Consolidated Fish Distributors* H *(Pvt) Ltd v Zive & Ors* 1968 (2) SA 517 (C) at 522H; *Culverwell v Beira*

Ndou J

(supra); Wickee v Wickee 1929 WLD 145 at 148 and *Van Biljon v Van Biljon* A 1960(1) PH F28 (O).

From her opposing papers, the respondent is relying on inability to comply with the order in that she does not have the goods she was ordered to return. In my view, proven inability to comply with the court's order affords a respondent protection against a committal for contempt: *Campbell v Herbert* B (1908) 18 CTR 22. From what I highlighted above, the respondent has failed to discharge the onus on her. She has failed to establish that she is unable to comply with the court order. The evidence shows that she was instrumental in the removal of the property. She is in a position to comply with the order and it is expected of her to do so. She should not be allowed to defy the law In this regard Greenlang J, in *Sabawu v Harare West Rural Council (supra)* C at 51B-D, stated;

> "To my mind, the fact that the applicant has succeeded in defying the law and the High Court over a period... does prejudice justice in an insidious way. It tends to subvert the psychological bond that exists between the law giver and the subjects of the realm. People in general accept the law and submit to its dictates and circumscriptions in the knowledge that such D submission ensures peace and good order. What they do demand is equality before the law as being the guarantee of sacred human rights. Actions such as those by the applicant, in which a subject sets himself outside or above the law, prejudices this relationship, if only for the reason that other persons are then entitled to question why they should be expected to be law abiding... He is demonstrating to the world his ability E not only to defy the law but to emasculate the court's power to enforce its orders. Success in this stance makes a mockery of the law and tends to bring the administration of justice into disrepute. It also subverts the State's power over its subjects to ensure compliance with its laws via the court which is the State's constitutional vehicle for enforcement."

I am, therefore, satisfied that the respondent's disobedience of the order of this F court is not only wilful but also *mala fide.* The origin of her conduct can be traced in her fear of not getting any matrimonial property as their relationship is for all intents and purposes dead. There is no registered marriage between the parties and in her papers she went all out to establish that she was not the applicant's girlfriend but his customary law wife. Her position does not look G very bright in the absence of a registered marriage and the fear for losing out on assets is understandable. Defying the law, however, is not the solution. She has to go and establish her status as a common law wife in court and thereafter benefit from the share of matrimonial property. Self help cannot be condoned even in such circumstances. People have to assert their rights through lawful means. H

Ndou J

A Before I grant the order I propose to deal with the issue of Mr *Moyo's* ethical conduct. Mr *Makonese's* attempts at assailing Mr *Moyo's* ethical conduct is lacking articulation. After questioning him I was able to discern the following. First, the respondent wanted Mr *Moyo* to declare his "interest" in the matter. Second, Mr *Moyo*'s attitude was not consistent with the achievement of reconciliation of the parties. Third, that Mr *Moyo* socialises with applicant. B A lot of allegations were thrown around. I will deal with material issues raised in turn.

First, the fact that *Mr Moyo* was involved in other matters involving the parties and the applicant and other parties is not a bar for him to appear for the applicant in this matter. Second, there is nothing wrong *per se* in a legal C practitioner advising a client in the termination of a relationship. Mr *Makonese* should know better that the communication between Mr *Moyo* and his client, the applicant is privileged. Third, the fact that Mr *Moyo* socialises with the applicant is not a problem as such, although the nature of such socialisation may, in some instances, not be ethically desirable. From what was submitted there is some cause for concern here. Although it did not come out that clearly D it seems beyond dispute that Mr *Moyo* knows the applicant socially. He also stated that he dealt with him in his divorce two years ago. When the relationship between the parties *in casu* started having problems he tried to "resolve" the problems. It is not clear whether he was trying to resolve in his capacity as a friend or as applicant's legal practitioner. I would, however, point out that if Mr *Moyo* mediated between the parties as a mutual friend it would E be ethically wrong for him to later appear for one of the parties in legal proceedings involving the same dispute. The other issue raised related to a different matter between the parties Mr *Moyo* drafted an affidavit of withdrawal on behalf of the applicant. He signed the affidavit as a Commissioner of Oaths. This, in my view, is clearly wrong. Most of these allegations were raised during F the application for committal for contempt. They are not relevant to the issue before me. As I understand it, Mr

Makonese brought this to my attention as a concerned officer of this court and not in order to cloud the issue of the contempt committal by his client. It would, in any event, be unethical for Mr *Makonese* to do the latter. The Registrar will forward a copy of the judgment to the Law Society for these issues to be looked into properly.

G Coming back to the main issue, I am satisfied that the order sought is merited and I therefore grant the order in terms of the amended draft.

Majoko & Majoko, applicant's legal practitioners

H *Makonese & Partners,* respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/MIKESOME INVESTMENTS (PVT) LTD v SILCOCKS INVESTMENTS (PVT) LTD 2003 (2) ZLR 56 (H)

MIKESOME INVESTMENTS (PVT) LTD v SILCOCKS INVESTMENTS (PVT) LTD 2003 (2) ZLR 56 (H)

Citation	2003 (2) ZLR 56 (H)
Case No	Judgment No. HH-107-03
Court	High Court, Harare
Judge	Smith J
Heard	22 May 2003
Judgment	16 July 2003
Counsel	*T Mapfunde,* for the plaintiff *R M Fitches,* for the defendant
Case Type	Civil action (stated case)
Annotations	No case annotations to date

Flynote

Contract — *legality— contract illegal for want of compliance with statutory* C *formalities — whether payment made is recoverable*

Estate *agent — commission — contract illegal due to non-compliance with statutory formalities — commission not payable*

Land — *subdivision — sale of subdivision before approval in terms of s39(1)* D *of the Regional Town and Country Planning Act [Chapter 29:12] — unlawfulness of sale*

Sale — *land — subdivision —subdivision sold before sub divisional approval granted — illegality of sale*

Headnote

The defendant gave the plaintiff estate agent a mandate to sell, on its behalf, E certain residential stands on *t*wo farms owned by the defendant. A plan had been drawn up showing the subdivisions

but approval for the subdivision as required by the Regional Town and Country Planning Act [*Chapter 29:12*] had not been obtained at the time the plaintiff executed the mandate. The approval was subsequently obtained, but the plaintiff F had sold some of the stands before the approval was obtained and the defendant paid the plaintiff a sum of money as part commission on those sales. The plaintiff claimed commission for the sales and the defendant counter-claimed for the refund of the commission it had paid. The matter proceeded as a stated case, subject to certain evidence being led. The questions of law stated for decision were: G

1. Whether at the time the plaintiff effected its mandate, the contract was void for want of compliance with s 39(1) of the Act.
2. If so, whether the plaintiff was entitled to sue for its commission.
3. Whether the defendant was entitled to are fund of the part commission it had paid. H

Smith J

A *Held,* that an agreement for the change of ownership of any portion of a property, except in accordance with a permit granted under the Act which allows for a subdivision, is prohibited. As the sales were illegal, there was no valid basis for the plaintiff to claim commission on the sales it effected.

Held, further, that the enrichment of the plaintiff was without a legal cause B because every sale it concluded was illegal. That being the case, the defendant was entitled to a refund of the commission by virtue of the *condictio ob turpem vel iniustam causam.* The *in pari delicto* rule did not apply in these circumstances.

Case cited C

X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd 2000 (2) ZLR 348 (S)

Case information

T Mapfunde, for the plaintiff

D *R M Fitches,* for the defendant

Judgment

Smith J: The plaintiff (hereinafter referred to as "Sommerfield") issued summons claiming from the defendant (hereinafter referred to as "Silcocks") the sum of $3 277 500, in respect of commission due by the latter to Sommerfield as agent's commission in terms of the Estate Agents Act as per E the agreement entered into by the parties. Silcocks opposed the claim. It pleaded that there was no such agreement as alleged by Sommerfield; alternatively, if there was an agreement as alleged, the agreement was illegal and unenforceable because the permit to subdivide the land had not been granted; alternatively, even if there was an agreement as alleged, the parties had not agreed as to whether or not commission was to be charged. Silcocks F filed a counterclaim for an order that Sommerfield refund the $950 000 it had been paid by Silcocks as commission. The parties agreed that the question in dispute is one of law and, as most of the facts were agreed, evidence would be led on one issue and thereafter judgment could be given in accordance with Order 29 r 204 of the High Court Rules.

G The facts admitted by the parties and duly recorded are as follows. Silcocks gave Sommerfield a mandate to sell, on its behalf, certain residential stands on two farms owned by Silcocks. A plan had been drawn up showing the subdivisions but approval for the subdivision as required by s 39(1) of the Regional Town and Country Planning Act [*Chapter 29:12*] (hereinafter H referred to as *"Chapter 29:12")* had not been obtained at the time Sommerfield

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Smith J

executed the mandate. Such approval was subsequently obtained in A November 2001. Sommerfield had sold some of the stands before that date and Silcocks had paid it $950 000 in commission. When the Estate Agents Council became aware of such sales, it investigated the matter and then issued a Stop Trading Notice, which Sommerfield agreed to abide by, and disciplined Sommerfield.

Sommerfield did not tell Silcocks what the Estate Agents B Council had done. When Silcocks found out what had happened, it did not want Sommerfield to continue taking money in respect of the stands it had sold, because of the disciplinary hearing. Silcocks did not want to be involved in a scheme which could become the subject of a scandal, because the owner of the company is a senior officer in the Zimbabwe Republic Police. Silcocks convened a meeting of those who had purchased stands in the scheme and C explained the situation. The purchasers agreed that payments of future instalments would be made direct to Silcocks. Sometime after that meeting approval of the subdivision was granted and the project was completed without any further problems. Sommerfield then sued for the balance of the commission it felt was due to it in respect of the sales it had made on behalf of Silcocks. D

The questions of law for decision are —

1. Whether, at the time Sommerfield effected its mandate, the contract was void for want of compliance with s 39(1) of [*Chapter 29:12*].
2. If so, whether Sommerfield is entitled to sue for its commission.
3. Whether Silcocks is entitled to a refund of the commission it had paid E in the sum of $950 000.

The parties wished to lead evidence as to the agreement that had been entered into between them.

The first witness was Mr S Mhondamapango, who testified as follows. He is the principal registered estate agent employed by Sommerfield. He was F mandated by Silcocks to sell stands and was promised commission on each stand he sold. It was Silcocks that had drawn up the plans for the subdivision. He was not aware that the scheme was illegal. Silcocks had appointed a person to do the planning. The person concerned had prepared other schemes and he was conversant with the procedures relating to subdivisions and the relevant provisions *of Chapter 29:12.* The mandate he was given by Silcocks was to G sell the stands. He thought everything was in order. The firm appointed by Silcocks to do the subdivisional plans was FM Eiving (Pvt) Ltd (hereinafter referred to as "FM Eiving"). By letter dated 10 October 2000 that firm, acting on behalf of Silcocks, appointed Sommerfield as selling agents for shares in the company which owned the land. In the letter it was pointed out that "the subdivision is non-statutory" and that prospective buyers would be buying H shares in Silcocks, not actual stands.

Smith J

A In cross-examination, Mhondamapango said that he was a registered estate agent. He had been so registered since February 2000 and had had nine years of "hands-on" experience in selling property. Prior to his appointment by Silcocks, he had been involved in only one case of selling subdivisions. In that case, the sales were effected by the transfer of shares. He was aware that a permit approving the subdivision was necessary. When the Estate Agents B Council investigated the matter he was told that his company could continue collecting money in respect of the stands he had sold, but he was not to effect anymore sales. The sales he had effected were illegal. At the meeting, he had with the planner, the planner had insisted that selling the stands by way of shares was lawful. It was not his responsibility to see that all the legalities were complied with. That was the responsibility of the planner. His duty was merely C to sell the stands.

Silcocks called two witnesses. The first was Mr S Gwasira who testified as follows. He has been a member of the Police Force for 23 years and holds a senior rank. He first met Mhondamapango in the year 2000. Mhondamapango was acting for a firm of estate agents called BHI and was selling stands on a D farm next door to his. He mentioned that he wanted to subdivide his farm and sell stands, Mhondamapango came to his farm and said that there would be no difficulty. He then contacted Mr Chizema who was employed by FM Eiving, which practised as project planners, managers and property development consultants. Chizema told him that he would have to get a permit to authorize the subdivision of his farm. However Mhondamapango later told him that he E could sell the stands before he got a permit for the subdivision. Mhondamapango said that the sale of the stands on the next door farm had been effected on the basis of selling shares in the company which owned the land, and he undertook to get some lawyers who could advise them as to the procedures to be adopted and draft the necessary agreements. The farm is near Kadoma. Mhondamapango F had arranged for the purchase of a shelf company, which was Silcocks, and the farm was transferred into the company's name. He relied on Mhondamapango's advice because he was a registered estate agent. The plans were drawn up by Chizema. They started selling stands in

early 2000. Then in May Mhondamapango stopped selling stands. He got suspicious and approached the Estate Agents Council. He then found out that Mhondamapango had been G ordered to stop selling the stands. He then called a meeting of those who had bought stands. Some had already finished their payments. They formed an association and agreed they would make their payments to him instead of Sommerfield. He had explained the position to them, telling them that the sale of shares was not acceptable and that a permit for the subdivision would have H to be obtained. He told them that anyone who wanted to pull out could do so

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and would be refunded what he had paid. From then on he had worked hand A - in-hand with the association of buyers. Eventually he had obtained the permit in November 2001 and thereafter the project had been completed successfully.

On 24 October 2000, he had written to Sommerfield to say that the firm had been duly appointed to be their estate agent and to act on behalf of Silcocks to dispose of the subdivisions, which were being sold on a share transfer basis. B It was Mhondamapango who had said that the letter of appointment was necessary. The idea of selling the stands by way of share transfers was that of Mhondamapango and he was the one who had transferred the farm into the company's name.

Under cross-examination, Gwasira made the following responses. The letter Chizema wrote to Sommerfield on 10 October 2000, appointing Sommerfield C as selling agents, was written after he and Chizema met Mhondamapango and was written because Mhondamapango said what had been discussed must be put in writing. The meeting had taken place on the next door farm where Mhondamapango was selling stands on a "share transfer" basis on behalf of a firm called BHI. He had told them that it was possible for Silcocks to follow D the same procedure and a permit for the subdivision would not be necessary. After the meeting with the people who had purchased shares, some of them did withdraw from the scheme and their deposits were refunded. When the Estate Agents Council instructed Sommerfieled to stop selling stands in the project, Mhondamapango should have told him about it but he did not. That was why he terminated Sommerfield's mandate. The letter from Silcocks to Sommerfield, E dated 24 October 2000, wherein the latter was appointed to be the estate agent to dispose of the subdivisions of the project had actually been drafted and typed by Mhondamapango and then given to him to be signed. Mhondamapango had done many letters for Silcox and then asked him to sign them.

The last witness was Chizema, a town planning consultant with FM Eiving. F He testified as follows. Gwasira had approached him and asked him to subdivide the land. He was appointed planning agent. He prepared a layout plan of the subdivisions for lodging with the local planning authority. A firm called BHI had sold some plots on a neighbouring farm by way of share transfers. Mhondamapango had recommended that as a method of selling stands in the project. He had attended several meetings where the matter was G discussed. At the time Gwasira was the owner of the land, but a company was formed and the land transferred into the company's name. He had written the letter dated 10 October 2000 to Sommerfield appointing it as selling agent to sell shares for the subdivisions. He had described the subdivision as "non- statutory" because no permit for the subdivision had been obtained. The letter was written after the discussions between him, Gwasira and Mhondamapango. H

A In cross-examination, Chizema made the following responses. He has, been practising as a project planner since 1995 and has planned many projects. He had drawn up the plans for the subdivision of the farm at the request of Gwasira. He had advised Gwasira that no subdivision could be sold legally unless a permit had been obtained in terms of s 39 *of Chapter 29:12.* That was why the scheme to sell the subdivisions by way of share transfers was adopted. B Gwasira decided that he would sell the subdivisions because Mhondamapango had recommended the scheme and said that that was how the subdivisions on the next door farm were being sold. He had written the letter dated 10 October 2000 in the name of FM Eiving appointing Sommerfield as selling agents and advising that "the subdivision is non-statutory, that is, it is not in accordance with s 40" of *Chapter 29:12.* He only wrote the letter after he had been C convinced that the sale of subdivisions by way of share transfers was legal. He had not had any previous experience of selling subdivisions by way of share

transfers. Both Mhondamapango and the legal practitioner had discussed the matter with him and Gwasira and they had persuaded him that the scheme was legal.

D Mr *Mapfumo* argued that it was Gwasira and Chizema who had suggested the share system to Mhondamapango, who was not aware that it was illegal. The letters written by Gwasira and Chizema to Sommerfield showed clearly that they were instructing that the sales be effected by way of share transfers. Mr *Fitches* submitted that Gwasira and Chizema had been credible witnesses and the probabilities supported their evidence. Mhondamapango is a registered E estate agent and so they relied on his expertise.

Sommerfield's claim for $3 277 500 is based on it having been appointed by Silcocks to sell certain pieces of subdivided land. The evidence clearly establishes that when Sommerfield was so appointed, no permit had been obtained in terms of s 40 of the *Chapter 29: 12* for the land to be subdivided. F In *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd 2000* (2) ZLR 348 (S) McNally JA referred to s 39(1) of *Chapter 29:12,* which forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under s 40 which allows for a subdivision. He said:

> "The agreement... is clearly an 'agreement for the change of ownership' G of the unsubdivided portion of a stand. What else could it be for? Whether the change of ownership is to take place on signing, or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which prohibited."

There can be no doubt, therefore, that the sales of the subdivisions in question H by Sommerfield were unlawful. When the Estate Agents Council became

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aware of the sales it issued a Stop Trading Notice. As the sales were illegal, A there is no valid basis for Sommerfield to claim commission on the sales it effected. In Joubert's *General Principles of the Law of Contract* at p 151 the learned author states:

> "The basic rule is that agreements contrary to law are invalid. This means that no obligation arises from such agreements and that no action on any B contract can be maintained. No party can claim performance of what has been promised to him. If the unlawful agreement is the *causa* for another agreement, then the lawfulness of the other agreement can be attacked."

The commission that Sommerfield is claiming from Silcocks is in respect of subdivisions which it sold on behalf of Silcocks. The sales were effected before November 2001, which was when the permit approving the subdivisions C was issued in terms of s 40 *of Chapter 29:12.* Clearly, therefore, those sales were unlawful. Consequently, Sommerfield cannot claim any commission in respect of the said sales.

In De Villiers & Macintosh on *Agency,* the learned authors state at p 417 that an agent is not entitled to, and forfeits, his remuneration if he is guilty of wilful D misconduct or breach of duty or if the transactions involve services which are illegal. The services provided by Sommerfield were to sell subdivisions. The sales were effected by way of share transfers. The sales were illegal because no permit had been obtained in terms of s 40 of *Chapter 29:12.* As Sommerfield did not complete its mandate, in that the sales it concluded had no legal effect, it was not entitled to claim commission on the illegal sales. Sommerfield, even E if it was not aware that no subdivision could be sold if a permit has not been issued in terms of s 40 *of Chapter 29:12,* should have been aware of the legal necessities. It operates as an estate agent and Mhondamapango is a registered estate agent. The fact that the Estate Agents Council disciplined Sommerfield or Mhondamapango for purporting to sell the subdivisions by way of share transfers shows that Sommerfield had not acted in the manner expected of F registered estate agents. From the evidence led, I consider that it was established that it was in fact Mhondamapango who had suggested that the subdivisions should be sold by way of share transfers, so that the necessity of obtaining a permit could be avoided. It was he who persuaded Gwasira to embark on such a scheme.

Is Sommerfield entitled to retain the $950 000 which Silcocks has paid it? In G Joubert's *General Principles of the Law of Contract* at p 152 the learned author says:

> "The only matter that remains is the question of recovery of performance by any of the parties to the unlawful agreement. In this regard the factual position is of importance. It may be that the performer is the poorer and H

Smith J

A that the recipient is the richer. This enrichment is without a legal cause and therefore unjustified. On principle, it should be possible for the performer to reclaim his performance or whatever has enriched the other party. In the Roman law there was in fact a remedy, *viz* the *condictio ob turpem vel iniustam causam.* This remedy has survived into modern times. This means that basically the law recognises the right of the performer to B reclaim his performance or whatever is left thereof. Apart from the above-mentioned *condictio* no other enrichment claim is recognised."

The money collected by Sommerfield in respect of the sales of subdivisions was owed to Silcocks. By retaining the commission Somerfield became the richer and Silcocks the poorer. The enrichment of Sommerfield is without a legal cause because every sale it concluded was illegal. That being the case, C I consider that Silcocks is entitled to a refund of the $950 000 by virtue of the *condictio ob turpem vel iniustam causam.* Mr *Mapfunde,* quite rightly, did not argue that Sommerfield is entitled to retain the $950 000 by virtue of the rule that *in pari delicto, potior est conditio possidentis.* There is no question of Silcocks being *in pari delicto.* Sommerfield is a registered estate agent. It ought to have advised Silcocks of what the law required and how the sales D should be conducted. It failed to do so. Gwasira acted on the advice of Mhondamapango.

Accordingly, the answers to the three questions posed are:

1. At the time Sommerfield effected its mandate to sell the subdivisions, the contracts of sale it concluded on behalf of Silcocks were void for E want of compliance with s 39(1) *of Chapter 29:12.*
2. Sommerfield is not entitled to claim commission in respect of the sales it concluded on behalf of Silcocks.
3. Silcocks is entitled to a refund of the commission it paid Sommerfield in the sum of $950 000 with interest thereon at the prescribed rate from F the date the claim in reconvention was filed.

Manase & Manase, legal practitioners for the plaintiff

Dube Manikai & Hwacha, legal practitioners for the defendant

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/CHIZURA v CHIWESHE 2003 (2) ZLR 64 (H)

CHIZURA v CHIWESHE 2003 (2) ZLR 64 (H)

Citation	2003 (2) ZLR 64 (H)
Case No	Judgment No. HB-80-03
Court	High Court, Bulawayo
Judge	Cheda J
Heard	17 July 2003
Judgment	17 July 2003
Counsel	*S Mazibisa,* for the applicant *C P Moyo,* for the respondent
Case Type	Opposed application

Annotations Link to case annotations

Flynote

Practice and procedure — *special plea — lis pendens — not an absolute bar — court may disregard defence when it is just and equitable to do so* C — *delay affecting deceased estate and prejudicing beneficiaries — plea dismissed*

Headnote

The applicant was the executor of a deceased estate. The respondent was tenant of premises owned by the estate. The applicant sought the eviction D of the respondent for failure to pay rent. The respondent raised the defence of *lis pendens,* on the grounds that the applicant had brought similar proceedings already, which had not been finalised.

Held, that the principle of *lis pendens* is not an absolute bar. It is discretionary upon the court to decide whether it is just and equitable E that it must be allowed to proceed. This matter involved a deceased estate, which should receive the court's sympathetic hearing and urgent attention, for failure to do so will result in beneficiaries suffering. It would be unjust and inequitable that the finalisation of this matter be suspended by a defence of *lis alibi pendens.*

Cases cited F

Baldwin v Baldwin 1967 RLR 289 (G)

Chibanda v Musumhiri & Anor 1992 (2) ZLR 50 (H)

Loader v Dursot Bros (Pvt) Ltd 1948 (3) SA 136 (T)

Mahomed & Son v Mahomed 1959 (2) SA 688 (T)

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

Nissi Global (Global (Pvt) Ltd v Enbert Stationery Mfrs & Ors HB-76-03

Case information

S Mazibisa, for the applicant

C P Moyo, for the respondent H

2003 (2) ZLR p65

Cheda J

Judgment

A **Cheda J:** The applicant is the executor of the estate of the late the Grace Chizura and is acting as such, of the, being the lessor of certain premises known as 101 Netherby Drive, Sunnyside, Bulawayo and the respondent is a lessee of the premises. A lease agreement was entered into between the parties on 30 B January 2001.

On 15 July 2002 the applicant issued out summons for the cancellation of the lease agreement and eviction of the defendant on the basis that the defendant had breached the lease agreement. Reliance was placed on clauses 3 and 8 which read:

> C "**3. Rental**
>
> The rental payable by the lessee shall be $7 000 (seven thousand dollars) per month (unless varied by a Rent Order issued by a Rent Board in terms of the Rent Regulations 1982 Statutory Instrument 626 of 1982 or any subsequent legislation), payable monthly in advance free of exchange of other deductions on or before the first day of every month into Zimbabwe D Banking Corporation Limited (ZIMBANK) account number 43302- 130444-101 in the name of MISS NOBUKHOSI NCUBE. Payment may also be made at such other place directed by the Lessor from time to time.
>
> Should the Lessee fail to pay the monthly rental within seven (7) days of due date the lessor without prejudice to any of his/her rights, shall further have the right to demand and recover from the Lessee all

legal costs E incurred in consequence of such late rent including party and party attorney and client costs and any collection commission charged to the lessor, all of which amounts the lessee agrees to pay.

Furthermore, whether or not the Lessee thereafter pays his/her rental and all legal costs as aforesaid, the Lessor shall F have the right to evict the Lessee from the premises with immediate effect. The Lessor shall also have the right to deny access by the Lessee to the premises while eviction procedures are being executed."

"**8. Condition of premises**

The Lessee shall, on taking possession of the premises, satisfy himself that the leased premises and any appurtenances or contents thereof G including keys, locks, windows, sewage pipes, and pans or electrical installation and fittings, including thermostats and elements, plumbing, especially washers, ballvalves and wash hand basins, refrigerators, fire- place fixtures or furniture, are in a good and proper state of repair and in a clean and sanitary condition and shall within seven (7) days of so taking possession notify the Lessor in writing of the details of any defect in the H state of repair or condition of the leased premises, the appurtenances or

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contents aforesaid, AND THE FAILURE OF THE LESSEE TO SO A A NOTIFY THE LESSOR shall be deemed an acknowledgement that the whole of the same are in good and proper state of repair and in a clean and sanitary condition. Notification of any defect not repaired rendered the Lessor liable to repair such defect."

The respondent filed an appearance to defend on 25 July 2002, to which the B applicant responded by filing an application for summary judgment which is subject of these proceedings.

Point *in limine*

At the hearing Mr *Moyo* raised a point *in limine* in the form of a special plea, basically that this matter involves the same parties and the same subject as in C cases HC 1462/02 and HC 1638/02. He argued that, of the two cases, only case number HC 1638/02 had been withdrawn by the applicant and 1462/02 was still pending. It is therefore his argument that this matter should not be dealt with before the above matter is disposed of. It is, indeed, correct that in all the above cases the respondent has been entering an appearance to defend and filing pleas. In case 1462/02 one of the issues he raised is that the applicant D is not the executor of the estate of the late Grace Chizura.

Even if the applicant was not, the respondent should not forget that when he entered into the lease agreement, he signed and accepted the applicant as having authority to sign as the lessor and in fact continued to pay rent to him and/or his agent. This argument is in my view without merit.

I have examined the cases referred to by Mr *Moyo* which give rise to the E defence *of lis pendens* or *lis alibi pendens.* Herbstein and Van Winsen in the *Civil Practice of the Superior Courts in South Africa* 3 ed at p 269-270 state:

"If an action is already pending between parties and the plaintiff therein brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or F a different court, it is open to such defendants to take the objection of *lis pendens* that is another action respecting the identical matter has already been instructed, whereupon the court, in its discretion, may stay the second action pending the decision in the first action."

It is clear that the principle of *lis pendens* or *lis alibi pendens* is not an absolute bar. It is discretionary upon the court to decide whether it is just and equitable G that it must be allowed to proceed. The question then is, is it just and equitable to allow the present case to be heard or allow the objection raised by respondent to bar the hearing? I believe it is important in order to make a proper assessment of this case to look at the history of the matter. The respondent accepted the applicant's position as executor of the estate when he entered into the lease agreement. When he is now called upon to pay up in time, he then H

A raises a defence of lack of authority on the part of the applicant to act and has been forcing the applicant to withdraw his claim. This matter involves an estate which, in my view, should receive the court's sympathetic hearing and urgent attention, for failure to do so will result in the beneficiaries suffering. It will therefore be unjust and inequitable that the finalisation of this matter

be suspended by a defence of *lis alibi pendens* which is not *per se* absolute. In B *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 *(T)* at 138 Roper J clearly stated:

> "It is clear on the authorities that a plea *of lis alibi pendens* does not have the effect of an absolute bar to he proceedings, in which the defence is raised. The court intervenes to stay one or other of the proceedings because it is *prima facie* vexatious to bring two actions in respect of the C same subject matter. The court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist- *Wolff NO v Solomon* (1898) 15 SC 297 at 307; *Michaelson v Lowenstein* 1905 TS 324; *Osman v Hector* 1933 CPD 503."

The rule is therefore not immutable. See also D *Baldwin v Baldwin* 1967 RLR 289 (G) at 290D and *Mhungu v Mtindi* 1986 (2) ZLR 171 (S). It is my view that this is a proper case where a court can ignore the existence of this defence in the interest of justice and above all bearing in mind that this dispute involves a deceased's property the balance of convenience favours that the matter should proceed.

E **Merits**

It is not disputed by the respondent that their terms and conditions of the agreement are governed by the lease agreement. He, however, is of the view that the applicant has always allowed him to pay his rent outside the stipulated date. This may well be so, but that in my view does not take away the F applicant's rights to enforce the agreement. Any variation of the lease agreement was to be in accordance with clause 21 which reads:

> **"21.Variation of lease**
>
> It is recorded that this agreement is the whole agreement between the lessor and the lessee and that there have been no warranties, guarantees, representations or conditions precedent, save as are specifically recorded G herein. No alteration, variations or permitted cession of this lease shall be of any force and effect unless in writing and signed by both parties hereto."

The respondent further argued that he is a statutory tenant in accordance with the Rent Regulations (Statutory Instrument 626 of 1982). A party who seeks protection under these Regulations should also comply with the obligations H imposed on him by the same Regulations as well. In *Chibanda v Musunhiri*

Cheda J

& Another 1999 (2) ZLR 50 (H) at p 59D-E Mubako J had this to say: A

> "The Rent Regulations only protects the respondent as long as he remains a *bona fide* statutory tenant. Section 30(2) stated that no eviction order shall be made by any court -
>
> *'so long as the lessee continues to pay rent due within 7 days of due date and performs other conditions of the lease.'"* B

Judging by the respondent's performance and behaviour during the lease he C certainly falls outside the ambit of this protection. He is therefore not a *bona fide* statutory tenant. It is therefore clear that the respondent is in breach of the lease agreement and applicant was perfectly entitled to take the action he took.

Costs

The applicant is asking for costs at a higher scale. Clause 19 of the lease C agreement is explicit. In addition to this, I would like to observe that the respondent's attitude and actions has been that of frustrating the applicant at every given opportunity. His conduct is reprehensible and it is the type of conduct which, even if there had been no clause regarding the payment of costs, the court would have been bound to order costs at the higher scale. He D has always known and appreciated that he had no defence to resist eviction but persisted in his hollow defence. This is borne out by his response in his opposing affidavit when he stated:

> "I am of the opinion that should she approach me in a civil manner we should resolve this matter without going to court and obviously at lesser expense on both of us." E

In awarding costs at a higher scale, the losing litigant's attitude in the proceedings is an essential ingredient which should be taken into account as it impacts negatively in the expenses of the litigant - see *Mahomed* & *Son v Mahomed* 1959 (2) SA 688 (7). It is clear that the respondent knew that he

had no 'defence but rather wanted the applicant to bend down on her knees in F claiming her property back. The applicant has indeed done so at a considerable' expense and it is only proper that she recovers all her expenses, thus putting . her back to where she was prior to the commencement of these proceedings see *Nissi Global (Pvt) Ltd v Eubert Stationery Manufacturers (Pvt) Ltd* & *Ors* HB-76-03 (unreported).

In conclusion therefore the following order is made: G

1. An order for the summary judgment termination of the lease agreement, regarding stand number 101 Netherby Drive, Sunnyside, Bulawayo be and is hereby granted.
2. The respondent be and is hereby ordered to vacate stand number 101 Netherby Drive, Sunnyside, Bulawayo with seven (7) days of granting of H

Cheda J

A this order, failing which the Deputy Sheriff is hereby ordered to evict him together with all claiming through him.

3. The respondent be and is hereby ordered to pay costs of suit at an attorney and client scale.

B *Cheda* & *Partners,* applicant's legal practitioners

Majoko & *Majoko,* respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/S v NYIRENDA 2003 (2) ZLR 70 (H)

S v NYIRENDA 2003 (2) ZLR 70 (H)

Citation	2003 (2) ZLR 70 (H)
Case No	High Court, Bulawayo
Court	Judgment No. HB-86-03
Judge	Chiweshe J & Ndou J
Heard	14 July 2007
Judgment	7 August 2007
Counsel	Ms *A Masawi,* for the appellant *L Masuku,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) - *statutory offences - Sexual Offences Act* C *[Chapter 9:21] - s 3(1) - unlawful sexual relations with a minor factors to consider*

Evidence — *sexual cases — approach to — need to consider nature and circumstances of offence carefully — need for satisfactory explanation for unsatisfactory parts of complainant's conduct*

Evidence - *sexual cases - complaint - when admissible - reason why* D *such evidence admitted*

Headnote

To justify the conclusion that the assessment made by a trial court of the credibility of a witness is wrong, an appellate court must be persuaded that the finding defies reason and common sense. The fact that a witness E lied in some respects does not mean that the trier of fact has to disregard the witness's evidence *in toto.* The trier of fact is entitled to consider the witness's explanations for the unsatisfactory parts of his or her conduct. In a rape case, her testimony should be assessed on the basis that there is no standard reaction to a rape. Although the courts have moved away from the two-pronged "cautionary" test, the nature and circumstances of F the alleged sexual offence must be considered carefully. Where the areas in respect of which the complainant moved away from the truth were areas fundamental to her story as a whole, it would be a serious misdirection for the magistrate to say that he finds the truth to lie somewhere else. In such a situation, the court does not find where the G truth lies, it decides whether the witness on whose evidence the court is asked to rely is telling the truth.

Complaints in sexual cases are admitted to show consistency and to negative a defence of consent, but not as proof of their contents, nor to corroborate the, complainant. For the complaint to be admitted it must meet the following requirements: (a) it must have been made voluntarily and not H

Ndou J

A as a result of questions of a leading and inducing or intimidating character; (b) it must have been made without undue delay but at the earliest opportunity which, under all the circumstances, could reasonably be expected, to the first person to whom the complaint could reasonably be expected to be made; and (c) the complainant must give evidence.

In a case of having unlawful sexual relations with a minor female, factors C relevant to sentence include: (a) the age difference between the parties: the greater the difference, the more serious the offence; (b) the proximity of the minor to 16 years: the closer the minor is to 16, the less serious the offence; (c) whether the accused was *in loco parentis;* (d) whether the parties had any intention of marrying.

Cases cited C

S v Banana 2000 (1) ZLR 607 (S)

S v Chuma 1983 (2) ZLR 372 (H)

R v de Beer 1933 NPD 30

R v du Plessis 1922 TPD 153

D *S v Five* 1988 (2) ZLR 168 (S)

R v Gannon 1906 TS 114

S v Gardener 1982 (2) ZLR 290 (S)

S v L [2003] 1 All SA 16(SCA)

R v M 1959 (1) SA 352 (A)

E *Sv Mbanda S*-184-90

S v Mlambo 1994 (2) ZLR 410 (S)

S v Nare 1983 (2) ZLR 135 (H)

R v Osborne [1905] 1 KB 551; [1904-7] All ER Rep 54 (KBD)

R v Petros 1967 RLR 35 (G); 1967 (2) SA 497 (R) *(sub nom R v P)*

R v Sava 1967 RLR 367 (G)

F *R v Sithole* 1967 RLR 403 (G)

S v Soko S-118-92

S v Zulu 2003 (1) ZLR 529 (H)

Case information

Ms *A Masawi,* for the appellant

G *L Masuku,* for the respondent

Judgment

Ndou J: The appellant was convicted by a regional magistrate sitting at Bulawayo on 4 October 2000 on a charge of rape. He was sentenced to eight years' imprisonment, with two suspended on condition of good behaviour. H Aggrieved by his conviction, the appellant appealed to this court.

2003 (2) ZLR p72

Ndou J

The salient facts are that the complainant and the appellant are neighbours A staying in the same block of flats in the Iminyela suburb of Bulawayo. The complainant's father and the appellant are friends, resulting in the complainant regarding the appellant more of a father to her. At the time of the trial the appellant was aged 37 years and the complainant had turned 15 years. On 30 June 2000 at about 1000 hours the appellant went to the complainant's house. B The complainant was home alone. He found the complainant ironing clothes on a table in the kitchen. The appellant sat on a sofa in the kitchen and read a newspaper. After the complainant had finished ironing, she sat on a chair far from the accused and started to read a novel. The appellant stood up and went in front of the complainant.

There was a serious dispute on what happened thereafter prior to the arrival C of the complainant's father. Although the appellant strongly denied during the trial having had sexual intercourse with the complainant, Ms *Masawi,* on his behalf, conceded in her submission in this court that sexual intercourse took place. Having regard to the medical report I find that the concession was properly made. Dr Chiwora, who examined the complainant a day after the alleged rape, observed bruising and wounds in her genitalia. The only issue D that remains is whether such sexual intercourse was consensual.

[*His Lordship examined the evidence in detail and continued:*]

It is common cause that the complainant's father entered the house after the sexual act through the sitting room door as the complainant left the house through the door which led from the kitchen to the toilet. The complainant's E father, a member of the Zimbabwe Republic Police, changed into civilian clothes from the police uniform. He then joined the appellant and the two chatted over a continental sporting event that was being highlighted on the local television. I will examine the evidence.

It is not surprising that a concession was made that the appellant had sexual intercourse with complainant. F

The trial magistrate found that the complainant was a credible witness. It is trite that the assessment of the credibility of a witness is the province of the trial court. In *S v Mlambo* 1994 (2) ZLR 410 (5) at 413 Gubbay CJ said:

> "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 G court unless satisfied that it defies reason and common sense."

In *S v Soko* S-118-92 at p 8 of cyclosty led judgment Ebrahim JA said:

> "A court of appeal will not interfere with a trial court's assessment on credibility lightly. There has to be something grossly irregular in the proceedings to warrant such interference. This is because the trial court H

2003 (2) ZLR p73

Ndou J

A by having the witness before it is better able to make all other factors relevant in assessing credibility. The appeal court, on the other hand, is confined to the record."

In *S v Mbanda* SC-184-90 at p 7 of cyclosty led judgment Gubbay CJ said:

"An appellate court must never overlook that the trial court's living through a drama of a case is in a unique position to evaluate the evidence in its B 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"

See also *S v Zulu* 2003 (1) ZLR 529 (H).

C I will adopt the above approach *in casu.* I hold the view that the finding by the trial court that the complainant is credible defies reason and common sense. That the complainant lied in many respect is beyond dispute. Further there are material discrepancies between her version and that of her father. I, however, have no problems with trial court's findings on the credibility of her father, Ms Ntini, Sibusisiwe Mthethwa and the appellant. The first three witnesses were D correctly found to be credible. The appellant was properly found to be a liar in material respects. I do not, however, adopt an armchair approach in assessing the complainant's version. Her testimony has to be contextualised. The fact that she lied in some respects does not mean that the trier of fact has to disregard her evidence *in toto.* The trier of fact is entitled to consider her E explanations for the unsatisfactory parts of her conduct. Her testimony should E be assessed on the basis that there is no standard reaction to a rape. It does not follow that every rape situation should be characterised by screaming of the complainant, tearing of the victim's garments, immediate report to a relative or someone close to the victim, crying after the rape, preservation of evidence of rape etc. Each case has to be considered on its merits. It is the complainant's explanation for the irregularities or material unsatisfactory features of her evidence that I am not satisfied with. It is F important to emphasise that it is incumbent upon the State to prove its case beyond reasonable doubt. If not, the appellant is entitled to a positive finding in his favour. As rightly pointed out by Mpati JA in *S v L* [2003] 1 All SA 16 (SCA) at p 21 J 22A:

"In my view, there is simply not enough evidence to prove the appellant's G guilt beyond reasonable doubt. He is therefore entitled to the benefit of doubt. The result will of course be a grave injustice if the appellant in fact raped the complainant. But that does not justify the commission of an even more serious injustice of convicting a person without his guilt having been established beyond reasonable doubt."

In considering the complainant's evidence I am fully aware that the two H pronged test in sexual cases is no longer part of our practice. This, however,

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Ndou J

does not mean that I should not consider the nature and circumstances of the A alleged sexual offence carefully. In this regard Gubbay CJ, in *S v Banana 2000* (1) ZLR 607 (S) at 614E-G, said:

"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 approach advocated in South Africa. In so holding, I B have not overlooked the well researched judgment of Gillespie J in *S v B 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 Journal of Family Law* 173, I respectfully endorse the view that in sexual C 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 added)

With this in mind I proceed to consider the questionable aspects in the evidence of the complainant. D

First, the complainant did not make a spontaneous report of the alleged rape to three first available sympathetic witnesses, namely, her father, Pretty Ntini and Sibusisiwe Mthethwa. Her reason for not reporting is that she was afraid that the appellant would be confronted and then assault her. Second, her father is a policeman and he arrived dressed in police uniform soon after the sexual E act. What does she do? Instead of reporting she tries to avoid him and also avoids having eye contact with him by rushing to the toilet. Once inside the toilet she realised that there were stains on her garment which were consistent with sexual act having taken place. She deliberately takes steps to conceal such evidence. She changed her stained skirt and wraps herself with a towel

instead. She washes the blood stained panties and later decides to dispose of F them in order to destroy evidence of the sexual act. She discarded the panties when the police had already arrested the appellant and were investigating this matter. Why would she, at that stage, take active measures to destroy evidence against the appellant? Third, she deliberately lied by saying that when her father arrived she was already in the toilet. Her father stated that he found her G in the house and she avoided eye contact and did not welcome him as she normally would have. Further, she lied that she soaked her skirt in the laundry. Her father stated that she placed the skirt in the tub without water. The father cannot be mistaken in these respects as that was what prompted his suspicion. He saw the dry skirt with a wet spot on the back side. These lies are on material aspects of her evidence. Her father referred her to an elderly female neighbour. H

Ndou J

A I would, however, give her credit in that the prosecution did not adduce sufficient evidence to show familiarity between the complainant and Pretty Ntini. The complainant does not necessarily confide in every female adult close to her parents. Maybe she was not close enough to Pretty Ntini to disclose issues of this kind. Their relationship should have been sufficiently canvassed by the trial prosecutor when the complainant and Pretty Ntini B testified. She gave two versions to her aunt Sibusisiwe. She only came up with the rape allegations after her father chased her away. She only cried after her father chased her away. She only came up with rape allegations after persistent probing by Pretty Ntini and later by Sibusisiwe.

The circumstances and evidence suggest an air of over-familiarity between the C complainant and the appellant. During cross examination she agreed with him on what he pointed out to be her interest in newspapers. Looking at the overall circumstances of the case as outlined above and this over-familiarity, there is a smack of a love affair between the complainant and the appellant. With these material unsatisfactory aspects of the complainant's evidence the court *a quo* could not have satisfied itself that the danger of false incrimination has been D excluded. The complaint of rape was extracted from her by applying pressure on her i.e. chasing her away, persistent questioning (suggesting her explanation was not regarded as being plausible). The circumstances of the case are such that it is easy for her to cry rape and difficult for the appellant to refute.

In this case the trial court overlooked some rules of evidence. It is important E to emphasise that complaints in sexual cases are admitted to show consistency and to negative a defence of consent, but not as proof of their contents and not to corroborate the complainant-*South African Criminal Law and Procedure* Vol II by P M A Hunt 2 ed by J R L Milton at p 448-9; *R v M* 1959 (1) SA 352 (A) at 355 and *R v De Beer* 1933 NPD 30.

For the complaint to be admitted it must meet the following requirements: F

(a) The complaints must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating character: *R v Petros* 1967 RLR35 (G); 1967 (2) SA 497 (R) and *R v Osborne* [1905] 1KB 551, [1904-1907] All ER Rep 54.

(b) It must have beert made without undue delay but at the earliest opportunity G which, under all the circumstances, could reasonably be expected, to the first person to whom the complaint could reasonably be expected to make: *R v Gannon* 1906 TS 114*; R v Du Plessis* 1922 TPD 153 and *R v P (supra).*

(c) The complainant must give evidence.

In casu the evidence of Sibusisiwe Mthethwa falls foul of the requirements set H out in (a) and (b) above. From the judgment of the trial magistrate it does not

Ndou J

seem that he was alive to these requirements when he considered the evidence A of Sibusisiwe. This is a misdirection on his part.

In my view there is, however, sufficient satisfactory evidence that sexual intercourse took place between the complainant and the appellant. The only issue that remains is whether the trial court was justified in holding that such sexual act was not consensual. The only evidence on consent is that of the B complainant. I have already alluded to the fact that her testimony was unsatisfactory in

certain material respects. The approach to such unsatisfactory evidence was set out by Baron JA in *S v Gardner* 1982 (2) ZLR 290 (S) at 295G-296A in the following terms:

> "It is of course trite that simply because a witness is shown to have lied in certain respects the court should not without more ado reject the whole of C his evidence; if the aspects on which the witness has lied are by comparison peripheral or minor then the remainder of that witness's evidence is still entitled to examination, albeit with rather greater care than if he had not been shown to have lied at all. On the other hand, if the aspect on which the witness has lied goes to the root of his story, or is clearly of major importance to the story as a whole, then he cannot be D regarded as a credible witness. If, therefore, the areas in respect of which the complainant moved away from the truth were areas fundamental to her story as a whole then it was a serious misdirection for the magistrate to say that he finds the truth to lie somewhere else. In a situation such as this the court does not find where the truth lies; it decides whether the witness on whose evidence the court is asked to rely is telling the truth." E

In casu the areas in which the complainant lied cannot be described as minor or peripheral. They are central to the allegation of lack of consent. This is a fundamental issue in trial of rape. My decision does not mean that I believe the complainant consented to intercourse with the appellant; it means simply that in my judgment it has not been proved to the standard applicable to cases of this kind that she did not. F

Evidence from the appellant and the complainant was that the appellant knew the complainant from birth. They were neighbours and have been so since her birth. The appellant and complainant's father were friends all along. He obviously knew what her age was. If not, he at least must have appreciated that she was a minor. Ms *Masawi* concedes, and rightly so in my view, that the G appellant should be found guilty of "statutory rape", i.e. a contravention of s 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*] (this was the applicable Act at the time of the conviction). On a charge of rape, the latter is a competent verdict - s 211(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. I will, therefore, reduce the charge accordingly.

In light of the above I am at large as far as sentence is concerned. Both counsel H

2003 (2) ZLR p77

Ndou J

A submit that a custodial sentence is called for. I agree. The only issue is one of the length of such imprisonment. Ms *Masawi* submits that a sentence of twelve months' imprisonment with half thereof suspended will meet the justices of the case. Mr *Masuku* submits that I should look at a sentence in the region of three years. The relevant factors in this case are, first the age difference between the appellant and the complainant: *S v Five* 1988 (2) ZLR 168 (S). B In this case Korsah JA said at 171 A:

> "I cite the above footnote merely to illustrate that in cases of unlawful sexual intercourse the disparity between the ages of the defendant and his victim has always been acknowledged as a factor, either of mitigation or aggravation, depending on whether the difference in ages is small or great."

C The appellant was aged 37 years and the complainant 15 years, giving a disparity of 22 years. This is an aggravating factor - see *S v Chuma* 1983 (2) ZLR 372 (H). Second, proximity to 16 years. As the complainant is aged 15 years, she is closer to 16 years. This is mitigatory: *R v Sithole* 1967 RLR 403 (G). Third, as against the complainant, the appellant was *in loco parentis.* D This is aggravating. The complainant regarded him "not as brother but a father." Fourth, the appellant has no intention of marrying the complainant. This is aggravating. According to Gubbay J (as he then was) in *S v Nare* 1983 (2) ZLR 135 (H) at 137H:

> "The rationale of this offence is to protect immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to E appreciate the implications involved and the possibility that psychicor physical injury may be suffered. That protection is achieved not by punishing the female, but rather the male partner, who in effect is assumed to have been responsible for inducing her to engage in sexual relations."

In *R v Sava* 1967 RLR 367 (G) at 368, Beadle CJ suggested a general but nonetheless useful guide in the determination of the seriousness of this F offence. The court has to have regard to (a) the age, (b) appearance and character of the complainant; age of the accused; and (c) the circumstances under which the offence was committed. Applying the above principles and also having regard to the sentences imposed in these cases, I feel that a sentence in the region of two years, with part thereof suspended, would have G been appropriate. It is common cause that the appellant served a period of seven months prior to his admission to bail pending this appeal. I will take this into account together with other personal circumstances of the appellant submitted by his counsel.

Accordingly, I would allow the appeal against both conviction and sentence. H The conviction and sentence by the court *a quo* are quashed and substituted

Ndou J A

as follows:

> "*Verdict:* Guilty of contravening section 3(a) of the Criminal Law Amendment Act [*Chapter 9:05*]
> *Sentence:* 24 months' imprisonment of which 16 months is suspended for 4 years on condition the accused in that period does not commit any offence involving rape or of sexual nature and for which he is convicted B and sentenced to imprisonment without the option of a fine. As the appellant had by the time he was admitted to bail undergone about 7 months of the term of imprisonment he is immediately entitle to his liberty."

Chiweshe J concurred. C

Masawi & Associates, appellant's legal practitioners

Criminal Division of the Attorney-General's Office, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/BULAWAYO DIALOGUE INSTITUTE v MATYATYA NO & ORS 2003 (2) ZLR 79 (H)

BULAWAYO DIALOGUE INSTITUTE v MATYATYA NO & ORS 2003 (2) ZLR 79 (H)

Citation	2003 (2) ZLR 79 (H)
Case No	Judgment No. HB-87-03
Court	High Court, Bulwayo
Judge	Ndou J
Heard	27 June 2003
Judgment	7 August 2003
Counsel	*K Ncube,* for the applicant First respondent in person
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

C **Practice and procedure** — *application — urgent — application made either ex parte or at very short notice — necessity for applicant to act with the utmost good faith and lay all relevant facts before the court*

Practice and procedure — *interdict — application for — final prohibitory interdict — what applicant must establish*

D **Statutes** — *Public Order and Security Act [Chapter 11:17] — ss 24, 25 & 26 — power of police to control or prohibit public gatherings*

Headnote

The applicant wished to hold a public meeting and notified the police of its intention to do so, adding a request to "grant the authority". The response E of the police, which was received two days before the meeting was to be held, stated that the "application was not approved". The applicant sought an urgent *ex parte* interdict to prevent the police from interfering with the meeting. In its papers, the applicant did not disclose that a meeting had been held with the police, at which the police's reasons for objecting to the meeting were given.

F *Held,* that in an urgent *ex parte* application, utmost good faith must be shown by the applicant to lay all relevant facts before the court, so that the court may have full knowledge of all the circumstances of the case before making its order. In view of the very short notice at which the application was brought, the applicant should have mentioned the fact that discussions had been held with the police.

G *Held,* further, the applicant did not seem to appreciate the powers of the police under the Public Order and Security Act [*Chapter 11:17*]. These were, once they had been notified of a public meeting, either to control the meeting, under s 25, or prohibit it, under s 26.

Held, further, that in order to succeed in obtaining a final prohibitory H interdict the applicant must establish (a) a clear right; (b) an injury

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Ndou J

actually committed or reasonably apprehended and (c) the absence of A similar protection by any other ordinary remedy. The applicant had not claimed that the police did the wrong thing, acted in the wrong manner or acted on the wrong grounds. The applicant seemed to have based the application on the premise that the police did not have the powers that the Act actually gives them.

Held, further, that if the applicant's case was premised on judicial review of B the police's administrative actions, a proper legal foundation must be laid for the relief sought.

Cases cited

Barclays Bank v Giles 1931 TPD 9 C

Bull v Min of State (Security) & Ors 1987 (1) SA 422 (ZH)

de Jager & Ors v Heilbron & Ors 1947 (2) SA 415 (W)

Diepsloot Residents & Landowners' Assn & Ors v Administrator, Transvaal & Ors 1993 (3) SA 49 (T)

Gosschalk v Roussow 1966 (2) SA 476 (C)

Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd & Anor 2001 (2) ZLR 551 (H) D

Knox D'Arcy Ltd and Others v Jamieson and Others 1995 (2) SA 579 (W)

In re *Leydsdorp & Pietersburg (Tvl) Ests Ltd (in liq)* 1903 TS 254

Logie's Est v Priest 1926 AD 312

Ex p *Madikiza et uxor* 1995 (4) SA 433 (Tk)

Power NO v Bieber & Ors 1955 (1) SA 491 (SWA) E

Sanachem (Pty) Ltd v Farmers Agri-Care (Pty) Ltd & Ors 1995 (2) SA 781 (A)

Setlogelo v Setlogelo 1914 AD 221

Venter v van Graan 1929 TPD 435

Woods & Ors v Ondangwa Tribal Authority 1975 (2) SA 294 (A) F

Legislation considered

Public Order & Security Act [*Chapter 11:17*], ss 24, 25 & 26

Case information

K Ncube, for the applicant

First respondent in person G

Judgment

Ndou J: This is an urgent application seeking an order in the following terms:

"Interim Relief Granted

Pending the finalisation of the matter, the applicants be granted the following relief: H

Ndou J

1. That the A first, second, third and fourth respondents be and *(sic)* are hereby interdicted from interfering in anyway with the holding of the Youth Conference by applicant at the Auditorium of the Natural History Museum, Bulawayo.
2. That service on the first respondent be deemed service on second, third and fourth respondents for purposes of this application.

B Final Order

That the first respondent pay the costs of this suit on an attorney and client scale."

I heard the application on 27 June 2003 and dismissed the application with costs. I indicated then that my reasons for doing so will follow. This judgment C provides the reasons.

The brief facts are that the application is a *universitas* operating under the name of Bulawayo Dialogue Institute. On 12 June 2003 the applicant notified the first respondent of its intention to hold a Youth Conference on 28 June 2003 at the National History Museum in Bulawayo. The notification was made in terms of the Public Order and Security Act [*Chapter 11:17*] D (hereinafter referred to as POSA). The applicant did not specify the particular section of POSA but I can safely assume s 24. The first respondent, as the regulating authority, replied to the applicant by letter dated 17 June 2003 informing the applicant that its "application" was "not approved by the office". The applicant received this response on 25 June 2003. This application E was launched two days later, on 27 June 2003. One of the reasons given by the applicant for the application is that the first respondent did not furnish the reasons for the refusal of the application. It was also submitted that it was wrong for the first respondent to purport to be vested with power of approving or disapproving the holding of the conference. It was submitted that all that POSA requires of the applicant is the notification of the first respondent of the F intended conference and no more. I should point out that the letter addressed to the first respondent by the applicant had both elements of notification and application for authority as it read:

"Re: NOTIFICATION OF YOUTH CONFERENCE

I hereby notify you of our intention to hold a conference focusing on issues of youth development. This will focus on issues of HIV/AIDS, G unemployment and scholarship among other things. This will be on 28 June 2003 ... About 100 youths from in and around Matabeleland will participate in this event.

Kindly grant the authority." *(Emphasis added)*

The highlighted sentence shows that authority was being sought. The first H respondent's response has to be viewed in this context. Further, the applicant

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Ndou J

does not seek the review of the decision of the first respondent. This A application for an interdict is launched "out of caution" as "there is a reasonable apprehension that first respondent may authorise his officers to violently break up the conference." The source of the apprehension is that applicant and the first respondent had previous dealings a week before. On that occasion the applicant had organised an event for school children. The B first respondent did not approve. The applicant went ahead and the first respondent sent officers who broke up the meeting. The applicant's organisers ended up by being arrested and they paid deposit fines for organising the said meeting contrary to the directives of the regulating authority i.e. the first respondent.

Although the founding affidavit tried to explain the payment of admission of C guilt fine as a way to "get our freedom", there is no evidence that they took steps to have the admission set aside by a

magistrate in terms of applicable statutory provisions. With such a background, it was foolhardy for the applicant to arrange another meeting with more or less the same obstacles as the previous one. The final prejudice was in a way self-inflicted. The applicant cannot say it did not anticipate these financial losses in the face of such a D background. Why invite speakers, participants, hire services and a venue when it is clear that the "legal" requirements are still to be sorted out? This is, unfortunately, a calculated risk taken by the applicant and cannot be used in court as a basis for the urgency. The previous meeting arranged by the applicant a week before ended in circumstances of violence so it was E irresponsible for the applicant to arrange another a meeting more or less along the similar lines and expose the youthful participants to violent disruption of the meeting. Concerned about this probability the applicant and the first respondent met on 25 June 2003. They discussed the positions of each side. The meeting centred around the reasons why the first respondent did not approve the application. F

The applicant, in the founding papers, did not disclose that this meeting took place. The applicant gave the impression that no reasons were given for the disapproval. The discussions in this meeting were relevant to this application. Whether the reasons were inadequate by reason of not being in writing is not an issue here. What is important is that, when launching this application, the G applicant had been furnished with oral reasons for the police objection. The applicant, in such an urgent application, should have disclosed the holding of this meeting. If I had accepted the averments in the founding affidavit without insisting on service on the respondents, I would have been unaware that reasons were given at a meeting between the parties. In urgent applications, utmost good faith must be shown by the applicant to lay all relevant facts H

Ndou J

A before the court, so that it may have full knowledge of all the circumstances of the case before making its order: *Barclays Bank v Giles* 1931 TPD 9; *De Jager & Ors v Heilbron & Ors* 1947 (2) SA 415 (W); In re *Leydsdorp and Pietersburg (Tvl) Estates Ltd, In Liquidation* 1903 TS 254; *Estate Logie v Priest* 1926 AD 312 and *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd & Anor 2001* (2) ZLR 551 (H). In *Civil Practice of the Supreme Court of* B *South Africa* 4 ed by L van Winsen, A C Cilliers and C Loots at p 367 the learned authors state:

> "Although, generally, an applicant is entitled to embody in his supporting affidavits only allegations relevant to the establishment of his rights, when he is bringing en *ex parte* application in which relief is claimed against another party he must make full disclosure of all the material facts C that might affect the granting or otherwise of an order *ex parte.* The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court, so much so that if an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully and *malafide* or negligently, which might have influenced the decision of the court whether to make an order D or not the court has a discretion to set the order aside with costs on the grounds of non-disclosure."

See also *Power NO v Bieber & Ors* 1955 (1) SA 491 (SWA) and Ex p *Madikiza et uxor* 1995 (4) SA 433 (Tk) at 436I-J.

The *audi alteram partem* rule, as a principle of natural justice, applies in such E urgent applications with merited exceptions. The respondents *in casu* were served with the application on the day of the hearing. This was indeed a very short notice. This short notice is a major constraint on the respondents' preparation of their response. The respondents did not have sufficient time to be heard from an informed position. An urgent application is an exception to the general rule and as such the applicant is expected to disclose fully and F fairly all material facts known to him or her. This court has a discretion, even if the non-disclosure is material, to grant or dismiss the application: *Venter v Van Graan* 1929 TPD 435. The circumstances are normally so divergent and varied that it is not possible for me to lay any guideline, save to say that in the instant matter there is need to dismiss the application as a seal of disapproval of such *malafides* of the applicant.

G I alluded to the issue of powers of the police, i.e. the regulating authority. As pointed out, the applicant makes no reference to any specific section of POSA. I will deal with the matter without the benefit of detailed submissions by the applicant. As I understand it, s 24 requires the organiser of a public meeting to give the regulating authority, effectively, the police, at least four clear days' H written notice of the holding of the gathering. Subsection (2) sets out the

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Ndou J

purpose of the giving of the notice. Under subs (6), it is an offence not to give A the required notice. Section 25 gives the police *powers to control the gathering.* Section 25 provides:

> "(1) If a regulating authority, having regard to all the circumstances in which a public gathering is taking place or is likely to take place, has reasonable grounds for believing that the public gathering will occasion — B
>
> (a) public disorder; or
>
> (b) a breach of the peace; or
>
> (c) an obstruction of any thoroughfare; he may, subject to this section, give such directions as appear to him to be reasonably necessary for the preservation of public order and the public C peace and preventing or minimising any obstruction of traffic along any thoroughfare.
>
> (2) Without derogation from the generality of subsection (1), directions under that subsection may provide for any of the following matters:
>
> (a) prescribing the time at which the public gathering may commence and its maximum duration; D
>
> (b) prohibiting persons taking part in the public gathering from entering any public place specified in the directions;
>
> (c) precautions to be taken to avoid the obstruction of traffic along any thoroughfare;
>
> (d) prescribing the route to be taken by any procession; E
>
> (e) requiring the organisers to appoint marshals to assist in the maintenance of order at the public gathering.
>
> (3) Whenever it is practicable to do so, before issuing a direction under subsection (1) a regulating authority shall give the organiser of the public gathering concerned a reasonable opportunity to make representations in the matter." F

It seems to me that the meeting referred to above between the applicant's representative and the first respondent was conducted under subs (3). I say so because what was discussed was how the applicant's meeting should be conducted. There is no provision in s 25 for the regulating authority to prohibit the meeting, although he could, in practice, make it very difficult by, for G example, only allowing a meeting to take place over a very short period.

It is under s 26 that a regulating authority may *actually prohibit a public gathering,* if he believes on reasonable grounds that the gathering will occasion public disorder. The letter written by the first respondent does not clearly do so. It merely states that the application was "not approved by the office." The "streetwise" or man-in-the-street" approach towards this litigation H

Ndou J

A adopted by the applicant's legal practitioner makes it difficult to appreciate the basis of the interdict. Without making reference to specific sections of POSA the applicant makes general remarks in the founding affidavit:

> "It is however wrong for the first respondent to purport to be vested with power of approving or disapproving the holding of the conference. I am informed by our lawyers that all the Act requires of the applicant is B notifying the first respondent of its intended conference and no more".

If one looks at s 24 in isolation the statement is correct. But it would wrong, in my view, to simply excise s 24 from the entire Act. The provisions of section have to be understood contextually. The objective of s 24 is to inform the regulating authority so that the latter can exercise his powers under ss 25 and C 26. Once the regulating authority, the first respondent *in casu,* is aware of the details of the intended public gathering he may decided to *control* it using his s 25 powers. In such a case the regulating authority controls or gives directions based on the interests of public order, peace or flow of traffic in any thoroughfare (subss (1) and (2)). In other words, under s 25 the meeting takes place subject to the regulating authority's control and direction. Under s 26 the D regulating authority may actually *prohibit* a public gathering it believes on *reasonable grounds that the gathering will occasion public disorder.* The effect of the provisions of ss 25 and 26 is that the regulating authority has a lot more powers than the applicant appreciates. Whether the first respondent's powers to control and direct and prohibit public gatherings amount to a power of approving or disapproving public gatherings seems immaterial to me. What E is important is for me to acknowledge the existence of the said powers.

In casu, the applicant is not challenging the constitutionality of POSA by alleging a violation of a fundamental right. The basis of the applicant's claim arises from the interpretation of POSA. The

applicant seeks a prohibitory final interdict. An interdict can be used to prevent the threatened commission or F continued commission of an unlawful act. It is an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm: *Bull v Minister of State (Security) & Ors* 1987 (1) SA 422 (ZH); *Gosschalk v Roussow* 1966 (2) SA 476 (C); *Woods & Ors v Ondangwa Tribal Authority* 1975 (2) SA 294 (A); *A Guide to Zimbabwean Administrative* G *Law* 3 ed (1998) by G Feltoe at 62 and *Civil Practice of the Supreme Court of South Africa* 4 ed *(supra)* at 1063. In *Introduction to South African Law and Legal Theory* 2 ed by W J Hosten, AB Edwards, F Bosman & J Church the learned authors at p 1074 describe an interdict as follows:

> " If an applicant fears that an administrative action or impending action will H affect his rights or result in prejudice, he may apply for an interdict

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Ndou J

> restraining the administrative organ from carrying out its action. He must A show that he has a clear legal interest, that no other remedy is available to him and that the matter is so urgent that he will suffer irreparable prejudice if the interdict is not granted": *Setlogelo v Setlogelo* 1914 AD 221.

In order to succeed in obtaining a final prohibitory interdict the applicant must establish, first, a clear right, second, an injury actually committed or reasonably B apprehended and, third, the absence of similar protection by any other ordinary remedy: *Setlogelo v Setlogelo (supra); Diepsloot Residents v Landowners 'Association & Ors v Administrator, Transvaal & Ors* 1993 (3) SA 49 (T) at 60B-C; *Knox D'Arcy Ltd and Others v Jamieson and Others* 1995 (2) SA 579 (W) at 592H-593C and *Sanachem (Pvt) Ltd v Farmers Agri-Care (Pty) Ltd& Ors* 1995 (2) SA 781 (A) at 789B-D. C

In this case the applicant does not seem to appreciate that it must establish the above requirements in order to succeed with its interdict. There is no attempt to establish a clear right. It is indeed difficult to see one in the body of this application. If I grant the relief sought in terms of the draft order I will effectively stop or prevent the regulating authority, i.e. the first respondent, from exercising powers bestowed on him by virtue of the provisions of ss 25 D and 26. The mischief targeted by the remedy of an interdict is an unlawful act. Obviously the exercise of ss 25 and 26 powers by are gulating authority cannot be said to be unlawful in the normal scheme of things. The exception, however, are *ultra vires* actions. The administrative powers of the first respondent derive from POSA. The nature and extent of those powers are to be found in E ss 25 and 26 of the Act. The first respondent's powers are not unlimited. If the first respondent purports to exercise a power he does not have, or acts in excess of a power he possesses, his action will be invalid on the basis that it is *ultra vires: A Guide to Zimbabwean Administrative Law supra* at p 51. It appears that in this case the applicant has not claimed that the first respondent did the wrong thing, acted in the wrong manner or acted on the wrong grounds. The F applicant seems to have based the application on the fact that first respondent does not have the ss 25 and 26 powers. I may be wrong but it is evident that this application was launched without the applicant appreciating the provisions of POSA. In addition to what I said about ss 25 and 26 the applicant's founding affidavit fortifies my view in this regard:

> "10. In any event the meeting applicant intends to hold is one that is not G of political nature ...
>
> 14. The meeting is not of a political nature. The delegates will not sloganeer, *toyi-toyi,* wear political institutions regalia or sing political songs."

Surely if applicant read POSA it would have been apparent it refers to all H

Ndou J

A public meetings, with a few stated exceptions. The applicant should obviously not adopt a "I will take you to court" approach without articulating with some measure of precision the nature of legal right intended to be enforced. If the applicant's case is premised on judicial review of the first respondent's administrative actions, a proper legal foundation must be laid for the relief sought. The relief sought here is an interdict so the applicant's founding B papers should clearly make averment to establish the requirements of such relief as outlined above. From the applicant's papers the relief sought is, accordingly, not merited.

In the circumstances, I therefore dismissed the application as outlined above.

C *Hara & Partners,* applicant's legal practitioners.

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/S v TSVANGIRAI & ORS 2003 (2) ZLR 88 (H)

S v TSVANGIRAI & ORS 2003 (2) ZLR 88 (H)

Citation	2003 (2) ZLR 88 (H)
Case No	Judgment No. HH-119-03
Court	High Court, Harare
Judge	Garwe J & Assessors
Heard	14 July 2003; 17 July 2003
Judgment	8 August 2003
Counsel	*B Patel*, with him *J Musakwa* & *M Nemadire*, for the State *G Bizos SC*, with him *J C Andersen SC* and *E Matinenga*, for the defence
Case Type	Criminal trial
Annotations	Link to case annotations

Flynote

Criminal law — *common law crimes — high treason — sufficiency of* C *evidence — number of witnesses required*

Criminal procedure — *discharge at close of State case — when may be granted — State evidence utterly unreliable — rarity of cases where such a finding could be made*

Headnote

It is not competent for a court to convict a person of high treason except on D the evidence of two witnesses for each "overt act" charged or, where two or more overt acts are charged, one witness for each overt act. There would be no compliance with s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] if, in a case where more than one overt act is charged and there is only one witness, the same witness were to give E evidence on each of the overt acts. Where one overt act is charged at least two witnesses must give evidence on the overt act, although the evidence need not overlap. Where the court is relying on the evidence of only two witnesses to prove the whole overt act, the evidence of each of those witnesses must be such that, standing alone, it would, if believed, be adequate to establish that the accused committed the overt act of treason F with which he is charged.

An "overt act" is any act manifesting the criminal intention and tending towards the accomplishment of the criminal object. It is generally is a composite thing, passing through distinct stages and made up of various circumstances. Several witnesses speaking to those different stages and G circumstances may be necessary.

In terms of s 198(3) of the Criminal Procedure and Evidence Act, the court shall return a verdict of not guilty if at the close of the State case the court considers that there is no evidence that the accused committed the offence charged (or any other offence with which he could be convicted on that charge). Thus, the court must discharge the accused at the close H of the case for the prosecution where (a) there is no evidence to prove an

Garwe J

A essential element of the offence; (b) there is no evidence on which a reasonable court, acting carefully, might properly convict; (c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it. Instances of the last such cases will be rare; it would only in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material B evidence can possibly be believed.

Cases cited

A-G v Bvuma & Anor 1987 (2) ZLR 96 (S)

A-G v Mzizi 1991 (2) ZLR 321 (S)

C *A-G v Tarwirei* 1997 (1) ZLR 575 (S)

S v Banda & Ors 1990 (3) SA 466 (B)

R v Hennig 1943 AD 172

S v Kachipare 1998 (2) ZLR 271 (S)

R v Leibbrandt & Ors 1944 AD 253

R v Strauss 1948 (1) SA 934 (A)

Legislation considered D

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 198(3), 269 &298

Case information

E *B Patel,* with him *J Musakwa* & *M Nemadire,* for the State

G Bizos SC, with him *J C Andersen SC* and *E Matinenga,* for the defence

Judgment

Garwe JP: The three accused in this matter have been undergoing trial on a charge of high treason. The allegation in broad terms is that on three separate occasions between October and December 2001 the accused requested F Mr Ari Ben Menashe of Dickens & Madson, a consultancy firm operating in Montreal, Canada, to organize the assassination of President Mugabe and to overthrow the constitutionally elected government of Zimbabwe. It is further alleged that as part of that plot accused two faxed a memorandum of understanding to Dickens & Madson which was a cover for the unlawful plot G to assassinate the President and to stage a military *coup d'etat.*

At the close of the evidence for the prosecution, defence counsel applied for the discharge of the three accused. The State has opposed the application and says the application appears to have been made as a matter of course.

It is, I think, necessary to clarify once again the law applicable in an H application of this nature. The issue is certainly not whether the State has

Garwe J

proved its case beyond a reasonable doubt as to justify a conviction. In terms A of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the court shall return a verdict of not guilty if at the close of the State case:

> "The court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon." B

The interpretation of s 198(3) has been considered in a long line of cases both in this country and South Africa. The position is now settled that:

> "So far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution, it has reason to suppose that the inadequate evidence C adduced by the State might be supplemented by defence evidence...": *S v Kachipare* 1998 (2) ZLR 271 (S) at 275.

In other words, where the court considers that there is no evidence that the accused committed the offence, it has no discretion but to acquit him. In particular the court *shall* discharge the accused at the close of the case for the prosecution where: D

(a) there is no evidence to prove an essential element of the offence: *A-G v Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102;

(b) there is no evidence on which a reasonable court, acting carefully, might properly convict: *A-G v Mzizi* 1991 (2) ZLR 321 (S) at 323B; and

(c) the evidence adduced on behalf of the State is so manifestly unreliable E that no reasonable court could safely act on it: *A-G v Tarwirei* 1997 (1) ZLR 575 (S) at 576.

Whilst it is settled that a court shall acquit at the end of the State case where the evidence of the prosecution witness:

> "has been so discredited as a result of cross-examination or is so manifestly F unreliable that no reasonable tribunal could safely convict on it" (Practice Note by Lord Parker cited with approval *in A-G v Bvuma & Anor (supra)* at 102-103)

it is clear that such cases will be rare. This would apply:

> "only in the most exceptional case where the credibility of a witness is so G utterly destroyed that no part of his material evidence can possibly be believed" *(per* Williamson J in *S v Mpetwa &* Ors 1983 (4) SA 262 at 265, cited with approval by McNally JA in *A-G v Tarwirei (supra)* at 576-577.

Before considering whether or not the accused should be put on their defence, it is necessary to consider the law on the crime of treason because of its peculiar nature. In terms of our common law the crime of high treason: H

Garwe J

> A "consists in any overt act committed by a person owing allegiance to a state possessing *majestas* with intent unlawfully to overthrow, impair, violate, threaten or endanger the existence, independence or security of the state, or to overthrow or coerce the government of the state, or change the constitutional structure of the state": *South African Criminal Law and Procedure, Volume II, Common Law Crimes,* 3 ed by J R L Milton.

B Since the time of the Roman Empire, the crime of treason has had a somewhat chequered and controversial history. It has been perceived in some quarters as a weapon of suppression and has come to be defined in terms which are vague and over inclusive: *South African Criminal Law and Procedure Volume II* at p3. Because of the fact that the offence is the first among public crimes in order of origin and gravity, the fact that it is ill-defined and the consequences of C conviction, s 2 of the English Stature of Treason of 1695 required that there should be evidence of two lawful witnesses to a charge of treason. This has been incorporated into the legislation of various former British colonies, including Zimbabwe. In particular, s 269 of our Criminal Procedure and Evidence Act provides as follows:

> D "**269. 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 in the indictment, summons or charge under trial on the single evidence of any competent and credible witness:
>
> E Provided that it shall not be competent for any court:
>
> (a) ...
>
> (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; F
>
> (c) ..."

In addition, the Act has, in s 298, made provision that, on the trial of a person charged with treason, evidence shall not be admitted of any overt act not alleged in the indictment, unless

relevant to prove some other overt act alleged therein.

G There can be no doubt, therefore, that these special rules and, in particular, the requirement that there must be two witnesses in every case, were designed to protect an accused person facing a charge of treason. I agree with the remarks of De Wet CJ in *R v Hennig* 1943 AD 172 that:

> "What I imagine the legislation in its original form had in mind was that H treason should not be held to be proved simply because one person has

> come forward and alleged it against an accused. The evidence must be A evidence of more than one person, which provides some protection against individual malice, but there need not, in my view, be any overlapping of the evidence ..." (at 177 and 178).

The issue that necessarily arises at this stage is how the two witness rule applies in practice where only one overt is charged on the one hand and where B more than one overt act is charged on the other. Where two or more overt acts are alleged, the position is clear that there must be the evidence of one witness to each such overt act. During argument the State contended but later conceded that there would be no compliance with the Act if, in a case where more than one overt act is charged and there is only one witness, the same witness were to give evidence on each of the overt acts. In this regard I can do no better than C cite the remarks of Watermeyer CJ in *R v Strauss* 1948 (1) SA 934 (A) at 939 where he stated:

> "It was, I think, intended to maintain the requirement of at least two witnesses in every case of treason so that, if there were two overt acts charged, the same witness could not, if he were the only witness, prove both of them." D

Considering the rationale for the two witness rule, there can be no doubt that where one overt act is charged at least two witnesses must give evidence on the overt act, although the evidence need not overlap. This is because:

> " an overt act maybe, and generally is, a composite thing, passing through distinct stages, and made up of various circumstances, and, to prove it in E its integrity, several witnesses speaking to those different stages and circumstances my be necessary...": *per* De Wet CJ in *R v Henningsupra* at p 177

The learned Chief Justice further remarked on the same page:

> "The position is not the same as in the case of an accomplice, which needs only to be corroborated in some material particular either by another F witness or by circumstances or possibly an admission on the part of the accused himself. The section does require that there should be for every charge of treason at least two witnesses but that the object was not to insist on complete overlapping is, I think, shown by the fact that where there are two or more overt acts charged the law requires one witness to each such overt act. The protection required by the subsection does not go the length G of requiring full overlapping in regard to all the evidence and I agree ... that it would be most unsatisfactory and would lead to miscarriage of justice if that were the position ..."

At p 178 the learned Chief Justice continued:

> "... when one overt act is charged in the indictment, each essential part of that overt act must be proved by the evidence of two witnesses. It follows H

> A that in the present case, in which the court is relying on the evidence of only two witnesses to prove the whole overt act, the evidence of each of these witnesses must be such that standing alone it would, if believed, be adequate to establish the fact that the accused committed the overt act of treason with which she is charged ..."

I believe the above remarks correctly reflect the law on the matter.

B There has been argument during this application on the number of overt acts forming the basis of the charge. The State submitted that there were four overt acts, whilst the defence argued that there was only one as the meetings held subsequent to the meeting of 22 October 2001 were simply to record what had previously been discussed and not separate acts to further the alleged plot.

C An overt act is any act manifesting the criminal intention and tending towards the accomplishment of the criminal object- see *R v Leibbrandt* 1944 AD 253 at 284; *S v Banda & Ors* 1990 (3) SA 466 (B). It includes an attempt, incitement and conspiracy to commit the offence.

It also includes the activities of an accomplice and accessory after the fact. As noted in *R v Henning supra,* an overt act "generally is a composite thing, passing through distinct stages and D made up of various circumstances and to prove it in its integrity several witnesses speaking to those different stages and circumstances may be necessary."

Having considered the evidence led in this case, it seems to me that in the present case there is but one overt act charged. That overt act is the agreement E to request Dickens and Madson to arrange the assassination of the President and thereafter the staging of a military coup and to put in place transitional arrangements. The fact that three meetings were held does not mean there were three separate overt acts. In its heads the State submitted that the accused incited and conspired to commit treason in the manner alleged. The State further submitted that the subsequent meetings of 3 November 2001 and 4 F December 2001 at which accused 2 and 3 were not present were a continuation of the plot. The contract faxed on 23 October 2001, according to the charge, was a cover for the plot. In other words, it was part and parcel of the plot. It was not an independent act designed to facilitate the assassination of the President and the staging of a military coup. The fax does not stand on its own. In my view, and considering that an overt act may pass through distinct stages G and is made up of various circumstances, only one overt act has been charged in the indictment, although four different instances of it have been cited.

I now proceed to consider the application for discharge. I will consider the application in so far as it relates to accused one first and thereafter the second and third accuseds.

Garwe J

ACCUSED 1: MORGAN TSVANGIRAI A

He attended all three meetings. Against him is the evidence of Ari Ben Menashe, Tara Thomas, and the video evidence. The question at this stage is whether -

(a) an essential element of the offence has not been proved

(b) there is no evidence on which a reasonable court, acting carefully, might B properly convict, or

(c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

The first aspect of the question does not really arise. In my view, the State evidence has touched on all the essential elements of the offence. I appreciate C that it was submitted by the defence that the meetings did not go beyond mere discussion and that Menashe never intended to act on the alleged plot. For purposes of the present application there is no need in my view for the court to dwell on this. The real question is whether there is no evidence upon which a reasonable court might convict and/or whether the evidence adduced by the State is so manifestly unreliable that no court could safely rely on it. This court D was addressed at length on the credibility of Ari Ben Menashe and Tara Thomas as state witnesses. The defence submitted that this court cannot possibly believe their evidence. Submissions were also made on the audio and videotapes and this court was asked to find that that evidence is unreliable and cannot be relied upon. The court was also addressed on the probabilities. E Whilst it is true that credibility is a factor that can properly be considered and that a discharge may be granted where the State evidence is manifestly unreliable, the position, as already noted, is that this happens rarely and only in really clear cases where the credibility of the witness has been so utterly destroyed that no part of his material evidence can possibly be believed.

The present case cannot be said to fit into that category. That the meetings took F place is common cause. What is in issue is what was discussed exactly. The subject of the elimination of the President was touched upon although the defence case is that the first accused was entrapped. A video was taken of the third meeting. The court has watched that video. Whilst portions of the video are not audible, certain other portions are and it was possible to produce a G transcript. Although the authenticity of the videotape has been questioned, the testimony of an expert called by the prosecution is that there is no evidence that the tape has been tampered with. There is talk in the video of the setting up of a transitional government involving the army before elections. This is a case where the court must look at the totality of the evidence. It cannot reasonably be argued that the evidence has been so utterly destroyed that no H

Garwe J

A material part of the evidence can possibly be believed. The available evidence establishes *a primafacie* case against the first accused. In all the circumstances therefore I am satisfied that there is no basis upon which accused 1 can be acquitted.

ACCUSED 2: WELSHMAN NCUBE & ACCUSED 3: RENSON GASELA

B In respect of accused 2 and 3, the prosecution evidence is that accused 2 was surprised when told of the plan but that he went along with it. The following day the second accused faxed a contract which was a cover for the plot. The contract itself, it is common cause, does not speak of the plot but gives a mandate to Dickens & Madson to engage in lobbying for the MDC and generally to do all things for the MDC in pursuance of its objectives. In respect C of accused 3, the evidence is that he was also present at the London meeting (which is common cause) and Ari Ben Menashe's evidence that he and Rupert Johnson repeated that they had put a plan together and sold it to the first accused. It is said accused 3 actively participated in the discussion.

There is no further evidence against accused two and three. The evidence given against the two accuseds was given by Menashe. Only Menashe says they were D part of the conspiracy.

The State has submitted that the three accused "incited and conspired" to commit the crime of treason. The State further says the subsequent meetings were a continuation of the first and that the two accused are criminally liable by reason of the fact that they were co-conspirators.

E I have some difficulty with this submission by the State.

Firstly, only one witness has given evidence against them. No evidence has been given by a second witness-that they incited and conspired as alleged. Both incitement and conspiracy to commit treason are acts of treason. They have to be proved by two witnesses at the very least.

F Secondly, the evidence of Menashe himself is unclear on what basis exactly they become co-conspirators. "Going along" with what was being said or "actively taking part in a discussion" is vague. One is left wondering what exactly they did.

Clearly, whilst it is the State case that the subsequent meetings were a G continuation of the first meeting, the evidence of Tara Thomas does not implicate the two accuseds. It does not establish their involvement in the conspiracy or incitement. An incitement or a conspiracy to commit treason is itself treason. The position is different from that of an accomplice where corroboration would suffice. There must be the evidence of two witnesses and where one overt act is charged the evidence of each must stand independently H and must speak to the overt act. Where more than one overt act is charged there

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Garwe J

must be the evidence of one witness to each such overt act. In the case of A accused two and three there is the evidence of only one witness.

Even if one were to accept that there is more than one overt act charged, it is clear there is no evidence implicating these two accused in the subsequent overt act or acts. It could not have been the intention of Parliament that, in a case such as the present, where the two accused were present only at one of the B three meetings, the evidence of one witness would suffice. If that were the position the safeguards envisaged by s 269(b) would be negated. Put another way, even if everything Mr Menashe said about the second and third accused was accepted in its entirety, the absence of a second witness to speak to the overt act means that the provisions of the section have not been met.

In the result therefore, this court would acquit accused 2 and 3. In respect of C accused 1 however the application for his discharge is dismissed.

Attorney-General's Office, legal practitioners for the State

Atherstone & Cook, legal practitioners for the accuseds D

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Source:
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S v DANGAREMBWA 2003 (2) ZLR 97 (H)

Citation	2003 (2) ZLR 97 (H)
Case No	Judgment No. HH-123-03
Court	High Court, Harare
Judge	Chinhengo J & Uchena J
Heard	20 August 2003
Judgment	20 August 2003
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *common law crimes — assault with intent* C *to do grievous bodily harm — imprisonment not only appropriate punishment —factors to be considered*

Headnote

The tendency to regard all cases of violence and, in particular, those of assault with intent to cause grievous bodily harm as falling within the scope of those offences where prison sentences are desirable must be avoided. In D order to properly exercise his discretion in such cases, the judicial officer will often be guided by such factors as the weapon used, the seriousness of the injury, the nature of the degree of violence and the medical evidence. The factors of mitigation as put forward by the accused will also have to be considered. Imprisonment is not the only sentence which E can be imposed in such cases.

Cases cited

S v Mugwenhe & Anor 1991 (2) ZLR 66 (S)

S v Mpofu 1992 (2) ZLR 68 (H)

Judgment

F **Chinhengo J:** The accused pleaded guilty to a charge of assault with intent to cause grievous bodily harm. He was sentenced to a fine of $2 000 and in default of payment to two months' imprisonment.

The facts which were admitted by the accused are these. The accused and the complainant were lovers. On 11 July 2003 at lunch time, the accused G accompanied the complainant to her residence for lunch. They traveled from Mutare City Centre to Dangamvura where the complainant resided. At the complainant's house the accused asked the complainant about her alleged infidelity. The

complainant is single whilst the accused is married. An altercation ensued which resulted in the accused assaulting the complainant with clenched fists on the face several times. He kicked her on the face with H booted feet and assaulted her "recklessly" with a wooden crutch until it broke

Chinhengo J

into three pieces. The medical report produced in court as an exhibit shows A that the complainant sustained serious injuries:

> "Left tramatos conjunctivitis; multiple bruises on the back, thigh and torso; chipped tooth, tenderness over... chest wall; dislocation left wrist; occipital haematoma."

The doctor also observed that a blunt instrument was used to deliver blows to B the head, "torso and body" and that there was a possibility of intracranial bleeding because of repeated trauma to the head. He concluded that the complainant had suffered "45 percent degree of injury" which he adjudged to be serious.

The record of proceedings went on scrutiny to the regional magistrate who commented as follows: C

> "Accused was convicted on his plea of guilty on a charge of assault with intent to cause grievous bodily harm.
>
> The conviction is proper. I find the sentence grossly lenient for his brutal battery of a girlfriend who had fallen down after being kicked with booted feet on the face. The assault was so vicious and protracted that the wooden D crutch broke into pieces.
>
> Among injuries inflicted were: chipped tooth, dislocation of the left wrist and occipital haematoma. The Doctor opined that there was a possibility of intracranial bleeding due to repeated trauma to the head. He further opined that severe force caused the injuries he observed. He estimated that complainant sustained 45 percent degree injuries. E
>
> The available facts do not show much provocation. The record does not mention that complainant offered to withdraw the charge against accused and that the accused helped complainant pay her medical bills. Even if this is so, I find a $2 000 fine shockingly lenient. It sends the wrong message to society ..."

The regional magistrate's criticism of the sentence is right on the mark. The F trial magistrate took into account extraneous factors in assessing the sentence. The record indeed does not show that the complainant intended to withdraw the charges nor that the accused assisted her with paying the medical bills. It is entirely wrong for a judicial officer to base his decision in any matter on factors that were not placed before him. G

Cases of assault with intent to cause grievous bodily harm often attract a sentence of imprisonment. The following are cases summarized in Feltoe *A Guide to Sentencing in Zimbabwe* at pp 161-164. The accused persons in those cases were sentenced to imprisonment and, depending on the seriousness of the injuries and the mental condition of the accused i.e. whether drunk or sober, the sentences varied from a few months to twenty-four months: H

Chinhengo J

A *S v Ndhlovu* HB-57-83 - a young man attacked his mother with an axe resulting in fairly severe injuries but no permanent disability-effective two years' imprisonment appropriate;

S v Lambe & Anor HH-374-84 - accused assaulted his wife with hands and fists and burnt her arm and punched another woman; in the absence of provovation, 12 months of which three were suspended was appropriate;

B *S v Sparks* HH-23 5-85 - accused assaulted a wife viciously with fists, towel rail and heavy object, fracturing both wrists and lacerating forehead - 18 months' imprisonment of which nine months suspended appropriate;

S v Ncube HB-19-86 - unprovoked and prolonged attack by accused on young girl with fists, resulting in laceration and loss of tooth - six months' imprisonment with two months conditionally suspended C appropriate;

S v Horwe HH-311-86- brutal and unprovoked attack on woman - accused first offender, throttling girlfriend by kicking her head, knocking out two teeth - four months' imprisonment with one month conditionally suspended appropriate;

E *S v Mwembe* HB-151-86- accused struck woman on head and arm with hoe handle and fractured her arm - a short prison sentence appropriate;

S v Donga & Ors HB-37-87- deliberate assaults by the accused causing serious injuries which necessitated hospitalisation of the complainants - effective prison term rather than a fine appropriate;

S v Sibanda HB-62-87 - accused severely assaulted girlfriend with a stick after beer drink causing a broken arm, two scalp lacerations and multiple bruising - effective nine months' imprisonment appropriate;

S v Ndlovu HB-197-87 - accused stabbed his ex-girlfriend with a knife in the stomach with severe force causing serious injuries - effective six months' imprisonment appropriate;

F *S v Razawu* HH-257-87- accused drunk and provoked. Stabbed his wife in the face and side but did not cause serious injuries - eight months' imprisonment of which four months were conditionally suspended.

In referring to the above-cited cases, I do not intend to recommend a tariff

approach to sentencing. Such an approach was criticized in *S v Mugwenhe &*

Anor 1991 (2) ZLR 66 (S) where Ebrahim JA said at 69B-D:

> G "An examination of cases of assault with intent to cause grievous bodily harm lead me to the conclusion that a term of imprisonment is invariably imposed, particularly where the assault causes serious injury and/or disfigurement. The 'tariff approach to sentence is gaining wider currency, if it is not already firmly ensconsed on our judicial benches. This approach to sentence, while commendable, is not without its drawbacks; H the principle one being that it ignores the fact 'that the determination of

> a sentence in a criminal matter' is preeminently a matter for the discretion A of the trial court. 'In the exercise of this discretion, the function of the trial judge has a wide discretion in deciding which factors - I here refer to matters of fact and not of law - should influence him in determining the measure of punishment:' *per* van Winsen AJA in *S v Fazzie & Ors* 1964 (4) SA 673 (A) at 684A."

And at 70F-71B: B

> "The tendency to regard all cases of violence and, in particular, those of assault with intent to do grievous bodily harm as falling within the scope of those offences where prison sentences are desirable must be avoided: see *S v Kulati* 1975 (1) SA 557 (E); *S v Makkahela* 1975 (3) SA 788 (C). There is also a tendency to regard 'deterrent sentences' and 'exemplary sentences' as being just: the view being that it is equitable to make an C example of someone by punishing him more severely than he deserves so that others will be persuaded to desist from emulating him: see also *S v Khulu* 1975 (2) SA 518 (N) at 521; *S v Matoma* 1981 (3) SA 838 (A).Not only is the argument specious and fallacious; it is doubtful whether the claims supporting its alleged efficacy are justified at all. This is not to say that judicial officers are to throw up their judicial arms in exasperation D and do nothing more. All that is being suggested is that judicial officers exercise their discretion to the full and acknowledge where necessary the shortfalls of existing penal policy. The dynamism necessary for this approach is not achieved by reference to alleged 'tariffs' of sentences for specific categories of offences. Invariably, when dealing with sentences the court refers, or is referred to, innumerable cases which purportedly lay E down the limits of the range of appropriate sentences for the case actually before it."

Mugwenhe's case places emphasis on the proper exercise of the sentencing discretion. In order to properly exercise that discretion in a case such as this, the judicial officer will often be guided by such factors as the weapon used, the seriousness of the injury, the nature of the degree of violence and the F medical evidence *(Mugwenhe supra* at 71E). The factors of mitigation as put forward by the accused will also have to be considered: *S v Mpofu* 1992 (2) ZLR 68 (H) is another case where it was stated that imprisonment is not the only sentence which can be imposed in cases of assault with intent to cause grievous bodily harm. G

In the present case, the trial magistrate cannot, in principle, be faulted for opting for a non-custodial sentence. He can and must be faulted for failing to exercise his sentencing discretion in respect of the *quantum* of the sentence which he imposed. It is apparent from the facts accepted by the accused and from the other evidence, particularly the medical report, that the accused sustained very serious injuries. The accused used a wooden crutch to assault H

A the complainant until it was broken into three pieces. The force which he used was severe. To impose a fine of $2 000 was, in my view, a misdirection. A comparison with the cases I have referred to above shows clearly that this sentence was manifestly lenient. A further misdirection was of failure by the trial magistrate in this case to impose in addition to a fine a wholly suspended sentence of imprisonment in order to deter the accused from committing a B similar offence. In my view, a sentence of a fine of $50 000 and in default of payment five months' imprisonment would have been the more appropriate. Alternatively, the magistrate could quite appropriately have sentenced the accused to five months' imprisonment, suspend two months on condition of good behaviour and three months on condition that he performed community service. In the result I decline to certify the proceedings as being in accordance C with real and substantial justice.

Uchena J concurred.

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S v NYATHI 2003 (2) ZLR 102 (H)

Citation	2003 (2) ZLR 102 (H)
Case No	Judgment No. HB-90-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	21 August 2003
Judgment	21 August 2003
Counsel	*S S Mlaudzi,* for the accused
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure — *legal representation — right to — limits to right* C *— when court may order trial to proceed without accused having legal representation*

Criminal procedure — *review — procedure — use of— should not be used where conviction attacked*

Criminal procedure — *trial — irregularity — failure to allow legal* D *representation — failure by accused to secure legal representation or to apply for postponement for that purpose — court entitled to order trial to proceed*

Criminal procedure — *trial — irregularity — failure to grant postponement to allow defence witness to be obtained — whether court entitled to refuse postponements* E

Headnote

The accused's conviction and sentence in the magistrates court had been confirmed on review. His legal practitioner sought to bring the matter on review again. He attacked the conviction and

submitted that the proceedings were defective. He alleged that the magistrate had not F allowed the accused to secure legal representation after his then legal representative had died. It was also alleged that the magistrate had not granted a postponement to enable a defence witness to be called.

Held, that other than in very exceptional cases, the accused may not use the review procedure to attack the conviction. He should appeal. The circumstances of this case did not warrant making an exception. G

Held, further, that while every person charged with a criminal offence is permitted to defend himself, at his own expense, by a legal practitioner of his choice, the trial court has a discretion, in appropriate cases, to order that the trial should proceed despite the absence of a legal practitioner. Before doing so, the court must clarify whether the absence is the fault of the accused or of the lawyer. The right to legal representation H

Ndou J

A imposes an obligation to permit, not to ensure, legal representation. The accused had sufficient time to find another legal representative or to ask for a postponement to secure one. *Held,* further, that not every refusal of an adjournment or postponement of a trial to give the defence time to call a witness constitutes a gross irregularity. The question is whether in refusing the adjournment all the B material facts were taken into consideration. In this case the accused abandoned his intention to call his witness after two postponements failed to secure his attendance.

Cases cited

C *Fikilini v A-G* 1990 (1) ZLR 105 (S)

Nhari v PSC 1999 (1) ZLR 513 (S)

*Paweni & Anor v A-G*1984 (2) ZLR 39 (S)

R v Chidongo 1939 SR 210

R v Croeser 1947 (2) SA 483 (C)

R v Kistah (1908) 29 NLR 580

D *R v Leggate 1941* SR 2

R v Levin & Ors 1928 TPD 357

S v Moyo (1) 1978 RLR 316 (G)

Sv Nqula 1974 (1) SA 801 (E)

S v Paweni & Anor 1984 (2) ZLR 16 (H)

E *S v Runganga* 1995 (2) ZLR 303 (H)

R v Pria & Anor 1967 RLR 106 (G)

R v Steyn 1918 TPD 152

S v Stokie 1980 ZLR 280 (G)

R v Zackey 1945 AD 505

Wheeler & Ors v A-G 1998 (2) ZLR 305 (S)

Case information

F *S S Mlaudzi,* for the accused

Judgment

Ndou J: The accused was convicted of one count of assault with intent to do grievous bodily harm and another of housebreaking with intent to steal and theft by a Beitbridge Magistrate. He was sentenced to twelve months and ten G months' imprisonment respectively, with three months thereof

suspended on condition of good behaviour. The matter was submitted for automatic review to this court. The proceedings were confirmed as being in accordance with real and substantial justice.

The record was re-submitted for review to this court, but this time around with H an embodiment of written submissions from the accused's legal practitioners.

2003 (2) ZLR p104

Ndou J

It seems to me that the intention is to seek my indulgence to exercise my wide A powers bestowed by s 29 of the High Court Act [*Chapter 7:06*]. This is my assumption as the accused's legal practitioner did not bother to state the legal basis of the application, moreso after the proceedings have been confirmed. Be that as it may, this court has very wide powers on review: see *R v Chidongo* 1939 SR 210. In the exercise of such powers, I am there to assist, as far as I B am able, in the administration of justice and to ensure that the accused person receives fair treatment. On review, I must be satisfied that the proceedings in the lower court were substantially just: *R v Leggate* 1941 SR 2; *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S); Gubbay CJ's remarks in his paper *What a Reviewing Judge expects of a Magistrate* as reported in *Legal Forum* (1992) Vol 2 No 4 p 6 and with reference to *Criminal Procedure in Zimbabwe* C by John Reid Rowland at 26-5:

> "The latter learned author aptly described the purpose of review as follows:
>
> > '... it is imperative to ensure that the review system, which is aimed at providing a curb on any misdirected or arbitrary exercise of power, is administered efficiently and speedily. A magistrate should not live in fear of reviewing judges, constantly looking over his shoulder, but D should regard the reviewing judge as the second member of a two man team. The reviewing judge is not there to criticise or nit-pick or show off his knowledge; he is there to assist, as far as he is able, in the administration of justice and to ensure that accused persons receive fair treatment'."

As these proceedings have already been reviewed and confirmed, the accused E in essence, seeks the withdrawal of the certificate of confirmation. Such a withdrawal is merited where it is shown, first, that there has been an irregularity in the proceedings or mistake. Second, where facts are discovered which, if known at the time of the initial review, would have resulted in the original certificate being withheld: see *S v Moyo* (1) 1978 RLR 316 (G) and F *Criminal Procedure in Zimbabwe (supra)* at 26-6. Using this approach I proceed to consider the merits of the second application for review. The basis for the latter review is firstly, the attack on the conviction; secondly, refusal of an adjournment or postponement to give the accused a chance to obtain alternative representation.

Use Of Review Procedure To Attack The Conviction G

Mr *Mlaudzi,* for the accused, in his papers filed the accused person's affidavit attacking the propriety of the conviction. Generally, the accused is not allowed to use the review procedure to attack the conviction. He should appeal against the conviction. In very exceptional cases, this court, may, however, be prepared to deal with the propriety of the conviction on review. In H

2003 (2) ZLR p105

Ndou J

A *S v Runganga* 1995 (2) ZLR 303 (H), MALABA J (as he then was) remarked at 306G-307E:

> "The legal practitioner did not have to use the review procedure to attack the conviction. In *R v Pria & Anor* 1967 RLR 106 (G), Davies J said at 107G and 108C:
>
> > 'In terms of subsections 55 and 58 of the Magistrates Court Act [now B s 57(1)(ii)(b) and 57(2)] a person who has been convicted before a magistrates' court is entitled only to submit a written statement, on review, setting out the grounds or reasons upon which he considers the sentence imposed upon him not to be in accordance with real and substantial justice. He is not entitled to submit written representation attacking the conviction. The proper course if he wishes to attack the C conviction is to note an appeal... Appeal procedure is entirely different from review procedure and it is wholly inappropriate for an accused person to attempt to attack his conviction by way of review.'"

At 307D-E, the learned judge went on to deal with the exception:

> ' Section 29(4) of the High Court Act [*Chapter 7:06*] is worded in terms that are identical to those of s 64(4) of the Magistrates Court Act which D was repealed by s 59 of Act 29 of 1981. The section confers upon a judge of the High Court the power to review proceedings of an inferior court which come to his notice 'notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review'. The judge can only exercise his review

powers in terms of s 29(2) of the High Court Act if E he is satisfied that the proceedings brought to his notice in the circumstances set out in s 29(4) are not in accordance with real and substantial justice."

See *also S v Hulley* HB-60-95.

In the circumstances, it is wrong for *Mr Mlaudzi* to have used the review F procedure to attack the conviction of the accused. The appeal procedure should have been used.

Refusal of adjournment or postponement to afford the accused an opportunity to secure alternative legal representation and/or call defence witnesses

G This is an allegation of irregularity in the proceedings. This court may, in exceptional cases, where it is satisfied that the allegations of irregularity in the proceedings are not without foundation, exercise its indulgence of reviewing the proceedings: see *R v Pria supra; S v Stokie* 1980 ZLR 280 (G) and *S v Runganga supra.* This indulgence is, however, not readily granted. In this regard the remarks of Gubbay J (as he then was) in *S v Stokie supra* are H instructive. At 282F-H the learned judge warned:

Ndou J

"I have no hesitation in remarking that it is wrong to use s 64(4) [of the A Magistrates Court Act] as a cover to get the benefit of an appeal in the proceedings not subject to automatic review. The ordinary procedure of appeal must be followed. If the attitude of this court were otherwise, it would be inundated with complaints in the most trifling of cases. As it is, the time of a reviewing judge is sufficiently occupied with matters that properly come before him. In the light of the above, I was sorely tempted B to refuse to consider the merits of this particular conviction... 1 emphasise however, that my decision to exercise my power under s 64(4) of the Act in this instance must not be taken by practitioners as a precedent for obtaining for a client thought to be aggrieved a cheap form of redress not provided by the legislature by slipping in by the back door."

Malaba J in *S v Runganga supra* at 307H also emphasised: C

"It is important to point out to legal practitioners that procedures should be used for the purposes for which they were created. The indulgence of reviewing the proceedings where the propriety of the conviction is attacked under s 29(4) will not be readily granted."

The first issue relates to the court ordering the trial without the accused D "person's legal representative. It is trite that every person who is charged with a criminal offence is permitted to defend himself at his own expense, by a legal practitioner of his own choice -s 18(3)(d) of the Constitution of Zimbabwe, 1980. This constitutional right is reiterated in s 191(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], s 65 of the Magistrates Court Act [*Chapter 7:10*] and s 51 of the High Court Act *supra.* The trial court however, E has a discretion, in appropriate cases, to order that the trial should proceed but this discretion must be exercised judicially. Before exercising this discretion, the trial court must clarify whether the absence of the accused person's legal practitioner is the fault of the accused or of the legal representative. The accused should not be penalised for the fault of his legal practitioner in such cases: see *S v Nqula* 1974 (1) SA 801 (E) and *Criminal Procedure in* F *Zimbabwe supra* at 15-5.

The right to legal representation as enshrined in s 18(3)(d) of the Constitution *supra* and other pieces of legislation that I have referred to above imposes an obligation to permit, not to ensure, legal representation: *Constitutional Law of Zimbabwe* by G Linington at 421 -2 and *Wheeler & Ors v Attorney-General* G 1998 (2) ZLR 305 (S). In other words, this right is limited, it is not absolute. In the above case, Gubbay CJ at 311 said:

"... it is only in exceptional circumstances that a court would be justified in refusing a postponement of the trial to an accused who wanted to engage a legal representation at his own expense; or whose chosen legal representative was absent for good reason. But where the application for H

Ndou J

A the postponement is obviously vexatious or frivolous or where the accused is guilty of gross negligence in failing timeously to engage the services of a legal representative of his choice or of a deliberate tactic to unreasonably delay the trial, he cannot complain that his constitutional rights are infringed if the trial is ordered to commence. In addition, there is no right to seek to secure the services of a legal practitioner who is B disabled from representing a client, for instance, by not being permitted to enter the country; or who because of heavy commitment, is unavailable to appear for an excessively long period. If the State is

unable to prove any such reason, the trial should be postponed until the chosen legal representative is available. In this way, an accused will enjoy the full protection of the Constitution."

C In *S v Paweni & Anor* 1984 (2) ZLR 16 (H), Ebrahim J (as he then was) held that this right must be interpreted in a way that conforms with the principle that justice should be done. This means that there is a need to consider not only the interests of accused persons but also the interests of all parties concerned. When determining the application and extent of the right in particular cases, courts must consider how much notice of the trial has been given, the D complexity of the case, and, where applicable the availability of other competent lawyers. The above decision was upheld by the Supreme Court in *Paweni & Anor v Attorney-General* 1984 (2) ZLR 39 (S) where Gubbay JA (as he then was) at 43 stated:

"[An accused] is entitled to choose whom he wishes to represent him, but if his prime choice is unavailable then he is obliged to look further afield E and engage someone else. In other words, the right of choice is subject always to the practitioner's availability on the trial date."

In *Nhari v Public Service Commission* 1999 (1) ZLR 513 (S), Gubbay CJ further amplified the protection of s 18(3)(d) of the Constitution at pp 517- 519 in the following terms:

F "The appellant... had an absolute right to procure legal representation. It was not a question of the ... magistrate having a discretion whether to permit it. His discretion turned on the grant or refusal of the postponement sought. However a refusal arising from an injudicious exercise of that discretion would constitute a denial of the right to legal representation. It is ... a matter of considerable importance, both in the interests and G 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 ... if the H absolute right to procure legal representation is to have any meaning and

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significance, it must embrace the right to be afforded a reasonable A opportunity to secure it. A refusal of that opportunity, where requested, constitutes a denial of the right to a fair hearing guaranteed under subss (2) and (9) of s 18... Notwithstanding the inconvenience which would have been suffered by all save the appellant, I have not the slightest doubt that the refusal of the postponement constituted sufficiently improper exercise by the... magistrate of his discretion to warrant B interference."

The basis of the accused person's attack is captured in para 3 of his affidavit which I propose to quote in its entirety:

"3. I had engaged the services of Mr Nikisi to represent me at my trial but he died before trial. I was still preparing to get an alternative legal C practitioner but I was waiting to be refunded the funds I had paid him however the court decided to try without defence lawyer."

The trial magistrate's comment is that this intention was not communicated to him. In any event, the trial took place over a period of four months. The accused had sufficient time to secure the services of another legal practitioner or request a postponement to secure one. The accused has been dilatory in D securing legal representation. He should have requested a postponement in order to secure legal representation. He has not even bothered to explain such failure on his part. Even with the benefit of legal representation there is no attempt to explain why the accused person had been dilatory in securing legal representation and, more importantly, why he failed to request a postponement for that purpose. The accused has not established a factual basis for this E failure.

Coming to the question of the alleged refusal to grant a postponement for the accused to call defence witnesses, the accused has not been candid in his affidavit. The record reveals that accused requested a postponement and was granted one on two occasions. This occurred between 18 July 2002 and 26 F August 2002. When he failed to secure his witnesses he decided on his own, to close his case and dispense with the calling of defence witnesses. In the circumstances, there is no irregularity committed according to the record of the proceedings. In any event, it is trite that not every refusal of an adjournment or postponement of a trial to give the defence time to call a witness who is not available at court constitutes a gross irregularity. The decision on whether or G not to grant an adjournment of atrial in terms of ss 165 and 166 of the Criminal Procedure and Evidence *Act supra* is a matter within the discretion of the trial court. However, the decision to refuse an adjournment or postponement will be interfered with if the decision in the circumstances amounted to a gross regularity because material facts were not taken into consideration: see *S v Runganga supra.* In other words, where the trial court has taken into account H

Ndou J

A all the material facts bearing upon the decision, the review tribunal will not interfere with the decision, even if on the same facts it would have reached a different decision: see *R v Zackey* 1945 AD 505 and *R v Croeser* 1947 (2) SA 483 (C). The question is not whether the review tribunal would have exercised the discretion differently, but whether in refusing the adjournment all the material facts were taken into consideration. In the circumstances, not every B refusal of an adjournment of a trial to give the defence time to call its witness who is not available at court constitutes a gross irregularity necessitating interference with the proceedings. In all cases, where there are grounds for a postponement, it should be granted even if the magistrate has a doubt, because the presumption should be that the application is *bonafide.* The magistrate has a duty to enquire into the reasons for the request for a postponement. Once he C has enquired fully into the reasons he should then make up his mind whether to grant the postponement or not: see *R v Kistah* (1908) 29 NLR 580; *R v Steyn* 1918 TPD 152 and *R v Levin & Ors* 1928 TPD 357.

As alluded to above, the accused abandoned his intention to call the defence witness having after two postponements failed to secure the attendance of his D witness. The accused person's application is devoid of articulation on the factual basis of the alleged gross irregularity. He did not show that he requested and was refused the postponement either to secure the services of legal representation and/or attendance of his defence witness. He was content with brief and bland allegations of irregularity. Whilst I agree that in such instances, we have to prefer the use of the criteria that emphasise the E paramount important of the right to legal representation, there is *in casu* no factual basis for a finding that a gross irregularity was committed by the trial court in the exercise of its discretion.

In the circumstances, even considering the accused person's submissions, there is no case made out for the withdrawal of the judge's certificate of F 17 October 2002. I, accordingly, decline to withdraw the certificate of confirmation and the proceedings I still consider to be in accordance with true and substantial justice.

G *Samp Mlaudzi & Partners,* accused's legal practitioners

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REGISTRAR-GENERAL v TSVANGIRAI 2003 (2) ZLR 110 (H)

Citation	2003 (2) ZLR 110 (H)
Case No	Judgment No. HH-142-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	21 August 2003
Judgment	21 August 2003
Counsel	*C T Mudenda,* for the applicant *B W Elliot,* for the respondent
Case Type	Opposed application

Annotations No case annotations to date

Flynote

Elections — *constituency registrars — transmission of ballot papers and other electoral material following election to Registrar-General* C *— Registrar-General's duty to ensure that materials transmitted*

Practice and procedure *—judgment — default judgment — rescission — final order granted in default — applicant claiming good prospects of success due to inability to comply with court's interim order — statutory duty on him to perform acts which were subject of order — not open to* D *him to rely on inability to comply*

Headnote

In October 2002 an interim order was granted against the applicant. The order required that, as from 16 October 2002, the presidential election material (ballot papers) mentioned in the order were to be preserved in sealed packets and transmitted by the constituency registrars to the applicant E forthwith for him to hold in safe custody. A final order was granted without opposition the next month, but the applicant failed to comply with it. Instead, he sought to have the order rescinded. He also lodged an application to stay execution of the final order. An order had also been granted, prohibiting the applicant from destroying the material associated with the election. The applicant claimed that he intended to oppose the F final order but his legal practitioners had failed to submit the necessary papers.

Held, that the explanation for the default was inadequate as it did not tell what actually happened leading to the failure to file the opposing affidavit. There was dilatoriness on the part of the applicant himself and G on the part of his legal practitioner. The handling of the case indicated unconcern or insouciance which the court could not condone or approve of.

Held, further, that the applicant's lack of *bona fides* was shown by the various unsuccessful applications he had made. The failure to comply with the interim order indicated an initial unwillingness to comply with the terms H of the provisional order.

2003 (2) ZLR p111

Chinhengo J

A *Held,* further, that s 78 of the Electoral Act [*Chapter 2:01*] made it clear that the constituency registrars were obliged to keep election materials referred to in that section in sealed packets and not to open any such packets whilst in their custody. They were required to send the election materials to the Registrar-General in Harare after making certain endorsements on each packet. It was not open to him to claim that it was B not possible to comply with the court's order, as there was a statutory duty on him to do so. It was an administrative function which was part and parcel of and ancillary to the election process for which the applicant should have provided at the time of holding elections.

Cases referred to C

Chrmn, PSC & Ors v ZIMTA & Ors 1996 (1) ZLR 637 (S)

Chetty v Law Soc Tvl 1985 (2) SA 756 (A)

Colyn v Tiger Food Industries Ltd [2003] 2 All SA 113 (SCA)

Deweras Farm (Pvt) Ltd & Ors v Zimbank 1998 (1) ZLR 368 (S)

G D Haulage (Pvt) Ltd v Mumurgwi Bus Service (Pvt) Ltd 1979 RLR 447 (A)

D *Hainard v Est Dewes* 1930 OPD 119

Manjean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA 801 (C)

Shinga Express (Pvt) Ltd v Hubert Davis (Pvt) Ltd 1989 (2) ZLR 45 (H)

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

E *Stockil v Griffiths* 1992 (1) ZLR 172 (S)

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

Zimbank v Masendeke 1995 (2) ZLR 400 (S)

Legislation considered

F Electoral Act [*Chapter 2:01*], s 78

Case information

C *T Mudenda,* for the applicant

B W Elliot, for the respondent

Judgment

G **Chinhengo J:** This was an application for an order rescinding a provisional order confirmed against the applicant in his absence on 13 November 2002. At the conclusion of the hearing on 21 August 2003, I dismissed the application with costs. These are my reasons.

Chinhengo J

Brief History Of Matter A

On 16 October 2002, a provisional order with the following final and interim relief was issued by Makoni J against the applicant as the respondent: "Terms of the Final Order Sought

That you show cause to this Honourable Court why a final order should not be made in the following terms: B

"IT IS ORDERED:

1. That in relation to the Presidential Election held on 9-11 March, 2002, in order to prove that all the Constituency Registrars in Zimbabwe (who are under the direction and control of the Respondent) have complied with sub-sections (1)—(3) of s 78 of the Electoral Act and that the respondent has himself complied with ss (3) of s 78 of C the said Act, the respondent be and is hereby ordered to produce to this Honourable Court within three (3) days of the date of this order at some suitable venue in Harare nominated by this Honourable Court, all the separate, sealed packets referred to in ss (1) of s 78 of the said Act in compliance with ss (2) and (3) of the said Act in respect of all counted and rejected ballot papers together with counterfoils D and used voters' rolls used in all polling stations in all constituencies in Zimbabwe during the said Presidential Election held on 9-11 March, 2002.
2. That the costs of the application shall be determined by this Honourable Court when it adjudicates upon the Election Petition in Case No. HC 3616/2002. E

Interim Relief Granted

Pending the determination of this chamber application, the respondent shall preserve, and shall ensure that all the Constituency Registrars in Zimbabwe (who are under his direction and control) shall preserve in separate sealed packets all counted and rejected ballot papers together F with counterfoils and used voters' rolls used in all polling stations in all constituencies in Zimbabwe during the said Presidential Election held on 9-11 March 2002 and shall ensure that the said Constituency Registrars shall transmit the same to him forthwith for him to hold in his safe custody".

The interim reliefmeant that as from 16 October 2002 the presidential election G materials mentioned in the interim order were to be preserved in sealed packets and transmitted by the constituency registrars to the applicant forthwith for him to hold in safe custody. The provisional order was confirmed by Omerjee J on 13 November 2003 in the absence of any opposition by the applicant. There is no indication that between 16 October and 13 November 2002 the applicant complied or attempted to comply with the interim order. H

Chinhengo J

A In terms of the final order as confirmed the applicant was required, in order to prove that all constituency registrars had complied with s 78 (1) – (3) of the Electoral Act and that he himself had

complied with s 78 (3) of the Electoral Act to produce to this court, within three days of 13 November 2002, all the presidential election material referred to in the order at some suitable venue nominated by this court.

B After the provisional order was confirmed, the applicant applied, on 15 November 2002, for the rescission of the provisional order as confirmed. The respondent duly opposed the application and on 4 December 2002 the applicant filed his answering affidavit. Heads of argument were then filed — the applicant's on 26 February 2003 and the respondent's on 12 March 2003. C The applicant did not set the matter down for hearing. It was, however, the respondent who, on 9 July 2003 and on a certificate of urgency in terms of r 223(A) of the High Court Rules 1971, applied for the set down of this application. The application was referred to me on 28 July 2003, whereupon I set it down for 21 August 2003.

During the period between the granting of the provisional order and the D hearing of this application, the applicant lodged another application which is relevant to this application. It was an application to stay execution of the order granted by Omerjee J. This application was heard and dismissed by Gowora J on 27 November 2002 in case No. HC 10273/2002.

Two other applications which were heard and determined by this court are E relevant to the proper determination of the present application. On 12 September 2002 and in case No. HC 8225/2002 the respondent obtained an order from this Court (per Guvava J) against the applicant (being respondent in that case) which provided that:

> "The respondent shall not destroy and instead shall keep in his safe custody and shall not alter or amend in any way all the documents referred F to in s 78 of the Electoral Act [*Chapter 2:01*] pending the outcome of the election petition instituted by the applicant in case No. HC 3616/2002 against the respondent and three others".

This order, as is apparent, disallowed the destruction of the presidential election material therein referred. On 26 September 2002 and in case No. HC 8657/2002. Matika J refused the applicant the authority to destroy the G presidential election material. In all these cases it is clear that the issue between the applicant and the respondent has been the preservation and safe custody of the presidential election material pending the hearing of the election petition lodged by the respondent in case No. HC 3616/2002. The toing and froing is self-evident: H

- in case No. HC 8225/2002 the respondent applied for and obtained an

order that the applicant should not destroy the presidential election A material in terms of s 78(4) of the Electoral Act;

- in case No. HC 8657/02 the applicant applied for but was refused permission to destroy the presidential election material although he was granted other relief;
- In case No. HC 9021 /2002, at the instance of the respondent, a provisional B order was granted and later confirmed, directing the applicant to preserve and keep in safe custody in Harare all the presidential election material;
- In case No. HC 10273/2002 the applicant applied for a stay of execution of the order in case No.HC 9021/2002 and that application was dismissed.

It seems to me that the applicant has not fared well in all these applications in C regard to the issue concerned in the present proceedings. The reason therefor will become apparent later on in this judgment.

The Present Application

The respondent sought the confirmation of the provisional order in case No. HC 9021/2002 when the applicant had failed to file his opposing papers on D time. The provisional order was consequently granted in the absence of any opposition. It was therefore an order entered in default against the applicant.

An application for the rescission of a judgment entered in default requires that the applicant should show good and sufficient cause for his default. In order to show good and sufficient cause an applicant should comply with certain requirements: E

(i) he must give a reasonable explanation of his default. If his default was wilful or it was due to gross negligence the court should not, and normally does not, come to his assistance.

(ii) his application must be *bona fide* and not made with the intention of delaying the plaintiffs claim or relief. F

(iii) his defence to the plaintiffs claim must be *bona fide.* If he makes *a prima facie* defence i.e. he sets out averments which, if established at the trial, would entitle him to the relief asked for, that will be sufficient. In this regard he does not have to deal fully with the merits of the case and produce evidence to show that the probabilities area actually in his favour. G

The requirements of good and sufficient cause are set out in many cases, among them: *G D Haulage (Pvt) Ltd v Mumurgwi Bus Service (Pvt) Ltd* 1979 RLR 447 (A); *Shinga Express (Pvt) Ltd v Hubert Davis (Pvt) Ltd* 1989 (2) ZLR 45 (H); *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S); *Stockil v Griffiths* 1992 (1) ZLR 172 (S); *Deweras Farm (Pvt) Ltd& Ors v Zimbabwe Banking Corporation* 1998 (1) ZLR 368 (S); *Zimbank Corporation* H

Chinhengo J

A *v Masendeke* 1995 (2) ZLR 400 (S); *V Saitis & Co (Pvt) Ltd v Fenlake (Pvt) Ltd 2002* (1) ZLR 378 (H) [2002] 4 All SA 50 (ZH). There is no need for me to deal with these requirements in any detail in view of the many decided cases. What remains is to apply the facts of this case to the applicable legal principles and determine whether the requirements have been complied with.

Merits of Present Application

B In the founding affidavit, the applicant stated that, after the provisional order was granted on 16 October 2002, he instructed the Civil Division of the Attorney-General's office (the Civil Division) to oppose the provisional order. He averred that on 23 October 2002 he received affidavits "in this matter which I duly signed". These affidavits were returned to the Civil Division on C 29 October 2002 by one of his officials, a Mr Mhende. The affidavits were acknowledged by a Mrs Bangira, a senior legal process clerk in the Civil Division. He averred that he was "utterly shocked" when on 14 November 2002 he learnt that the provisional order had been granted unopposed. He investigated the matter with his legal practitioners in the Civil Division who expressed shock that the provisional order had been granted unopposed. He D said that the legal practitioners had told him that they had laboured under a mistaken belief that the opposing papers had been filed. He averred that on further investigation it was established that Mrs Bangira had been negligent. The applicant accordingly contended that he should not be prejudiced because of Mrs Bangira's negligence "in a matter of national importance" and that he E should be allowed to file his opposing affidavits. The applicant also averred that he was "unable to enforce the order granted to the respondent" for the reasons set out in the opposing affidavit which he had signed but which was not filed of record, leading to the default judgment. The applicant could not have meant that he was "unable to enforce the order granted" but that he was unable to comply with it. His was to comply with and not enforce the order.

F Mrs Bangira filed a supporting affidavit. She deposed to the following in paras 3-7 of her affidavit:

"3. I was advised that I had signed for these affidavits when these were returned by an official of the Registrar-General's office, (Applicant herein), on the 29th October 2002. G

3.1 This was evidenced by my signature in the delivery book used by the Registrar-General. See Annexure 'A' attached hereto.

4. I cannot recall what I did with the affidavits after I had received them.

4.1. The normal procedure is to place these affidavits in the trays of the officer concerned for collection by that officer's clerk.

5. On investigations I discovered that the law officer's clerk had not had H sight of these affidavits.

Chinhengo J

6. We have searched my office and the law officer's office and we A located these affidavits in file number 4/HA/2765 YD, also a matter involving *Morgan Tsvangirai v R G Mugabe & 3 Ors* (the election petition). See Annexure 'B' attached hereto.

7. I sincerely regret the confusion caused as a result of my actions".

This is the applicant's explanation for his default. In his opposing affidavit, B the respondent dealt with the inadequacies of this explanation. He averred that Annexure "A" attached to the applicant's affidavit did not give a date as to when the applicant's opposing affidavits were delivered to the Civil Division. In this averment the respondent was wrong. Annexure "A" indicates that the affidavits were delivered on 29 October 2002. For present purposes, therefore, it can be accepted that the opposing affidavits were delivered to the Civil C Division on 29 October 2002. The respondent averred that since a legal practitioner in the Civil Division had dealt with the matter at the time that the provisional order was granted, that legal practitioner should have ensured that the opposing affidavits were filed on time. The legal practitioner concerned did not, in this application, file any affidavits to explain her failure to file the affidavits timeously. The applicant attempted in his answering affidavit to D explain the legal practitioner's failure to file the opposing affidavits in these words:

> "It is a fact that there are now too many files involving myself and the respondent. Misfiling can be expected to occur".

These unfortunately are the words of the applicant and not those of any legal E practitioner in the Civil Division, who should speak for herself. There would be no need for the applicant to speak on behalf of the Civil Division or to attempt to explain what may or may not have happened in the Civil Division. An affidavit was, however, filed by Miss Mudenda, a legal practitioner in the Civil Division, apparently in response to the respondent's challenge that there was no affidavit by a legal practitioner in the Civil Division to explain what F had happened. Miss Mudenda averred that the legal practitioner handling the matter could not file a supporting affidavit because she intended to argue the matter in court. Yet, when the matter was heard on 21 August 2003, Miss Mudenda, whohad filed a supporting affidavit, argued the matter herself. This obviously created a doubt as to the real reason why the legal practitioner G handling the matter did not file a supporting affidavit, when, as it later transpired, the legal practitioner who filed a supporting affidavit, Miss Mudenda, actually argued it.

Mrs Bangira's supporting affidavit is vague. She is a clerk in the Civil Division. In her affidavit she said that she "was advised" that she had signed for the affidavits and that her signature in the delivery book was evidence of H

Chinhengo J

A the fact that she had received the affidavits. Quite clearly Mrs *Bangira* is not positive in her averments. She does not say that she received the affidavits or that she signed for them. Her lack of positiveness is borne out by her statement that she does not recall what she did with the affidavits. She fails to explain how the affidavits ended up in file number 4/HA/2765 YD when "the law officer's clerk had not had sight of those affidavits".

B The application in case No HC 9021 /2002 was "a matter of national importance" as far as the applicant was concerned. Yet when he received the affidavits from the Civil Division on 23 October 2003 and signed them (see para 4.1 of the founding affidavit), those affidavits were not immediately returned to the Civil Division until 29 October 2002. This is hardly the manner in which the C applicant is expected to handle a matter of national importance. On the part of the applicant's legal practitioner also, having represented the applicant at the hearing of the provisional order and having lost the. case at that stage, the legal practitioner should have been alert to the fact that the matter was "of national importance" and needed to be followed up to ensure that all the necessary papers were filed on time. There is no affidavit by the legal D practitioner who handled the matter to show what she did to ensure that the affidavits were filed timeously. The explanation for the default is, in my view, inadequate as it does not tell what actually happened leading to the failure to file the opposing affidavit. It seems to me that there was dilatoriness on the part of the applicant himself and on the part of his legal practitioner. Wilfulness generally "connotes deliberateness in the sense of knowledge of the action and E its consequences... and a conscious and freely taken decision to refrain from giving notice of intention to defend" (*Manjean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) but "unconcern or insouciance" (*Hainard v Estates Dewes* 1930 OPD 119) is the more appropriate description of an attitude to the proceedings which amounts to wilfulness. I am satisfied F that the delay of about six days by the applicant in forwarding the signed affidavits to the Civil Division, the absence of an affidavit by the lawyer handling the application on the applicant's behalf, and the failure by anybody to clearly explain what happened to the affidavits once they were delivered to the Civil Division indicate unconcern or insouciance which the court

cannot condone or approve of. Even if the fault could be squarely laid at the feet of G the applicant's legal practitioner, the vagueness of the explanation as given by Mrs Bangira as to what actually happened in the legal practitioner' s office and the absence of any explanation by the legal practitioner herself leads me to the conclusion that the explanation for the default is not reasonable. After representing the applicant at the hearing of the provisional order and having been fully aware of the "national importance" of the application, it does not H appear that the legal practitioner did anything to ensure that the papers were

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2003 (2) ZLR p118

Chinhengo J

filed timeously. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* A *Cape* [2003] 2 All SA 113 (SCA) Jones AJA stated as follows:

> "While the courts are slow to penalize a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys...". B

The subsequent failure by the applicant's legal practitioner to prosecute this matter diligently is further evidence of the ineptitude with which she conducted this case. There is thus no sufficient explanation to meet the requirement that the default should not be regarded as wilful. I accordingly regarded the explanation given as vague, intended to delay matters and quite insufficient.

The second requirement for the rescission of an order or judgment granted in C default is that the application for rescission must be *bona fide,* that is to say, it must not be intended to delay the claim by the other party. The various applications to which I have referred bring into question the application's *bona fides.* These are the decisions of this court in cases Numbers HC 8225/ 2002; HC 8657/2002; HC 9021/2002 and later HC 10273/2002. The failure D to comply with the interim order indicates an initial unwillingness to comply with the terms of the provisional order. I do not think that 1 need to say more about the application's *bona fides.*

It is generally accepted that, whilst the inadequacy of the explanation for default may well justify a refusal of rescission, its weakness may be cancelled out by the applicant putting forward a *bona fide'defence* which has a good E prospect of success *(Colyne 's* case *supra).* This however is subject to the cautionary statement made in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 767J-768D that:

> "As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy F only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstance, when the question of the sufficiency or otherwise of the defendant's explanation for his being in default is finely balanced, the circumstances that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission... But this is not to say that the stronger the prospects of success the more indulgently will the court G regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that the appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success. Nevertheless, in the interests of fairness to the appellant, it is H desirable to refer to certain aspects thereof'.

2003 (2) ZLR p119

Chinhengo J

A I do not think that it should be "in fairness" to the other party that the court has to consider that party's prospects of success. In *V Saitis, supra,* it was stated that the true test for a rescission of judgment is whether good and sufficient cause has been established and that the three requirements must generally be examined together and not in isolation, hence the statement at 386 (57e-f of the All SA Report) that:

> B "To my mind Blackie J [in *Shinga Express, supra*] was not saying that the test for 'good and sufficient cause' or 'sufficient cause' was 'wilful default' alone. He was in fact simply stating that if one fails to establish the existence of an essential element of 'sufficient cause', then he is unlikely, and does usually fail, to establish 'sufficient cause'".

Without laying down a general rule of law that in all cases the judge must C examine whether or not all the requirements of good and sufficient cause have been met, I will now proceed to inquire into

whether the applicant has good prospects of success on the merits. Those prospects are addressed in the opposing affidavit which the applicant should have filed but failed to do as discussed above.

D It seems to me that applicant's case is founded on three grounds: (a) that the respondent cannot rely on s 78(3) of the Electoral Act for the relief he sought because the presidential materials ceased to be governed by the Electoral Act but are now governed by an order of court. This, the applicant argues, was because the respondent applied to enforce s 78(3) of the Electoral Act after the expiry of the six months period specified in that section; (b) that he has no E physical space where the presidential election material can be stored: they should be stored at the constituency registrars' offices; (c) the order by Guvava J in case No HC 8225/2002 did not oblige the applicant to store the presidential election material in Harare; and (d) that he has no funds to ensure compliance with the order.

F If the applicant had not been dilatory in prosecuting this application and that application had been heard as a matter of urgency, I probably would have had cause to examine his arguments differently. This application was only heard after judgments were handed down in case No. HC 8657/2002 by Matika J and in case No. HC 10273/2002 by Gowora J. I cannot disregard those judgments as it seems to me there was no reason to persist in this application after those G judgments were handed down. That perhaps explains why the applicant did not move to set down the matter. He must have realised that his prospects of success were not good. Section 78 of the Electoral Act provides in the relevant subsections as follows:

> "(1) Assoon as may be after polling day or the last polling day, as the case H may be, in his constituency, the constituency registrar shall enclose in

> separate sealed packets the counted and rejected ballot papers. A
>
> (2) A constituency registrar shall not open any —
>
> (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 B section *sixty;* or
>
> (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 paragraph (d) of subsection (3) of section *seventy-two;* or C
>
> (d) sealed packet containing counted or rejected ballot papers; while such packet remains in his custody.
>
> (3) As soon as may be after polling day, the constituency registrar shall transmit to the Registrar-General in separate packets —
>
> (a) all the packets referred to in sub-section (2); and D
>
> (b) the statement in terms of sub-section (3) of section *sixty* and the report of the result of the verification thereof; and shall endorse on each packet a description of its contents and the date of the election to which it relates.
>
> (4) The Registrar-General shall retain for six months all the documents referred to in subsection (2) and then, unless otherwise directed by an E order of the High Court, shall cause them to be destroyed."

These provisions are clear. They obliged the constituency registrars to keep election materials referred to in that section in sealed packets and not to open any such packets whilst in their custody. They require the constituency registrars to transmit the said election materials to the Registrar-General after making certain endorsements on each packet. The word "transmit" has a very F clear meaning. It is used in its ordinary sense to mean "send"; "deliver"; "forward" "dispatch"; or "pass on". There can be no other legislative intention in s 78(4) than to require the constituency registrars to send the election materials to the Registrar-General in Harare.

The order sought to be rescinded is an order which, in my view, is in G accordance with s 78(3) of the Electoral Act. The stipulation in the order that the presidential election material should be transmitted to the applicant within three days was intended to give effect to the requirements of that provision that the material be transmitted to the applicant "as soon as may be after polling days". There is therefore no merit to the applicant's contention that s 78(3) does not require the constituency registrars to transmit the election material H to him in Harare.

Chinhengo J

A The applicant's contention that the said presidential election material is no longer kept by him pursuant to s 78 but in terms of a court order is specious. It is s 78(4) which provides the authority upon which the High Court may order or direct that the election material should not be destroyed. If this subsection did not provide accordingly there would be no basis for the High Court to make such an order. The Electoral Act (s 78(4)) and the High Court order both B provide the basis upon which the applicant is required to keep the presidential election materials in his safe custody in Harare. The High Court order is therefore in terms of the Electoral Act and the presidential election materials are, therefore, kept in terms of that Act.

The respondent said that he has no physical space and financial resources with C which to give effect to the order. That argument was shot down by Matika J in his judgment in case No. HC 8657/2002 where he said:

> "He (applicant) is only obliged to store the election materials in sealed packets. Whether there are logistical problems in storing them, the space or whatever is not the concern of this court. It is an administrative issue which is up to the applicant to determine how best to deal with that D aspect".

Gowora J made the same point more emphatically at p 4 of her judgment in case No. HC 10273/2002:

> "The order by Makoni J is forcing the applicant to comply with what is a statutory duty. The election material should have been sealed in packets and sent to the applicant by the constituency registrar shortly after the last E polling day. The respondent should not have been put to the expense of applying to court for the applicant to be compelled to comply with the provisions of the Act. In compliance with the Act, the applicant should have made provision for storage space of the materials from the constituency registrars. As far back as 12 September 2002, the applicant has had knowledge of the respondent's interest in the ballot papers and should F have made adequate arrangements for the transmission and storage in Harare in compliance with the provisions of s 78(3) of the Act. The transmission of the 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 G applicant should have provided for at the time of holding elections".

I do not think it is necessary to deal with the registrar's argument regarding financial resources. The position was clarified by the above mentioned orders of two eminent judges of this court. His was to ensure that he paid heed to the pronouncements of the learned judges subject, of course, to his right of appeal against any of their decisions with which he may have been aggrieved. He H cannot derive any comfort from the statement by Gubbay CJ in *Chairman,*

Chinhengo J

PSC & Ors v Zimta & Ors 1996 (1) ZLR 637 (S) at 645C-G where he said that A the courts cannot in general interfere with the Government's prerogative as to the allocation of funds. The facts of the present case are distinguishable from those in that case. The essential question in *Zimta's* case *supra* was whether the court could order the PSC and therefore the Government to provide funds to pay bonuses to civil servants where, pursuant to an enabling law, the PSC B had cancelled the payment of bonuses to civil servants. Here the issue is simply one where the applicant is required to perform a function required of him by statute and in the normal course of his duties. The facts indeed are quite distinguishable.

In the result I am satisfied that the applicant has not given a reasonable explanation for his default, that his application is not bona fide and that it has C no reasonable or good prospects of success on the merits. I am satisfied that he failed to establish that he has good and sufficient cause as required by r 63 (2) of the High Court Rules, 1971, to have the judgment in case No. HC 9021/2002 rescinded.

These were my reasons for dismissing the application with costs. D

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

Gill, Godlonton & Gerrans, respondent's legal practitioners

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Source:
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MUREHWA SOUTH ELECTION PETITION 2003 (2) ZLR 123 (H)

Citation	2003 (2) ZLR 123 (H)
Case No	Judgment No. HH-103-03
Court	High Court, Harare
Judge	Ndou J
Heard	25 February 2002; 27 February 2002; 11 March 2002; 13 March 2002
Judgment	27 August 2003
Counsel	*H Zhou,* with him *A Mugandiwa,* for the petitioner *F G Gijima,* for the respondent
Case Type	Election Petition
Annotations	No case annotations to date

Flynote

C **Elections —** *election petition — dismissal for want of prosecution — how to be effected*

Headnote

There being no provision in the Electoral Act [*Chapter 2:01*] dealing with dismissal of an election petition for want of prosecution, the court relied on O 9 r 62 of the High Court Rules, 1971, to order absolution from the D instance in favour of the respondent, where the petitioner had failed to appear after three postponements. The court also ordered the petitioner to pay costs on the legal practitioner and client scale.

Cases cited

Broughton v Manicaland Air Services (Pvt) Ltd 1972 (1) RLR 350 (G)

C *Collins v van der Merwe* 1908 TS 1086

General Wholesale Suppliers (Pvt) Ltd v Aims Distributors 1974 (2) RLR 175 (A); 1975 (1) SA 600 (RA)

Irish & Co Inc v Kritzas 1992 (2) SA 623 (W)

Morhardt v Windisch 1926 SWA 1

F *Verkouteren v Savage* 1918 AD 143

Legislation considered

High Court Rules, 1971, O 9 r 62

Case information

G *H Zhou,* with him *A Mugandiwa,* for the petitioner

F G Gijima, for the respondent

Judgment

Ndou J: The petitioner launched this petition in terms of s 132 of Electoral Act [*Chapter 2:01*]. He seeks an order in the following terms:

Ndou J

"IT IS ORDERED THAT: A

1. The Respondent was not duly elected as the Member of Parliament for the constituency of Murehwa South.
2. The result of the election in Murehwa South be and is hereby set aside.
3. The seat in Murehwa South is declared to be vacant. B
4. A certificate stating that the seat in Murehwa South is vacant shall be forwarded to the Speaker of Parliament.
5. A report in writing shall be forward to the Speaker of Parliament stating that the allegations of corrupt practices and illegal practices by the Respondent have been proved.
6. A report in writing shall be forwarded to the Speaker of Parliament C stating that corrupt practices and illegal practices extensively prevailed at the election in Murehwa South.
7. A report in writing shall be forwarded to the Attorney-General setting out the corrupt practical and illegal practices of the Respondent.
8. It is hereby declared that, within five years of this order, Respondent D shall not be registered as a voter, vote in any election or hold any public office other than public office regulated exclusively by or in terms of the Constitution of Zimbabwe.
9. The costs of this petitioner shall be paid by the Respondent on the scale of legal practitioner and client."

The salient facts of the case are that in June 2000 parliamentary elections took E place in Zimbabwe. In Murehwa South, Ward Nezi, a businessman, and Joel Biggie Matiza, an architect, stood as candidates for the MDC and ZANU-PF respectively. The results of the elections were declared on 27 June 2000 as follows:

"Joel Biggie Matiza - ZANU-PF - 13 895

Ward Nezi - MDC - 4 426 F

Eddyson Chiwara-UP-404."

Mr Nezi was not satisfied with the conduct of the elections in Murehwa South constituency, culminating in this petition. As a candidate in that constituency Mr Nezi has a right to present this petition in terms of s 132 of the Act. He articulated certain corrupt and illegal practices in a document filed as G Annexure "A" to the petition. Because of the turn of events I do not think it is necessary to outline these alleged practices in this judgment.

The matter was set down for hearing before me for 25 February 2002. Both parties were duly notified of the date of trial. On this date Mr Nezi did turn up; however, his legal practitioner Mr *Mugandiwa* was in attendance. H Mr Matiza and his legal practitioner were in attendance. Mr *Mugandiwa*

Ndou J

A applied for a postponement to a specific date. He submitted that the petitioner was not deliberately delaying the finalisation of the matter. He indicated that the delay had been occasioned by the dilatoriness of the Registrar of this court. He submitted that the latter generally delayed in setting down the forty June 2000 election petitions. He submitted that all the petitions were filed in July 2000 and by December 2000 not a single one had been set down. He submitted B that as of April 2001 only eight petitions had been finalised, with the first judgment only handed down on May 2001. It is very difficult for me to comment on these general allegations as I am seized with this petition

out of the alleged forty. I am not familiar with the facts in those other thirty-nine. For the purposes of the judgment I will confine myself to the circumstances of this C petition.

The reasons advanced for seeking the postponement are first, that around 95 perecent of the Mr Nezi 's witnesses are subsistence farmers and with the onset of the rain season they required time for farming activities. Second, the witnesses were "displaced from their homes" and were unable to move freely in the constituency as a consequence of political violence that engulfed the D area in the run up to the presidential elections. Third, an organisation known as Amani Trust, which had originally offered to pay the witnesses' expenses during the course of the petition, has since declined the said offer. The petitioner, therefore, required time to raise witnesses' expenses. The petitioner sought a postponement to 18 March 2002. Mr *Gijima,* for the respondent, strongly opposed the application. He submitted that, technically, the petitioner E was in default even though his legal practitioner was present. The petitioner has not explained the reason of his absence. He indicated that the petitioner did not seem to take his petition seriously. First, he did not attend meetings in judges' chambers where the set-down logistics were discussed. Second, this date was chosen by the petitioner himself, so his request for postponement F should not be allowed. Third, the respondent had several times requested for a summary of the evidence. The petitioner failed to provide the same, citing safety of the witnesses. The respondent suggested that the petitioner uses *pseudonyms* to address this concern. He, however, did not receive the summary of evidence from the petitioner. Finally, he further submitted that there was a need to bring litigation to finality. In the end I granted the G postponement but attached conditions thereto. I postponed the petition to 11 March, 2002.

On 11 March 202 the petitioner was again not in attendance. I granted another indulgence and postponed the matter to 13 March 2002 for the petitioner to prepare his case. For the record, I should point out that this application was H also opposed by the respondent. I ordered the petitioner to bear wasted costs.

2003 (2) ZLR p126

Ndou J

On 13 March 2002, Mr *Zhou,* for the petitioner, submitted that the petitioner A was not available and that he had not obtained instructions from him. He conceded that he does not have any meaningful explanation for the non- attendance. He submitted that he had no meaningful basis for seeking another postponement. He, however, submitted that he had no instructions to withdraw the petition and left everything in my hands. Mr *Gijima* submitted B that, as previously pointed out, the petitioner did not seem to take the matter seriously as evinced by his failure to attend in previous hearings. He submitted that the respondent had been forced to incur heavy travel and accommodation expenses of witnesses. He submitted that Mr *Zhou*'s best route was to withdraw the petition and tender costs. As this was not done the respondent prayed that the petition be dismissed for want of prosecution with costs on C legal practitioner and client. Mr *Zhou* submitted that dismissal for want of prosecution was inappropriate. He submitted that I dismiss the petition based on default with no order as to costs. There is no provision in the Electoral Act dealing with this issue so I have to use the rules of this court to resolve this procedural point. The relevant rule is r 62 which provides:

> "When on the calling of any case the defendant appears in court personally, D or by his legal practitioner, and the plaintiff makes default, the defendant *shall be absolved* from the said suit or action unless sufficient cause to postpone the same, or to make some other order therein, appears to the court." (emphasis added)

In casu, it is common cause that there is no sufficient cause for the postponement. E The only remedy available to the respondent according to r 62, is absolution from the petition. Notwithstanding that the rules make no provision for dismissal, the court has the inherent power to dismiss the action in appropriate cases: see *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 (1) RLR 350 (G). From the foregoing it is evident that if, when atrial is called, the defendant appears and the plaintiff does not appear, the defendant is entitled to an order F granting absolution from the instance with costs, but may lead evidence with a view to satisfy the court that final judgment should be granted in his favour, and the court, if so satisfied, may grant such ajudgment: see *The Civil Practice of the Supreme Court of South Africa* by Van Winsen, Cilliers and Loots, 4 ed at 661, *Irish & Co Inc v Kritzas* 1992 (2) SA 623 (W) at 623I-J; *Collins v Van der Merwe* 1908 TS 1086; *Verkouteren v Savage* 1918 AD 143 and G *Morhardt v Windisch* 1926 SWA 1. *In casu,* absolution from the instance is called for.

Costs

When a defendant is absolved from the instance he should be regarded as being the successful party, and the plaintiff should be ordered to pay the defendant's H

Ndou J

A costs unless there are good reasons for ordering otherwise: see *General Wholesale Suppliers (Pvt) Ltd v Aims Distributors* 1974 (2) RLR) 175 (A); 1975 (1) SA 600 (RA) at 601; The *Civil Practice of the Supreme Court of South Africa supra* at p 685C and *Law of Costs* by Cilliers at page 247 (C).

In the light of the above I grant the respondent absolution from the instance B with costs on the legal practitioner and client scale.

Wintertons, petitioner's legal practitioners.

FG Gijima Associates, respondent's legal practitioners.

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S v KADEMAUNGA 2003 (2) ZLR 128 (H)

Citation	2003 (2) ZLR 128 (H)
Case No	Judgment No. HH-126-03
Court	High Court, Harare
Judge	Smith J
Heard	27 August 2003
Judgment	27 August 2003
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law (statutory offences) — *Concealment of Birth Act [Chapter 9:04] — s 2 — hiding live infant with intent to conceal birth — offence committed — same conduct could be charged under other statutes* C

Headnote

The accused had given birth to a child. Wishing to conceal the birth, she put the infant in an anthill. The child was found alive a day or so later. She was charged with contravening s 2 of the

Concealment of Birth Act [*Chapter 9:04*], that is, by secret burial or other disposal of the body of D the child, endeavouring to conceal the birth thereof. The scrutinising regional magistrate queried the appropriateness of the charge.

Held, that it was no longer necessary to show that the accused had disposed of the dead body of her child. The 1969 amendment to the legislation was to the effect that if the woman disposes of the body in an endeavour to conceal the birth, whether the baby is dead or alive at the time, she has E committed the offence. However, a charge of attempting to contravene s 2 of the Infanticide Act [*Chapter 9:12*] or of contravening s 7(e) of the Children's Act [*Chapter 9:04*] (leaving an infant unattended in circumstances which were likely to cause the infant physical or mental distress or harm) would have been equally competent. F

Case referred to

S v Chingodya 1996 (1) ZLR 521 (H)

Legislation considered

Children's Act [*Chapter 5:06*], s 7(1)

Concealment of Birth Act [*Chapter 9:04*], s 2 G

Judgment

Smith J: The accused was charged with contravening s 2 of the Concealment of Birth Act [*Chapter 9:04*] (hereinafter referred to as "*Chapter 9:04*"). She was convicted and sentenced to 12 months' imprisonment, half of which was suspended for five years on condition she did not, during that period, commit H any offence involving concealment of birth or infanticide for which she was

---

Smith J

A sentenced to imprisonment without the option of a fine and the other half was suspended on condition she did 210 hours of community service. The facts of the case are as follows. On 31 December 2001 she secretly gave birth to a full- term baby. She concealed it in a hole in an anthill. When her husband came back from the fields he noticed that she was no longer showing signs of pregnancy, so he called members of the Neighbourhood Watch to interrogate B her. Apparently, she was three months pregnant when she married her husband and she did not tell him. When she gave birth she did not want him to know that she had delivered a full term baby. She told the members of the Neighbourhood Watch where she had hidden the baby and they retrieved it. The baby was still alive. When it was examined at the hospital on 3 January 2002 it had septic wounds on its abdomen and a septic ulcer on its right thigh.

C The regional magistrate who scrutinised the record queried whether the charge that was put to the accused was appropriate. He felt that the case involved a child, not the body of a child. The child was, and still is, alive and so the accused had abandoned her baby. He felt that contravening s 7(1) of the Children's Act [*Chapter 5:06*] would have been a more appropriate charge. D The trial magistrate agreed that that would have been a more appropriate charge but said that, in his view, the charge of contravening s 2 of *Chapter 9:04* was not improper. The regional magistrate has submitted the record for review.

Paragraph (e) of s 7 of the Children's Act [*Chapter 5:06*] makes it an offence for any parent who:

> E "in the case of an infant, left that infant unattended in circumstances which were likely to cause the infant physical or mental distress or harm".

There is no doubt that the accused contravened para (e) above. Leaving her baby in a hole in an anthill must have caused it physical distress or harm, considering that it would have had no food and that it had developed septic wounds and ulcers by the time it was saved. Furthermore, a charge of attempted F infanticide would also have been appropriate.

Section 2 of *Chapter 9:04* provides as follows:

> "**2. Penalty for concealment of birth**
>
> Any woman who is delivered of a child shall be guilty of the crime of concealing the birth of her child if she, by secret burial or other disposal G of the body of the child, endeavours to conceal the birth thereof, and shall be liable to imprisonment for a period not exceeding five years."

Chapter 9:04 initially came into the statute law of this country as Ordinance 10 of 1845 and the date it came into operation was 10 June 1891. It was part of the laws of the Cape Colony which were adopted as the initial statutory law in this country. The only amendment that has been made to Ordinance 10 of H 1845 was effected by Act 12 of 1969.

2003 (2) ZLR p130

Smith J

In the 1939 Revised Edition of the Statute Law of Southern Rhodesia, A Ordinance 10 of 1845 appeared as the Concealment of Birth Act [*Chapter 32*]. Section 2 thereof read as follows:

> "2. Any woman who is delivered of a child shall be deemed to be guilty of concealing the birth of her child, if she by secret burial or other disposal of the dead body of the said child endeavours to conceal the birth thereof, B and shall be liable to imprisonment for a period not exceeding five years."

In the 1963 Revised Edition of the Statute Laws of Rhodesia, Ordinance 10 of 1845 appeared as *Chapter 29*. Section 2 of *Chapter 29* of 1963 was identical to s 2 of the *Chapter 32* of 1939.

The Criminal Law Amendment Act, 1969 (No. 12 of 1969) amended s 2 of Chapter 29 of 1963 by deleting the word "dead" and that is why, when the C Revised Edition of the Laws was produced in 1974, the Concealment of Birth Act [*Chapter 57*] was identical in wording to the present *Chapter 9:04*.

The amendment made by Act. 12 of 1969 shows a clear intention to extend the ambit of the offence originally created by Ordinance 10 of 1845. Whereas it originally covered cases where a dead body was disposed of, since 1969 the D offence is committed whether the body disposed of was dead or alive at the time of disposal. One can see the reason for the amendment. When the offence covered only the disposal of dead bodies, it meant that the State would have to establish that at the time the body was disposed of the baby was in fact dead. If the baby was alive at the time of the disposal but died thereafter, the woman would not have been guilty of the offence. The effect of the amendment is that E if the woman disposes of the body in an endeavour to conceal the birth, whether the baby is dead or alive at the time, she has committed the offence. It would be illogical to hold that the woman is not guilty if the baby survives, but if it does not then she is guilty.

For the reasons set out above, I consider that the charge preferred against the F accused was proper and that her conviction is in order. On the other hand, a charge of attempting to contravene s 2 of the Infanticide Act [*Chapter 9:12*] or of contravening s 7(e) of the Children's Act [*Chapter 9:04*] would have been equally competent.

Gillespie J, in *S v Chingodya* 1996 (1) ZLR 521 (H), set out what he considered to be the relevant factors to be taken into account in determining an appropriate G sentence where a woman is convicted of contravening s 2 of *Chapter 9:04*. The sentence imposed complies with the views expressed by Gillespie J.

The conviction and sentence are confirmed. H

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THE MUD-MAN ENTERPRISES (PVT) LTD T/A BLUE CHIP AGENCIES v NECHIRONGA & ORS 2003 (2) ZLR 131 (H)

2003 (2) ZLR p131

Citation 2003 (2) ZLR 131 (H)

Case No Judgment No. HH-128-03

Court	High Court, Harare
Judge	Ndou J
Heard	15 November 2001; 16 January 2002
Judgment	27 August 2003
Counsel	*P C Paul,* for the applicant *J R Tsivama,* for the respondent
Case Type	Details not suplied
Annotations	No case annotations to date

Flynote

Contract— *termination—cancellation—breach by one party of obligations — when other party entitled to cancel contract— breach must relate to* C *vital or important term — whether necessary for innocent party to demand performance*

Headnote

The applicant bought a house from the respondents. He paid part of the purchase price, but did not, as required by the contract, obtain a loan from D a building society, nor did he pay the balance on time. In order to pay the balance, he purported to sell the house to a third party, at a higher price than he paid. The respondents notified him that the sale was cancelled.

Held, that the right to resile from an agreement does not arise merely by virtue of the fact that a contracting party has failed to carry out an obligation under an agreement timeously and has received a valid notice of rescission. E The breach must also relate to a vital or important term of the agreement. Whether in a particular case the breach is of such a material or substantial nature is a question which can only be satisfactorily decided after an examination of all the relevant facts. On the facts of this case, the breach was material.

Held, further, that the notice of rescission was not preceded by a demand, but F this was not necessary to place the applicant *in mora,* the applicant having failed to pay in time.

Cases cited

Asharia v Patel & Ors 1991 (2) ZLR 276 (S)

Aucamp v Morton 1949 (3) SA 611 (AD)

G *Buitendag v Buys* 1973 RLR 98 (AD)

Chomse v Lotz 1953 (3) SA 738 (C) *Cohen v Haywood 1948 (3) SA 365 (A)*

Geldenhuys & Neethling v Beuthin 1918 AD 426

Laurie v Wright 1940 SR 62

H *Laws v Rutherfurd* 1924 AD 261

Ndou J

Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co 1970 (1) SA 584(T) A

Magnet Motor Co v Bernstein 1929 TPD 431

Matimba v Salisbury Municipality 1965 RLR 291 (AD); 1965 (3) SA 513 (SR AD)

Oatorian Properties (Pty) Ltd v Maroun 1973 (3) SA 779 (A) B

Radiotronics (Pty) Ltd v Scott, Lindberg & Co Ltd 1951 (1) SA 312 (C)

Rhoprops Ltd v Levy & Anor G-B-9-75

Strachan v Prinsloo 1953 (3) SA 738 (C)

Sweet v Ragerguhara 1978 (1) SA 131 (D)

Case information

P C Paul, for the applicant C

J R Tsivama, for the respondent

Judgment

Ndou J: In this application, the applicant seeks an order in the following terms:

> "It is ordered that:
>
> The cancellation of the Agreement of Sale between the applicant and the D first and second respondent in respect of Stand No. 321 Clee Drive, Prospect be invalid and the respondents be directed to effect transfer of this property to the applicant against payment of the balance of the purchase price, plus costs of transfer."

Most of the facts in this matter are common cause or to some extent beyond E dispute. It is not in dispute that on 26 November 1998 the applicant company, through its managing director, Mr Walter Tongwe Mudzingwa-Manamike entered into an agreement with the first and second respondents in terms of which the applicant purchased from first and second respondents, stand No. 321 of Prospect for the sum of $500 000. It was contemplated that the applicant would pay $90 000 from its own funds and the balance would be F raised from a bank. For this reason, the agreement of sale was reflected in two separate documents i.e. one for $410 000 and another for $90 000. The former document was filed with this application but the latter document is missing. It is clear that the first and second respondents are, in fact, not the owners of the property and the owners are third and fourth respondents as shown in the Deed of Transfer filed of record. It is common cause, however, that all four G respondents are related to each other and that the third and fourth respondents had given the first and second authority to sell the said property on their behalf and possibly to keep to themselves the proceeds thereof. It is common cause that, although the agreements provide for cash payment of $90 000 and $410 000 on signature of the two documents, only $90 000 was paid. The H

Ndou J

A applicant indicated to the first and second respondents that the $410 000 would be financed through a bank loan. The first and second respondents, were however, paid $80 000 and this sum was paid by the applicant, *in casu,* and accepted by them on 31 December 1998. The applicant, thereafter, secured a purchaser for the property, one Mrs Dimbi. The first and second respondents were not satisfied with this development. They were of the view that the B applicant acted fraudulently by making arrangements to sell the property to Mrs Dimbi. They allege that the applicant had no right to sell the property to Mrs Dimbi for $650 000 shortly after they "sold" the property to the applicant, before the latter had paid the full purchase price or obtained transfer of the rights, title and interest in the property. They accused the applicant of having acted *mala fide,* lacking transparency and taking advantage of their trust. The C applicant submits that there is no legal bar to a person who has purchased property from re-selling it even before transfer is effected, since it is not a requirement of our law that a seller be the owner of property at the time of a sale. It is not necessary for me to decide on the correctness of this submission in this application. On 27 April 1999, the first and second respondents D purported to cancel the agreement and addressed a letter to the applicant in the following terms:

> "Re:- AGREEMENT OF SALE FOR STAND No. 321 CLEE DRIVE, PROSPECT, WATERFALLS, HARARE
>
> We refer to the above agreement entered between Mr Mudzingwa and the undersigned on 26 November 1998 and payment document dated 27 E November 1998 signed by both parties.
>
> In view of breach of conditions of sale laid down, we hereby cancel the agreement in terms of para 8 of the Agreement of Sale of this stand."

The letter was signed by both first and second respondents. Paragraph 8 of the Agreement of Sale reads:

> F "In the event of the purchaser defaulting in any payment or committing a breach of any of the other terms or conditions hereof and failing to remedy such breach within a period of fourteen (14) days after receipt of written notice requiring him to do so, the seller shall either have the right to cancel this agreement and resume occupation of the property, together with any improvements made thereto, and all payments made by the Purchaser be G forfeited *op rouwkoop,* without prejudice to any claim for damages which the seller may have arising out of such breach or otherwise, or alternatively, the seller shall, at his option, have the right to sue the Purchaser for the balance of the purchase price against tender of registration of transfer."

One of the breaches relied upon by the respondents is that the applicant effected a cheque payment of $210 000 and on two instances the cheque was H referred to the drawer. The question is whether this amounts to a breach of the

---

Ndou J

agreement. The first and second respondents also contended that the applicant A misrepresented to them that he had already secured a loan for $410 000 from the bank and that is why the agreement made reference to a"cash sale". In this regard, clause 2 of the Special Conditions reads:

> "This sale is conditional upon the Purchaser being able to raise a loan secured by a First Mortgage Bond from a Building Society on the property..." B

The applicant apparently decided on its own, without informing the first and second respondents, to raise the purchase price through a method other than the one agreed upon. The applicant decided to sell the property to Mrs Dimbi for cash, receive the said cash and pay the balance of the purchase price to the respondents. The issue here is whether the applicant was entitled to do so in C light of the express provisions of clause 2 *supra.* The purported sale to Mrs Dimbi took place in November 1998. The dilemma the applicant faced was occasioned by Mrs Dimbi's prudence. She was not prepared to pay the purchase price directly to the applicant but instead chose to pay the purchase price into her legal practitioner's trust account. The applicant exhibited some financial guts or folly and decided to pay the first and second respondents from D its own sources without access to moneys from Mrs Dimbi or a bank loan. Two attempts were made in this regard and, in both instances, the applicant's cheques were not honoured by its bankers on account of lack of funds. It was only after these valiant attempts at effecting payments that the respondents purported to cancel the agreement. E

The issue for determining is whether the applicant is in breach of the agreement between the parties. The applicant failed to raise the balance of the purchase price as per the agreement. Instead, the applicant "sold" the property, subject matter of the agreement, to a third party. All this was contrary to the express provisions in the agreement. The applicant made two attempts at paying the balance outstanding on the purchase price by cheque. As alluded F to above, the cheques were dishonoured. The respondents' case is that all this constituted a breach entitling them to rescind the agreement. It seems clear that the applicant was in default and the respondents elected to cancel the agreement on that account. The respondents informed the applicant of their election. G

In para 6 of the founding affidavit, the applicant stated:

> "Although the agreements provided for cash deposits of $90 000 and $410 000 only the deposit of $90 000 was in fact, paid on signature of the agreements. *I informed the first and second respondents that the $410 000 would be paid from monies to be borrowed by us from the Bank"* (my emphasis). H

Ndou J

A The arrangements between the applicant and Mrs Dimbi were made contrary to the express provisions of the Special Conditions in the agreement. According to the respondents, the applicant was supposed to have paid the balance of the purchase price by the first of December 1998. It is common cause that the applicant did not do so. The basis of this contention is a document signed by two of the applicant's representatives and the first and second respondents on B 27 November 1998 i.e. a day after the agreement of sale *in casu* had been signed by the parties. The document provides:

"Mrs B. Patsanza	Mrs H. Nechironga
I.D. No. 63-361063 V8	I.D. No. 63-050430 A42
Sellers of stand No. 321 Prospect:	3½ Acre
C Agreed Price	$500 000
Amount Received	$90 000

Balance $410 000 to be paid by the first week of December 1998" (Signed by sellers and buyers).

What is discernible from the papers filed by the parties is that the applicant D is obliged:

(a) to pay the balance of the purchase price of $410 000 by the first week of December 1998; and

(b) in compliance with clause 2 of the Special Conditions of the Agreement, to raise a loan secured by a first mortgage bond from a building society.

E It is common cause that the applicant attempted to meet the obligation in (a) by making a cash payment of $80 000 and a cheque of $210 000 by 31 December 1998. The latter payment was not to be as the cheque was dishonoured by the applicant's bankers. The applicant's papers make no mention of the $210 000 cheque at all. Bearing in mind that it was dishonoured I am not sure whether this was not by accident but by design. So some three F weeks after the due date for the payment of the balance of the purchase price of $410 000 the applicant attempted to pay $290 000 but only succeeded with payment of $80 000 on account of the circumstances that I have just outlined above. Another cheque payment was made on 14 January 1999 also with disastrous consequences as it too was dishonoured.

It is further beyond dispute that the applicant never approached a building G society to raise a loan secured by a first mortgage. In fact, clause 2 of the Special Conditions further required of the applicant"... To apply immediately for such loan to at least two (2) registered building societies and shall accept same timeously upon the terms offered". None of this was done. Instead, contrary to these express conditions, the applicant embarked on an arrangement H of selling the said property, i.e. even before it was transferred to it, to a third

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party in order to raise the balance of the purchase price. This is a variation A of the agreement. Any such variation has to be made pursuant to the provisions of clause 10. The cumulative effect of the applicant's conduct is that it has breached the agreement. The applicant, however, contends that by accepting the payment of $80 000 on 31 December 1998 the respondents waived then- right to complain that payment of the full purchase price was not paid on B signature. In this regard, I stress what was said in *Matimba v Salisbury Municipality* 1965 RLR 291 (A) at 293 F-G;
1965 (3) SA 513 (SR AD) at p 515E-F that there is no magic formula attached to the defence of waiver. It is entirely a question of fact to be decided upon a consideration of all the circumstances of the particular case. The applicant, in this case, has to establish on a balance of probabilities that the respondents did an unequivocal C act which is consistent only with the applicant's right to continue to pay outside the express terms of the agreement: see *Buitendag v Buys* 1973 RLR 98 (AD).

In my view, the facts placed before me clearly establish a breach of the agreement by applicant. The next issue is whether the respondents are thereby entitled to rescission of the agreement. Rescission does not automatically D follow upon the establishment of a breach of the agreement. As was stated in *Rhoprops Ltd v Levy & Anor G-B-9-75* at pp 12 of the cyclostyled judgment:

> "The law on this matter seems to be clearly settled. A purchaser's remedy depends upon the seriousness of the defect, and the purchase will not be entitled to rescission unless the breach goes to the whole root of the contract." E

Also, Wille and Millin's *Mercantile Law* 15 ed, pp 169 and Mackeurten *Sale of Goods in South Africa* 14ed, pp 392. Rescission is available only where the breach complained of is such as to make the

article useless for the purpose for which it is bought, or at any rate so serious that the buyer, had he known of it at the time of sale, would not have bought. I*n Aucamp v Morton* 1949 (3) SA 611 (A) at 619, F Watermeyer CJ said:

> "... a breach by one party of the obligations resting on him will only give the other a right to treat the contract as discharged if the breach is one which evinces an intention on the part of the defaulter no longer to be bound by the terms of the contract for the future, or if the defaulter has broken a promise, the fulfilment of which is essential to the continuation G of the contractual tie."

The right to resile from an agreement does not arise merely by virtue of the fact that a contracting party has failed to carry out an obligation under an agreement timeously and has received a valid notice of rescission. In addition an essential requirement is that, the *mora* must relate to a vital or important term of the H

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A agreement. In other words, a notice of rescission is of no legal consequence unless it relates to the failure to perform a vital or important term of a contract timeously: see *Sweet v Ragerguhara* 1978 (1) SA 131 (D) and *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A). Whether in a particular case the breach is of such a material or substantial nature is a question which can only be satisfactorily decided after an examination of all the relevant facts. B Although materiality is an issue, like any other, which may be capable of determination on the averments in affidavits, from the nature of the enquiry *viva voce* evidence will in most cases be necessary for its proper adjudication: *Sweet v Ragerguhara supra.* As already pointed out above, the applicant has already made two cash payments towards the purchase price i.e. for $90 000 and $80 000 respectively leaving abalance of $330 000. In the circumstances, C the agreement is partly executed and partly still executory. The innocent parties i.e. the respondents, have, in the first instance, one of two remedies, *viz,* to elect either to rescind the agreement and claim restitution and damages, or to abide by the contract and insist upon it being carried out and claim damages. In regard to these two remedies, it is essential to remember that where two D parties have entered into an agreement they are bound by the reciprocal obligations flowing from such agreement and neither of them can by unilateral act withdraw from or vary any of the obligations arising out of the agreement. The fact that one informs the other that he cancels the contract or that he does not intend to carry out its obligations under the agreement; or the fact that one of them commits a material breach of the contract does not by itself put an end E to the agreement. The agreement only comes to an end where the innocent party accepts the cancellation or informs the other party that he regards the material breach as a repudiation of the agreement and cancels the agreement. In the latter case, it is necessary for the innocent party to follow up his recording of the breach by a statement of cancellation, because it is only if he elects to cancel (i.e. accepts repudiation) that the contract is rescinded: see *Radiotronics* F *(Pty) Ltd v Scott, Lindberg & Co Ltd* 1951 (1) SA 312 (C); *Geldenhuys & Neethling v Beuthin* 1918 AD 426 and *Magnet Motor Co v Bernstein* 1929 TPD 431.

Because the respondents elected to rescind the contract the obligation is placed upon them to make restitution of that which they have received under G the agreement and their ability and preparedness to do this is a prerequisite to their right to rescind.

On the question of the need to adduce *viva voce* evidence as outlined in *Sweet v Ragerguhara supra,* the parties' legal practitioners urged me to adopt a robust approach and determine the issues on the papers filed of record, thus H dispensing with the need to refer the matter to trial.

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Ndou J

The critical question to be determined is whether from the facts before me, the A applicant was effectively in *mora* thereby enabling the respondents to resile from the contract. I have already alluded to the notice of rescission given by the respondents to the applicant. It is trite that in order to constitute a notice of rescission, the language must clearly and unequivocally convey an intention to cancel the contract: see *Asharia v Patel & Ors* 1991 (2) ZLR 276 (S). The B language used by the respondents clearly and unequivocally conveyed an intention to cancel the agreement and that is the context in which it was understood by the applicant resulting in the launch of these proceedings. The notice of rescission was not preceded by a demand (*interpellatio)*. In my view, such *interpellatio* was not necessary to place the applicant *in mora.* We are dealing here with *mora ex re* as the agreement fixes the time for performance C i.e. the first week of December 1998. This fixed time

makes the demand that would otherwise have to be made by the respondents - *dies interpellatpro homine-Laws v Rutherfurd* 1924 AD 261. In this case, Innes CJ at 262 said:

> "It is the same principle which applies when a debtor undertakes to discharge an obligation on a specified date; the creditor need make no demand: *dies interpell at pro homine,* and the debtor is *in mora* if he fails D to pay on the appointed day."

See *Cohen v Haywood* 1948 (3) SA 365 *(A); Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 (1) SA 584 (T) and *Laurie v Wright* 1940 SR 62. The applicant failed to pay the balance of the purchase on the stipulated date. The applicant tried to perform in a wrong manner by not E seeking a loan from a building society "immediately" after the signing of the agreement. The applicant instead tried to sell the said property at a higher price in order to raise the balance of the purchase price. The cumulative effect of these factors satisfies me that the applicant's failure to comply with the agreement was due to its own fault. Contextually, the effect constitutes a breach going to the root of the agreement. The importance of the breach *in casu* F was of such significance that, without more, justified cancellation of the contract by the respondents: see *Strachan v Prinsloo* 1925 TPD 709. The terms of the contract are clear and the above principle must be applied no matter how hard the result may be on the applicant. In any event, I have no dispensing power to extend the stipulated date of first week of December 1998: see *Chomse v Lotz* 1953 (3) SA 738 (C). G

I accordingly, dismiss the application with costs against payment by the respondents of the amounts already paid by the applicant.

Wintertons, applicant's legal practitioners

Sawyer & Mkushi, respondents' legal practitioners H

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Source:
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LEADER TREAD ZIMBABWE (PVT) LTD v SMITH 2003 (1) ZLR 139 (H)

Citation	2003 (1) ZLR 139 (H)
Case No	Judgment No. HH-131-03
Court	High Court, Harare
Judge	Ndou J
Heard	18 March 2002; 19 March 2002; 28 March 2002
Judgment	27 August 2003
Counsel	*G S Wernberg,* for the plaintiff *H Simpson,* for the defendant
Case Type	Civil action
Annotations	Link to case annotations

Flynote

Contract — *compromise — novation — distinction between — compromise of illegal contract — whether valid*

Contract — *novation — distinction between novation and compromise — novation of illegal contract — whether valid*

Headnote

In general compromise differs from novation in that the existence of a valid D prior obligation is not a requirement, whereas the intention to novate presupposes a valid existing obligation, and if there is no such obligation then a new obligation does not arise from the purported novation agreement. Compromise may, however, in certain circumstances constitute a novation.

E The parties entered into an arrangement whereby the plaintiff would pay the defendant to provide foreign currency for the plaintiff's business. The plaintiff claimed it was an express term of their agreement that the currency should be obtained legally; the defendant, on the other hand, alleged that the parties agreed that he would obtain the currency illegally on the black or "parallel" market. The defendant subsequently failed to F provide the plaintiff with foreign currency for which it had paid, so the plaintiff's representatives got him to sign an acknowledgement of debt for the amount it had paid him. When the defendant failed to pay the amount, the plaintiff sued him on the acknowledgement of debt. The defendant raised the defence that the acknowledgement was based on an illegal transaction.

G *Held* that the acknowledgement of debt was a compromise which constituted a novation. Its effect was to extinguish the original agreement between the parties and to replace it with a new one. The validity of the compromise did not depend on the legality of the original agreement, and any defence which the defendant might have relied upon had he been H sued upon the original agreement fell away.

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Cases cited A

Dennis Peters Investments (Pty) Ltd v Ollerenshaw & Ors 1977 (1) SA 197 (W)

Erasmus, Est v Church 1927 TPD 20

Tauber v Von Abo 1984 (4) SA 482 (E)

Tumahole Bereng v R [1949] AC 253 (PC)

Van Zyl v Niemann 1964 (4) SA 661 (A) B

Viola v G J Harvey (Pty) Ltd 1964 (2) SA 535 (T)

Case information

G S Wernberg, for the plaintiff

H Simpson, for the defendant C

Judgment

Ndou J: The plaintiff claims payment of the sum of $ 1 288 461.10 from the defendant, together with interest thereon at the prescribed rate from 14 February 2001 to the date of payment in full, and costs of suit. The plaintiffs claim is premised upon a simple acknowledgement of debt executed by the defendant in the plaintiffs favour on 5 March 2001. D

The defendant originally raised three grounds of defence. First, illegality, on the basis thatthe acknowledgement was based on a series of illegal transactions. Second, agency, based on the allegation that the defendant acted on the plaintiff's behalf as an agent in transacting foreign currency deals with a third party. And third, duress, alleging that he had been induced by threats to sign the acknowledgement of debt shortly after having suffered a heart attack. E

The defendant, however, elected at the pre-trial conference, to abandon the defence of duress and this was confirmed by his counsel at the commencement of the trial. The remaining issues, therefore, relate to the questions of illegality and agency only.

Plaintiff's Case F

The plaintiff called three witnesses viz. Messrs Malcolm Evans, Clive Davis and Prosper Marambanika. Mr Evans and Mr Davis are directors of the plaintiff and Mr Marambanika was its accountant.

The main thrust of their evidence is that plaintiff is a manufacturer and depends entirely upon sourcing its raw materials from South Africa through G a company known as Leather Tread SA (Proprietary) Limited. Whilst these corporate entities are distinct from one another, there is a relationship between the two in the sense that the shares of the local company are held by its directors as nominees for the South African Company to which they are in turn, answerable. There is, in addition, a contractual relationship between the two in the sense that the plaintiff is from time to time a debtor of the parent H

Ndou J

A company in respect of materials imported from it and imported to Zimbabwe.

Hitherto, payment in respect of goods imported into Zimbabwe by the plaintiff had been made in the ordinary way through the plaintiff's local bank. This involved the submission of an application form together with customs documents and a pro-forma invoice in respect of the goods. Thereafter the local bank would obtain the requisite exchange control authority (if indeed the B same was required) and payment would be made by inter-bank transfer to South Africa. During the latter part of the year 2000, due to the exigencies of the declining economic position in the country, foreign currency became very scarce and could no longer be sourced through commercial banks. Around October 2000, the plaintiff, through its witnesses, was introduced to the C defendant via one Colin Kirkpatrick, an employee of the defendant, as being the proprietor of a licensed *bureau de change* who was in a position to assist the plaintiff with the procurement of foreign currency.

The initial meeting between the parties took place at the offices of the plaintiff and involved Messrs Davis, Marambanika, Kirkpatrick and Smith (i.e. the defendant). Preliminary discussions were held where it was made clear to the D defendant that authority to use the services of his *bureau de change* would have to be granted by the management of the parent company. At that meeting, however, Davis and Marambanika stated that the issue of legality was very much on the agenda and that they sought assurances that the operation would be legitimate and above-board.

E It is common cause that a subsequent :meeting was arranged in order to facilitate the introduction of the defendantto the managing director of Leather Tread SA (Pty) Ltd, Mr Sprosson. The meeting was held at the Italian Bakery in Avondale, Harare. The meeting was attended by Messrs Sprosson, Evans, Davis, Kirkpatrick and Smith. According to Evans and Davis the main object of the meeting was for Mr Sprosson to receive satisfactory assurances of the F defendant's credentials and the legality of the proposed future business to be conducted between the parties. Having been thus assured, it was agreed that, first, the defendant would source foreign currency through the auspices of his *bureau de change.* Second, that the foreign currency was to be obtained by the defendant from legitimate FCAs (Foreign Currency Accounts) operated by his *bureau de change,* Odyssey (Pvt) Limited. Third, that the payments would be G made via this source directly to Leather Tread SA (Pty) Ltd and, upon receiving confirmation of these payments, the defendant would be paid by plaintiff the agreed Zimbabwe equivalent. Fourth, that payments were initially to be made directly to a bank account operated by the defendant at Stanbic Bank. This arrangement was specifically requested by the defendant in order to facilitate H prompt payment to him and it was for this reason that the payments were not

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Ndou J

made to Odyssey. This was possible due to the fact that the plaintiff also had A an account with the same bank.

It is common cause that the first three payments by plaintiff to defendant were in fact made in exactly this manner by means of an inter-account transfer by means of written letters of request generated by the plaintiff to the bank. Thereafter, it is also common cause that the payments, were in the main, made B by cheque drawn in the defendant's favour, the proceeds of which could be cleared quickly as the drawer's bank and the collecting bank were one and the same.

The question of legality was significantly discussed and the defendant indicated that he would source the currency from legitimate so-called FCAs i.e. Foreign Currency Accounts held by him. In the circumstances, there was C never any question at all of the defendant having acted as an agent for the plaintiff by obtaining foreign currency via third parties. Both Evans and Davis categorically denied that there was to have been any illegality in the procurement of the foreign currency. Evans stated unequivocally that had the defendant acted illegally in obtaining this money, he would have acted outside his D mandate. The question of legality was important to the plaintiff as it was its *raison d'etre* to being able to continue to obtain currency and it did not want any problems in this respect. Eventually the defendant approached Mr Sprosson directly in South Africa and requested a change to the hitherto accepted way of doing business. The defendant indicated that the plaintiff should pay him up-front in Zimbabwe currency and the defendant would E thereafter source the Randa and deposit this to Leather Tread SA (Pty) Ltd. By now, a relationship of trust had been established between the parties. Thereafter payments totalling $ 1 925 000.00 were made to the defendant but no reciprocal payment was received in South Africa. This litigation is as a result of this failure. It was at this time that the defendant became elusive in the extreme. He kept his mobile phone switched off. Promises by his wife that F he would return the plaintiff's representative's calls amounted to naught. The plaintiff's representative became increasingly anxious and suspected that something was amiss. Eventually, a visit was made by Messrs Marambanika and Davis to the defendant's business premises in Central Avenue, Harare. A heated exchange resulted and tempers flared on both sides. Eventually, G however, calm returned and the parties shook hands and appeared to be reconciled.

It is common cause that at that point the defendant issued the plaintiff with a cheque for $500 000.00 with the request that plaintiff's representative should wait two days before banking the same. The defendant simultaneously drew the acknowledgement of debt annexed to the summons as Annexure "A". The H

A acknowledgement of debt was drawn in favour of the plaintiff. The cheque was subsequently deposited and honoured but no further payments have, been made resulting in these proceedings.

Defendant's Case

The defendant's evidence is similar or identical in many respects to that of the B plaintiff regarding the means by which the parties were introduced and the purpose of that introduction. After the initial mention of the plaintiff's name and requirements by Kirkpatrick, the defendant for a while forgot about this because, he said, there were many other purchasers looking for foreign currency at the time. It is common cause, however, that the two meetings took place as outlined by the plaintiff's witnesses. It is also common cause that at C the first meeting, Davis indicated that he did not have authority to close a deal and required his South African Chief Executive Officer's say-so. The latter apparently required to be personally assured regarding the integrity of the defendant. The central issue in this regard revolved upon the reason why Mr Sprosson wanted to meet the defendant in person. Was this an indication that the plaintiff was concerned about the question of illegality? The original D arrangement was that no payments would be made to the defendant until payment had been received in South Africa. There was, therefore, no risk to the plaintiff of losing money. According to the defendant, he gave the plaintiff two options. One was the "legal route" which would utilise FCAs as the means of securing the money and would be done via his *bureau de change.* The other E was the "illegal route" in terms of which the defendant would directly seek foreign currency on the open market, or the parallel market as it commonly referred to. The plaintiff, according to the defendant, opted for the latter because it was under pressure from Leather Tread SA (Pty) Ltd having been in arrears with payments. Evidently, the so-called illegal route would provide foreign currency faster and at a slightly cheaper rate. The defendant alleged F that the plaintiff's representatives told him that the plaintiff was indebted to Leather Tread SA (Pty) Ltd in the sum of about ZAR 3 000 000,00 and that they wished to purchase currency in tranches of ZAR100 000.00. The defendant stated that it was agreed that he would receive a commission of 10 *per centum* and that there was no negotiation regarding that rate: it was a case of "take-it-or-leave-it". The defendant further testified that to export currency G without following the appropriate channels was an offence and that the plaintiff made an informed choice to pursue the illegal route.

The defendant stated that on one occasion after the relationship between the parties had begun to sour due to the non-performance by him of his obligations under the agreement, he paid a large sum of foreign currency directly to the H plaintiff in Harare in order to reduce the debt owed by him to the plaintiff. He

alleged that he was subsequently told by Evans that the latter had thereafter A smuggled the money out of the country. The defendant testified some time thereafter he suffered a heart attack and was hospitalised for some time. By the time he recovered, Kershaw had gone to ground and he was unable to track him down. He stated that he was up to that point in time perfectly willing, and fully intended, to pay in terms of the acknowledgement of debt. When, however, the B plaintiff resorted to these proceedings to recover the acknowledged outstanding amount, he changed his mind and sought to rely upon, principally, the defence of illegality. His reason for having adopted this stance was an angry reaction to the plaintiffs alleged temerity in approaching the court for assistance in recovering the debt due to it.

The court has to decide the vital issues on the evidence of the witnesses and C the probabilities. The defendant's pleadings differ markedly from his evidence in important respects. In order to set up the defence that he acted as an agent for the plaintiff in the plaintiffs dealings with a third party, the defendant alleged in his further particulars filed on 10 July 2001 that "Defendant was to source foreign currency as an agent for the plaintiff from a Mr Rob Kershaw, a South African". In a similar vein, the defendant, in his amended plea filed D on 12 November 2001 alleged (in paragraphs 2(a) and (b)) that:

> "Defendant avers that when he received the $1 288 461,10 from the plaintiff he did so as the agent of the plaintiff and received specific instructions to purchase South African Rand from his contact in South Africa, Rob Kershaw. Defendant avers that he handed the full amount to E Mr Kershaw in terms of his mandate and scope of his authority together with a request to provide South African rand at an agreed exchange rate."

The defendant in his plea claimed that Mr Kershaw neither delivered the rand nor accounted for the Zimbabwean currency allegedly given to him and alleged that there was no lack of diligence on his part in this respect. On 22 November 2001 the plaintiff asked defendant to supply, *inter alia,* the following further F particulars to the amended pleas:

> "Was the defendant specifically instructed by the plaintiff to hand over all the money to this Mr Kershaw? What measures did the defendant put in place to ensure that the plaintiff s said instructions would be carried out?"

The defendant responded to these questions on 27 November 2001 as follows: G

> "Yes. Defendant paid the sum of $2 750 000,00 to Mr Rob *Kershaw,* and believed that Mr Rob Kershaw would in turn pay the sum of ZAR 250 000,00 to the plaintiff's parent company in South Africa, as had happened on previous occasions."

Mr *Simpson,* for the defendant, in his cross-examination of the plaintiff's witnesses, gave the impression that the said Rob Kershaw was known to them. H

A Against the background of these pleadings, and questions to the plaintiff's witnesses under cross-examination, it is strange that the defendant, in his testimony, stated that he never mentioned Mr Kershaw's name to any of the plaintiff's representatives at any time. He categorically confirmed that these representatives were not even aware of Mr Kershaw's existence. The only possible inferences that I draw from this is that either Mr Kershaw does not B exist and is figment of defendant's imagination and he forgot his earlier fabrication. Alternatively, unknown to the plaintiff and contrary to its clear instructions, the defendant used Mr Kershaw for his own purposes but thereafter elected in the pleadings to use his name for the express purpose of avoiding liability.

C **Assessment of the evidence**

I am satisfied that the plaintiff's witnesses gave credible evidence. They supported each in all material respects. They, mainly, gave a credible account on how the agreement was concluded and

its terms and conditions. Their understanding was that the defendant was procuring the foreign currency legally through the use of FCAs. That is what the defendant assured them of. D On the other hand, the defendant gave false evidence. I have already alluded to the question of the existence of Mr Kershaw. The defendant deliberately lied and changed his story. It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all: see *Tumahole Bereng v R* [1949] AC 253 (PC) E and Hoffman & *Zeffertt South African Law of Evidence.* If a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide. *In casu,* I am satisfied that he deliberately lied to mislead the court on the nature of the agreement with plaintiff to escape liability. If the defendant sourced the foreign currency through the "illegal route" he deliberately deceived the plaintiff in this regard. In my view, the defendant lied F on the question of Mr Kershaw because the defence of agency cannot be sustained. He is lying to try and escape an obligation under the contract.

The effect of the acknowledgement of debt signed by the parties in March 2001

As I understand the plaintiff's submission, the acknowledgement of debt G resulted in a compromise, i.e. *transactio* or a novation, and therefore the defence of illegality falls away. I do not think that this statement of law is correct in its entirety. There is a difference between compromise and novation. In general compromise differs from novation in that the existence of a valid prior obligation is not a requirement. The intention to novate presupposes the H existence of a valid existing obligation. If this assumption is false, no new

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obligation arises from the purported novation agreement: see *Tauber v Von* A *Abo* 1984 (4) SA 482 (E). Compromise may, however, in appropriate circumstances constitute anovation. In my view, an acknowledgement of debt signed by the parties is a compromise which falls in this category. It constitutes a novation and as such on failure of the defendant to comply with compromise agreement (i.e. the acknowledgement of debt), the plaintiff cannot fall back on B the old obligation but must base his claim on breach of the new agreement, unless an express or implied term in the latter empowers the plaintiff to base its claim on the obligation. There is no such term *in casu:* see *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669-670 and *Law of Novation* by L R Caney. At p 44 the learned author Caney observed:

> "A compromise *(transactio)* is a novation, with this difference, however, C that a novation of an invalid contract is itself invalid, but if a compromise is made about a contract the validity of which is in doubt, this cannot be upset on the ground that the contract which was compromised was invalid; the purpose is to replace uncertainty with certainty. It is a novation designed to effect settlement of a dispute and may be arrived at by novation in the narrower sense of the word or by delegation." D

The defendant paid the plaintiff $500 000.00 by cheque with an arrangement that it be deposited after two days. This was accepted by the plaintiff. The defendant simultaneously drew and signed an acknowledgement of debt in favour of the plaintiff. The cheque, as per arrangement, was subsequently deposited and honoured. The defendant made these arrangements to avoid litigation. The effect, therefore, is that the original agreement was extinguished E and replaced by the new one. This is compromise, and as such any defence which the defendant might have relied upon had he been sued upon the original agreement falls away: see *Dennis Peters Investments (Pty) Ltd v Ollerenshaw & Ors* 1977 (1) SA 197 (W) and *Viola v GJ Harvey (Pty) Ltd* 1964 (2) SA 535 (T). Viewed in its proper context, compromise is one of the various ways in F which the obligations under a contract are terminated: see *The Introduction to South African Law and Legal Theory* by W J Hosten, A B Edwards, F Bosman and K Church (2 ed) at pp 759 and 765. The compromise between the plaintiff and the defendant substituted the original agreement between the parties for the supply of foreign currency. The validity of the compromise did not depend on the legality of the first agreement. G

The purpose of the *transaction* between the plaintiff and the defendant was to prevent or avoid litigation. This was admirably stated in *Estate Erasmus v Church,* 1927 TPD 20 at page 24 (citing Domat *Roman Law* vol 1 para 1078)

> "A *transactio* is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual H consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing."

Ndou J

A *Transactio* is not limited to parties who are litigants. According to Voet, 2.15.1 *transactio* includes settlement of matters in dispute between parties who are not litigants and later at 2.15.10, he includes within the scope of *transatio,* agreements on doubtful matters arising from the uncertainty of pending conditions "even though no suit is then in being or apprehended." (Gane's translation, Vol 1 p 452).

B In light of the above, I do not have to consider the illegality of the first agreement. Because the effect of the acknowledgement of debt of March 2001 between the parties constituted a compromise, as a matter of law the defendant's defence of illegality falls away.

The defendant has no other legal way of avoiding performance in terms of the C acknowledgement of debt of March 2001. The latter agreement is not tainted with illegality. The plaintiff's claim must, therefore, succeed.

It is accordingly ordered:

1. That judgment be and is hereby entered in favour of the plaintiff against the defendant for the payment of $ 1 288 461,10 together with interest at D the prescribed rate with effect from 14 February 2001 to date of payment in full.
2. Costs of suit.

Honey & Blanckenberg, plaintiff's legal practitioners

E *Manase and Manase,* defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/TINARWO v HOVE & ORS 2003 (2) ZLR 148 (H)

TINARWO v HOVE & ORS 2003 (2) ZLR 148 (H)

Citation	2003 (2) ZLR 148 (H)
Case No	Judgment No. HH-138-03
Court	High Court, Harare
Judge	Smith J
Heard	18 June 2003
Judgment	27 August 2003
Counsel	*G M Mabuye,* for the plaintiff *O Lemani,* for the defendants
Case Type	Stated case
Annotations	No case annotations to date

Flynote

Legal practitioner — *conduct and ethics — duty of care — duty owed by legal* C *practitioner to third parties — when legal practitioner liable*

Legal practitioner — *duty to client — duty to exercise professional competence and diligence — failure to protect client's interests by serving papers on all relevant parties*

Headnote

The plaintiffs property was sold in execution when he failed to service a D mortgage bond. The building society had instructed a firm of legal practitioners to sue the plaintiff. Default judgment was taken against the plaintiff, and the messenger of court removed the plaintiff's goods for sale. The plaintiff instructed his own legal practitioners to apply for rescission and for the sale in execution to be stayed. By consent, E rescission was granted but the messenger of court was not informed; he proceeded with the sale. The plaintiff claimed for the loss from the building society and its legal practitioners, claiming that they should have advised the messenger of court. Their failure to do so constituted a breach of a duty of care they owed him.

Held, that the legal practitioners were agents of the building society. F

Held, further, that a legal practitioner who is instructed by his client to carry out a transaction that will affect an identified third party owes a duty of care towards that third party in carrying out the transaction, since such a third party is a person within the legal practitioner's direct contemplation as someone who is likely to be closely and directly hurt by his acts or G omissions. The legal practitioner can reasonably foresee that the third party is likely to be injured by those acts or omissions.

Held, further, that the plaintiff's own legal practitioners brought the application for rescission against, *inter alios,* the messenger of court. It was for them to do their duty towards the plaintiff and to protect his interests by having the papers served on the messenger. They failed to do so. H

2003 (2) ZLR p149

Smith J

Cases cited A

Cape Town Municipality v Paine 1923 AD 207

Halliwell v Johannesburg Municipal Council 1912 AD 659

Maketo & Anor v Wood& Ors 1994 (1) ZLR 102 (H)

Legislation considered B

Magistrates Court (Civil) Rules 1980 *(SI* 290 of 1980), Order 22 r 8

Case information

G M Mabuye, for the plaintiff

O Lemani, for the defendants

Judgment

C **Smith J:** This is a stated case in terms of Order 29, rule 199 of the High Court Rules. The relevant facts are as follows. The second defendant (hereinafter referred to as "ZBS") issued summons in the magistrates court on 23 May 2001 against the plaintiff (hereinafter referred to as "Tinarwo") claiming payment of $891 351 which was owed in terms of a mortgage bond. The first D defendant (hereinafter referred to as "Hove") is the legal practitioner who handled the matter on behalf of ZBS and she is a member of the third defendant (hereinafter referred to as "HLA"). On 19 September 2001 ZBS obtained default judgment against Tinarwo and a writ of execution was issued. On 12 November, acting on the instructions of Hove, the messenger of court removed Tinarwo's goods in execution of the writ. On 6 December an *ex parte* E application for rescission of judgment and stay of execution, which had been filed by Tinarwo, was served on Hove and HLA. In the heading of the application it was stated that ZBS is the plaintiff and Tinarwo the defendant. It went on to state that

application would be made on 18 December 2001 for the rescission of the default judgment entered in favour of the applicant on 9 F May 2001. There is no indication as to who the applicant is. In the affidavit in support of the application it is stated that Tinarwo is the applicant, ZBS is the first respondent and the messenger of court is the second respondent. The affidavit then goes on to explain why Tinarwo was not in willful default. A rule *nisi* was issued by the magistrate on 5 December, returnable on 18 December 2002 (it should have been 2001) calling on the "first respondent" to show G cause why the default judgment should not be rescinded. The interim relief granted was two-fold. The messenger of court was directed to stay execution and it was ordered that the order be served on the "respondents" by the "applicants" legal practitioners. On the return day the rule *nisi* was confirmed, by consent of the parties, and it was ordered that the goods be released.

The rule *nisi* was not served on the messenger of court. The goods that were H attached were sold by public auction on 11 December. The parties became

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aware of that fact on 21 December. Because the goods had been sold, it was A not possible to comply with the order that the goods be released.

Tinarwo then issued summons claiming from the defendants $650 000. He contends that the sale in execution was solely due to the negligence of Hove, who was the agent of HLA, alternatively it was due to the negligence of HLA, who was the agent of ZBS, alternatively, it was caused and contributed to by B the joint negligence of all three defendants. The negligence was that they failed to notify the messenger of court on 5 or 6 December or soon thereafter that the execution of the writ had been stayed.

ZBS claims that it did not consent to the return of the goods or the proceeds of the sale and that the magistrate had misdirected herself when she made that order. ZBS has since noted an appeal against the order that was granted by C consent.

The defendants contend that they did not owe Tinarwo a duty of care. If any one had been negligent, it was Tinarwo's legal practitioners as they had not cited the messenger of court as a respondent in the application for rescission. Furthermore, they contend that it is unreasonable to suggest that, as respondents D in the rescission proceedings, they should have served the papers on the messenger of court.

The quantum of damages is not in issue. The issues for determination are:

1. Whether or not Hove and HLA were acting as agents of ZBS?
2. If so, whether they owed Tinarwo a duty of care towards the attached E goods?
3. If so, whether such duty of care was breached by the defendants?

Mr *Mabuye* referred to *Maketo & Anor v Wood& Ors* 1994 (1) ZLR 102 (H) as authority for the proposition that the defendants owed Tinarwo a duty of care. By failing to advise the messenger of court of the stay of execution, they F breached that duty. The duty of Tinarwo was no more than advising the defendants, in reasonable time, prior to the sale in execution, of the stay. That duty was discharged when the *ex parte* application was served on HLA.

Mr *Lemani* submitted that it was the duty of Tinarwo's legal practitioners, when they filed the *ex parte* application, to have cited the messenger of court as a party to the proceedings and then to have served the rule *nisi* on the G messenger of court. Failure by Tinarwo and his legal practitioners to do such things were the sole cause of Tinarwo's goods having been sold. *Mr Lemani* further pointed out that the *ex parte* application was flawed in a number of respects. Although in an application the parties are referred to as the applicant(s) and the respondent(s), in the *ex parte* application the parties were described H

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A as plaintiff and defendant. Furthermore, even though Tinarwo was the applicant he was described as the defendant and ZBS was described as the plaintiff. In the supporting affidavit, although in the heading Tinarwo was described as the plaintiff, in the affidavit he says that he is the applicant and he goes on to say that ZBS is the first respondent and the messenger of the court is the second

respondent. As mentioned earlier, in the heading to the B affidavit ZBS is described as being the plaintiff and the messenger of court is not mentioned. *Mr Lemani* further argued that the rule *nisi that* was issued was directed at the messenger of court and it was ordered that the applicant's legal practitioners were to serve the order on the messenger of court. They failed to do so and it was their failure which resulted in the sale going ahead.

C **ISSUES**

1. Were Hove and HLA acting as agents of ZBS?

As HLA were briefed by ZBS to institute the action against Tinarwo, and as Hove was the legal practitioner who was handling the case on behalf of HLA, there can be no doubt that they were acting as agents of ZBS. D When Tinarwo failed to file a plea and ZBS obtained judgment by default, it was Hove and HLA who lifted the judgment and then obtained the writ of execution. Clearly they were then responsible for delivering the writ to the messenger of court so that execution could be instituted.

2. Did Hove and HLA owe Tinarwo a duty of care towards the attached goods?

E In *Halliwell v Johannesburg Municipal Council* 1912 AD 659 at 672 Innes CJ said:

> "where, in consequence of some positive act, a duty is created to do some other act or exercise some special care so as to avoid injury to others, then the person concerned is, under Roman-Dutch law, liable for damage F caused to those whom he owes such duty by an omission to discharge it."

The principle enunciated above has been accepted and followed in very many cases, both in South Africa and in this country. In *Cape Town Municipality v Paine* 1923 AD 207 Innes CJ stated at p 216-217:

> "It has repeatedly been laid down in this court that accountability for unintentioned injury depends upon *culpa* — the failure to observe that G degree of care which a reasonable man would have observed. I use the term reasonable man to denote the *diligens paterfamilias* of Roman law—the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another, and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation, a reasonable man would have foreseen the likelihood of H harm and governed his conduct accordingly, is one to be decided in each

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> case upon a consideration of all the circumstances. Once it... would have A been foreseen and guarded against by the *diligens paterfamilias,* the duty to take care is established... But as pointed out in *Transvaal & Rhodesian Estates v Golding* and *Farmer v Robinson GM Co Ltd* 1917 AD 18 and 501, there is an advantage in adhering to the general principle of the Aquilian law and in determining the existence or non-existence of *culpa* by applying the test of a reasonable man's judgment to the facts of each B case."

Adam J, in *Maketo 's* case, *supra,* referred to those cases, *inter alia,* in deciding whether or not a legal practitioner was liable to an execution debtor, where the execution debtor had paid most of the debt he owed but the legal practitioner failed to notify the Deputy Sheriff timeously and the goods were sold. At pp 128H-129C the learned judge said: C

> "Further, a legal practitioner's duty to his client is a paramount duty. The duty, when owed by a legal practitioner to a third party, is not a wide and general duty to do all that properly can be done for the third party. But there is a duty owed to his client, as well as to a third party, to use proper care in carrying out the client's instructions. A legal practitioner who is D instructed by his client to carry out a transaction that will affect an identified third party owes a duty of care towards that third party in carrying out the transaction, since such a third party is a person within the legal practitioner's direct contemplation as someone who is likely to be so closely and directly hurt by his acts or omissions. The legal practitioner can reasonably foresee that the third party is likely to be injured by those acts or omissions. In this matter, there is no question of whether the legal E practitioners could fairly have been expected to contemplate the third party as someone likely to be affected by any lack of care on their part. The nexus between them was that the third party was named and identified in the proceedings instituted by those legal practitioners. The proximity arose from the duty of care owed to their client, which was in no way casual or accidental or unforeseen. To hold that the legal practitioners F were under such duty towards the third party did not mean the imposition of an uncertain and unlimited liability on the legal practitioners."

As stated by Adam J, the legal practitioner's paramount duty is to his or her client and, in doing that duty, he or she must ensure that no harm is done to any other party which does not flow from strict

observance of the client's G instructions. ZBS, which was the client, wanted to get the money it was owed by Tinarwo and instructed HLA to get the requisite order from the court. That was done. Subsequently a writ of execution was obtained and handed to the messenger of court.

Thereafter it was Tinarwo who stepped into the picture and started to institute proceedings. He instructed his legal practitioners to have the sale in execution H staved. It was his legal practitioners who filed the *ex parte* application. As

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A stated earlier, there were a number of very basic flaws in the papers filed. The parties who were the applicant and the respondent(s) were not clearly described in the headings to the application, the founding affidavit and the draft order as should have been done. In paragraph 1 of the founding affidavit it is stated that Tinarwo is the applicant, ZBS is the first respondent and the messenger of court is the second respondent. It follows, therefore, that the B applicant's legal practitioners appreciated that the messenger of court was being made a party to the application. They were acting in compliance with Order 22 rule 8 of the Magistrates Court (Civil) Rules, 1980, which provides that in every application, the person substantially interested shall be made respondent. Since the messenger of court was made a respondent, there was C an obligation on Tinarwo's legal practitioners to ensure that the papers were served on the messenger of court. That obligation, which flows from the fact that the messenger of court had been made a party, was reinforced by the order granted by the magistrate. As part of the interim relief the magistrate directed that the order be served upon the respondents by the applicant's legal practitioners. When one looks at the founding affidavit, one sees that the D respondents are ZBS and the messenger of court.

Since there was a duty specifically imposed on Tinarwo's legal practitioners to serve the order on the messenger of court, I do not consider that there was also a duty on the part of Hove or HLA to advise the messenger of court that the rule *nisi* had been granted ordering the messenger of court to stay execution. Hove and HLA had done their duty towards ZBS. It was for E Tinarwo's legal practitioners to do their duty towards him and to protect his interests. They failed to do so.

3. If a duty of care existed, did the defendants breach it?

For the reasons set out above, I consider that no such duty of care existed.

F Mr *Mabuye* argued that the messenger of court was the agent of ZBS and HLA, and therefore they had an obligation to advise him of the contents of the rule *nisi.* I do not think that the messenger of court can be described as the agent of an execution creditor or a legal practitioner. The messenger of court is an officer of court who has specific duties which he must carry out. In doing so, he is not acting as an agent. This case is distinguishable from *Maketo 's* case, G *supra,* because in that case the judgment debtor had made payments to the legal practitioner and thereupon the legal practitioner had a duty to advise the messenger of court that the payments had been made. In this case it was Tinarwo who made the application for a stay of execution. In terms of the rule *nisi,* there was an obligation on the part of Tinarwo's legal practitioners to serve the papers and the rule *nisi* on the messenger of court.

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The plaintiff's claim is dismissed with costs. A

Mabuye & Co, legal practitioners for plaintiff

Hove, Lemani & Associates, legal practitioners for defendants B

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Source:

SIBANDA v INDEPENDENCE GOLD MINING ZIMBABWE (PVT) LTD & ANOR 2003 (2) ZLR 155 (H)

Citation	2003 (2) ZLR 155 (H)
Case No	Judgment No. HH-139-03
Court	High Court, Harare
Judge	Smith J
Heard	28 May 2003
Judgment	27 August 2003
Counsel	*M Hogwe,* for the plaintiff *A M Gijima,* for the first defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

C **Employment — employee** — *injuries sustained in course of employment — action to recover damages or compensation—National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice, 1990 (SI 68 of 1990) — effect on right of action under common law*

Headnote

D The plaintiff was seriously injured in an accident at the mine where he worked. The accident was caused by the negligence of the second defendant, who was a junior employee. The plaintiff sued his employer and the second defendant for damages and for pain and suffering. The amount of damages claimed constituted the difference between what he E was paid under the National Social Security Authority scheme for compensation for injuries caused at work and what he said he would have earned over the same period had he not been injured.

Held, that in a case such as this the employer is liable under the common law for damages suffered by an employee due to an accident which occurs in F the course of his duty. However, the legislature has introduced legislation dealing with compensation for workmen being injured on duty. Section 3 of the National Social Security Authority Act [*Chapter 17:04*] empowers the Minister of Labour to establish social security schemes by way of a statutory instrument. Acting in terms of that section, the Minister has made the National Social Security Authority (Accident G Prevention and Workers' Compensation Scheme) Notice, 1990 (SI 68 of 1990). The Scheme prescribes what compensation shall be payable to a worker if he has an accident which results in his death or disablement. The compensation so payable is in substitution of any other legal remedy.

H *Held,* further, that any common law rights the plaintiff would have had

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against the mining company were removed. The Scheme did not provide A for payment for pain and suffering and precluded the worker from pursuing any such claim against his employer, save in very limited circumstances, which did not apply in this case.

Held, further, that while under the common law, the defendant could be liable for the negligence of even a very junior employee, the Scheme changed B the common law. Section 9(1)(a) of the Scheme spells out the categories of employees whose negligence can be laid at the door of the employer. It must be a person who is entrusted by his employer with the management of the trade or business or any branch or department thereof, or who is appointed to be in charge thereof, or a person having the right to engage or discharge workers on behalf of the employer. The employee in C question did not fall into any of these categories so the defendant could not be held liable for any damages suffered by the plaintiff.

Held, further, that the scheme specifically provided that no proceedings to recover damages from a third party may be taken by the worker until the General Manager of the Scheme has been so notified. There was nothing in the papers to show that the General Manager of the Scheme was D notified of these proceedings and so the claim against the second defendant could not be recognised.

Legislation considered

National Social Security Authority (Accident Prevention and Workers' E Compensation Scheme) Notice, 1990 (SI 68 of 1990), ss 8, 9 & 10

Case information

M Hogwe, for the plaintiff

A M Gijima, for the first defendant

Judgment

Smith J: The plaintiff (hereinafter referred to as "Sibanda") issued F summons claiming from the defendants $704 658 for loss of future earnings and $500 000 for pain and suffering. The facts on which his claims are based are as follows. On 16 July 1999, Sibanda, who was employed by the first defendant (hereinafter referred to as "Arcturus Mine"), was on duty as a machine operator. He was being assisted by the second defendant (hereinafter G referred to as "Mateo") and Henry Gwandira, both of whom were also employed by Arcturus Mine. Sibanda alleges, that while he was reversing the drilling machine, Mateo negligently switched on the machine, thereby causing it to turn, which knocked Sibanda down. As a result of Mateo's negligence, Sibanda suffered very serious injuries, namely, a fracture of his right femur and osteomylitis. He was rendered incapable of continuing with his normal H

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A work. At the time of the accident he was earning a net monthly salary of $3 725.86. Because he can never work again, he estimates that he has lost future earnings of about $1 117 758, which he would have earned had he continued working and retired at the age of 65 years. He has been awarded a disability pension by the National Social Security Authority (NSSA) which will amount to $413 100 over the period from the date of the accident to the B date he would attain the age of 65 years. The difference between what he would have earned and the pension he will receive is $704 658. He has also experienced pain and suffering for which damages in the sum of $500 000 is claimed.

The defendants denied that Mateo had been negligent. They allege that the C accident occurred as a result of a mechanical fault when Sibanda lost his grip on the spanner he was using to unscrew rods, resulting in the spanner injuring his thigh. They deny liability and claim that the payment by NSSA to Sibanda of a disability pension has discharged any liability they may have had. The legal practitioners subsequently renounced agency on behalf of Mateo as they lost contact with him.

D Sibanda testified as follows. He was employed by Arcturus Mine as a machine operator. He was on duty on 16 July 1999, being assisted by Mateo and Gwandira. He was using the machine to drill holes in the rock underground. He wanted to reverse the machine so he got a spanner and started to unscrew some bolts. He had loosened two and was about to start unscrewing the third E when he was suddenly flung against the side of the tunnel. His helmet was knocked off. He looked down and saw that his leg had been injured. The femur had been fractured. He saw Mateo standing at the control switch. Mateo should have been removing litter from the floor of the tunnel and generally

cleaning up the place. Mateo had obviously switched on the machine. At the time the machine was switched on he was using a metal spanner to loosen a F bolt. When it was switched on the drill started to revolve at high speed and that jerked the iron spanner out of his hand and it hit him on the leg. He was taken to the clinic at the mine and then transferred to Parirenyatwa Hospital. His leg was put in plaster. On 23 July the plaster was removed and a pin was inserted in his leg. He was discharged from hospital on 26 July. Even now his leg is not completely healed. Some liquid is still oozing from the wound. He felt severe G pain when the bone was broken. For three or four months afterwards he could not sleep on his side or his stomach. He had to lie on his back. After his recovery he returned to the mine for light duties but was eventually discharged on medical grounds in April 2000.

At the time of the accident Sibanda was 38 years old and his net salary was H $3 725.86 a month. Initially his disability was 60% but as he improved it was

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reduced to 30 per cent and finally 23 percent. He receives a pension from A NSSA. Originally it was $1 300 a month but it has been reduced to $738 a month. He has no job and cannot work. He is unable to carry a five-litre bucket filled with water. He is often in pain. He takes three pain-killer pills a day, morning, noon and night. He cannot bend his leg. NSSA paid him $10 000. He is claiming $704 658, being the difference between what he would have B earned had he carried on working with Arcturus Mine until he reached retirement age and what he will have received from NSSA over the same period. He is also claiming $500 000 as damages for the pain and suffering he experienced. When the accident occurred Mateo could see that he was working on the drilling machine. Mateo deliberately switched it on.

In the course of cross-examination Sibanda made the following responses. He C started working for Arcturus Mine in 1991 as a general hand. Then he was promoted to the position of drilling assistant and, in 1996, he was appointed as a diamond driller. As the machine operator he handled the drilling machine, which has a power pack. The drill is connected to the control room where there is a switch. When the accident occurred he was at the rock face, which was about three metres from the control unit. Mateo was in the control room which D housed the control unit. Being the machine operator, he was the one who switched on the machine. The drilling rod is fitted to the machine through a chuck-head. When the rod has penetrated to the fullest extent, the machine is stopped and the chuck-head is loosened and the machine is reversed so that another section of the rod is exposed. Then the chuck-head is tightened and E the drill can penetrate further. He loosened two bolts on the chuck-head and was loosening the third when Mateo switched on the machine. When the machine was switched on the chuck-head started to spin and that was what caused the chuck spanner to fly off and hit his leg. He had not told Mateo to switch on the machine.

Sibanda agreed that he had signed the claim form sent to NSSA which was the F employer's report of the accident (Exhibit 5). In giving a brief description of how the accident happened it is stated "The worker was unscrewing rods which had got stuck in the hole using a wrench spanner when it lost grip, hitting the worker on the thigh". He said that he did not remember seeing the form and that the description of the accident is not correct. He is uneducated G and did not appreciate fully the contents of the document. He did not describe how the accident had occurred to anyone. Officials from NSSA had gone to investigate the matter.

Arcturus Mine called two witnesses. The first was Sylvester Kadewere, the Human Resources Manager at the mine. He testified as follows. Whenever there is an occupational accident which results in a worker being incapacitated H

A for more than eight hours, an Accident Report Form is completed and submitted to NSSA. The form relating to Sibanda's accident had been completed by a junior in his office. NSSA had accepted the claim in respect of Sibanda's accident and has been paying him a disability pension. After the accident Sibanda had been detained at Parirenyatwa Hospital for a short period. After his release from hospital he had performed sedentary duties at B the mine. Then he had had a relapse and went to see a doctor who had referred him to NSSA for a reassessment. Originally the assessment of his disability had been 60 percent and, as his condition had improved, it had been reduced to 50 percent

and then 23 per cent. Eventually, on the recommendation of NSSA, Sibanda had been retired on medical grounds on 2 April 2001. He had C been paid the normal terminal benefits.

In cross-examination Kadewere gave the following responses. The description of the accident given on the Accident Report Form was based on the investigations of the safety officer. It was not Sibanda who had completed the form.

The last witness was Daniel Chatera, the resident geologist at the mine, who D testified as follows. He had been resident geologist at the mine for 11 years. He knew how the machine that Sibanda had been using at the time of the accident functioned. The machine is a tool to take samples from the rock. It has a diamond crown which is attached to rods, and bores into the rock. It has three components: a power pack, a control panel and a motor assembly which causes E the rods to turn so that the crown bores into the rock. When the chuck-head which holds the rod firm gets close to the rock-face, it must be reversed so it grips the rod further down and then the rod can go deeper into the rock. The switch on the control panel can stop the machine. The machine operator has to unscrew the chuck-head to move it further down the rod.

Chatera said that it was most unlikely that the accident could have happened F in the manner described in the Accident Report Form. The chuck spanner that Sibanda was using is much smaller than a wrench spanner. If the chuck spanner had fallen on his leg it would not have caused the femur to fracture.

From the evidence it seems clear that the accident occurred in the manner described by Sibanda. He was using the drilling machine at the rock face. The G machine had been switched off and he was loosening the chuck-head, using a chuck spanner. Before he finished doing so Mateo switched on the machine, causing the chuck-head to start spinning. That had the affect of wrenching the chuck spanner out of Sibanda's hand and sending it flying. It struck Sibanda's leg and fractured the femur.

Ordinarily, in a case such as this, the employer is liable for damages suffered H by an employee due to an accident which occurs in the course of his duty. That

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is the position under the common law. However, the legislature has introduced A legislation dealing with compensation for workmen being injured on duty. Section 3 of the National Social Security Authority Act [*Chapter 17:04*] (hereinafter referred to as "*Chapter 17:04*") empowers the Minister to whom the administration of the Act has been assigned to establish social security schemes by way of a statutory instrument. Acting in terms of that section, the B Minister has made the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice, 1990 (SI 68 of 1990)) (hereinafter referred to as "the Scheme"). The Scheme prescribes what compensation shall be payable to a worker if he has an accident which results in his death or disablement. The compensation so payable is in substitution of any other legal remedy. Section 8 of the Scheme provides as follows: C

> "8. From and after the 1st January, 1960 —
>
> (a) no action at common law shall lie by a worker or any dependant of a worker against such worker's employer to recover any damages in respect of an injury resulting in the disablement or death of such worker arising out of and in the course of his employment; and
>
> (b) no liability for compensation shall arise save under and in accordance D with this Scheme in respect of such disablement or death; and
>
> (c) any worker who is entitled to periodical payments under this Scheme shall not be entitled to receive wages in terms of section 14 of the Labour Relations Act, 1985."

Section 9 of the Scheme, which provides for additional compensation if the E accident was caused by negligence, reads as follows:

> "9.(1) Notwithstanding anything to the contrary contained in this Scheme, if a worker meets with an accident which is due —
>
> (a) to the negligence —
>
> (i) of a person entrusted by his employer with the management or in F charge of such employer's trade or business or any branch or department thereof; or
>
> (ii) of a person having the right to engage or discharge workers on behalf of his employer;
>
> or

(b) to a patent defect in the condition of the premises, works, plant or G machinery used in such trade or business, which defect his employer or any person referred to in paragraph (a) has knowingly or negligently failed to remedy or caused;

the worker or, in the case of his death as a result of such accident his representative, may within three years of such accident proceed by action in a court of law against the employer where the employer concerned is an H

2003 (2) ZLR p161

Smith J

A employer individually liable, or otherwise against his employer and the general manager jointly, for further compensation in addition to the compensation ordinarily payable under this scheme:

Provided that in the case of an action in which the employer and the general manager are joined, nothing in this section shall be construed to mean that any compensation awarded under this section is payable by the B employer.

(2) If the court is satisfied that the accident was due to any such negligence or defect as is referred to in subsection (1), it shall award the applicant such additional compensation as it would deem equitable to award as damages in an action at common law."

In the light of s 8 of the Scheme, the liability of the defendants must be C determined in terms of the Scheme. Sibanda has been paid, and is still being paid, compensation in terms of the Scheme in respect of the accident which happened at the mine on 16 July 1999. It is to be hoped that the compensation he is receiving will be increased substantially to enable him to survive in the present hyper-inflationary environment in which we are living. A pension of D $738 a month is hardly sufficient to buy food for one person for one day, let alone a month. In terms of s 9 of the Scheme, Sibanda is entitled to institute an action for additional compensation if the accident was due to negligence on the part of his employer or a person entrusted with the management or in charge of the business or of a person having the right or engage or discharge workers on behalf of the employer or to a patent defect in the condition of the E premises, works, plant or machinery. There is no question of any negligence on the part of any person other than Mateo, a fellow worker who switched on the machine when Sibanda was in the process of trying to loosen the chuck- head that was holding the rod. There has been no question of any patent defect in the drilling machine.

Can the negligence of Mateo be attributed to Arcturus Mine, which was the F employer? Arcturus Mine is an artificial *persona* and therefore cannot, itself, be capable of doing something negligently. Negligence can only be attributed to an employee of the corporate body. Under the common law, Arcturus Mine could be liable for the negligence of Mateo, even though he is a very junior employee. However, the Scheme does change the common law. Section G 9(1)(a) of the Scheme spells out the categories of employees whose negligence can be laid at the door of the employer. It must be a person who is entrusted by his employer with the management of the trade or business or any branch or department thereof, or who is appointed to be in charge thereof, or a person having the right to engage or discharge workers on behalf of the employer. Mateo does not fall into any of these categories. Therefore the Arcturus Mine H cannot be held liable for any damages suffered by Sibanda.

2003 (2) ZLR p162

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Section 10 of the Scheme provides that where an accident in respect of which A compensation is payable under the Scheme was caused in circumstances creating a legal liability in some person other than the employer to pay damages to the worker, then the worker may both claim compensation under the Scheme and institute an action against the third party. In this case, the accident was caused by Mateo and therefore Sibanda would be entitled to B claim damages from him. However, of s 9 (2) of the Scheme provides that before instituting proceedings against the third party, the worker must notify the General Manager of the Scheme, in writing, of his intention to do so. The subsection specifically provides that no proceedings in a court of law to recover damages from a third party may be taken by the worker until the General Manager of the Scheme has been so notified. There is nothing in the C papers to show that the General Manager of the Scheme was notified of these proceedings and so the claim against Mateo cannot be recognised.

Under the common law, if a worker is injured whilst at work and, because of negligence on the part of the employer or a fellow worker, the employer is liable for the damages suffered by the worker, the worker can claim damages for pain and suffering. The Scheme does not provide for payment for

pain and D suffering and precludes the worker from pursuing any such claim, against his employer save in very limited circumstances. I would recommend that this aspect be reconsidered by NSS A. I also strongly recommend that pensions be reviewed as a matter of urgency and increased substantially in order to enable pensioners to survive. E

As regards costs, Mr *Hogwe* submitted that, if the court determines that Sibanda is debarred by the Scheme from claiming damages from the Arcturus Mine, then the latter should have raised that defence in its plea. It did not do so and therefore each party should pay its own costs. The issue of non-liability in terms of the Scheme was raised only after Sibanda had closed his case. It seems to me that there is merit in that submission. If the defendants had F pleaded that the Scheme precluded Sibanda from claiming against his employer, it is probable that the action would have been aborted. Accordingly I think it will be appropriate to order that each party pays its own costs. G

It is ordered that the plaintiff's claim is dismissed and that each party pays its own costs.

Hogwe, Dzimirai and Partners, plaintiff's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners H

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MUGADZAHWETA v BANDA 2003 (2) ZLR 163 (H)

Citation	2003 (2) ZLR 163 (H)
Case No	Judgment No. HH-74-03
Court	High Court, Harare
Judge	Hungwe J
Heard	28 August 2003
Judgment	29 August 2003
Counsel	*A A Musunga,* for the applicant *Mrs S Jarvis,* for the first and second respondents *Ms R Gatsi,* for the third respondent
Case Type	Details not suplied
Annotations	No case annotations to date

Flynote

Elections — *urban council election — candidate for election as councillor — disqualification — whether candidate disqualified because not* C *resident in ward*

Local government — *elections— urban council election — candidate for election as councillor — disqualification — whether candidate disqualified because not resident in ward*

Headnote

D The applicant objected to the first respondent's candidature in urban council elections on the grounds that the first respondent was not resident in the ward for which he was a candidate. He sought an order barring the first respondent from contesting the elections. The first respondent established that he had been resident in the same council area for more than twelve months.

E Held, that there is no requirement in the Electoral Act [*Chapter 2:01*] that a person seeking election as a town councillor must reside within the ward in which he is seeking election. It is sufficient if he is resident within the council area and is enrolled on the voters' roll for that area.

Legislation considered F

Electoral Act [*Chapter 2:01*], s 103G

Case information

A A Musunga, for the applicant

Mrs S Jarvis, for the first and second respondents

G *Ms R Gatsi,* for the third respondent

Judgment

Hungwe J: The applicant seeks an order that:

(a) the nomination of first respondent to stand as a candidate for second respondent in the Norton Town Council Elections due on 30 August, H 2003 be and is hereby set aside; the first respondent be and is hereby

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Hungwe J

barred from contesting the urban Council elections for Norton Town A Council scheduled for the 30th and 31st August, 2003;

(b) the first respondent pays the costs of suit.

This application is opposed by the first respondent, his party and the Registrar-General.

In his founding affidavit the applicant states that the first respondent does not B reside in Ward 1 Norton and is therefore not qualified to stand as councillor for the elections. He basis his averment on the following facts. The first respondent registered himself as a voter on the Ward 1 Voters Roll Norton Town Council as residing at Stand No K 375 Poort Road, Katanga, Norton. There is no such address on Poort Road in Norton. That address, K 375, is C found in Katanga Township. 375 Poort Road is a stand leased by one Maponga. A Mr Wellington Maponga of that address swore to an affidavit stating that he did not know the respondent nor was he related to him. Mr Matika Pearson Tichaona of K 375 Katanga, Norton, deposed to another affidavit stating that the first respondent is not known to him nor has he ever resided at that address. The director of Housing and Community Service for D Norton Town Council, Mr Doga, in a letter addressed to whom it may concern, states that Mr Takaendere leases K 375 Ngoni Township whilst Mr W Maponga leases stand No 375 Norton. In a separate letter of the same date similarly addressed, the director of Housing and Community Services also states that:

> "... the Rates Clearance certificate for Jonathan Banda was issued on the E strength of a letter from the landlord who considers that he is a lodger at K 53 and that he had resided on the Council for the past 10 years".

Makosa Navaya does not deny any knowledge of the first respondent. He explains that he was conned into signing a document by which the first respondent obtained the rates clearance certificate. What he denies is that the F first respondent was at any time his lodger, contrary to Doga's claims.

The primary documents relied upon by the applicant is an extract of the Norton 2003 Main Voters Roll Block 010632. It gives the first respondent's address as K 375 Poort Road, Katanga Township, Norton. It is the basis of the applicant's claim that the first respondent obtained his registration through misrepresentation. G

The first respondent explains in his opposing affidavit as follows. He denies making any misrepresentations in order to be a registered voter. When he registered as a voter in 1999 he was staying at 375 Poort Road, Norton, where he was employed as a trainee motor mechanic by a "Sekuru" Maponga. He has since moved to the United Kingdom. He suggests that the address as recorded H

Hungwe J

A in the voters register was an error by the data capture clerk in the office of the third respondent. He says that Wellington Maponga is the son of Sekuru Maponga.

He knows Makosa Navaya of K 53 Katanga Township. He was registered as a lodger at his house for three years. He produced proof to that effect in the form of a lodgers card. That card shows that on 18 August 2000 he paid lodger's B fees for a whole year. He did the same in 2001 when he paid $250 on 22 June 2001 and 7 July 2003.

He explained that he was born in Norton and has continually resided there from that date to the present. He now stays in an informal dwelling with his parents, but by its nature he cannot have any paper trail necessary to effect any C change of address for voting purposes. As he has continuously lived in the Norton Council area, there is no basis upon which he could be disqualified.

He pointed to the fact that the third respondent's office has accepted nominations for candidates of persons as ward councillors whose residential addresses are outside the ward but inside the council area, arguing that there D could be no basis now for dismissing his nomination on that basis.

The first respondent has alleged that Makose Navaya may have been unduly influenced, by threats of assaults, to swear to an affidavit wherein he denies that he lodged at his house in the past ten years. He gave a narration of physical harassment by his opponents of his family after his nomination. He says that the applicant took over a bottle store on a farm where a farmer was killed and E is widely feared in the area. These are serious allegations. The applicant must have challenged the respondent to prove them. If he does not challenge them, they are taken as true. In the present case I note that the applicant has not controverted the allegations, although he was present in chambers at the hearing.

F In considering the merits of this application the court examined the explanation given by the respondents in opposing the order sought.

It is true that the address given in the voters' roll, Annexure A to the founding papers, is not an address at which the first respondent currently resides. The fact is that it is not an address that can be found in Norton. It is patently a wrong address for any purpose. He gave the correct address in Poort Road, Norton, G where he once resided. He was a trainee mechanic under the employ of the registered lessee who has now emigrated to the United Kingdom. These allegations were not disputed by the applicant. The applicant, further, did not dispute that Wellington Maponga is the son of that Maponga who went to the United Kingdom. If this is correct, then it shows that the first respondent was H always resident in the council area in which the election is to be held.

Hungwe J

Furthermore, the third respondent confirms that the error reflected in the A voters register is a result of its office staff. Most importantly, the first respondent in Form VI, which he completed on 27 May 2003, gave the correct address as 375 Poort Road, Norton. He declared that he was entitled to be registered in the constituency of his residence. Ward 1 is part of the constituency where the elections will be held on 30 and 31 August 2003. There B is an endorsement that there was on 27 May 2003 presented to the constituency registrar, proof of such residency in the form of an envelope addressed to him at that address. It was at the time deemed satisfactory proof of residence in the constituency. I am therefore satisfied that first respondent is resident at the address given to the registrar. That address falls under Ward 1 of the constituency. C

The basis of the applicant's objection to the first respondent's candidature was that by the relying on an address at which he is no longer resident and a rates clearance certificate relating to a property on which he is no longer resident, the first respondent misrepresented to the registrar, and therefore his nomination is liable to be set aside.

It is the spirit of the Electoral Act [*Chapter 2:01*] which must guide the court D in the determination of the parties rights.

In terms of s 103 G of that Act, any person who —

(a) is a citizen of Zimbabwe;

(b) has reached the age of 21 years; and E

(c) is enrolled on the voters roll for the council area concerned; and

(d) is not disqualified in terms of subsection (2) shall be qualified to be elected as a counsellor.

There has been no suggestion that the first respondent is disqualified in terms of subs (2) of that section. F

As the first respondent is a Zimbabwean citizen over the prescribed age who is on the voters roll for the Norton Area Council he is *prima facie* entitled to be elected as a councillor for the Ward 1.

Even if it is accepted that the first respondent has not shown that he is resident in the ward in which he is registered, it is sufficient if he satisfies the third G respondent that it is appropriate if he is registered as a voter in a council area in which he is not resident (s 103C). He has demonstrated that he has been resident in the same council area for a period in excess of 12 months. In matters of this nature, the court's approach must always be guided by the principles that uphold the fundamental liberties set out in the Constitution. An order of court barring a prospective candidate from running in an election can hardly H

Hungwe J

A be said to be concomitant with the upholding of the fundamental freedoms. In any event, in the view that I take of the matter, and in view of the opposition filed by the third respondent, serious prejudice to first respondent will result from an order barring the first respondent from contesting the election.

A stronger case has to be made out before this court can bar a candidate from running in an election. This is not a case in which a court could grant the order B sought.

In the premises the application is dismissed with costs.

Musunga and Associates, applicant's legal practitioners

C *Atherstone & Cook,* first and second respondent's legal practitioners

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MKHANDLA v MUDZVITI & ORS 2003 (2) ZLR 168 (H)

Citation	2003 (2) ZLR 168 (H)
Case No	Judgment No. HB-92-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	27 August 2003

Judgment 29 August 2003

Counsel *N Mathonsi,* for the applicant
C Dube, for the second respondent

Case Type Chamber application

Annotations No case annotations to date

Flynote

Court — *contempt — party in contempt — when such party may be heard* C

Elections — *urban council election — mayor — qualifications for election as mayor — O-level passes, including one in "English" — includes pass in English literature*

Interpretation of statutes — *ambiguity — ascertaining intention of legislature — word capable of two meanings*

Words and phrases — *"Pass in English"* D

Headnote

A court will usually refuse to hear a person who has disobeyed an order of court until he has purged his contempt. The fact that a party has disobeyed an order of the court is not in itself a bar to his being heard, but if his disobedience is such that, for as long as it continues, it impedes E the course of justice by making it more difficult for the court to ascertain the truth or to enforce its orders, the court may in its discretion refuse to hear him until the impediment is removed. The question of urgency has to be taken into account. The party's conduct, however, will be a relevant factor in the determination of the question of costs.

A candidate for the post of mayor is required, in terms of s 103H of the Urban F Councils Act [*Chapter 29:*15], to have at least five passes at O-level, including one in English. The applicant's opponent had a pass in English literature, but not one in English language.

Held, that the governing rule of interpretation — overriding the so-called "golden rule" — is to endeavour to ascertain the intention of the G lawmaker from a study of the provisions of the enactment in question. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words alone do in such a case best declare the intention of the lawgiver. In the present situation, however, the legislature was aware of the existence of the two subjects, and chose not to specify H

Ndou J

A one or the other. It could thus be held to have intended that either English language or English literature would be acceptable.

Cases cited

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

Bourne v Norwich Crematorium Ltd [1967] 2 All ER 576 (ChD)

B *Broadley NO v Stevenson* 1972 (2) RLR 418 (G); 1973 (1) SA 585 (R)

Byliefeldt v Redpath 1982 (1) SA 702 (A)

Challenge Auto (Pvt) Ltd & Ors v Standard Chartered Bank Zimbabwe Ltd HH-221 -02

Clement v Clement 1961 (3) SA 861 (T)

C *Dean v Wiesengrund* [1955] 2 QB 120; [1955] 2 All ER 432 (CA)

Di Bona v Di Bona & Anor 1993 (2) SA 682 (C)

Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O)

Farrar's Estate v Commissioner of Inland Revenue 1926 TPD 501

Flugel v Swart 1979 (4) SA 493 (E)

Garfield v Minister of Defence 1986 (2) ZLR 112 (H)

D *Gordon & Anor v Robinson* 1957 R & N 205; 1957 (2) SA 549 (SR)

Hadkinson v Hadkinson [1952] 2 All ER 567 (CA)

Jackman v Jackman 1969 (2) RLR 534 (G)

Markides & Anor v Levendale 1954 SR 77; 1954 (4) SA 181 (SR)

Mlilo v Chairman, Public Service Commission HB-51 -90\

Moyo v President, Board of Inquiry & Ors 1996 (1) ZLR 318 (H)

E *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (A)

Petras v Petras S-71 -91

Reynolds Bros Ltd v Chrmn, Local Rd Transportation Bd, Johannesburg 1984 (2) SA 826 (W)

R v Venter 1907 TS 910

F *Sabawu v Harare West Rural Council* 1989 (1) ZLR 47 (H)

Savage v CIR 1951 (4) SA 400 (A)

Smith NO v Brummer NO & Anor; Smith NO v Brummer 1954 (3) SA 352 (O)

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

V Saitis and Co v Fenlake 2002 (1) ZLR 378 (H); [2002] 4 All SA 50 (ZH)

G *Van Aswegen v Kruger* 1974 (3) SA 204 (O)

Vrystaat Estates (Pvt) Ltd v President, Administration Court of Zimbabwe & Ors 1991 (1) ZLR 323 (S)

Zimbank v Masendeke 1995 (2) ZLR 400 (S)

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Legislation considered A

Urban Councils Act [*Chapter 29:*15], s 103H(1)

Case information

N Mathonsi, for the applicant

C Dube, for the second respondent B

Judgment

Ndou J: In the main application the parties appear as reflected above. In HC 1760/03 the second respondent, the Registrar-General, is the applicant and applicant is the respondent. The latter is an application for condonation by the second respondent to file opposing papers out of time. On account of time constraints the parties' legal practitioners requested that I hear submissions in both matters and then make one composite and final decision. I agree that C it is convenient to proceed in that fashion and accordingly granted leave for the same. In the main application this court had granted a provisional order in the following terms:

"**Terms of Final order Sought**

1. That first, second and third respondents make available to the D Registrar of this court and applicant's legal practitioners all documents constituting the nomination papers of the third respondent filed at the nomination court in Gwanda on 21 July 2003 within 48 hours of service of this order upon them or some other official in their respective offices.
2. That in the event that third respondent's nomination documents do E not meet the requirements of the law, his nomination be and is hereby nullified and he is prohibited from contesting the mayoral

elections set for 30 and 31 August 2003.

3. That the costs of this application be borne by the first, second and third respondents jointly and severally, the one paying the other to be absolved. F

Interim Relief Granted

Pending the finalisation of this matter the applicant is granted the following relief:

4. That the first and second respondents or the one or other of them be and are hereby ordered and directed to file with the Registrar of this G court the original documents constituting the nomination papers filed by the third respondent at the Nomination Court on 21 July 2003 for the Gwanda Mayoral Elections and serve copies of the same documents upon the applicant's legal pracitioners, Messrs Coghlan & Welsh, within 48 hours of service of this order upon them. H

Ndou J

A **Service of provisional order**

The order should be served upon the respondents."

It is evident that it was only the first and second respondents who were required to produce the nomination papers filed by the third respondent. The interim order granted does not require the third respondent to do so. The application and the interim order were only served on the second and third B respondents. The salient facts of the case are that the applicant and the third respondent are candidates for the Gwanda Mayoral Elections which have been pencilled for 30 and 31 August 2003. The applicant is a Movement for Democratic Change candidate and third respondent is a ZANU (PF) candidate. These elections are being held in terms of the Urban Councils Act [*Chapter* C *29:15*] as amended (hereinafter called "the Act").

On 21 July 2003, a nomination court presided over by the first respondent sat to receive nominations of both applicant and the third respondent. Not being happy with the acceptance of the third respondent's papers, the applicant requested permission from both the first and second respondents to inspect the nomination papers in question, but permission was not forthcoming. No D reasons were given to the applicant for this. In the result, the applicant launched this urgent application for the provisional order as outlined *supra,* which was granted on 15 August 2003.

I propose to deal with the applications in turn.

APPLICATION FOR CONDONATION BY SECOND RESPONDENT: E **HC 1760/03**

Although one application was filed, I agree with Mr *Mathonsi,* for the applicant, that there are, in essence, two issues involved here. First, the second respondent was in contempt in that he failed to produce the third respondent's nomination papers within 48 hours. Second, the second respondent seeks to F file opposing papers out of time and seeks the indulgence of this court to do so. In his founding affidavit, the second respondent seems to confuse the two issues. Mr *Dube,* for the second respondent, seems to confuse the two issues in his submissions but nevertheless alludes to the issue of contempt as well. On the issue of contempt it is trite that I have a discretion. The court will usually refuse to hear a person who has disobeyed an order of court until he G has purged his contempt. The fact that a party has disobeyed an order of the court is not in itself a bar to his being heard, but if his disobedience is such that, for as long as it continues, it impedes the course of justice by making it more difficult for the court to ascertain the truth or to enforce its orders, the court may in its discretion refuse to hear him until the impediment is removed. See *Civil Practice of the Supreme Court of South Africa* by L D van Winsen, H A C Cilliers and C Loots (4 ed) at p 827; *Di Bona v Di Bona & Anor 1*993 (2)

Ndou J

SA 682 (C) at 688G and 689B-E; *Hadkinson v Hadkinson* [1952] (2) All ER A 567 (CA) at 575B-C; *Clement v Clement* 1961 (3) SA 861 (T) at 864-5; *Byliefeldt v Redpath* 1982 (1) SA 702 (A) at 714F-G; *Jackman v Jackman* 1969 (2) RLR 534 (G); *Garfield v Minister of Defence* 1986 (2) ZLR 112 (H) and *Sabawu v Harare West Rural Council* 1989 (1) ZLR 47 (H).

In casu, the question of urgency has to be taken into account: *Clement v* B *Clement supra* at 867. Applying these legal principles to the facts of this case, I am persuaded to exercise my discretion in favour of the second respondent being heard. His conduct, however, will be a relevant factor in the

determination of the question of costs. The second respondent's disobedience does not impede the course of justice by making it difficult for me to ascertain the truth.

I will now consider the question of condonation for late filing of opposing papers. Order 32 r 233 of the Rules of this court provides:

> "233(1) The respondent shall be entitled within the time given in the court application in accordance with rule 232, to file a notice of opposition in form 29A, together with one or more opposing affidavits.
>
> (2) ...
>
> (3) A respondent who has failed to file a notice of opposition and opposing affidavits shall in terms of subrule (1) *be barred"* (emphasis added)

The removal of the bar is an indulgence resting in my discretion. A party who applies for the removal of a bar should set out in his affidavit, first, what his defence is; and, second, the facts on which he relies for his defence, i.e. a defence that is good in law. The test is the same as that applied to a defendant's affidavit in summary judgment: *Markides & Anor v Levendale* 1954 SR 77; 1954 (4) SA 181 (SR) at 183H- *in fine; Broadley NO v Stevenson* 1972 (2) RLR418 (G); 1973 (1) SA 585 (R); *Van Aswegen v Kruger 1974(3) SA 204* (O); *Flugel v Swart* 1979 (4) SA 493 (E) at 497F-H and *Civil Practice of the Supreme Court of South African supra* at 554. Is there good cause for the removal of the bar? It is trite that I have a wide discretion in this regard. The courts are inclined to grant applications for removal of bar where:

(a) a reasonable explanation for the applicant's delay is forthcoming;

(b) the application is *bonafide* and not made with intent to delay the other party's claim;

(c) it appears that there has not been a reckless or intentional disregard of the rules of the court;

(d) the applicant's case is not obviously without foundation, and

(e) the other party is not prejudiced to an extent which cannot be rectified by a suitable order of costs: *Smith NO v Brummer NO & Anor; Smith NO v*

Ndou J

> *Brummer* 1954 (3) SA 352 (O) at 357 *in fine* - 358B and *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O). Lack of diligence, or negligence, on the part of the applicant or his legal practitioners, even if gross, is not necessarily a bar to relief: *Gordon & Anor v Robinson* 1957 R & N 205; 1957 (2) SA 549 (SR) at 552C-D. The rationale for the above position is easily understandable *via* the words of McNally JA in *Songore v Olivine Industries* 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."

The court has to carry out a balancing act. As aptly pointed by the learned Judge of Appeal at 211E-F:

> "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 ... 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 and Co v Fenlake* 2002 (1) ZLR 378 (H); [2002] 4 All SA 50 (ZH) and *Challenge Auto (Pvt) Ltd & Ors v Standard Chartered Bank Zimbabwe Ltd* HH-221-02. Factors which the court takes into account in applications for condonation for non- compliance with the rules of court were admirably set out in *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H) as being:

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

(b) the explanation therefor;

(c) the prospects of success on the merits;

(d) importance of the case;

(e) the convenience of the court; and

(f) the avoidance of unnecessary delay.

See also *Moyo v President, Board of Inquiry & Ors* 1996 (1) ZLR 318 (H); *Mlilo v Chairman, PSCHB-5*1-90 and *Vrystaat Estates (Pvt) Ltd v President, Administration Court of Zimbabwe & Ors* 1991 (1) ZLR 323 (S) at 329G-H.

The foregoing requirements are cumulative and not alternative and bare assertions in this regard will not suffice: *Petras v Petras* S-71-91 and *Zimbank v Masendeke* 1995 (2) ZLR 400 (S). *In casu,* the delay is brief. The second respondent was supposed to file his opposing papers on 25 August 2003 but only approached the court on 27 August 2003.

Ndou J

This, however, does not mean that I should grant the application for condonation A on mere request. The second respondent has to justify his application. His explanation is that of time constraints and distance between his head office where he is based and the Gwanda office, the subject matter of these proceedings. He also cited the issue of instructing the Civil Division in the Attorney-General's Office, who in turn instructed a Bulawayo-based private B law firm. He articulated his difficulty in meeting the deadline. Having regard to the fact that the urban local government elections are taking place throughout the country during the same days as the Gwanda mayoral elections, his position is understandable. It is a notorious fact that elections in this country are preceded by litigation against, *inter alia,* the second respondent. Bearing in mind that the issue here in one of interpretation of statutes there are C prospects of success on the merits. Litigation resulting from mayoral elections, or any elections for that matter, is a matter of great importance to the electorate. It is in the interest of justice and convenience of the court to condone the non-compliance with the rules. The cumulative facts placed before me establish a case for the condonation and I accordingly allow the late filing of the opposing papers. D

MAIN APPLICATION

Although a copy of the third respondent's Ordinary Level General Certificate of education was produced, I gave the second respondent leave until the end of business on 28 August 2003 to produce a legible copy. The original certificate was filed on 28 August 2003 in the morning. In the circumstances, E the only issue for determination is whether the third respondent qualified to stand as a mayoral candidate. For the record, the third respondent is the sitting mayor of Gwanda who is seeking re-election. The applicant contends that the third respondent does not posses the requisite academic qualifications to stand as a mayoral candidate and he wants his nomination to be rejected for that reason. The relevant provision is contained in s 103H of the Act which F reads:

"**103H Qualification and Disqualification for Election as Mayor**

(1) Any person who -

(a) is a citizen of Zimbabwe; and

(b) has attained the age of 40 years; and G

(c) ...

(d) holds academic or professional qualifications to at least the following levels -

(i) a general certificate of education with passes in at least five subjects including English at ordinary level; H

Ndou J

(ii) either - A

A. a general certificate of education with passes in at least two subjects at Advanced Level; or

B. a post-ordinary level qualification in any profession or calling obtained after pursuing at least two years of studies; and B

C. has a working knowledge of either Shona or Ndebele language; and

D. is not disqualified in terms of subsection (2) and (3)

shall be qualified for election as mayor of a municipal council" (emphasis added)

C The third respondent passed five ordinary level subjects in 1969, namely *Literature in English,* Bible Knowledge, Geography, Ndebele and General Science (emphasis added).

The Act requires "a pass in English". The contention in this matter lies in the interpretation of "a pass in English". Does the Act require a pass in an ordinary level subject known as "English Language" only or would a pass in a subject known as "Literature in English" suffice? Did the

lawgiver intend that a pass in English means a pass of the subject D known as "English Language"? According to the applicant, the dictionary definition of English excludes Literature in English. Reliance is placed on the definitions in *Webster's New International Dictionary* Vol 1 2ed where "English" is defined as follows:

> E "The language of the English and of the people of the United Stated and most of the British Colonies."

"Literature" is defined in the dictionary as p 1442-3 as follows:

> "Literary culture, acquaintance with letters, book knowledge... Literature is now used chiefly of writings distinguished by artistic form or emotional appeal as literature consists of all the books where moral truth and human F passion are touched."

In *Reader's Digest Oxford Complete Wordfinder* (a combination of dictionary and the sausus) at p 487 English is defined as "the language of England, now used in many varieties in the British Isles, the United States and most Commonwealth countries and often internationally." According to the G applicant, the literal meaning of a pass in English is a pass of the subject known as "English Language". It must however be noted that "what seems a clear meaning to one man may not seem clear to another... The literal meaning is not something revealed to judges by a sort of authentic dictionary, it is only what individual judges think is the literal meaning.": *Savage v Comr for Inland Revenue* 1951 (4) SA 400 (A) at 410 *per* Schreiner JA. The context of H a provision may in certain circumstances compel departure from the ordinary

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Ndou J

(A) at 370 and *Reynolds Bros Ltd v Chairman, Local Road Transportation* A *Board, Johannesburg* 1984 (2) SA 826 (W) 828. The applicant contends that I utilise the literal rule of interpretation because the words in the Act are precise and unambiguous. In *Sussex Peerage Claim* (1844) quoted by Innes CJ in *Venter v R* 1907 TS 910 at 913 it was said:

> "If the words of the statute are in themselves precise and unambiguous, B then no more can be necessary than to expound those words in their natural and ordinary sense. The words alone do in such a case best declare the intention of the lawgiver."

Further, the applicant relies on the maxim *expressio unius est exclusio alterius,* also stated as *expressum facit cessare taciturn* (that which is expressed puts an end to that which is silent): *Dean v Wiesengrund* [1955] 2 QB 120. C I do not think that this maxim is applicable *in casu* because the legislature did not expressly state that an ordinary level subject known as English Language is a requirement. I think it has to be accepted that the legislature did not qualify a pass in English. At the time of the passing of the piece of legislation the legislature was aware that there was in existence two ordinary level subjects known as English Language and Literature in English D and could easily have restricted the requirement to a pass in English Language, the subject. It did not expressly do so. Sentences in the section are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you gave them as separate words: *per* Stamp E J in *Bourne v Norwich Crematorium Ltd* [*1967*] *2* All ER 576 (ChD) at 578. A formulation of the intentionalism was stated in *Farrar's Estate v Commissioner of Inland Revenue* 1926 TPD 501 at 508 as follows:

> "The governing rule of interpretation - overriding the so-called "golden rule" - is to endeavour to ascertain the intention of the lawmaker from a study of the provisions of the enactment in question ..." F

In casu, the lawmaker intended to require a pass in "English", which could either be a subject commonly known as English Language or one known as Literature in English. This, in my view, is the intention of the legislature. In light of the above finding it follows that I should discharge the provisional order issued on 15 August 2003. The only issue left is one of costs. I alluded G that the first and second respondents' contempt is relevant in this regard. I feel that their conduct forced the applicant to launch these proceedings. They had in their possession the original documents requested by the applicant. They did not produce them for inspection by the applicant. Even after the interim order was granted they failed to produce the same. In the circumstances they must be visited with the order of costs. The position of third respondent is H

Ndou J

A different. The documents requested by the applicant were no longer in his custody, a factor obviously known to the applicant. He is not in contempt because the order did not seek to make him

do anything within 48 hours. In the circumstances it would be unfair to order him to pay costs. In the circumstances I make the following order:

1 That the provisional order issued by this court on 15 August 2003 be and B is hereby discharged.

2 That the costs of this application shall be borne by the first and second respondents jointly and severally, the one paying the other to be absolved.

Coghlan & Welsh, applicant's legal practitioners

C *Paradza, Dube & Associates,* instructed by *Civil Division of the A-G's Office,* second respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/LALLEMAND v LALLEMAND 2003 (1) ZLR 178 (H)

LALLEMAND v LALLEMAND 2003 (1) ZLR 178 (H)

Citation	2003 (1) ZLR 178 (H)
Case No	Judgment No. HH-130-03
Court	High Court, Harare
Judge	Mavangira J
Heard	23 January 2003
Judgment	3 September 2003
Counsel	*Gill, Godlonton & Gerrans,* applicant's legal practitioners *Honey & Blanckenberg,* respondent's legal practitioners
Case Type	Opposed application and counter application
Annotations	No case annotations to date

Flynote

Contract—*waiver— by conduct—what must be shown—delay in enforcing right — not per se evidence of waiver by conduct* C

Headnote

The onus is upon a party asserting waiver to prove it, but although, as in all civil cases, the onus may be discharged on a balance of probability, it is not easily discharged. In the case of waiver by conduct, the conduct must be plainly inconsistent with an intention to enforce the right in issue. A D party does not lose his rights by mere delay, even if he is aware of the fact that another has infringed his rights. Delay or "standing by" may be taken into consideration by the court in arriving at the conclusion as to whether or not the party did or did not lose his rights.

Judgment

Mavangira J: The respondent in this matter instituted divorce proceedings E in this court against the applicant herein in Case No. HC 17712/99. On 7 February 2002 the court handed down judgment and a decree of divorce. The germane part of the order provides:

> "2.That in respect of the matrimonial home, the defendant shall pay the plaintiff $8 million within 3 months of the date of this order, failing which F the property shall be sold to best effect and the net proceeds shared equally between the parties."

The applicant however failed to pay the $8 million within three months of 7 February, 2002. He wrote a letter on 24 May 2002 to the respondent's legal practitioners attaching thereto a bank certified cheque in the said amount. The respondent's legal practitioner wrote back on 27 May 2002 returning the G cheque on the basis that the $8 million was not paid within the three-month period ordered by the court or within the extended period promised by the applicant.

A The applicant has thus brought the present application seeking an order in the following terms:

> "It be and is hereby ordered that:
>
> (a) The respondent accept the payment of $8 000 000 tendered by the applicant as payment of the respondent's share of the matrimonial home. B
>
> (b) The respondent attends to the signing of all the necessary documents to facilitate the transfer of her half share of the matrimonial home to the applicant.
>
> (c) The applicant is to effect payment to the respondent of the sum of $780.82 being interest at the prescribed rate of *30 per centum per annum* on the sum of $8 000 000 from 7 May 2002 to 24 May 2002. C
>
> (d) The respondent to pay the costs."

The applicant makes the present application on the basis that not only did he give notice of the fact that payment would have been made outside the three-month time limit, but as late as 13 May, that is, a week after the expiry of the three month time limit, the respondent's legal practitioners made the D following observation:

> "We note that the $8 000 000 due to our client for her undivided one-half share in the former matrimonial home will be paid to her within the next few days."

Furthermore, the first protest in relation to the "alleged" late payment of the E monies was made after payment had been effected.

The applicant contends that there was thus an agreement between the parties in relation to the late payment of the $8 million. This, he contends, is not surprising when one has regard to the background and the events that occurred between the handing down of the order and the date upon which payment was effected. Furthermore, the applicant had effected certain payments that he was F not legally obliged to do and the respondent was naturally grateful for that.

The events that the applicant refers to are the following. Although the judgment and decree of divorce were handed down in open court on 7 February 2002, the order that was subsequently issued was undated and there were various amendments that needed to be effected to the order. Correspondence G was addressed to the trial judge, who was then away on leave. Eventually, and on 20 May 2002, the trial judge effected the amendments and issued the amended order, stating therein the date of the judgment or order as 21 January 2002 as opposed to 7 February 2002.

It is however important to note at this stage that it is common cause that the H date of the judgment and order is 7 February 2002 and the calculation of the

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three-month time limit has been with effect from that date on the part of both A parties.

The applicant thus prays for an order in the terms already referred to above.

The respondent, on the other hand, has opposed the application and also filed a counter-application wherein she seeks an order in the following terms:

> " IT IS ORDERED THAT: B

1. Case Numbers HC 5007/02 and this application be and are hereby consolidated.
2. The former matrimonial home known as No 3 Woodham Road, Mandara, Harare be sold to best effect and the net proceeds shared equally between the parties. C
3. The term 'best advantage' shall be deemed to be the highest figure offered by a prospective purchaser within a period of fourteen days from the date upon which the legal practitioners for applicant and respondent engage the services of estate agents to sell the property.
4. Once the sale has been concluded, the parties be and are hereby directed to sign the agreement of sale, the transfer documents and any D other documents necessary to effect transfer to the purchaser. Failing this, the Deputy Sheriff for Harare be and is hereby empowered to sign such documents on behalf of the defaulting party.
5. .....
6. The defendant shall pay the costs of this application."

Both matters, that is, the application and the counter-application were, by the E agreement of the parties, heard simultaneously.

Paragraph 5 of the draft order in the counter-application was abandoned at the hearing.

The respondent makes the counter-application on the following basis. Firstly, that the order of the court in Case No. HC 17712/99 is very clear and that in F terms of para 2 thereof, the applicant was to pay $8 million to the respondent within three months of the date of the order, failing which the property would be sold to best effect and the net proceeds shared equally between the parties. The applicant did not pay the said sum within the given time limit. The fact that she had granted the applicant the indulgence of a few more days should not be G taken, as urged by the applicant, to be an election on herpart to abandon the part of the judgment as reflected in para 2 cited above or as a waiver of her rights in terms thereof. In any event, payment was only attained by the applicant when he became aware that a firm of estate agents had been instructed by the respondent to provide a market assessment of the matrimonial home, which assessment they did provide, and they also intended to "show- case" it to clients or potential buyers. H

Mavangira J

A The respondent also averred that the applicant earns all of his income by way of foreign currency and there was nothing to prevent him from importing foreign currency at any time to settle the debt. Furthermore, in the letter dated 27 May 2002, the applicant's legal practitioners were pleading with the respondent's legal practitioners for the respondent to accept the $8 million. They were not alleging a legal right to pay the respondent $8 million.

B The respondent thus prays for the dismissal of the main application with costs and of the granting of the order that she seeks in the counter-application.

The issue that I have to decide is, in my view, whether or not the respondent waived her rights in terms of para 2 of the order in Case No. HC 177712/99.

In *The Law of Contract in South Africa* 3 ed R H Christie, in dealing with "The C requisites of waiver" says at pp 511-2:

> "That means not only that the onus is upon the party asserting waiver to prove it, but that although, as in all civil cases, the onus may be discharged on a balance of probability, it is not easily discharged. In *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A) Steyn CJ said:
>
> > D 'There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue *(Smith v Momberg* (1895) 12 SC 295 at 304; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 62). But in *Martin v de Kock* 1948 (2) SA 719 (A) at 733 this court indicated that that view may possibly require reconsideration. E It sets, I think, a higher standard than that adopted in *Laws v Rutherfurd* 1924 AD 261 at 263, where Innes CJ says:
> >
> > 'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to F enforce it.'
> >
> > This accords with that applied in *City of Cape Town v Kenny* 1934 AD 543 and was followed in *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 436 *and Linton v Corser* 1952 (3) SA 685 (A) at 695. (*Cf Ellis & Ors v Laubscher* 1956 (4) SA 692 (A) at 702). In my opinion the test is more correctly stated in these cases.'

G To this it is only necessary to add that it has repeatedly been held that clear proof is required, especially of a tacit as opposed to an express waiver".

In *Estoppel "Cases and Materials"* the authors, P I Visser and J M Potgieter, say at p 96:

"In *Mutual Life Assurance Co of New York v Ingle* 1910 TS 540 at 550 H Innes CJ remarked that 'after all, waiver is the renunciation of a right'.

2003 (2) ZLR p182

Mavangira J

How this takes place as a matter of law has been stated in the following A two Appellate Division decisions. In *Laws v Rutherfurd* 1924 AD 261 at 263 it was held that:

'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances.'" B

The question then is whether on the facts of this matter, the respondent conducted herself in a manner that is plainly inconsistent with an intention to enforce her rights in terms of para 2 of the order in Case No. HC 17712/99. The effect of the applicant's contention is that by the letter dated 13 May 2002, the relevant portion which has already been cited above, the respondent made C an observation or conducted herself in such a manner as is plainly inconsistent with an intention to enforce her rights. What appears to be clear, however, is that as at 13 May 2002 the respondent appears to have indulged the applicant with a few more days in which to pay the $8 million. What is also clear is that the respondent decided to enforce her right in terms of the court order, that is, the right to have the property sold in the event of the applicant failing to pay D the $8 million within the three-month time limit. This decision is clearly stated in the letter from her legal practitioners dated 27 May 2002 which was written in response to the applicant's legal practitioners of 24 May 2002 under cover of which the cheque for $1 million had been sent to the respondent's legal practitioners.

There appears to be no indication that the respondent renounced or abandoned E her rights. What is clear is that she delayed in enforcing her right. RH Christie, *op cit,* says at p 491:

"In *North Eastern Districts Assn (Pty) Ltd v Surkhey Ltd* 1932 WLD 181 at 186 Krause J said that —

'it is not by mere delay that a man loses his rights, even if he is aware of F the fact that another has infringed his rights. Delay or "standing by", as it is called, may be taken into consideration by the court in arriving at the conclusion as to whether or not the man did or did not lose his rights.'"

In my view, there is no evidence of an indication by the respondent of abandonment or renunciation of her rights. In the circumstances, there is no G basis for the granting of the order sought by the applicant. On the other hand, for the same reasons, there is justification for the respondent to succeed in her counter-application but only to the following extent. In my view, the first three paragraphs of the order sought are unnecessary, as the issue covered therein has already been properly dealt with or covered in para 2 of the order in Case No. HC 17712/99. However, in view of the unchallenged averment by the H respondent stated in the following terms in her founding affidavit in the

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2003 (2) ZLR p183

Mavangira J

A counter-application: "Respondent denies my entitlement to sell the property and, by implication, refuses to sign any and all papers necessary to effect transfer to a purchaser", it is, in my view proper to grant para 4 of the draft order.

My decision to dismiss the main application, necessarily means that the respondent is at liberty to enforce her rights forthwith in terms of para 2 of the B order in Case No. HC 17712/99.

In the result, I order as follows:

IT IS ORDERED:

1 That the main application is dismissed with costs. C

2 The counter-claim succeeds to the following extent:

(a) that once the sale has been concluded, the parties be and are hereby directed to sign the agreement of sale, the transfer documents and any other documents necessary to effect transfer to the purchaser. Failing this, the Deputy Sheriff for Harare be and is hereby empowered to sign such documents on behalf of the defaulting party. D

(b) that the respondent, that is the applicant in the main application, pays the costs of the counter-application.

Gill, Godlonton & Gerrans, applicant's legal practitioners

E *Honey & Blanckenberg,* respondent's legal practitioners

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S v MUREMBWE 2003 (2) ZLR 184 (H)

Citation	2003 (2) ZLR 184 (H)
Case No	Judgment No. HH-144-03
Court	High Court, Harare
Judge	Makarau J & Makoni J
Heard	2 September 2002
Judgment	3 September 2003
Counsel	Appellant in person Ms *F Ziyambi,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *common law crimes — theft — by a police* C *officer — small amount stolen and most recovered — community service appropriate*

Headnote

Policemen who are appointed to uphold the law must perform their duties in an exemplary manner and should not themselves resort to criminal acts. Ordinarily the theft of a small amount by a first offender would not attract D a custodial sentence, but when a policeman turns to theft, he must expect to be sent to prison. However, where there are special mitigatory factors, community service instead of imprisonment may be appropriate.

Cases referred to

S v Mberi HH-250-90 E

Case information

Appellant in person

Ms *F Ziyambi,* for the respondent

Judgment

Makoni J: The appellant was convicted of theft in the magistrates court and F was sentenced to 12 months' imprisonment with four months suspended on the usual conditions of good behavior. The appellant appeals against both conviction and sentence.

The appellant and his co-accused, one Edward Hove, were both members of the Zimbabwe Republic Police based at Marondera Police Station. The G appellant was of the rank of a sergeant whilst his co-accused was an inspector. On 10 October 1998, they proceeded to Nyamapanda police station. The co- accused obtained keys to the exhibit room and they gained access to it. They stole five kilograms of dagga, a bag containing 38 T shirts, and 36 cans of Castle beer and locked them in the motor vehicle they were using. On their way back, the co-accused, who was driving, hit a pedestrian and had to remain H

Makoni J

A behind attending to the accident. The appellant proceeded with the journey with the loot, which he took to his house. The appellant later received information that Nyamapanda police were looking for his co-accused in connection with the stolen property. He then removed the property from his house in the police camp and took it to his friend's house in Dombotombo township. His co-accused later collected the property, using a taxi, to Musami B Cross with the intention of taking it back to Nyamapanda. He was arrested in a police trap and the appellant was later arrested. On the basis of these facts they were charged and convicted of theft.

The value of the stolen property is $1 000 and property worth $965 was recovered. The street value of the dagga is $10 000 and only 3.62 kgs were C recovered.

The appellant's main grounds of appeal are that the magistrate misdirected herself in convicting him when, firstly, the evidence showed that the theft was committed by his senior and that whatever part he played he was following instructions. Secondly, that the evidence showed that he did not participate in loading the goods in the truck. Thirdly, that he was convicted on the basis that D he took the goods to his friend's house and yet he was following instructions.

As regards sentence, his grounds of appeal were that the magistrate misdirected herself in sentencing him to the same sentence with his co-accused and yet their levels of participation were different. Secondly, she did not take into account all the mitigatory features such as the fact that he was a first offender, E he was the sole breadwinner in the family and that he was going to loose his job.

The respondent in its heads of argument supported both the conviction and sentence. Ms *Ziyambi* submitted on behalf of the respondent that the conduct of the appellant throughout the period of the commission of the offence up to the time of arrest is consistent with a person acting in common purpose with F his co-accused. The appellant was rightly found guilty of the offence on the basis of the doctrine of common purpose and that theft is a continuing offence. The appellant participated in the theft by keeping the property at his house and later hiding it well knowing it to be stolen.

I agree with the submissions by the respondent. The appellant was present G when his co-accused removed property from the exhibit room in the absence of officers from Nyamapanda and without signing for the goods. He did not question his co-accused and his explanation is that he was his senior. After leaving his co-accused at the scene of an accident, he took the property to his house. When he was fully aware that Nyamapanda Police were looking for his co-accused in connection with the stolen property, he removed the property H from his house in a police camp and took it to his friend's house in

Makoni J

Dombotombo Township. When the property was removed some of it was A missing.

In my view from the above factors, the only reasonable inference that can be drawn from the conduct of the appellant is that he acted in common purpose with his co-accused. The magistrate's reasoning cannot be faulted and there was no misdirection on her part in convicting the appellant. B

In her reasons for sentence the trial magistrate took into account the personal circumstances of the appellant and that he was a first offender. She also took into account that the appellant was a police officer and that his moral blameworthiness was high. She commented about cases reported in the press involving dishonesty by police officers. She felt that imposing a non-custodial sentence would be to trivialise the gravity of the offence. C

The State in its heads of argument and in its initial submissions on the day of the hearing supported the sentence on the same reasons, that the appellant was a police officer who stole property in police custody. On being asked whether the sentence was appropriate even taking into account the appellant's position as a police officer, in view of the total value stolen, the respondent conceded D that it was not appropriate. This concession was properly made. The total value of the property stolen is $ 1 000 and property worth $968 was recovered. The State further conceded that the same sentence should be passed on appellant's co-accused.

In passing sentence, the magistrate reasoned that those who are engaged to E enforce and uphold the law and decide to breach it should not expect to be treated leniently. She went on to say the following:

> "Whilst it is trite to help first offenders out of jail by either imposing community service or a monetary remedy on them, the court is of the view that those types of sentences are not appropriate in this case. To impose a non-custodial sentence would be to trivialise the gravity of the offence. See *S v Mberi* HH-250-90". F

In that case a police officer converted $20 for a fine to his own use. He was convicted and sentenced to six months' imprisonment of which three month's imprisonment were suspended. The record was submitted to this court with the comment that the sentence of imprisonment, having regard to the value stolen, was too severe, despite the breach of trust involved. He submitted that a G substantial fine coupled with a wholly suspended sentence of imprisonment would meet the justice of the case. The record was placed before Smith J who disagreed with the views of the regional magistrate and confirmed the sentence. He stated:

> "Policemen who are appointed to uphold the law must perform their duties in an exemplary manner and should not themselves resort to criminal acts. H

Makoni J

> A Ordinarily the theft of $20 by a first offender would not attract a custodial sentence. But when a policeman turns to theft then he must expect to be sent to prison, unless there are special mitigatory factors."

I associate myself fully with this reasoning, but this case was decided before community service as a desirable alternative punishment to imprisonment had been adopted. It is my view that community service could be imposed if regard B is had to the numerous mitigatory factors in the matter, which are: the total value of the property stolen and that the bulk of the property was recovered, the fact that the appellant is a first offender and the effect of a sentence of imprisonment. Such a sentence would not trivialise the offence.

I will also consider reducing the prison term as there was a misdirection in not C having regard to the value of the goods stolen and putting emphasis on the appellant's status as a policeman. In view of the concession by the respondent, the sentence in respect of Edward Hove will also be reduced.

Accordingly the appeal is allowed. The sentence is set aside and is substituted with the following:

> "Each accused is sentenced to 8 months' imprisonment of which 4 months' D imprisonment are suspended for 3 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 4 months' imprisonment are suspended on condition that the accused perform 140 hours of community service at such institution and on such other conditions as the trial magistrate may determine. The matter E is remitted to the magistrate's court for the attention of the appellant's 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,"

F Makarau J concurred.

Appellant in person

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

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Source:
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CITY OF HARARE v GWINDI 2003 (2) ZLR 188 (H)

Citation	2003 (2) ZLR 188 (H)
Case No	Judgment No.HH-147-03
Court	High Court, Harare
Judge	Mavangira J
Heard	23 July 2003
Judgment	10 September 2003
Counsel	*L T Biti,* for the applicant *C T Mamvura,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Local government — *employee — senior employee — appointment of* C *— procedure for — effect of failure by council and Local Government Board to comply with procedures*

Statutes—*Urban Councils Act [Chapter 29:15] —procedure for appointment and dismissal of senior employees*

Headnote

While the affairs of the City of Harare were being run by a commission D appointed by the Minister in terms of s 80(1) of the Urban Councils Act [*Chapter 29:15*], advertisements were placed in the media for a public relations manager for the City. The post was not regarded as a senior one. About 20 applications were received. The commission decided not to appoint any of the candidates, but directly appointed the respondent, E who had not even applied for the position and who was not interviewed for it. The grade and salary he was offered were those for a senior employee. Later, the City, now run by an elected council, terminated the respondent's contract of employment on the ground that the appointment was irregular and unlawful. The City applied for an order that the respondent return his official vehicle and other property. The respondent F opposed the application and claimed reinstatement.

Held, that the appointment of the respondent was a blatant flouting of the provisions of s 134(2) of the Act, and the purported condonation of the irregularities by the Local Government Board was baseless and ineffectual and in breach of s 135(1) of the Act. There was no valid contract of employment. G

Held, accordingly, that the application succeeded, with no order as to costs, the counter-application being dismissed with costs.

Legislation considered

Urban Councils Act [*Chapter 29:15*], ss 80(1), 134, 135 & 140 H

2003 (2) ZLR p189

Mavangira J

Case information

A *L T Biti,* for the applicant

C T Mamvura, for the respondent

Judgment

Mavangira J: This is an application for the return by the respondent of his motor vehicle, a Nissan Hardbody registration number 779-208P, a B mobile phone Nokia 3210 and a set of keys, and a counter application by the respondent for his reinstatement by the applicant without loss of salary and benefits.

The following facts emerge from the papers. At the relevant time, the affairs of the applicant were being run by a commission appointed in terms of s 80(1) of the Urban Councils Act [*Chapter 29:15*] (the Act) by the Minister of Local C Government, Rural and Urban Development. In or around December 2001, the applicant invited applications for the post of a Public Relations Manager, Grade 6. Such applications were to be received not later than 4 January 2002. An advertisement was placed in the *Herald* and also in the *Sunday Mail* newspapers on 16 and 20 December 2001 respectively.

D Nineteen applications were received, after which the applicant's town clerk forwarded to the chairman and members of the then Executive Committee of the Commission a memorandum dated 14 January 2002 in which he recommended that the Commission convene a meeting to short-list suitable candidates for interview for the position of Public Relations Manager in the office of the Town Clerk, and also that the short-list be selected from the list E of the said 19 applicants. The memorandum further stated that a total of twenty applications were received, "with one late application". Attached to the memorandum was a document prepared by the Town Clerk giving full details of all applicants including their names, ages, sex, academic and professional qualifications as well as their experience.

F On 28 January 2002 the Commission met and debated a number of issues including that of the appointment of a Public Relations Manager. It considered the Town Clerk's report of 14 January 2002 and concluded that all the applicants were not suitable. The relevant portion of the minutes reads:

> "The commission considered a report dated 14 January 2002 outlining details of applications received for the above position. The Commission G expressed dissatisfaction with the applications received.

Following discussion it was:

RESOLVED

That Lesley Gwindi be appointed to the position of Public Relations Manager in Grade 3."

2003 (2) ZLR p190

Mavangira J

On 31 January 2001, a letter was written to the respondent by the Town Clerk. A It reads:

> "I make reference to considerations made in respect of the above position in a Special Commission Meeting dated 28 January 2002 and the subsequent decision of the same meeting item 3.
>
> I have pleasure in informing you that you are hereby offered appointment B to the position of Public Relations Manager (Grade 3) Town Clerk's Office on a commencing salary of $1 655 136,00 per annum)— oldscale and ($2 940 000 per annum) new scale — inclusive of allowances.
>
> The offer is subject in all respects to the terms and conditions of service — Statutory Instrument 66 of 1992 (General Conditions of Service Agreement). C
>
> Confirmation of appointment is subject to compliance with Medical Examination requirements — copies of the Medical Examination forms are hereby enclosed.
>
> Please advise me in writing as soon as possible whether you accept this offer or not.

In the event of acceptance, please indicate the date of assumption of your D duties".

The letter was copied to "Commission Chairman; Human Resources Director; Acting City Treasurer; Personal File".

In an undated letter which was received at the applicant's offices on 21 February, 2002, the respondent accepted the offer of employment in the E following terms:

"I am writing to inform you that I accept your offer of employment as the City of Harare's Public Relations Manager effective from 1 February 2002.

I am looking forward to working with you and the entire Council". F

Subsequently, a written contract of employment was executed between the parties on 27 February 2002.

It also emerges from the papers that on 18 February 2002 the applicant's Human Resources Director wrote a memorandum to the applicant's Chamber Secretary in the following terms:

"Having read the minutes of the Special Commission Meeting may I draw G your attention to item 3 'Vacant Position of Public Relations Manager'.

The minutes are not clear on whether the applicant was added to the pool of applicants or a head hunting exercise was conducted. Furthermore it is not clear whether he was subsequently interviewed by the Commission.

I am requesting that these aspects of the appointment be clearly worded H

Mavangira J

A in the resolution so that the Auditors and City Treasury do not pose unnecessary questions.

One further request is that the decision to upgrade the position from Grade 6 to Grade 3 be reflected correctly. I also wish to enquire if the issue of Local Government approval has been done away with. As you know it is a requirement that appointments to designated positions (1-3) be approved B by the Local Government Board."

Subsequent to this and on 1 March 2002, a letter was written to The Local Government Board seeking retrospective approval of the appointment of the respondent. The letter reads:

"Authority is hereby sought to appoint Mr L Gwindi to the position of Public Relations Manager in retrospect with effect from 4 February 2002.

C The position was advertised and the Commission met on 28 January 2002 to consider 19 applicants. The Commission did not find suitable any of the applicants. It was then decided to headhunt a suitable candidate from the open market and Mr Gwindi was then identified as a suitable candidate. Mr Gwindi was working for Zimbabwe Tourism Authority as the Public Relations Manager. He is well qualified and experienced.

D The Commission subsequently resolved to appoint Mr Gwindi and requested that he joins the Council immediately. He was then appointed and started work on 4 February 2002.

I attach herewith his Curriculum Vitae, Commission minutes and schedule of the 19 applicants."

E The Local Government Board responded by letter dated 5 April 2002 in the following terms:

"Reference is made to your application for the Local Government Board's condonation of the appointment of a Public Relations Manager for the City of Harare.

F Please be advised that the Local Government Board has condoned and approved the appointment of Mr L Gwindi as the Public Relations Manager for the City."

On 30 April 2002 the applicant wrote to the Local Government Board and stated:

"On the 29 April 2002, the Executive Committee expressed concern in the G manner the above mentioned employee was recruited. Some of the issues raised include why, despite the position having been advertised for Grade 6, the incumbent was appointed to a higher position in Grade 3 and that the employee was recruited before your approval. In short, sections 134 and 135 of the Urban Councils Act [*Chapter 29:15*] were not complied with.

Mavangira J

The Committee therefore resolved to terminate the contract of employment A of Mr Gwindi forthwith because the relevant recruitment procedures were not followed."

On 24 June 2002 the following letter was written to the respondent:

"Further to my letter dated 30 April, 2002 in regard to the above, you are hereby dismissed from Council Service in terms of section 140(b) of the B Urban Councils Act [*Chapter 29:15*] with effect from 24 June 2002. Your last working day is 24 June 2002.

Council terminated your contract of employment on the basis that your appointment was found to be irregular and unlawful.

Please surrender the vehicle, keys, cell phone any other council property in your possession to the Senior Administrative Officer after which I will C ask the City Treasurer to process and pay your terminal benefits.

This letter supersedes my letter dated 30 April 2002."

On 1 July 2002 the applicant wrote to the respondent the following letter:

"Reference is made to my letter of 24 June 2002 paragraph 3.

Please could you surrender the listed below items by end of the day of D Tuesday 2 July 2002.

(1) Nissan Hardbody
(2) Spare Car Keys
(3) Cellphone
(4) Back Door Key
(5) Master Key." E

It is the applicant's contention that the respondent has no legal basis for holding on to the items in question as there was never any contract of employment between the parties and there was thus no obligation to comply with s 140 of the Urban Councils Act, which demands permission of the Local Government Board to terminate such contract of employment. F

The applicant's contention was said to be based on two issues. Firstly, the contract of employment was *contra bonos mores,* that is, that it offends the morality of Zimbabweans in that no basis was shown as to why the respondent who was not one of the 19 applicants, was chosen above them when none of them were interviewed. This is particularly glaring when regard is had to the G impressive CVs of the 19 applicants and the fact that the respondent submitted neither application nor *curriculum vitae.* Furthermore, the position advertised for was a Grade 6 position, which is not a senior position, yet the respondent was appointed to a Grade 3 position, which is a senior position. It was submitted that this was done when Council had not rescinded the resolution of 26 May to appoint a Public Relations Manager in Grade 6. H

Mavangira J

A Secondly, the contract of employment, it was submitted, infringes and is *ultra vires* the provisions of the Urban Councils Act, in particular, s 135, in that the Local Government Board did not interview the respondent. Furthermore, unlike common-law bodies, the Local Government Board (the Board), being a creature of statute, can only do those things that it is permitted to do by the statute. The functioning and powers of the Board are set out in the Act and B these do not include condoning departures from compliance with the Act. It was further submitted that even if the Board had such powers, which was not conceded, that discretion would be tainted by the gross misrepresentations in the letter to the Board, in that the letter stated that the Commission met on 28 January 2002, when in fact it did not sit. Furthermore, it was not decided on that date to headhunt. The respondent's name emerged from nowhere. It C was further submitted that in any event the Commission did not carry out its statutory obligation to conduct an interview and also that it has no power to condone its own omissions or failure to comply with the Act.

On the other hand, it is the respondent's contention that there was a valid contract between the parties. Furthermore, that the Commission running the D affairs of the applicant at the relevant time was duly appointed in terms of s 80(1) of the Act and therefore had authority to act as the applicant in terms of the said section, and to vary or rescind any earlier resolutions made by itself in the execution of its duties in terms of s 89(3) of the Act. It was submitted that when the Commission resolved that the respondent be appointed it had authority to make that resolution. Furthermore, it was acting not as agent of E the respondent but of the applicant. The applicant is thus bound by the acts of the Commission.

It was also submitted on behalf of the respondent that a valid contract was concluded between him and the applicant after he had accepted the applicant's offer of employment to him. It was submitted further that, on the papers before F the court, there is no evidence that there was any

illegality on the part of the respondent and that one cannot cast aspersions of immorality against the respondent on the grounds of his qualifications as his qualifications are not in issue.

It was submitted on behalf of the respondent that there was substantial compliance with the provisions of the Act, with particular reference being G made to ss 134 and 135. Furthermore, there was no evidence that the appointment of the respondent prejudiced the applicant. Neither is there any evidence that the decision that the 19 applicants were unsuitable prejudiced the applicant. Thus, in the absence of prejudice, the court may overlook a formal or procedural defect.

2003 (2) ZLR p194

Mavangira J

It was submitted that, as there was a valid contract between the parties, the A respondent was lawfully in possession of the property in question.

In respect of the counter-application by the respondent, it was submitted that as the respondent was a senior employee of the applicant, it was imperative that the provisions of s 140(2) of the Act ought to have been complied with. The purported discharge was not approved by the Local Government Board. The B *audi alteram partem* rule was not adhered to. The purported summary dismissal of the respondent therefore constitutes a gross procedural irregularity and on that basis the court should set aside the arbitrary decision by the applicant to terminate the respondent's contract of employment. It was further submitted that the Minister of Local Government, Public Works and National Housing's directive that the respondent must be reinstated ought to be C complied with. The directive was in the Minister's letter dated 16 July 2002, which reads in part:

> "While I appreciate that any earlier letter with respect to Mr Gwindi was based on a recommendation of the Executive Committee, I note that your Council has now resolved to discharge same from employment, and a letter to that effect has since been written to him... D
>
> In this regard I hereby direct your Council to rescind the relevant resolutions in terms of section 314 of the Urban Councils Act [*Chapter 29:15*], and that you *(sic)* Council afford the parties a chance to be heard, or that you exercise the functions vested in you be sections 64(e) of the Urban Councils Act. Accordingly, could you ensure that... Mr L Gwindi and... are returned to council employment immediately. As suggested a E fortnight ago when you came to my office with the Deputy Mayor I would advise that you consult relevant officials in my Ministry for advice in future, should issues of concern arise, before making resolutions."

In response to the applicant's submission that in our law there is no general right of a litigant to approach this court on review before exhausting domestic F remedies unless there are special reasons, it was submitted on behalf of the respondent that there is no ouster of this court's jurisdiction pending exhaustion of domestic remedies. It was submitted that the issue of exhaustion of domestic remedies is one of discretion to be exercised by the court and that the issues raised in this matter are so serious as to warrant entertainment by this court. G

In my view the starting point is the determination of whether or not there was a valid and binding contract of employment between the parties.

Section 134 of the Act provides:

> "(1) Subject to this Part, a council *shall appoint persons approved by* the Local Government Board to be senior officials of the council: H

2003 (2) ZLR p195

Mavangira J

> A Provided that the appointment of a medical officer of health shall be subject to the approval of the Local Government Board and of the Minister responsible for health in terms of section 7 of the Public Health Act [*Chapter 15:09*].
>
> (2) The council concerned *shall recommend* to the Local Government Board the names of suitable candidates for appointment as senior officials." B (the emphasis is added).

Section 135 of the Act provides:

> "(1) The Local Government Board *shall interview* every person whose name has been submitted to it by a council in terms of this Part and *may* —
>
> (a) approve a person recommended by the Council concerned; or
>
> C (b) refuse to approve any person recommended by the council concerned.

(2) Where the Local Government Board refuses to approve a person recommended by a council, it shall give its reasons therefor in writing in such council.

(3) Where, after a period of two months has elapsed since the Local Government Board notified the council of its refusal to approve a person for appointment, the council fails to recommend any other person who meets the approval of the Board, the Board shall submit a report to the Minister setting out the full details of the matter for his consideration.

(4) The decision of the Minister on any matter referred to him in terms of subsection (3) shall be final." (The emphasis is added).

In my view, the provisions of the two sections are very clear regarding the manner of appointment of senior officials and it is not in dispute that the position to which the respondent was appointed is a senior position. It is quite clear that the process is started off by the applicant council recommending to the Board the names of suitable candidates for appointment. The Board then interviews every person whose name has been so submitted and may approve a person so recommended. The council then appoints the person(s) who has/ have been so approvedby the Local Government Board. It is quite clear to me, and in fact it appears to be common cause, that the provisions of the two cited and relevant sections were not complied with. It is rather the respondent's contention that by its letter of 5 April 2002, the Local Government Board condoned such non-compliance with the Act, thus validating the contract of employment.

In the letter of 1 March 2002, there is no explanation or reason given why the applicant chose not to comply with s 134(2) of the Act. There is no reason given why it was decided to appoint the respondent and not, as required by the

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Act, to recommend his name to the Board. There is also no reason on the papers why the Board condoned such a blatant breach of the Act nor on what authority such condonation was given.

It appears to me that the breach by the applicant of s 134(2) led to the breach by the Board of s 135(1) of the Act. I find persuasive the applicant's counsel's submission that assuming that the Board had the power to condone the applicant's defiance of the Act, there is no indication that the Board had power to condone its own failure to comply with s 135 (1) of the Act. The respondent's counsel did not point the court to any authority or provision in terms of which the Board has the power or authority to condone such a clear departure from or non-regard for the specifically applicable and relevant sections of the Act cited above. It is important in this regard to highlight the fact that although the appointment was made as the time when the affairs of the applicant were being run by a Commission and the termination of the contract was done at a time when an elected council was in place, it is common cause that the council is bound by the acts of the Commission, which as already stated above, was duly appointed in terms of the Act. Thus if there was a valid and binding contract executed, then the applicant council could only discharge the respondent from its employment in terms of s 140 of the Act.

Section 140 provides, *inter alia:*

(1) Subject to subsection(2) and to the conditions of service of the senior official concerned, a council may at any time discharge a senior official —

(a) upon notice of not less than three months; or

(b) summarily on the ground of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice.

(2) A council *shall not discharge* a senior official *unless the discharge has been approved by* the Local Government Board..." (emphasis added).

In my view s 140 becomes relevant only if or where there is a valid contract of employment. For the reasons discussed immediately above, it appears to me that no such contract ever came into being. The purported condonation of the blatant flouting of the provisions of the Act appears to me to be baseless and ineffectual. As submitted by the applicant's counsel, it was possible for the applicant to comply with the Act and have the respondent properly appointed in terms of the Act without having to resort to unstatutory means as happened in this case.

In the result, in my view the respondent's counter-application must consequently fail. There can be no reinstatement where there was no valid appointment in the first place. The counter-application is therefore dismissed with costs.

Mavangira J

A In view of my finding that the respondent's appointment was not valid or proper, I do not find it necessary to deal with or make findings on the other issues raised by the applicant. I however find in favour of the applicant and grant the order sought in the applicant's draft order for the return of the applicant's property which had been handed to the respondent by virtue of his appointment which has been discussed above. There is thus no legal basis for B the respondent to retain in his possession the claimed property.

With regard to the question of costs, it appears to me that this is a case in which an award of costs in favour of the applicant would in a way be akin to allowing a party to benefit from its own misdeed. This is particularly so in view of the fact that the applicant council is bound by and therefore a party to the acts of C its predecessor, the Commission. It is my view that on the facts of this case, each party must bear its own costs.

In the result it is ordered as follows:

IT IS ORDERED:

1 That the respondent returns to the applicant a Nissan Hardbody motor D vehicle registration number 779-2098P, a mobile Nokia phone, model 3210, master keys, spare keys for the above mentioned motor vehicle and back door keys, within 48 hours of the date of service of this order, failing which the Deputy Sheriff be and is hereby authorised to remove the said items from the respondent and surrender them to the applicant.

2 That each party bears its own costs. E

3 That the counter-application by the respondent is dismissed with costs.

Honey & Blanckenberg, legal practitioners for applicant

F *Scanlen & Holderness,* legal practitioners for respondent

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/BEAZLEY NO v KABELL & ANOR 2003 (2) ZLR 198 (S)

BEAZLEY NO v KABELL & ANOR 2003 (2) ZLR 198 (S)

Citation	2003 (2) ZLR 198 (S)
Case No	Judgment No. S-22-03
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA and Gwaunza JA
Heard	21 July 2003
Judgment	11 September 2003
Counsel	*J C Andersen SC,* for the appellant No appearance for the first respondent *AP de Bourbon SC,* for the second respondent
Case Type	Civil appeal

Annotations No case annotations to date

Flynote

Arbitration — *award — criteria for setting aside award — grounds of public* C *policy — restrictive application of public policy defence — limited grounds on which arbitrator's decision on fact may be set aside*

Headnote

The appellant was the liquidator of a construction company which had contracted to build a dam for the second respondent. The latter had cancelled the contract. The resultant dispute had gone before the first D respondent as arbitrator, who had decided, in favour of the second appellant, that the cancellation was valid. The High Court upheld the arbitrator's decision. On appeal by the liquidator:

Held, that since the appellant's case was founded on the provisions of Article 36(2)(b)(ii) of the UNCITRAL Model Law, set out in the First Schedule E to the Arbitration Act [*Chapter 7:15*], the main issue was whether "the award is in conflict with the public policy of Zimbabwe". In order to find that an arbitrator's decision is contrary to public policy, the court would have to find that the reasoning or conclusion in the award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted F moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the same point.

Held, further, that despite two errors in procedure made by the arbitrator no G substantial injustice was done so as to lead to the conclusion that the award was in conflict with the public policy of Zimbabwe.

Held, accordingly, that the appeal should be dismissed with costs.

2003 (2) ZLR p199

Sandura JA

Cases cited A

Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)

ZESA v Maposa 1999 (2) ZLR 452 (S)

Legislation considered

B Arbitration Act [*Chapter* 7:15], First Schedule, art 34(2)(b)(ii)

Case information

J C Andersen SC, for the appellant

No appearance for the first respondent

AP de Bourbon SC, for the second respondent

Judgment

C **Sandura JA:** This is an appeal against a judgment of the High Court which dismissed the appellant's application for an order setting aside the determination by the first respondent ("the arbitrator") that the termination of the contract involving the construction of Mteri Dam ("the dam") was valid.

The factual background is as follows. In May 1994, the second respondent D ("Hippo") and Main Contracting (Pvt) Ltd ("Main"), now in liquidation, concluded an agreement in terms of which Main

undertook to construct the dam in Chiredzi District. The consulting engineer responsible was Hart Frost ("the engineer").

It was expressly agreed that Main was to build the retaining wall so that it would store water by 1 October 1995, that the dam construction had to be advanced to the stage where water could be released into the canal by 31 January 1996, and that all the work had to be completed by 31 May 1996.

Subsequently, after the work had commenced and a number of site meetings had been held, at which concern about the rate of progress had been expressed, the engineer wrote to Hippo on 15 June 1995 as follows:

> "It is with extreme regret that it is necessary for us to advise you that in our opinion Main Contracting (Pvt) Ltd have failed to proceed with Mteri Dam construction in accordance with the contract and we do not consider it possible for them to complete the work by the required completion date.
>
> With reference to their contract programme they are, on various critical items, from 3.5 months to 7.5 months behind, after being on site for approximately twelve months. They have repeatedly revised their programme but in every instance they have failed to maintain their programmed production rates.
>
> We hereby certify, in terms of clause 65 of the General Conditions of Contract, 4 ed, ... that in our opinion Main Contracting (Pvt) Ltd, the contractor, has failed to proceed with the works with due diligence and is

> not executing the works in accordance with the contract and is persistently neglecting to carry out his *(sic)* obligations under the contract."

Consequently, on 20 June 1995, Hippo notified Main that it was terminating the contract and that Main should vacate the site within seven days.

Thereafter, Main caused itself to be placed in provisional liquidation. Its directors then challenged the termination of the contract by Hippo, and the matter was referred to arbitration. The arbitration was conducted in two stages. The first stage was concerned with liability, whilst the second stage dealt with damages.

In February 1996, the arbitrator determined that the termination of the contract by Hippo was valid, and in September 1998, he made an award of damages in favour of Hippo which was expressed in United States dollars.

Dissatisfied with the awards made by the arbitrator, Main's directors filed a court application in the High Court, in the name of the liquidator, seeking an order setting aside both awards in terms of Article 34(2)(b)(ii) of the UNCITRAL Model Law, set out as the First Schedule to the Arbitration Act [*Chapter 7:*15], and undertook to meet the costs of the litigation. The application was filed in November 1998.

The learned judge who subsequently heard the matter declined to set aside the award relating to liability, i.e. the finding that the contract had been validly terminated, but set aside the award relating to damages insofar as it expressed Hippo's loss in United States dollars. He remitted that aspect of the matter to the arbitrator for reconsideration.

Aggrieved by the learned judge's refusal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this court.

Article 34(2)(b)(ii) of the UNCITRAL Model Law, in relevant part, reads as follows:

> "An arbitral award may be set aside by the High Court only if-
>
> (a) ...
>
> (b) the High Court finds that –
>
> (i) ...; or
>
> (ii) the award is in conflict with the public policy of Zimbabwe."

Expanding on what is in conflict with the public policy of Zimbabwe, Article 34(5) states:

> "For the avoidance of doubt, and without limiting the generality of paragraphy (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if-

(a) the making A of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

It has been the policy of this court to restrictively construe what is in conflict with the public policy of Zimbabwe in order to recognise the basic objective B of finality in arbitrations. Thus, in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) at 465C-D, Gubbay CJ, with whom I concurred, said:

> "In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of law or morality or justice is violated. This is illustrated by *dicta* in many cases ..."

Emphasising the fact that under Article 34 the High Court does not exercise an appeal power, the learned Chief Justice said the following at 466E-G:

> D "Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral E standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.
>
> The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

F The learned judge in the court *a quo* was aware of the above test and applied it in determining the application before him. The issue which now arises is whether he correctly applied the test when he declined to set aside the award. I have no doubt in my mind that he did.

The first issue which I shall deal with is the appellant's contention that before G the contract was terminated in terms of clause 65(1) for slow progress, a notice in writing should have been served upon Main in terms of clause 46. That clause, in relevant part, reads as follows:

> "... should the Engineer at any time be of the opinion that the rate of progress of the Works or any part thereof is too slow to ensure the completion of the Works or any part thereof by the prescribed time or H extended time for completion, he shall so notify the contractor in writing

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> and the contractor shall thereupon, with the approval of the engineer, take A such steps as the contractor may think necessary to expedite progress so as to complete the Works by the prescribed time or extended time for completion...."

It was common cause that no notice was given to Main by the engineer in terms of clause 46 before Hippo terminated the contract in terms of clause 65(1) of the contract. clause 65(1), in relevant part, reads as follows: B

> "... if the engineer shall certify in writing to the Employer that in his opinion the Contractor -
>
> (a) -(b)...,or
>
> (c) has failed to proceed with the Works with due diligence, or
>
> (d) ...,or C
>
> (e) is not executing the Works in accordance with the Contract or is persistently or flagrantly neglecting to carry out his obligations under the Contract, or
>
> (f) - (g)...,
>
> then the Employer may, after giving seven days' notice in writing to the D Contractor,... enter upon the Site and the Works and expel the Contractor therefrom ..."

After considering the provisions of clauses 46 and 65(1), the learned judge concluded that compliance with clause 46 was not a necessary prerequisite to the termination of the contract in terms of clause 65(1), but that ordinarily clause 46 would be applied. He added that the arbitrator was wrong in finding E that the engineer should not have given proper notice to Main. He, however, found that no substantial injustice had resulted because the documents placed before the arbitrator reflected continuous warnings and complaints about the slow progress. In this regard, the learned judge said:

> "... there was a very substantial amount of evidence before the arbitrator F that the applicant company was very much behind in its work programme. There was substantial documentation, including various site minutes, reflecting this to be the case. There was various detailed documentation indicative of substantial inability of the applicant company to keep anything like up-to-date with the time requirements in what is common cause was a very tight contract. The documentation clearly reflects G continuing warnings and complaints given to the applicant's company and indicates revised programmes being put in place which were not adhered to. So while I am of the view that the arbitrator was wrong in not requiring clause 46 to have been followed, I am not satisfied that the failure shows any substantial injustice to the applicant."

I entirely agree with those comments and observations. The documents before H

Sandura JA

A the arbitrator graphically indicated that Main had fallen behind schedule in a serious way.

In addition, I am satisfied that compliance with clause 46 is not a necessary prerequisite to the termination of a contract in terms of clause 65(1). That opinion is supported by the learned author Philip Loots who, at p 212 of B *Engineering and Construction Law,* comments on clause 46 as follows:

> "**Notification of Slow Rate of Progress**
>
> If the engineer does not warn the contractor under this clause, that by itself will not affect the employer's right of forfeiture or to penalties for delay in completing."

In the circumstances, the failure by the engineer to notify Main of the slow rate C of progress in terms of clause 46, before the contract was terminated in terms of clause 65(1), cannot be a basis for the conclusion that the arbitral award made in favour of Hippo is in conflict with the public policy of Zimbabwe. I am satisfied that the test set out in *Maposa's* case *supra* has not been satisfied in this regard.

D The second issue which I wish to consider relates to a preliminary application for leave to adduce further evidence which was made to the learned judge by the appellant and which was dismissed. It was in the form of a chamber application filed on 24 September 1999.

The additional evidence which the appellant intended to adduce was in documentary form and essentially related to the unavailability of core material E in certain designated areas. The core material is an impervious material required in the construction of the dam wall. The documents consisted of correspondence between the engineer, Hippo and Stocks & Stocks (Pvt) Ltd, the company which replaced Main on the dam project, and were dated between July 1995 and January 1996.

F In the exercise of his discretion, the learned judge did not consider it appropriate to grant the application to lead further evidence for two main reasons.

The first reason was that the application had been filed very late. The additional evidence was available when the application for an order setting aside the arbitral awards was filed on 13 November 1998. It was only on 24 G September 1999, virtually a year later, and close to the initial date set for the hearing of the main application (i.e., 5 October 1999) that the chamber application for further evidence to be adduced was filed.

The second reason given by the learned judge was that since the most important aspect of the application related to the shortage of core material H which was imminent when the contract was terminated, and the documents

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Sandura JA

before the arbitrator clearly indicated that the shortage had been noted, A commented upon and raised as a serious problem, the arbitrator must have been fully aware of the problems relating to the shortage of the material and the consequence of such a shortage on the contract.

It is well established that this court will not interfere with the exercise of a judicial discretion unless it was exercised on wrong principles or the primary B court mistook the facts or did not take into account some relevant considerations or allowed extraneous or irrelevant matters to guide it: see *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62F-63A. In the present case, I am satisfied that the appellant has not shown that the learned judge exercised his discretion improperly. The application for leave to adduce further evidence was, therefore, properly dismissed. C

The third issue, which I now deal with, is the refusal by the arbitrator to allow certain documents to be produced by Main at the hearing. These documents were in respect of what happened after the contract had been terminated. They included the contract between Hippo and Stock & Stocks, the company which replaced Main on the dam project, and correspondence between the engineer, D Hippo and Stocks & Stocks. The arbitrator excluded these documents because, in his view, whatever took place after the termination of the contract was not relevant to the proceedings before him.

Commenting on the arbitrator's decision to exclude the documents, the learned judge said:

> "In my view, the arbitrator should have allowed the documents that Mr E *Andersen* requested to be placed before him to be included in the arbitration proceedings. As a general principle, all papers wanted by each party should have been placed before the Arbitrator. I am, however, satisfied that the papers filed covered all the main issues which the arbitrator needed to consider. Although it was wrong for the arbitrator not to allow the additional papers to be filed, I am satisfied that this did not F in any way preclude him from fairly determining the matter. It did not result, in my view, in a failure of justice to either party to any material extent.
>
> I would once again emphasise that there was a profusion of detailed papers put before the arbitrator. Each party had substantial opportunity to reply to the other party's submissions and re-reply and put forward any G documents and the arbitrator had a large volume of documents before him."

I agree entirely with the views expressed by the learned judge. However, I wish to add that when the arbitration proceedings commenced in January 1996 the parties were given an opportunity to lead further evidence and call witnesses H

A if they wished, but both chose not to do so. If Main considered the unavailability of the core material to be crucial to its case, it should have led further evidence on the matter. Instead, it left unsubstantiated the suggestion in its papers that the engineer, on whose recommendation Hippo terminated the contract, had an ulterior motive for the termination of the contract, which was the avoidance of the consequences of his own failure to designate areas with sufficient core B material.

In the circumstances, I agree with the learned judge that the refusal by the arbitrator to allow Main to produce the documents in question did not result in a failure of justice to either party to any material extent. It, therefore, follows that the said refusal cannot be a basis for the appellant's contention that the C arbitral award is in conflict with the public policy of Zimbabwe.

Finally, I would like to consider whether, taking into account all the facts in this case, the finding by the arbitrator that the termination of the contract was reasonable, justified and valid is in conflict with the public policy of Zimbabwe according to the criteria set by this court in *Maposa's* case *supra.* I have no doubt that it is not.

D In my view, bearing in mind, *inter alia,* that there was overwhelming evidence before the arbitrator that Main was very much behind its work programme, that revised programmes were put in place by Main but were never adhered to, and that many complaints had been made to Main about the slow rate of progress at various site meetings without yielding any positive results, I do not think E that it can be said that the award made by the arbitrator "constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award".

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

Malaba JA & Gwaunza JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

G *Scanlen & Holderness,* second respondent's legal practitioners

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Source:
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CHIRASASA & ORS v NHAMO NO & ANOR 2003 (2) ZLR 206 (S)

Citation	2003 (2) ZLR 206 (S)
Case No	Judgment No. S-135-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Ziyambi JA, Malaba JA & Gwaunza JA
Heard	12 September 2002
Judgment	11 September 2003
Counsel	*L T Biti,* for the appellants *S V Hwacha,* for the respondents
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Administrative law — *audi alteram partem rule — applicability — contractual* C *decisions — whether rule applies to termination on notice of contract of employment*

Employment — *termination — on notice — application to Minister for approval of termination — whether necessary when notice given in terms of contract— audi alteram partem rule — whether applies when contract* D *is terminated on notice — grounds for termination on notice — change in fortunes of employer — whether ground for termination*

Headnote

Before the enactment of s 12B of the Labour Act, which states that the dismissal of an employee is unfair unless the employer can show that it E was done in terms of an employment code of conduct, the dismissal of employees was regulated by the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985). The effect of those regulations was that an employer had to obtain written approval from the Minister of Labour and Social Welfare before terminating an employee's contract of employment F unless, in terms of s 1A of those regulations, there was a registered code of conduct that applied to the employee. This meant that an employer could terminate an employee's contract of employment on notice, in accordance with the contract, without first obtaining the Minister's approval. This was so even if the employment code of conduct did not deal with the termination of employment on notice. G

There is a presumption that the *audi alteram partem* rule applies to decisions that are made in the exercise of a statutory power, unless the rule is expressly excluded. There is no similar presumption when a decision is taken in the exercise of a contractual right because the question is whether or not failure to hear the other party constituted a breach of H

Malaba JA

A contract: a party cannot be in breach of an obligation which has not been made an express or implied term of the contract.

The appellants had been employed in an undertaking to which an employment code of conduct applied, and their contracts of employment were terminable by either side giving one month's notice. The appellants refused to accept new conditions of service which their employer wished B to introduce in order to enhance production, so their employer gave them one month's notice of termination of employment. They applied unsuccessfully to the High Court for a review of the termination on two grounds: first, that their employer had not obtained the Minister's approval; and secondly that they had not been given a hearing before the termination. On appeal:

C *Held that* since there was no act of misconduct alleged against the appellants (in which event the employment code of conduct would have applied), the employer had a right to terminate the contracts of employment with the appellants by giving them one month's notice, and could exercise that right without obtaining the Minister's prior approval.

D *Held,* further, that it was not an express term in the appellants' contracts of employment that they should be heard before the decision to give them notice was taken, and there was no basis on which such an obligation could be implied into the contracts.

Held, further, that a contract of employment cannot remain static throughout the whole of its existence regardless of changes in the fortunes of the E business, and refusal to accept a change in the terms and conditions of employment necessitated by the commercial interests of a business may be good enough reason for terminating a contract of employment on notice.

Cases cited F

Admin, Natal, & Anor v Sibiya & Anor 1992 (4) SA 532 (A)

Admin, Tvl, & Ors v Traub & Ors 1989 (4) SA 731 (A)

Admin, Tvl, & Ors v Zenzile & Ors 1991 (1) SA 21 (A)

Art Corp Ltd v Moyana 1989 (1) ZLR 304 (S)

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

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

Gründling v Beyers & Ors 1967 (2) SA 131 (W)

Kwaramba v Bain Industries (Pvt) Ltd S-39-01

Langeni & Ors v Minister of Health & Welfare & Ors 1988 (4) SA 93 (W)

H *Lunt v University of Cape Town & Anor* 1989 (2) SA 438 (C)

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Malloch v Aberdeen Corp [1971] 2 All ER 1278 (HL) A

Marlin v Durban Turf Club & Ors 1942 AD 112

Masundire v Willowvale Mazda Motor Industries (Pvt) Ltd HC-5958-95

Monckten v BSA Co 1920 AD 324

Samuriwo v Zimbabwe United Passenger Co 1999 (1) ZLR 385 (H)

Taylor v Min of Higher Education & Anor 1996 (2) ZLR 772 (S)

Turner v Jockey Club of SA 1974 (3) SA 633 (A) B

Legislation considered

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

Case information

L T Biti, for the appellants

S V Hwacha, for the respondents

Judgment

Malaba JA: This is an appeal from a judgment of the High Court dated 14 June 2001, by which an application for an order setting aside, in review D proceedings, a decision of the second respondent to terminate contracts of employment with the appellants was dismissed with costs. The ground upon which the decision had been brought on review was that it was unlawful because of the contravention of s 2(1)(a) of the Labour Relations (General Conditions of Employment)(Termination of Employment) Regulations, 1985 (SI 371/85 ("the Regulations") and breach of the *audi alteram partem* rule. E

The facts placed before the court *a quo* are not in dispute. The second respondent is a private company ("the company") incorporated in terms of the laws of Zimbabwe, carrying on the business of providing life assurance policies to members of the public. From its headquarters in Harare the company conducts its business operations through twelve branches situated F in different parts of the country under the supervision of branch managers. The appellants were three of twelve branch managers engaged by the second respondent, under a contract of employment which provided in clause 13 that it was terminable by either side upon giving one month's notice. The first respondent is the company's human resources manager.

The duties of a branch manager, under his/her contract of service, included the G recruiting of commission agents and supervising their work to ensure that their performance, as well as his/her own work, procured for the company as many insurance policies a month as possible. Branch managers were entitled to fixed monthly salaries regardless of the amount of work they and their commission agents would have done. H

Malaba JA

A In 1998 the company started experiencing viability problems. In response senior management set up a team to investigate the cause thereof. The management report produced by the investigation team revealed that the branches had largely become unproductive. A job evaluation exercise carried out at the time disclosed that the branch manager's job had wrongly been placed in grade 7 instead of grade 8 and over-valued.

B The recommendations made to senior management were that the branch manager's job should be downgraded; and that the remuneration for branch managers had to be performance-related in order to enhance production. Instead of branch managers being paid fixed salaries regardless of how much work they would have done, they had to work according to production targets C fixed by agreement with senior management. Their individual earnings were to be calculated on the basis of the extent to which they met the production targets.

To meet the operational requirements of the company, senior management was desirous of implementing the recommendations of the investigation team. Mindful of the fact that changes had to be made in the terms and conditions D of employment of branch managers, the first respondent said senior management engaged branch managers in discussions over the proposed changes as early as April 1999. The first respondent said that the principle by which senior management were guided in seeking to effect changes in the conditions of service of branch managers was that they should not suffer a reduction in what E they were earning at the time but that those who worked harder should be rewarded according to what they actually produced. In keeping with that principle, senior management created a "personal to holder" grade to enable the incumbent branch managers to retain as their basic salaries what they were earning on 16 March 2000 when their jobs were downgraded from grade 7 to grade 8.

F On 20 June 2000 a meeting between senior management and branch managers was held to discuss the proposed changes in their conditions of service. Branch managers made their views known to senior management on the disadvantages of relating their remuneration structure to production. They argued that there were many factors beyond their control which could affect production, thereby causing them financial prejudice.

G On 8 August 2000 the first respondent produced the first draft of the terms and conditions of the new contract the second respondent proposed to enter into with branch managers. It appears that the draft was not acceptable to all branch managers. The first appellant consulted a firm of legal

practitioners, who advised him to reject the offer on the ground that the terms and conditions were H inferior to those under which he was employed. The second and third

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appellants contacted a labour relations consultant who also advised them to A reject the offer.

On 1 December 2000 a revised draft of the proposed contract of employment was presented to branch managers for individual acceptance or rejection. On 14 December 2000 the first appellant wrote to the first respondent asking for more time to consult his legal practitioners on the matter. He was given until B 18 December 2000. In the meantime the second and third appellants contacted the labour relations consultant. All three appellants were again advised not to accept the offer. Eight branch managers, however, accepted the terms and conditions of the contract of employment offered by the company. The ninth branch manager initially rejected the offer but later changed his mind and accepted it. C

On 19 December 2000 the first respondent wrote to the three appellants, advising them that the company could not enter into further negotiations with them over the terms and conditions of the proposed contract, contained in the draft of 1 December2000. They were given up to 21 December 2000 to decide whether to accept or reject the offer. The three appellants refused to accept the offer. D

By letter dated 21 December 2000, each appellant was given one calendar month's notice of termination of his employment with the second respondent in terms of clause 13 of the original contract of employment. Review proceedings were instituted by the appellants in the High Court on 15 January 2001, challenging the lawfulness of the decision to terminate the contracts of E employment on notice.

The appellants' case was that the decision to terminate their contracts of employment was unlawful because:

> "(1) No prior written approval of the Minister of Labour and Social Welfare ('the Minister') had been obtained in terms of section 2(1)(a) of F the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, SI 371/85 (the Regulations); OR G
>
> (2) If the second respondent could terminate the contract of employment on notice the decision was in breach of the principles of natural justice in that they had not been heard before the decision to give notice of termination was taken; OR
>
> (3) The termination of the contracts of employment on notice without affording the appellants a hearing was in contravention of sections 18(1) and 18(9) of the Constitution (of Zimbabwe)."

The respondents' case was that the obligation to obtain prior written approval of the Minister to terminate a contract of employment with an employee to whom provisions of a registered Code of Conduct applied was removed by H

Malaba JA

A s 1A of the Regulations inserted by the Labour Relations (General Conditions of Employment) (Termination of Employment) (Amendment) Regulations, 1990 (No. 1) (SI 377/90). They contended further that the decision to terminate the contracts of employment with the appellants was a contractual right, the exercise of which was not made subject, either by the express or the implied terms of the contract, to a right of the appellants to be heard. The B respondents said the *audi alteram partem* rule was not applicable to their decision. The decision was not a disciplinary one, as no allegations of misconduct were made against the appellants which would have forced them to hold an enquiry in terms of the Code of Conduct before terminating the contracts of employment. On the third ground, the respondents averred that the provisions of ss 18(1) and 18(9) of the Constitution were irrelevant to the C resolution of the questions raised by the appellants in the application.

I now deal with the first point. The question raised for determination is whether or not, upon a proper construction of s 1A of the Regulations, an employer could terminate a contract of employment on notice without obtaining the prior written approval of the Minister where there was in D existence in the undertaking an employment Code of Conduct, the provisions of which applied to the employee, and no allegations of misconduct were made against him.

The Regulations enacted by the Minister in December 1985 in Statutory Instrument 371/85 provided in ss 2 and 3 that:

> E "2 (1) No employer shall, summarily or otherwise, terminate a contract of employment with an employee unless —
>
> (a) he has obtained the prior written approval of the Minister to do so; ...
>
> (b) ...
>
> (c) ... or F
>
> (d) the contract of employment is terminated in terms of section 3.
>
> (2) The Minister may approve the giving of notice of termination to an employee in terms of paragraph (a) of subsection (1) if he is satisfied that the period of notice is in accordance with the contract of employment and that it is necessary, for economic or other reasons, including the relative G interests of the undertaking, trade or occupation and the employee, to do so.
>
> 3 Where an employer has good cause to believe that an employee is guilty of—
>
> (a) (i)...
>
> H [Acts of misconduct listed];

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> the employer may suspend such employee without pay and other benefits A and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment."

The cases of *Art Corporation Ltd v Moyana* 1989 (1) ZLR 304 (S) at 308G- 309B and *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S) at 346 G-H decided that the effect of subs (1)(a) of s 2 of the B Regulations was that a contract of employment could not be terminated by giving the employee the requisite notice in accordance with the terms of a contract of employment without obtaining prior written approval of the Minister.

On 7 December 1990 the Regulations were, however, amended by the insertion of s 1A, which provided that: C

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

It was common cause that the second respondent had a registered employment Code of Conduct, the provisions of which applied to the appellants. The D respondents' contention was that the clear literal meaning of s 1A was that, as the second respondent had in operation a registered employment Code of Conduct, the provisions of which applied to the appellants, there was no obligation to obtain prior written approval of the Minister to terminate their contracts of employment on notice in terms of clause 13.

Mr *Biti,* for the appellants, relied on the decision of Bartlett J in the unreported E case of *Masundire v Willowvale Mazda Motor Industries (Pvt) Ltd* HC-5958- 95 for authority for the proposition that giving legal effect to the literal meaning of s 1A of the Regulations would lead to an absurdity in that employees, to whom provisions of an employment Code of Conduct applied, would not enjoy protection from arbitrary exercise of power by employers to F terminate contracts of employment on notice without any reasons being given, whilst employees with no Codes of Conduct applying to them would be protected as a result of the requirement of prior written approval of the Minister.

Mr *Hwacha,* for the respondents, argued that against the decision in *Masundire's* case, *supra,* on the interpretation of s 1A of the Regulations, was G an *obiter dictum* of Gubbay CJ in *Chivinge v Mushayakarara & Anor* 1998 (2) ZLR 500 (S), the decision of Garwe J (as he then was) in *Samuriwo v Zimbabwe United Passenger Co* 1999 (1) ZLR 385 (H) and the decision of three judges of this Court in *Kwaramba v Bain Industries (Pvt) Ltd* S-39- 2001. H

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A The learned judge in the court *a quo* felt bound by the decision in *Kwaramba's* case *supra* and held against the appellants on the question whether or not, upon a literal construction, their contracts of employment were lawfully terminated by the second respondent on a month's notice without having obtained prior written approval of the Minister to do so. He nonetheless said that had he not been bound by the authority of the decision in *Kwaramba's* B case *supra* and was free to give effect to his

own opinion of the matter, he would have associated himself with the reasoning of Bartlett J in *Masundire's* case *supra.*

Mr *Biti* argued on appeal that the cases which went against the decision in *Masundire's* case *supra* were wrongly decided and should be overruled. This C submission brought into question the correctness or otherwise of the decision in *Kwaramba's* case *supra,* which had to be considered by the full court.

I must emphasise the fact that we are here concerned with the applicable law as at the date of termination of the appellants' contracts of employment. The law was changed on 7 March 2003 by s 12B of the Labour Relations Amendment Act, 2002 (No. 17 of 2002), which made it an unfair dismissal if D an employer failed to show that he dismissed the employee in terms of an employment Code of Conduct.

I proceed. It appears to me that the literal meaning of s 1A of the Regulations was clear and unambiguous. It was that where there was in existence a registered employment Code of Conduct, the provisions of which applied to E the employee, then the employer was not under a statutory obligation to obtain prior written approval of the Minister to terminate the contract of employment with the employee on notice. That is not to say the employee was without protection against arbitrary termination of employment. The existence of a registered employment Code of Conduct, the provisions of which applied to the employee whose contract of service it was sought to terminate, was made F the pre-condition for the claim to the exemption from the obligation to obtain prior written approval of the Minister.

The provisions of the employment Code of Conduct had to apply to the employee's conduct as an employee. They did not have to apply to him by having as the subject-matter the termination of the contract of employment on G notice. The matters which the provisions of an employment Code of Conduct addressed were prescribed in s 101(2) of the Labour Relations Act [*Chapter 28:01*] ("the Act") and s 4 of Statutory Instrument 377/90. They related to discipline and the administration of discipline at workplaces. Whilst Codes of Conduct embodied statutorily prescribed procedures for the termination of contracts when allegations of misconduct were made against H the employee, their provisions by definition would not deal with the giving of

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notice as a procedural method of termination of a contract of employment. A

So, when it removed the obligation to obtain the prior written approval of the Minister as a procedural requirement for the termination of a contract of employment on notice, s 1A of the Regulations introduced the procedure contained in the employment Code of Conduct as the method of termination of the contract of employment where the disclosed or undisclosed reason B thereof was misconduct on the part of the employee. Where there was no allegation of misdemeanour, the effect of s 1A of the Regulations was that the employer had a right to terminate the contract of employment on notice, as long as the employee was one to whom the provisions of the registered Code of Conduct applied. The legal effect of s 1A of the Regulations was that a contract of employment could be terminated on notice for any reason other C than those relating to misconduct.

The interpretation placed on s 1A of the Regulations by Bartlett J in *Masundire's* case *supra* was to the effect that where there was a registered employment Code of Conduct the employer was obliged to terminate the contract of employment in terms of the provisions of that Code of Conduct D even if no allegations of misconduct were made against the employee. The learned judge was, at the same time, aware of the fact that his interpretation had no basis in the wording of the statute itself. He reasoned that since Codes of Conduct could not contain provisions dealing with termination of contracts of employment on notice, an employer who could not terminate in terms of the Code of Conduct was obliged to obtain prior written approval of the Minister E to terminate the contract of employment on notice. The learned judge was unable to acknowledge the fact that s 1A of the Regulations had the effect of creating two different procedural methods of termination of a contract of employment - one being the disciplinary procedure created by statute and the other being the giving of notice created by contract. The clear, unambiguous and mandatory provisions of s 1A of the Regulations, to the effect that F "sections 2 and 3 *shall* not apply to employees to whom the provisions" (my emphasis) of a registered employment Code of Conduct applied, could not, without doing violence to the language used, be interpreted to mean that prior written approval of the Minister to terminate the contract of employment on notice was required. Faced with this difficulty,

the learned judge then sought G to avoid giving legal effect to the literal meaning of s 1A by seeking to read words into the section so that it read "sections 2(1)(d) and 3 shall not apply to employees" to whom the provisions of a registered employment Code of Conduct applied. To that extent the learned judge was, with respect, no longer engaged in the process of interpreting s 1A of the Regulations. He was in effect now creating a statute for the legislature. There was no justification at all for H

Malaba JA

A the introduction of the limiting words suggested by the learned judge.

In the *obiter dictum* in *Chivinge's* case *supra* Gubbay CJ said at 504 D-G:

> "In *Masundire v Willowvale Mazda Motor (Ind) (Pvt) Ltd (an* unreported judgment dated 6 December 1995) Bartlett J was of the opinion that a literal interpretation of s 1A is so illogical as to lead to absurdity. I am not sure he was right. It could be argued fairly strongly that the introduction B of employment codes of conduct in December 1990 heralded a clear shift in labour policy from direct State control to an increase in labour autonomy. It may well be that it was considered that if employees in a particular undertaking were competent to negotiate a code of conduct, the indication was that they had reached a position where they were capable of looking after their own interests and solving their own problems. C Secondly, employees were now being encouraged to negotiate collective bargaining agreements dealing comprehensively with their conditions of service. (See, for instance, Collective Bargaining Agreement: Commercial Sectors, SI 45 of 1993, which in s 24 clearly envisages that notice may be included in individual contracts). *Then again it may have been thought that, as dismissal for misconduct was a major area of contention, once* D *a code of conduct was put in place, the need to regulate misconduct would be covered; hence if there was no longer the necessity in that area for the protection which existed under the Regulations, the other subsidiary protections might just as well be repealed.* Finally, there is no ambiguity in what s 1A provides. It clearly specifies that once a code of conduct has been registered, ss 2 and 3 do not apply. Nothing could be clearer." (The emphasis is mine)

E In *Samuriwo's* case *supra* Garwe J was also of the opinion that s 1A of the Regulations contained very clear and unambiguous language, the effect of which was that prior written approval of the Minister to terminate on notice a contract of service with an employee to whom the provisions of a registered Code of Conduct applied was not required. The learned judge made the F pertinent observation that the legislature must be presumed to have been aware when enacting s 1A of the Regulations that employment Codes of Conduct contained provisions which dealt with masters of discipline and administration of discipline at workplaces.

The *ratio decidendi* in *Kwaramba's* case *supra* was also to the effect that there G was no ambiguity in the meaning of s 1A of the Regulations. The basis of the decision was that once it was established as a fact that there was in operation in the undertaking a registered employment Code of Conduct, the provisions of which applied to the employee whose contract of service was sought to be terminated on notice, the employer was not under a duty to obtain prior written H approval of the Minister to terminate the contract of employment on notice.

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It is important to point out that the effect of the *ratio decidendi* in *Kwaramba 's* A case *supra* was not that the employer was free to terminate the contract of employment on notice regardless of the cause thereof. It is clear from the incorporation of the Code of Conduct into the procedural requirements for the termination of a contract of employment that the intention of the legislature was that where misconduct was involved, or the decision to terminate was of B a disciplinary nature, the employer was bound to comply with the disciplinary procedure prescribed in the Code of Conduct.

In this case, the appellants agreed that there was no act of misconduct alleged against them. The parties had failed to agree on the new terms and conditions of employment proposed by the second respondent to meet the operational requirements of its business. The second respondent had a right to terminate C the contracts of employment with the appellants by giving them one calendar month's notice and could exercise it without obtaining prior written approval of the Minister. The decision in *Kwaramba's* case *supra* is, in my view, correct, whilst that in *Masundire's* case *supra* is wrong.

The next question to determine is whether the right given to the employer to D terminate the contracts of employment on giving the appellants one month's notice for non-disciplinary reasons could be exercised without regard to the principle of natural justice expressed in the maxim *audi alteram partem*("the *audi* rule"). The *audi* rule is a common-law principle which has been applied by courts in review proceedings as part of administrative law, to grant relief to persons whose rights, liberty, property, or legitimate expectation have been E adversely affected by decisions made by public authorities or bodies in the exercise of statutory (public) powers without having been afforded the opportunity to be heard. In *Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731 (A) Corbett CJ at 748 G-H said the classical formulations of the *audi alteram partem* rule state that:

> "[W]hen a statute empowers a public official or body to give a decision F prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter: see *Chikane's* case [1] *supra* at 379G) unless the statute expressly or by implication indicates the contrary."

The principle can and has been applied in appropriate circumstances to G decisions made in the exercise of contractual rights. Whether or not the *audi* rule is applicable to a particular decision will depend on the circumstances of the case, particularly whether the express or implied terms of the statute or contract under which the decision is taken require its observation.

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A There is a presumption in favour of the application of the *audi* rule when the decision is made in the exercise of a statutory power unless the rule is expressly excluded. There is no similar presumption when a decision is taken in the exercise of a contractual right because the question in the area of contract is whether or not failure to hear the other party constituted a breach of contract. A party cannot be in breach of an obligation which has not been B made an express or implied term of the contract.

In *Marlin v Durban Turf Club &Ors* 1942 AD 112Tindall JAsaidat 126-127 that when the *audi* rule was being applied to procedures of tribunals it was:

> "...merely a compendious ... way of saying that such tribunals must observe certain fundamental principles of fairness which underlie our C system of law as well as the English law.... The said test of fundamental fairness, however, must be applied with due regard to the nature of the tribunal or adjudicating body and the agreement, if any, which may exist between the persons affected."

In *Gründling v Beyers & Ors* 1967 (2) SA 131 (W) Trollip J said at 141 D-E:

> D "In a statute empowering an official or body to give a decision adversely affecting the rights of liberty or property of an individual, a legal presumption usually operates that the *audi alteram partem* rule has to be observed. There is no such presumption in a contract. The obligation to afford a hearing according to natural justice must there be either an expressed or necessarily implied term of the contract. *(Russell v Duke of* E *Norfolk* [1948] 1 All ER 488, [1949] 1 All ER 109; *Lawlor v Union of Post Office Workers* [1965] 2 WLR579 at pp 591/2; cf *Marlin v Durban Turf Club and Ors* 1942 AD 112 at pp 122, 127/128)."

At p 141H His Lordship said that ordinarily an obligation to afford a hearing was not implied in the pure contract of master and servant in respect of the latter's dismissal.

F The test enunciated by Trollip J in *Grundling's* case *supra* was applied with approval by Botha JA in *Turner v Jockey Club of South Africa* 1974 (3) SA 633 where at 645H-646B he said:

> "In the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the G relevant enactment, while in the case of a tribunal created by contract the obligation derives from the express or implied terms of the agreement between the persons affected. *(Maclean v Workers' Union* [1929] 1 ChD 602 p 623). The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in a contract as stated in H *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (AD) at pp 214-5, and the

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> authorities there cited. The test is, of course, always subject to the A expressed terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified."

Lastly on the test to be applied, I need to refer to what was said by Lord *Wilberforce in Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 (HL). This was a case in which the Scottish education

authority terminated the B employment of a teacher by giving him notice in terms of the Education (Scotland) Act 1962. The teacher complained that the decision to terminate his contract of employment was unlawful because he had not been heard before being dismissed. At p 1293h His Lordship had this to say:

> "The appellant's challenge to the action taken by the respondents raises a question, in my opinion, of administrative law. The respondents are a C public authority, the appellant holds a public position fortified by statute. The considerations which determine whether he has been validly removed from that position go beyond the mere contract of employment, though no doubt including it. They are, in my opinion, to be tested broadly on arguments of public policy ...".

Later at p 1294 c-h he said: D

> "What is the test of whether the appellant is entitled to a hearing, or to state his case? In the judgments in the courts below and also in argument at the Bar, this was put largely in terms of the question whether the relation between the appellant and the education authority was that of master and servant, or was some other relation. If the appellant was merely a servant then, it was said, the law is that he can be dismissed without a hearing; and E his remedy lies only in damages. That the relationship between the appellant and the respondents was simply that of servant and master was the opinion of the Lord Ordinary, and the same approach is implicit in the judgments of the Inner House.... The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found, in one form or F another, in reported cases. There are two reasons behind it. The first is that, in master and servant cases, one is normally in the field of the common law of contract *inter partes,* so that principles of administrative law, including those of natural justice, have no part to play.... One may accept that if there are relationships in which all requirements of the observance of the rules of natural justice are excluded, ... these must be G confined to what have been called 'pure master and servant cases', which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection."

The cases cited by Mr *Biti* as authority for the submission that the *audi alteram partem* rule was applicable to the decision of the second respondent H

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A to terminate the appellants' contracts of employment on notice, involved public authorities or bodies exercising statutory (public) power. These are cases which properly gave rise to questions of administrative law. See *Langeni & Ors v Minister of Health & Welfare & Ors* 1988 (4) SA 93 (W); *Lunt v University of Cape Town & Anor* 1989 (2) SA 438 (C); *Administrator, Transvaal v Traub supra; Administrator, Transvaal & Ors v Zenzile & Ors* B 1991 (1) SA21 *(A); Administrator, Natal & Anor v Sibiya & Anor* 1992 (4) SA 532 (A); and *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S).

The decision to terminate the appellants' contracts of employment on notice was made in the exercise of a contractual right. Mr *Hwacha* argued that this C was a case of a mere contract of employment between private individuals. It was not an express term of the contract of employment containing the right to terminate on notice that the appellants should be heard before the decision to give them notice was taken. There is no basis on which such an obligation can be implied into the contract. That is particularly the case when termination for misconduct is expressly provided for in the Code of Conduct.

D In *Monckten v British South Africa Co* 1920 AD 324 a teacher who had refused to accept a decision by the Administration to transfer him from one school to the other was given notice to terminate his contract of employment. Had the action by the Administration been of a disciplinary nature, it would have been bound to hold an enquiry in compliance with the procedural requirements E prescribed by the Civil Service Regulations 1898. The appellant had not been charged with any act of misconduct. No formal enquiry had been considered necessary. The decision to terminate was taken in terms of his contract. In answer to the complaint by the appellant that the decision to terminate his contract of employment on notice was unlawful because it was in contravention of the *audi alteram partem* rule, Innes CJ said at 330:

> F "If the right of the Administration to terminate his service were based upon the enquiry; if the validity of their subsequent action depended upon these proceedings, we might have been able to assist him. But that is not the position; the steps subsequently taken were taken under the terms of his letter of appointment, and were covered by those terms. He held his post subject to transfer, and subject to three months' notice, or to equivalent G salary in lieu thereof. He was offered transfer to another educational

post, which he did not accept; and failing acceptance he received four months' pay and his service was terminated. I agree with the learned judge in thinking that he was not punished under the Regulations but dealt with under his contract."

Mr *Hwacha,* for the respondents, correctly pointed out that the appellants H were not dealt with in terms of the registered employment Code of Conduct,

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the provisions of which applied to them, because the decision to terminate A their contracts of employment was not of a disciplinary nature. No allegations of misconduct were made against the appellants. They were dealt with in terms of their contracts of employment. They had been offered employment under the new terms and conditions which they did not accept. The other branch managers had appreciated the fact that the proposed changes in their conditions of employment were in the interest of the business and accepted them. B

The appellants perhaps failed to appreciate that a contract of employment cannot remain static throughout the whole of its existence regardless of the changes in the fortunes of the business. Refusal to accept a change in the terms and conditions of employment necessitated by the commercial interests of a business may be a good enough reason for terminating a contract of employment C on notice. The decision to terminate the appellants' contracts of employment on notice without hearing them was not unlawful.

I agree with the learned judge in the court *a quo* that the provisions of ss 18(1) and 18(9) of the Constitution were irrelevant to the resolution of the questions raised by the application placed before him. There is no need to say more on them. D

The appeal is accordingly dismissed with costs.

Chidyausiku CJ, Sandura JA, Ziyambi JA, and Gwaunza JA concurred. E

Honey & Blanckenberg, appellants' legal practitioners

Dube, Manikai & Hwacha, respondents, legal practitioners

1 *Cabinet for the Territory of SWA v Chikane & Anor* 1989 (1) SA 349 (A)—*Editor*

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MATANDA & ORS v CMC PACKAGING (PVT) LTD & ORS 2003 (2) ZLR 221 (H)

Citation	2003 (2) ZLR 221 (H)
Case No	Judgment No. HH-113-03
Court	High Court, Harare
Judge	Hungwe J
Heard	20 August 2003
Judgment	17 September 2003s

Counsel *D A Machingura,* for the applicants
H Simpson, for the respondents

Case Type Civil application

Annotations No case annotations to date

Flynote

C **Company** — *shareholder — derivative action to protect company — allegation of oppressive or prejudicial management of company — when court may interfere with commercial decisions*

Headnote

As they had, by guaranteeing loans, undertaken personal risk in favour of a D company, the directors of the respondent demanded preferential treatment in the allotment of shares and voting rights. The applicants, who were shareholders, resisted preferential treatment on the allotment of shares. The matter was resolved by a shareholders' agreement that the directors enjoyed greater voting rights than the applicants.

In terms of s 196(1) of the Companies Act [*Chapter 24:03*], a member of a E company may apply to the High Court for an order in terms of s 198 on the ground that the company's affairs are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the interests of some part of the members including himself. The applicants sought such an order, requiring, among other things, that shareholders be allotted only one vote for each share held.

F *Held,* that it is not part of the business of the court to determine the wisdom of a course adopted by a company in the management of its own affairs. There is no suggestion in the Act that the court ought to review the opinion of the company and its directors in regard to a question which primarily, at least, is domestic and commercial. Accordingly, unless it G was shown that the respondents acted *mala fide* in making those decisions complained of, the court could not to interfere with internal business decisions made in the proper interests of that company. The applicants could not complain of oppressive or unfairly prejudicial conduct by the respondents on account of the voting rights of the H directors, as they were signatories to the shareholders agreement and

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Hungwe J

there was no allegation that their consent to that agreement was improperly A obtained or that it was induced by fraud.

Case cited

Levin v Felt & Tweeds Ltd 1951 (2) SA 402 (A) B

Legislation considered

Companies Act [*Chapter 24:03*], ss 196 & 198(1)

Case information

D A Machingura, for the applicants

H Simpson, for the respondents C

Judgment

Hungwe J: In this application the applicants seek an order:

a) directing the respondents to engage Kudenga and Company Chartered Accountants (Zimbabwe) to undertake an audit of the company' s books for the 12 month period between October 1996 and 31 December 1999 D

b) setting aside a resolution by the shareholders adopting an agreement entered into by both parties to this dispute on 10 February 1997 and substituting in its stead the following:

> "Each holder of fully paid up shares of the Company shall be entitled, in General Meetings, to one (1) vote for each fully paid up ordinary share held by such member". E

This application is brought in terms of s 198 (1) of the Companies Act [*Chapter 24:03*] which states:

> "(1) If the court is satisfied that an application under section *one hundred and ninety-six or hundred and ninety-seven* is well founded, it may make such order as it thinks fit for giving relief in respect of the maters F complained of."

In terms of s 196(1) a member of a company may apply to the court for an order in terms of s 198 on the ground that the company's affairs are being or have been conducted in a manner which is oppressive or unfairly prejudicial to the interests of some part of the members including himself.

The first applicant deposed to the founding affidavit on behalf of the G applicants. In it he complains basically of the unfairness of the shareholding structure as well as the voting rights and powers of the directors and the employees.

The background to this complaint can best be understood by a brief résumé of how first respondent, in which all the applicants and second to seventh respondents are shareholders and members, was created. H

2003 (2) ZLR p223

Hungwe J

A The applicants, and all the respondents except first respondent, terminated their contracts of employment with a company called Carnand-Metalbox between 1995 and September 1996. They agreed to apply their terminal benefits towards the initial purchase of the assets and equipment of their former employer through the first respondent, which was then incorporated for the purpose. Their joint resources were only $110 000. Two million dollars was required for the purchase of the said assets and equipment.

B In order to make the purchase first respondent needed that $2 million. In order to start business a further $900 000 was required as working capital. The first respondent obtained funding for this as loans from Scotfin and Unibank respectively. The second to seventh respondents, as directors, guaranteed these loans in their personal capacities.

As they had undertaken personal risk in favour of the first respondent, the C directors demanded preferential treatment in the allotment of shares and voting rights. The applicants resisted preferential treatment on the allotment of shares. The matter was resolved by an agreement that the directors enjoyed greater voting rights than the applicants.

On the basis of that agreement, a shareholders agreement was drawn and signed by the parties. It is Annexure "A" to the papers and is dated 17 April D 1997. In terms of that agreement the directors enjoy 19 votes when voting as a bloc as compared to 18 for the applicants when voting as a bloc, although in terms of shareholding the directors command only 36 *per centum* of shares as opposed to the 64 *per centum* for the applicants. This is the main bone of contention in this matter.

I consider the rest of the other complaints raised by the applicants as E insignificant. There have been no regular meetings of the shareholders and those that have been held were after pressure had been brought to bear on the management. Secondly, it is said that management has not carried out an audit of the company's affairs, despite a resolution of the general meeting to that effect.

Thirdly, they also say no information has been supplied by management in F respect of the status of their pension contributions towards their group pension fund.

In response to these three complaints, the respondents have demonstrated, on the papers, that in fact meetings have been held. The source of their dissatisfaction is that the applicants want a detailed report on every administrative aspect of the first respondent. The respondents have explained that they have made a business decision that once it is economically justifiable G to invite high profile auditors as requested by the applicants, they will do so. At the time this was demanded

of them it was not worth it. The respondents have also demonstrated compliance with their statutory obligations in respect of pension and tax payments.

Before a member invites the court to interfere in the internal arrangement of H a private company, that member must be reminded of the words of Centlivres

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2003 (2) ZLR p224

Hungwe J

CJ in *Levin v Felt & Tweeds Ltd* 1951 (2) SA 401 (A) at 414-415 where A he stated:

> "It is not part of the business of a court of justice to determine the wisdom of a course adopted by a company in the management of its own affairs [1]. I cannot find any trace in the statute of a suggestion that the Court ought to review the opinion of the company and its directors in regard to a question which primarily at least is domestic and commercial [2]"... B

See also HL Hahlo, *South African Company Law Through the Cases* 4 Ed p 275; Nkala & Nyapadi *Company Law in Zimbabwe* (1995) p 307.

Unless it is shown that the respondents acted *mala fide* in making those decisions complained of, a court ought not to interfere with internal business C decisions made in the proper interests of the company. There is no allegation on the papers that, in failing to hold general meetings regularly, the respondents were intent on deceiving the shareholders, or that an audit could reveal a fraud on the applicants, or an abuse of power.

Section 196 speaks of oppressive or unfairly prejudicial conduct by the respondents. It seems to me that that could only have been raised in respect of D the voting rights of the directors. The answer to that lies in the shareholders' agreement to which the applicants are signatories. There is no allegation that the applicants' consent to that agreement was improperly obtained or that it was induced by fraud. In fact the agreement is along the usual lines.

It provides for mechanisms for its review after five years. That avenue has not E been explored.

In any event the arrangement set out, quite properly in my view, protects those shareholders who have been prepared to put their neck on the block so to speak, in respect of the survival of the company.

In my view the application is ill conceived. I am not satisfied that there are F grounds upon which the intervention of the court can be justified.

In the result the application is dismissed with costs.

Dube, Manikai & Hwacha, applicants' legal practitioners

Manase & Manase, respondents' legal practitioners G

1 Citing Lord Loreburn in *Poole v National Bank of China Ltd* [1907] AC 229 at 236
2 Citing Lord Shaw in *Caldwell & Co Ltd v Caldwell*

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/ASSOCIATED NEWPAPERS OF ZIMBABWE (PVT) LTD v MADZINGO & ANOR 2003 (2) ZLR 225 (H)

ASSOCIATED NEWPAPERS OF ZIMBABWE (PVT) LTD v MADZINGO & ANOR 2003 (2) ZLR 225 (H)

2003 (2) ZLR p225

Citation 2003 (2) ZLR 225 (H)

Case No	Judgment No.HH-157-03
Court	High Court, Harare
Judge	Omerjee J
Heard	18 September 2003
Judgment	18 September 2003
Counsel	*A P de Bourbon SC,* with him *M P Mahlangu,* for the applicant Mrs *F Maxwell,* for the respondents
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

C **Criminal procedure** — *seizure of articles — seizure without warrant — when lawful — need for police to show that they believed, on reasonable grounds, that a warrant would be issued if it was applied for and the delay in obtaining a warrant would prevent the seizure or defeat the object of the search — effect of failure to show this*

D **Media** — *requirement for provider of mass media services to register under Access to Information and Protection of Privacy Act [Chapter 10:27] — publisher of newspaper making application — entitled to continue publishing until application considered*

Headnote

E The applicant, a newspaper publisher, had applied for registration under s 93 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*]. It had done so after the Supreme Court declined to hear its constitutional application against the requirement to register. In spite of the applicant having applied to register, armed police had seized a large quantity of the applicant's property and placed a blockade around the F applicant's premises. The police claimed that they had seized the property in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The applicant sought an order for the return of the property and for the removal of the police from the premises.

Held, that as no warrant had been issued for the seizure of the material, the police would have to show that they believed, on reasonable grounds, G that a warrant would be issued if it was applied for and the delay in obtaining a warrant would prevent the seizure or defeat the object of the search. As they had produced no evidence to that effect, the seizure was unlawful.

Held, further, that s 8 (2) of the Access to Information & Protection of H Information (Registration, Accreditation and Levy) Regulations, 2002

Omerjee J

(SI 169C of 2002) provided that, once a person had submitted an A application for registration, that person was permitted to carry on the activities in question whilst the application was being considered. There was no time limit; the provision was open-ended. The applicant was entitled to continue publishing and the police were not entitled to prevent it from doing so.

Provisional order granted. B

Case information

A P de Bourbon SC, with him *M P Mahlangu,* for the applicant

Mrs *F Maxwell,* for the respondents

Judgment

Omerjee J: The applicant is the owner and publisher of *The Daily News,* a C daily newspaper published in Harare and distributed throughout Zimbabwe. Its publishing activities commenced in March 1999 and continued until 13 September 2003. The Access to Information and Protection of Privacy Act [*Chapter 10:27*] (the Act) was promulgated and became law in March 2002. One of its provisions is that providers of mass media services, which includes D publishers of newspapers, must register. In terms of s 93 of the Act, any person who immediately before the Act became law, was publishing a newspaper was deemed to be lawfully registered for a period of three months. Therefore, the applicant was required to register before 15 June 2002. On that date the Access to Information and Protection of Information (Registration, Accreditation and Levy) Regulations, 2002 (SI 169C of 2002) were promulgated (the Regulations). E The Regulations prescribed the various forms that had to be used for registration. The applicant was of the view that various provisions of the Act were inconsistent with the Declaration of Rights and therefore unconstitutional and accordingly void. Acting on legal advice, the applicant applied to the Supreme Court for an order declaring certain provisions of the Act to be a nullity. It was of the opinion that the provisions were a nullity and, accordingly, F it did not apply for registration.

The application was heard on 3 June 2003. On 11 September, the Supreme Court handed down a ruling that it was not prepared to hear and determine the merits of the case until the applicant had applied for registration. After the ruling was handed down on Thursday 11 September, the applicant proceeded G to put together the application for registration. The applicant published a further edition of *The Daily News* on Friday, 12 September.

Late in the evening of Friday, 12 September, armed police visited the premises of the applicant at Old Mutual House and at Southerton and evicted all the employees from those premises. On the morning of 13 September, the chief executive officer of the applicant went to the Harare Central Police Station H

A where he was told that the applicant was to be charged with contravening s 72 of the Act and he prepared and signed a warned and cautioned statement. He sought permission from the Police for members of the staff of the applicant to be allowed to enter the applicant's offices so that they could prepare the application for registration. After consultation with his superiors, the police officer, Supt Chivasa, allowed certain named employees to enter the premises B for that purpose.

On Monday 15 September, the applicant presented its application for registration to the Media and Information Commission. The appropriate fees were paid and receipted and the application acknowledged. Once the application was filed the applicant approached the first respondent and sought permission C to continue its activities i.e. to publish a newspaper. The first respondent wanted proof that an application for registration had been made and that was duly furnished. However he then said that he was awaiting advice from the Attorney-General's Office and refused to lift the blockade of the applicant's premises until the advice was obtained. The first respondent has since refused to lift the blockade.

D The applicant claims that it is entitled to carry on its business of publishing a newspaper by virtue of the provisions of s 8 of the Regulations. Subsection (2) of that section provides that an applicant for registration who, before the date of commencement of the Act carried on the activities of a mass media service, shall, during the consideration of his application, be permitted to carry on the E activities of the mass media service until his application is determined.

The applicant claims that the matter is one of extreme urgency because it employs approximately 275 employees and, by reason of not being able to operate, it is losing gross revenue from the sales of its newspaper of approximately $18 million a day and from its advertising activities of between $17-20 million a day. The interests and welfare of its employees are in F jeopardy.

On 16 September, first respondent instructed police officers under his command to remove forcibly various pieces of equipment belonging to the applicant. The equipment consists of computers, printers and related office equipment.

G The applicant is seeking an order that the respondent vacate the premises of the applicant and restore possession and control thereof to the applicant, return all the goods and equipment removed

from the applicant's premises and refrain from interfering with the normal business activities of the applicant and its employees.

H The response of the respondent is as follows:

2003 (2) ZLR p228

Omerjee J

The respondents rely on s 49 of the Criminal Procedure and Evidence Act A [*Chapter 9:07*]. That section provides that the State may "in accordance with Part VI" of that Act, seize any article which is, on reasonable grounds, believed to be concerned in the commission of an offence. Section 50 of Part VI deals with seizure under warrant. There is no evidence before the court that a warrant was issued. Section 51 deals with seizure without a warrant. It provides that B a police officer may seize any article if the person concerned consents thereto, or if he believes, on reasonable grounds, that a warrant would be issued if it was applied for and the delay in obtaining a warrant would prevent the seizure or defeat the object of the search. There is no allegation that the applicant consented to the seizure. Nor is there any allegation that the first respondent believed that a warrant would be issued if it had been applied for and that he C considered that the delay in obtaining a warrant would defeat the object of the search. Accordingly the seizure was not done in accordance with Part VI of the Criminal Procedure and Evidence Act.

Since the provisions of the Act have not been declared to be unconstitutional and therefore void they must be observed. Therefore the applicant, being a D provider of a mass media service, is required to register in terms of s 66 of the Act. It is not disputed by the applicant that it is not registered. However, it has submitted an application for registration and has paid the requisite application and registration fees. In terms of s 8(1) of the Regulations, the Media and Information Commission is required, as soon as practicable, and in any case within 60 days either to grant or to refuse the application. Subsection (2) of E s 8 of the Regulations provides that the applicant is permitted to continue carrying on the activities of the mass media service until its application is determined.

The Act came into operation on 15 March2002. It provides in s 93 that persons such as providers of mass media services who are in business when the Act becomes law shall be deemed to be registered for a period of three months. F Obviously, it was envisaged that those persons who were required to register would apply and be registered within the three month period. However, the Regulations were not promulgated until 15 June 2002, the last day of the three month period. That meant that no application for registration could be made within the three months because the application forms were not prescribed, G neither were the fees until the end of the three months. In order to cater for the problem that would have ensued, s 8(2) of the Regulations provides that once a person has submitted an application for registration then that person is permitted to carry on the activities in question whilst the application is being considered. There is no qualification in s 8(2) that it refers only to applications which are made within a few days or any specified period after the three-month H

2003 (2) ZLR p229

Omerjee J

A period has elapsed. It applies to any application for registration, whenever it is made. Mrs *Maxwell* contended that the applicant "should not benefit from s 8(2)". As mentioned earlier, the Regulations were not promulgated until the very end of the three month period of deemed registration. That means that every application for registration made after 15 June was made by a person who was not registered. Section 8(2) does not provide that its provisions apply only B to those who apply for registration within a month or any stipulated period thereafter. It is open-ended. Mrs *Maxwell* does not give any legal basis for her submission and, indeed, there is none. It was not the order of the Supreme Court that made the applicant an "illegal operator". The Supreme Court merely declared that the applicant was acting outside the law. In fact it had been doing so since 15 June 2002. It only started operating within the law after C it lodged its application for registration on 15 September 2003.

Therefore, in view of the clear and unambiguous wording of s 8(2) of the Regulations, the respondents have no legal right to prevent the applicant and its employees from gaining access to the premises of the applicant and carrying on its business of publishing a newspaper. It is not in dispute that there is a D pending application for registration submitted by the applicant.

Furthermore, as regards the return of the property that was seized, the respondent claims that it was seized in order to enable it to be declared forfeited in terms of s 72(3) of the Act. I have dealt earlier with the contention that the seizure was not in accordance with Part VI of the Criminal Procedure E and Evidence Act. That being the case, the property must be restored to the applicant. It may only be declared forfeit after conviction.

The provisional order sought is granted in terms of the Draft Order filed of record.

F *Gill, Godlonton & Gerrans,* applicant's legal practitioners

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

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Source:
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VOLUNTEER FARMS (PVT) LTD v MPOFU & ORS 2003 (2) ZLR 230 (H)

Citation	2003 (2) ZLR 230 (H)
Case No	Judgment No. HB-96-03
Court	High Court, Bulawayo
Judge	Cheda J
Heard	18 September, 2003
Judgment	18 September, 2003
Counsel	*Ms P Dube,* for the applicant *C Dube,* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Interdict — *requirements for — application by landowner whose land has* C *been compulsorily acquired for eviction of persons settled on land — whether landowner has clear right to protect and no other satisfactory remedy - balance of convenience — whether favours landowner or persons resettled on land*

Land — *Land Acquisition Act [Chapter 20:10] — s 8 — acquisition of land for resettlement — objection by landowner to acquisition and application* D *to Administrative Court for confirmation — whether suspends acquisition.*

Headnote

The Minister of Lands, Agriculture and Rural Resettlement acquired the applicant's farmland in terms of s 8 of the Land Acquisition Act [*Chapter 20:10*] and settled the first five respondents on it. One of the E consequences of the acquisition, as stated in s 9(1)(b) of the Act, was that the applicant was obliged to "cease to occupy, hold or use" the land within 45 days. The applicant had objected to the acquisition, so the Minister (the acquiring authority) applied to the Administrative Court in

terms of s 7 of the Act for the acquisition to be confirmed. The applicant then sought an order in the High Court evicting the respondents from its F land and interdicting them from interfering with its farming operations, pending confirmation of the acquisition by the Administrative Court.

Held that the applicant's objection to the acquisition, and the Minister's application for its confirmation, did not suspend the acquisition. The respondents had the right to remain on the land in terms of the acquiring authority's procedure until the matter was determined by the Administrative Court. G

Held, further, that the requirements for an interdict had not been met. The applicant's clear right to its land had been interfered with in the form of the order of acquisition, so it was no longer a clear right; the balance of convenience favoured the resettlement of the respondents, rather than the applicant; and the applicant had another satisfactory remedy which was recourse to the Administrative Court. H

Cheda J

Cases cited A

M & T Mylne (Pvt) Ltd v Min of Lands & Anor HC 2051-02

Min of Lands v CFU 2001 (2) ZLR 457 (S)

S v Nottingham Estates (Pvt) Ltd 1995 (1) ZLR 253 (S)

Union Govt (Min of Mines) v Thompson 1919 AD 404

Vengesai & Ors v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H)

Legislation considered B

Land Acquisition Act [*Chapter 20:10*], s 8

Case information

Ms P Dube, for the applicant

C *C Dube,* for the respondents

Judgment

Cheda J: On 3 July 2003 applicant filed an urgent chamber application seeking the eviction of the third, fourth and fifth respondents from Volunteer Farm, hereinafter referred to as "the property".

D The brief history of this matter is that the applicant is the owner of four units which are held under a consolidated title under Volunteer Farms (Pvt) Ltd. The Government of Zimbabwe through the Ministry of Agriculture, Lands and Resettlement issued a preliminary notice and subsequently a section 8 order in terms of the Land Acquisition Act [*Chapter 20:10*] (as amended) against the applicant. The effect of a section 8 order was to stop the applicant from E actively carrying out agricultural activities on "the property".

Ms *P Dube* for the applicant raised three issues which I will deal with below:

1. Legitimacy of the Land Reform Process

It is her argument that this process is legally not complete yet, as the matter is pending before the Administrative Court by virtue of an objection lodged by F the applicant. It is for this reason that the applicant should be allowed to carry on with its agricultural activities.

In my view this question requires the examination of whether the acquiring authority, being the Ministry of Lands, Agriculture and Rural Resettlement, though not cited in this case, has complied with all the requirements for the G acquisition of the applicant's land. A preliminary notice was issued and served on applicant and a section 8 order was also issued which effectively prevents the applicant from actively continuing with its agricultural activities. Subsequent to that, an application for the confirmation of the section 8 order and an objection to the acquisition of their property were lodged with the Administrative H court by the Ministry and the applicant respectively.

Cheda J

2. Whether or not respondents are tenants A

The first to fifth respondents are newly resettled farmers although the applicant queries their status. The sixth respondent is the Officer-in-Charge of Lupane police under which the applicant's administration falls. I agree with Ms *Dube* that no lease agreement was filed by either the acquiring authority or the respondents themselves to prove their rights. However, to insist on that B proof, to me does not take the matter any further because the first, second, third, fourth and fifth respondents derive their right of occupation from the acquiring authority. They have been selected and settled in that property and if the acquiring authority is not happy with that settlement it should evict them or will evict them Their tenancy in my view will be a matter between themselves and the acquiring authority. C

3. The effect of section 8 order

Ms *Dube*'s argument is that s 8 of the Act should not be read in isolation but must be read in conjunction with ss 5 and 7 which deal with the issuing of a preliminary notice and the confirmation or otherwise by the Administrative Court. It is also her argument that s 8 as amended gives the acquiring authority D the right to ignore the fact that the matter is pending before the Administrative Court, and that on its own deprives applicant of its right to be heard, which of course offends against the principles of natural justice.

Mr *C Dube,* on the other hand, has argued that the enquiry should be whether the acquiring authority has complied with all the legal requirements in terns of the Act or not. E

It is common cause that the acquiring authority served the applicant with a preliminary notice in terms of s 5 of the Act on 1 June 2001, with the acquisition order on 12 January 2002 and that subsequent applications for confirmation were issued and served on applicant on 19 March 2002. This matter is therefore awaiting a hearing at the Administrative Court. The F applicant, despite the stage which this dispute is at, wants to be allowed to continue actively with its agricultural activities.

The pertinent question, therefore, is whether it should be allowed to do so. Ms *Dube* has argued thatthe constitutionality of s 8 of the Act is being challenged before the Supreme Court, not by applicant but by some interested parties G facing the same dilemma in the ongoing land disputes. Mr *C Dube* on the other hand has argued that applicant is not party to those proceedings and therefore should not use that argument. I agree with Mr *Dube,* that applicant is indeed not party to those proceedings and cannot therefore seek to be incorporated by reference in matters which do not relate to it. There is nothing in the papers before me that show it is part thereof. The court has a discretion in deciding H

Cheda J

A whether or not it should grant an interdict. That discretion must be exercised upon consideration of all the circumstances surrounding the case at hand. The acquiring authority has in my view legally acquired applicant's property, following all the legal procedures as laid down in the Act. The respondents have been settled on the property. This has to be taken into account too.

The intention of the legislature cannot be ignored when dealing with the effect B of s 8. Ms *Dube* argues that, interpreted as it is (amended), it tends to deprive the applicant of its right to be heard. Her argument is that while the applicant has a right to object to the acquisition, which objection lies with the Administrative Court, s 8 gives the acquiring authority the right to evict applicant and this therefore tends to finalise the matter. It is this scenario C which results in absurdity. If I understood her correctly she meant that while the matter is pending before another court of competent jurisdiction, in this case the Administrative Court, the acquiring authority is given a right to resettle people on its land, which becomes a final process.

The Act gives the applicant the right to object to the acquisition, which was what has been done. But the applicant is also entitled to approach the Supreme D Court on the basis of the unconstitutionality of any Act of Parliament. It is trite that an appeal against an order of a court or tribunal, or *quasi-*

judicial body or executive authority suspends the execution of the said order or decision. This point was ably stated in *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at 598E-F where Gillespie J stated:

> E "In stating the common law, Corbett JA referred to the automatic stay of execution upon noting of an appeal, as a rule of practice. That is, not a firm rule of law, but a long established practice regarded as generally binding, subject to the court's discretion. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound F by the four corners of its enabling legislation."

The cardinal rule of interpretation is that words should be given a meaning which expresses the intention of the legislature. As Gubbay CJ in *S v Nottingham Estates (Pvt) Ltd* 1995 (1) ZLR 253 (S) at 256D-E eloquently stated:

> "The primary rule of interpretation is, of course, to endeavour to ascertain G the intention of the law maker from an examination of the provision under consideration, placed in proper context. A court will commence its enquiry by giving the word its grammatical signification, unless it is clear that the literal sense, when so applied, defeats the legislative intendment. In such an event a deviation from the ordinary meaning is justified, provided always that the word is sufficiently flexible to admit of another H meaning by which such intention can be better effected."

2003 (2) ZLR p234

Cheda J

In casu, the legislature in my view deliberately and clearly provided for an A objection to the Administrative Court. It is my view, therefore, that the intention of the legislature was to have all matters related to the dispute arising from the Land Reform Process be dealt with by the Administrative Court. Those matters related to the constitutionality of the said process will be dealt with by the Supreme Court. B

This application being one for an interdict, the requirements for an interdict should be examined in relation to this application. These are clearly laid down in the *Law of South Africa* Vol 8 (1) at para 114 as follows:

(a) a *prima facie* right;

(b) a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; C

(c) that the balance of convenience favours the granting of an interim interdict; and

(d) that the applicant has no other satisfactory remedy.

I will deal with these requirements in relation to the facts of the matter as follows: D

(a) Prima facie right

The applicant is indeed the registered owner of the property, which is a clear right. However, that right in my view has now been interfered with by the statute in the form of a section 8 order which it is now challenging and is E therefore a subject of dispute before the Administrative Court. That right, therefore, in my view is no longer a clear right.

(b) A well grounded apprehension of irreparable harm

No argument has been advanced as to the apprehension of irreparable harm and as such nothing turns on this argument.

(c) The balance of convenience F

The acquiring authority's intention is to settle settlers like the first, second, third, fourth and fifth respondents and it has already done so. This exercise has been carried out in terms of the Act. In my view to remove them from the property will no doubt cause inconvenience to them and therefore the balance of convenience favours their settlement and not the applicant, who has been G lawfully removed. I say so because there is always a presumption of constitutionality in a statute.

(d) The applicant has no other satisfactory remedy

Again no argument by applicant has been advanced. In my view, therefore, the fact that the matter can still be determined at the Administrative Court stands to reason that there is still room for a satisfactory remedy. H

2003 (2) ZLR p235

Cheda J

A The requirements of an interdict have not been met in this case.

The fact that the requirements of an interdict have not been met and that the applicant has not appealed to a higher court but merely objected to the Administrative Court is not enough for this court to find in its favour. In my view an appeal and objection have two entirely different meanings. While an appeal is to a higher authority, an objection as provided for in the Act relates B to the Administrative Court, which court is of a lower jurisdiction than the High Court. In my opinion therefore the fact that applicant has objected to the confirmation of the acquisition of the property cannot and should not prevent the acquiring authority from pursuing its land reform programme as long as it is carried out legally. The land reform program has been declared lawful, see C *Minister of Lands, & Ors v Commercial Farmers Union* 2001 (2) ZLR 457 (S). I hold the view that as long as all the legal requirements laid down under the Act are complied with, the respondents have a right to remain on the property in terms of the acquiring authority's procedure until the matter is determined by the Administrative Court.

The duty of the court in my view is to give effect to the meaning of the language D in a statute if the language is clear and unambiguous. Our courts consistently apply the time-honoured principle that judges are to state the law andnot make it *(judicis est jus dicere non facere),* see *Union Government (Minister of Mines) v Thompson* 1919 AD 404 at 425.

It is my opinion that s 8 as amended is quite clear, the applicant should cease E its operations while awaiting the determination by the Administrative Court. I hasten to point out that in *M & T Mylne (Pvt) Ltd v Minister of Lands & Anor* HC 2051/02, I ruled that the applicant should remain on its property pending the determination of the Administrative Court. In that case respondents had not opposed the application and therefore the court did not have the benefit of both arguments, and the fact that they did not oppose meant that they F probably were no longer interested in the said property.

The application is therefore dismissed with costs.

Coghlan & Welsh, applicant's legal practitioners

G *Paradza, Dube & Partners,* respondents' legal practitioners

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CAPITAL RADIO (PVT) LTD v BROADCASTING AUTHORITY OF ZIMBABWE & ORS 2003 (2) ZLR 236 (S)

Citation	2003 (2) ZLR 236 (S)
Case No	Judgment No. S-128-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Malaba JA, & Gwaunza AJA
Heard	19 June 2002
Judgment	25 September 2003
Counsel	*A P de Bourbon SC,* for the appellant *J Tomana* with him *B Patel,* for the first respondent

Y Dondo, for the second respondent

Case Type Details not suplied

Annotations Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* C *Rights — s 24 — application under — locus standi of applicant — need for applicant to show that alleged contravention of Declaration of Rights is in relation to him — need for applicant to allege which right is being infringed*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* D *Rights — s 24 — application under — locus standi of applicant — a matter of law which needs to be pleaded*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 20 — freedom of speech — includes freedom of the press — right not limited to natural persons — derogation from right to freedom of speech — regulation of broadcasting— a permissible derogation* E *— appointment of board of Broadcasting Authority — appointment by Minister — permissible derogation — control of licensing by Minister — not constitutional*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — interpretation of — presumption of constitutionality — meaning of* F

Headnote

The applicant company wished to establish a radio station. It challenged the constitutionality of several provisions of the Broadcasting Services Act [*Chapter 12:06*]*:*

(a) s 4, under which the board of the Broadcasting Authority is appointed; G

(b) s 6, which makes the Minister of Information the licensing authority;

(c) parts of ss 8 and 22, which impose restrictions on non-citizens;

(d) s 9, which restricts the number of licences that may be issued to broadcasters other than the national broadcaster,

(e) s 11(1), under which conditions may be imposed on a licence; H

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(f) s 11(4), A under which a stated percentage of the content of a television broadcast must be in a minority language;

(g) s 12(1)(f), which required a licensee to state the sources of its funding;

(h) s 12(2) and (3), which limit the period for which a licence is valid;

(i) s 15, which allows the Minister unilaterally to amend a licence; and B

(j) s 16, which allows the Minister to suspend or cancel a licence.

The applicant alleged that these provisions contravened the freedom of speech provisions in s 20 of the Constitution.

The judges delivered separate judgments, concurring in parts, and dissenting in parts.

C *Held,* that an application under s 24 of the Constitution may only be brought to the Supreme Court on relatively narrow grounds. The applicant must show that the alleged contravention of the Constitution is in relation to him. In addition, he must allege which constitutional right is being infringed.

Held, further, that if the applicant is unable to meet these requirements, it D does not mean that he is without remedy: it is possible to bring the matter before the High Court, where all he must show is that he has an interest in the matter.

Held, further, that if the applicant alleges *locus standi* on narrow grounds, he may prejudice himself. *In casu,* the applicant approached the court as an E aspiring broadcaster, not as an individual whose rights were being affected.

Held, further that section 20 of the constitution covered freedom of the press, and such freedom is also enjoyed by corporate persons.

Held, further, that regulation of broadcasting is a permissible derogation from press freedom. The airwaves available are limited. It is permissible F to establish a broadcasting authority and to set reasonable parameters.

Held, further, that in its determination of what is reasonably justifiable in a democratic society the court has to bear in mind that there is always the presumption of constitutionality in favour of legislation. The *onus* is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State G to show that it does not. In comparison to other countries which are accepted as being democratic, the method by which the broadcasting authority in Zimbabwe is appointed and the degree of government control over it meet the requirement that restrictions should be reasonably justifiable in a democratic society.

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Held, further, that because it totally subordinated the regulating authority to A the Minister in the process of granting of broadcasting licences, s 6 was unconstitutional.

Held, further, that by limiting the number of licences to one broadcaster other than the national broadcaster, the legislation effectively created a monopoly, which was unconstitutional. It was also unconstitutional B (Chidyausiku CJ dissenting) to provide that no person should be a holder of both a broadcasting licence and a carrier licence.

Held, further, (Sandura JA dissenting) that the applicant had no *locus standi* to challenge ss 8(1), (2) and (5) or s 22(2), as it had not shown that it was adversely affected by those provisions. It had no *locus standi to* challenge s 11, which relates to television broadcasting C

Held, further, (Sandura JA & Gwaunza AJA dissenting) that as there was a procedure for reviewing the Minister's decisions under ss 15 and 16, those provisions were constitutional.

Held, further, (Sandura JA & Cheda JA dissenting) that it was permissible for Parliament to stipulate the period for which a licence was valid. The periods provided were not unreasonable. D

Held, further, that (Sandura JA & Cheda JA dissenting) that it was not unconstitutional for a licensee to be required to state its sources of funding.

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Barrette & Payette v A-G Canada (1993) 14 CRR (2nd) 166

Capital Radio (Pvt) Ltd v Min of Information (1) 2000 (2) ZLR 243 (S)

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Columbia Broadcasting v Democratic National Committee 412 US 772 (1973)

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National Broadcasting Co v United States 319 US 190 (1942)

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R v Oakes (1986) 19 CRR 308

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Woods & Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS); 1995 (1) BCLR 56 ZS)

F *Zimbabwe Teachers Association & Ors v Minister of Education and Culture* 1990 (2) ZLR 48 (H)

Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (S); 1984 (2) SA 778 (ZS)

Legislation considered G

Foreign Legislation:

Australia

Australian Broadcasting Services Act 1992 ss 3,36(2), 57, 113, 121, 155, 162

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Austria A

Federal Act on the Establishment of an Austrian Communications Authority and a Federal Communications Board ss, 3, 6

Canada

Broadcasting Act 1991, s 3

Canadian Radio-television and Telecommunications Commission Act B s 7(2)

Ireland

Broadcasting and Wireless Telegraphy Act 1988, s 3(1)

Italy

Act No 249 of 31 July 1997

Malaysia C

Communications and Multimedia Act, 1998 ss 7, 30, 34, 37, 38

Communications and Multimedia Commission Act, 1998, ss 6, 12, 18

New Zealand

Broadcasting Act 1989

Nigeria D

Decree 38 (1992)

Decree 55 (1999)

Norway

Act No 127 of 4 December 1992, ss 2 (1) (4), 3, 5, 7

South Africa E

Independent Communications Authority of South Africa Act, 2000, ss 3, 5(3)(4),6(c)(d)(e)

South Korea

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Sweden F

Radio and Television Act, 1996 ss 2(2), 9(3)

United Kingdom

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United States of America G

Communications Act 1934

International Instruments:

African Charter on Human and Peoples Rights, Art 9

International Covenant on Civil and Political Rights, Art 19

Universal Declaration of Human Rights, Art 19 H

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A *Zimbabwe legislation:*

Broadcasting Services Act [*Chapter 12:06*] ss 4(2)(3), (6), 8(1)(2)(5), 9(1)(2)(3), 11(1)(4), 12(1)(f), (2),(3), 15, 16, 22(2) Constitution of Zimbabwe 1980 ss 20, 24(1)

Case information

A P de Bourbon SC, for the appellant

B *J Tomana* with him *B Patel,* for the first respondent

Y *Dondo,* for the second respondent

Judgment

Chidyausiku CJ: The applicant in this case is a company duly incorporated with limited liability according to the laws of Zimbabwe, having as its main C object the purpose of carrying on a broadcasting service within Zimbabwe. The first respondent is the Broadcasting Authority of Zimbabwe (BAZ) and the second respondent is the Minister of State for Information and Publicity in

the President's Office, who is cited in his official capacity as the Minister responsible for the administration of the Broadcasting Services Act [*Chapter 12:06*] (hereinafter referred to as the Act). The Attorney-General of Zimbabwe is cited as an intervener in terms of s 24(6) of the Constitution of Zimbabwe. He is entitled to respond to and be heard on any of the issues raised in the founding affidavit in terms of the said section of the Constitution.

On 22 September 2000, in the case of *Capital Radio (Pvt) Ltd v The Minister of Information (1)* 2000 (2) ZLR 243 (S) the applicant made application to this Court for, and ultimately obtained, a ruling declaring that s 27 of the Broadcasting Act [*Chapter 12:01*] was unconstitutional in that the monopoly it granted the Zimbabwe Broadcasting Corporation was an infringement of the right to freedom of expression guaranteed under s 20(1) of the Constitution. The same order also struck down s 14 of the Radio-communication Services Act [*Chapter 12:04*] for the same reason. The applicant thereafter imported one antenna and one transmitter, hired some broadcasting equipment and began broadcasting on 28 September with a test signal. The second respondent sought to stop the applicant from broadcasting on the basis that such broadcasting was unlawful in terms of the Presidential Powers (Temporary Measures) (Broadcasting) Regulations. The Presidential Powers (Temporary Measures) Act under which the above regulations were made, was a stop-gap measure intended to fill the legal vacuum created by this Court declaring s 27 of the Broadcasting Act unconstitutional, which left the broadcasting services without a legal framework. The Presidential Powers (Temporary Measures) Act was superseded by the Broadcasting Services Act [*Chapter 12:06*] which came into force on 4 April 2001. The applicant contends that the Act contravenes the Constitution in certain respects. In particular, and in terms of

the draft order, the applicant seeks an order declaring the following sections of the Act unconstitutional:

(a) Section 4(2) and 4(3)
(b) Section 6
(c) Section 8(1) and (2) and 22(2)
(d) Section 8(5)
(e) Section 9(1),(2) and (3)
(f) Section 11(1) in conjunction with para 9(1)(b) and (c) of the Fifth Schedule
(g) Section 11(4)
(h) Section 12(1)(f), (2) and (3)
(i) Sections 15 and 16

The challenge to s 2, 3 and 4 of the Fifth Schedule was withdrawn during the pro\ill\ings.

In essence the applicant's case is that the impugned provisions contravene s 20 of the Constitution of Zimbabwe. The application is being brought in terms of s 24 of the Constitution. Section 24(1) of the Constitution confers *locus standi* only on an applicant who alleges that the declaration of rights has been, is being, or is likely to be, contravened in relation to the applicant. Section 24(1) provides as follows:

> "24(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress."

It is not sufficient to merely allege that a particular provision is inconsistent with the Constitution without a reference to the applicant's constitutional right. [1] I shall revert to this later.

In my view the impugned sections fall into two broad categories. The one category regulates the licensing process and the other category regulates the manner of operation once an applicant is successful and is operating as a broadcaster.

A It is common cause that the applicant has or intends to apply for a radio broadcasting service licence. I have no doubt that those impugned sections of the Act that regulate the process of obtaining a radio broadcasters licence, if unconstitutional, would or are likely to adversely affect the applicant. The applicant's *locus standi* to challenge those sections is beyond question. The applicant's *locus standi* to impugn those sections of the Act that regulate the B operations of a licensed radio broadcaster, which it is not, is debatable.

This Court is essentially an appeal court. It enjoys no original jurisdiction except in constitutional matters in terms of s 24 of the Constitution. Thus the jurisdiction and the *locus standi* of litigants seeking to approach this Court in terms of s 24 have to be found within the four corners of s 24 of the C Constitution. This restriction does not affect a litigant that wishes to institute a constitutional application in the High Court. The provisions of s 24 do not, in any way, circumscribe the *locus standi* of an applicant in the High Court. In the High Court the common law test namely having an interest in the matter under adjudication, is sufficient to establish *locus standi.* In a constitutional application in the High Court all that a litigant is required to show to establish D *locus standi* is a substantial interest in a matter.

A direct approach to the Supreme Court requires a litigant to allege that *his,* not another person's, fundamental right has been violated. Obviously it is not sufficient to merely allege that one's fundamental right has been, is, or is likely to be violated. The factual basis for such an allegation has to be set out. It E follows, therefore, that when a litigant is denied a hearing by this court because he has no *locus standi,* that does not necessarily mean that the door to litigation has been closed. It may merely mean that the litigant has commenced his application in the wrong forum taking into account the basis of his *locus standi.*

A constitutional application commenced in the High Court can always find its F way to the Supreme Court on appeal. In short, the basis of a litigant's *locus standi* in the High Court is much wider than it is in this court sitting as a constitutional court. In my view it would be doing violence to the language of s 24 of the Constitution to ascribe to it the meaning that it is sufficient to allege an interest in the matter in order to establish *locus standi.*

G The applicant, as already stated, initially approached this court in the case of *Capital Radio (Pvt) Ltd v Minister of Information, Posts and*

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Telecommunications (1) 2000 (2) ZLR 243 (S) on the basis that s 27 of the A Broadcasting Act [*Chapter 12:01*] was unconstitutional. As I understand the judgment the applicant applied to this court, in that case, on the basis that as an individual its right to receive and impart information was abridged by s 27 in that, that section restricted the means of communication between individuals. If the applicant had sought relief in the same capacity in these proceedings, B namely that as an individual, its right to receive and impart information was being or is likely to be abridged by the impugned sections of the Act I would have little difficulty in concluding that the applicant had *locus standi* in respect of all the impugned sections. This capacity could have been pleaded in the alternative. However, the applicant has elected to approach this court on the basis that it is an aspiring radio broadcaster and as such certain provisions C of the Act are likely to abridge its fundamental rights as an aspiring broadcaster. In my view by adopting this approach the applicant narrowed its own basis for *locus standi.*

I might also add that where facts are common cause and the question is whether on the admitted facts a litigant has *locus standi* that issue is a question of law which need not be pleaded. Failure to raise that issue on the papers is not fatal. D The court can and indeed should apply the law to the admitted facts but whenever possible both counsel should be given an opportunity to make submissions on the points of law that may not have been raised on the papers or in argument.

I shall further address the issue of *locus standi* when I come to deal with the E specific sections that have been impugned.

It is contended by the applicant that the specific provisions of the Act set out in the draft order are *ultra vires* the Constitution, in particular s 20, which guarantees the freedom of expression.

Section 20 of the Constitution which guarantees freedom of expression F provides in the relevant part as follows:

> "**20 Protection of freedom of expression**

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his G correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision —

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; H

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(b) for the A purpose of-

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals or Parliament; B

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter; or C

(c) that imposes restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

It would appear to me from the affidavits filed of record that the following D issues fall for determination in this case:

1. Whether s 20(1) of the Constitution includes freedom of the press.
2. If s 20 of the Constitution does include freedom of the press, does the setting up of a regulatory authority constitute a permissible derogation of that freedom of the press? E
3. If the setting up of a regulatory authority is a permissible derogation; are the impugned sections setting up such authority and the other impugned sections within the permissible constitutional derogations?

I will now deal with the above issues *seriatim.*

Does s 20(1) of the constitution include freedom of the media such as the F electronic media *in casu?*

Mr *Tomana,* for the first respondent, submitted that the applicant's contention that press freedom is protected under s 20 of the Constitution and, therefore, that restrictions or regulations imposed on the entrants into electronic media are unconstitional, was erroneous. He argued that there was an important G distinction between press freedom and the freedom of expression, which is that press freedom is not a human right while freedom of expression is a human right. He further submitted that s 20 of the Constitution confers and protects a human right which is specifically given to a private human being in his individual capacity to enjoy. This right, so the argument goes, is not given to a media institution at all. Mr *Tomana* further argued that the explicit language H of s 20 of the Constitution makes it obvious that it is referring to a human being

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and not the media or the press. In short, he argued that the domain wherein free A speech is exercised by everyone is distinctly different from the domain wherein the media demands press freedom, while using the common asset or the people's strategic and limited asset, the air waves. He concluded by submitting that the applicant's assumption that press freedom is subsumed under s 20 of the Constitution as well as Art 19 of the International Covenant B on Civil and Political Rights, (ICCPR) is fatally incorrect. Mr *Tomana* contends that no cause of action has therefore been established and all prayers founded on s 20 of the Constitution should fail.

In support of this contention Mr *Tomana* relied on the work of Robert W. McChesney entitled *Rich Media Poor Democracy* at p 269. He also relied on a presentation by Kaarle Nordenstreng to the International Symposium on the C Mass Media Declaration of UNESCO held on 26-28 June 1987 entitled "On the Nature and Significance of the Declaration".

The applicant, on the other hand, contends that the freedom of expression enshrined in s 20 of the Constitution includes freedom of the press and any interference with the means of communication between citizens constitutes an D abridgement of that right. Such an abridgement has to be saved by one of the provisos in s 20 of the Constitution to be lawful.

Thus, in this regard, the issue that falls for determination is what meaning is to be ascribed to s 20 of the Constitution. Put differently, does the freedom of expression entrenched by s 20 of the Constitution include freedom of the press? E

The issue here is one of the interpretation of s 20 of the Constitution. It is trite that in interpreting statutes, including the Constitution, the golden rule is that in order to ascertain the intention of the legislature, the words of a statute or legislation are to be given their ordinary or primary meaning. It is only where that primary meaning of the words is obscure or leads to absurdity that other F principles of interpretation are invoked to assist in the ascertainment of the intention of the legislature.

Some support for this approach can be derived from the fact that in other jurisdictions, where the legislature has sought to entrench freedom of the media or the press, explicit and unambiguous language has been used. For instance in the South African Constitution the following provisions are found: G

> "16.(1) Everyone has the right to freedom of expression, which includes —
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) ... H
>
> (d) ..." (emphasis is mine)

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A Thus the freedom of expression as set in the South African Constitution is spelt out clearly and unambiguously to include freedom of the press. This is not the case with s 20 of the Zimbabwe Constitution. Is this difference in the wording of any legal significance? The approach that words of a statute be ascribed their ordinary or literal meaning tends to support the first respondent's contention.

B However, there is another different approach to constitutional interpretation. This approach is supported by a long line of cases both nationally and internationally. In this approach a Constitution is considered a document that is *sui generis* requiring special guidelines of interpretation. These guidelines or principles include: C

1. the Constitution must be interpreted as a living instrument; [3]
2. the Constitution must be given a generous and purposive construction; [4]
3. the Constitution must be construed as a whole; [5]
4. the spirit of the Constitution, as reflected in the preamble and national objective and directive principles of state policy, is to guide interpretation D by the court; [6]
5. ratified treaties should provide a legitimate guide in interpreting constitutional provisions. [7]

This Court has had occasion to consider what meaning is to be ascribed to s 20 of the Constitution. The court concluded that s 20 of the Constitution has E to be interpreted using the broad principles set out above. Indeed Mr *de Bourbon* did not seek to argue this point strenuously. He took the view that the issue of what meaning is to be ascribed to s 20 of the Constitution has already been determined by this Court on the basis that freedom of expression extends to corporate persons and includes freedom of the press and that any F restriction on the means of communication, including the press, abridges

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freedom of expression conferred by s 20 of the Constitution. The case of A *Retrofit (Pvt) Ltd v PTC & Ors* 1995 (Z) ZLR 199 (S) clearly supports this contention.

It may be argued that this court, in interpreting s 20 of the Constitution to include its application to artificial persons and the freedom of the media, in effect amended the Constitution, a function constitutionally exercisable by B the legislative arm of the government. Whatever merit this argument may have, the fact of the matter is that the legislature, upon becoming aware of this ascribed meaning of s 20 of the Constitution, did not seek to amend the Constitution. In this regard it is also interesting to note that the 1999 Draft Constitution which was rejected in a referendum but was crafted by a constitutional commission composed of members of the legislature, sought to C guarantee freedom of the press in very specific terms. The Draft Constitution provided in clause 45 as follows:

> "45.(1) Everyone has the right to freedom of speech and express ion, which includes —
>
> (a) freedom to uphold opinions; D
>
> (b) freedom to seek, receive and communicate ideas and information regardless of frontiers;
>
> (c) *freedom of the press and other media of communication;*"

(emphasis is mine)

The present Lancaster House Constitution has seen its better days. The need E for its amendment, if not overhaul, commands consensus among Zimbabweans. Divergence of opinion only emerges on the nature and extent of such amendments. As I have said, the liberal approach to constitutional interpretation is supported by a long line of cases. "A Constitution is a living instrument which must be construed in the light of the present day conditions." [8]

The Supreme Court of Pakistan expressed similar sentiments in the case of F *Nauraz Sharif v President of Pakistan :*

> "... basic or fundamental rights of individuals which presently stand formally incorporated in the modern constitutional documents, derive their lineage from and are traceable to the Actival Law. With the passage of time and the evolution of civil society, great changes occur in the G political, social and economic conditions of society. There is, therefore,

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> A the corresponding need to re-evaluate the essence and source of fundamental rights as originally provided in the Constitution. They require to be construed in consonance with changed conditions of the society and must be viewed and interpreted with a vision to the future."

I respectfully agree with the above approach and appreciate the need to ascribe to s 20 of the Constitution a liberal interpretation in order to breathe life into B a Constitution with a declaration of rights in great need of rejuvenation.

The importance of freedom of expression that includes freedom of the press has been proclaimed by this court and courts in other jurisdictions as well as international organisations.

Thus, as the applicant correctly submitted, Art 19 of the Universal Declaration C of Human Rights proclaims the right to freedom of expression in the following terms:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of frontiers."

D Similarly Art 19 of the International Covenant on Civil and Political Rights proclaims as follows:

> "(1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas E of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Zimbabwe is a party to the African Charter on Human and Peoples Rights. The African Charter provides in Art 9 as follows:

> "1. Every individual shall have the right to receive information.
>
> 2. Every individual shall have a right to express and disseminate his F opinions within the law."

The African Commission on Human and Peoples' Rights noted, in respect of the above Article 9 of the ACHPR:

"This article reflects the fact that freedom of expression is a basic human right vital to an individual's personal development, his political G consciousness and participation in the conduct of the public affairs of his country." (Ref on p 6 of Applicant's heads of argument)

Zimbabwe, as I have already stated, is a party to the ACHPR and consequently Art 9 should provide a legitimate guide in interpreting s 20 of the Constitution.

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The European Court of Human Rights has also recognised the key role of A freedom of expression:

"Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man... it is applicable not only to 'information' or 'ideas' that are favourably received... but also to those which offend, B shock or disturb the State or any other sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'" [10]

Similarly, the Inter-American Court of Human Rights stated:

"Freedom of expression is a cornerstone upon which the very existence of a democratic society rests." [11] C

The right of free speech is universally recognised as one of the most precious of all political rights which is central to open, transparent, accountable and democratic government.

The above and other academic evaluations of the importance of free speech have received worldwide judicial recognition and have been most elegantly expressed by Mr Justice Cardozo in his often quoted words: D

"Of that freedom (thought and speech) one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." [12]

In the case of *Chavunduka & Anor v Minister of Home Affairs & Anor* this court had this to say:

"This Court has held that s 20(1) of the Constitution is to be given a E benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy ... Furthermore, what has been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth, and in promoting political and social participation; (iii) it strengthens the capacity of an F individual to participate in decision-making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change."

On the basis of these authorities, I am satisfied that the freedom of expression conferred by s 20 of the Constitution has to be interpreted to include freedom G

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A of the press and is also enjoyed by corporate persons. Freedom of the press is one thing. Abuse of the freedom of the press is another. Every right minded-person supports the former and abhors the latter. In efforts to remedy the ills of the latter undue restrictions should not be imposed on the former.

Does the setting up of a regulatory authority constitute a permissible B **derogation from the freedom of expression or the press?**

It is common cause that the setting up of a regulatory authority is a permissible derogation of the fundamental right of the freedom of expression. The applicant concedes that much in para 20 of the heads of argument wherein it is submitted:

"Freedom of expression is not, however, absolute. Every system of C international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression to take into account the values of individual dignity and democracy. Under international human rights law, national laws that restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR:

'The exercise of the rights provided for in paragraph 2 of this article D carried with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order *(ordre* E *public)* or of public health or jnorals.'"

In my view this concession is properly made and finds support in other jurisdictions. For instance in the case of *Athukorale and Ors v Attorney- General of Sri Lanka* the Supreme Court of Sri Lanka held that:

"having regard to the limited availability of broadcasting frequencies, the regulation of broadcasting was necessary to ensure the adequate coverage F of issues and to prevent the monopolistic domination of the frequency spectrum by the government or by a few individuals. On that basis regulation did not violate the right to freedom of speech but rather advanced it by serving the interest of the whole community and giving listeners and viewers the opportunity to consider a range of views. However, in order to safeguard the fundamental rights of freedom of G thought and expression the regulatory body had to be independent of the government...."

It is also apparent from the same judgment that regulation, particularly the need for licensing, was necessary for the maintenance of law and order. In this regard the court had this to say

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"Article 14 of the Constitution deals with those great and basic rights A which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country. Freedom of speech... goes to the heart of the natural right of an organised freedom-loving society to impart and acquire information ... This freedom is not absolute. There is no such thing as absolute or unrestricted freedom of speech and expression, wholly free from restraint' for that would amount to uncontrolled licence B which would lead to disorder and anarchy. *Absolute and unrestricted individual rights do not and cannot exist in a modern State. The welfare of the individual, as a member of collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs* ... Our Constitution has rightly struck a proper balance between the varying competing social interests, and has... C set forth the restrictions to which the fundamental right of speech and expression may be subject..." (empasis is mine)

The court went further in stating the necessity to licence and stated:

"Scarcity is not entirely a thing of the past, and therefore states have a continuing and compelling need to regulate the use of the frequency spectrum. The US Senate said that 'broadcast frequencies are limited and, D therefore, they have been necessarily considered a public trust.' (See S Rep No 562, 86th Cong 1st Sess 8-9(1959) US Code Cong &Adm News p 2571.) That observation was cited with approval by the US Supreme Court in *Red Lion Broadcasting Co.* The Supreme Court of India too has endorsed the view that airwaves/frequencies are limited and must be regarded as 'a public property' with regard to which the State must E exercise control so that they will be used for the public good: see *Secretary, Ministry of Information and Broadcasting, Govt of India v Cricket Association of Bengal* (1995) AIR (82) 1995 Supreme Court 1236 (esp paras 78, 185, 192, 193, 194). It is recognised that states 'have the right and the duty to ensure the orderly regulation of communications, and this can only be achieved by a licensing system' (*Gropper a Radio AG* F *v Switzerland* (A/173) (1990) 12 EHRR 321 at 350, per Berdhardt J). Because of the public property nature of frequencies, licences to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them during a specified time: see *Red Lion Broadcasting Co.*

Radio and television, because of their pervasive and wide reach and G influence on members of the public, constitute a most important means of mass communication. In order to play its role in advancing freedom of speech, the state, because of the limited availability of frequencies, must endeavour to ensure that the medium continues to be effective. Because of the limited availability of frequencies, chaos would ensue if the spectrum is uncontrolled and the usefulness of radio and television as a H

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A means of communication would soon come to an end, with unfortunate consequences for the right to free speech and independent thought. If there is to be effective communication, only a few can be licensed and the rest must be barred from the airwaves. The matter was explained in *Red Lion Broadcasting Co* 395 US 367 at 387-388 in the following words:

'Just as the Government may limit the use of sound-amplifying equipment B potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound track, or any other individual does not embrace a right to snuff out the free speech of others ... When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited C that there could be meaningful communications if half the people in the United States

were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is probably greater than the range of the human voice and 'the problem of interference is a massive reality. The lack of know-how ' and equipment may keep many from the air, but only a tiny fraction of D those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology. It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927

E The Court had earlier explained the need for a regulatory authority —

'Before 1927 the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government F control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently the Federal Radio Commission was established...' (See 395 US 367 at 375-376)."

In the case *Groppera Radio AG v Switzerland (1990)* 12 EHRR 321 the European Court of Human Rights recognised the need for licensing. At page G 339 (para 61) the court had this to say:

"The Court observes that Article 19 of the 1966 International Covenant on Civil and Political Rights does not include a provision corresponding to the third sentence of Article 10(1). The negotiating history of Article 19 shows that the inclusion of such a provision in that Article had been proposed with a view to the licensing not of the information imparted but H rather of the technical means of broadcasting in order to prevent chaos in

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the use of frequencies. However, its inclusion was opposed on the ground A that it might be utilised to hamper free expression, and it was decided that such a provision was not necessary because licensing in the sense intended was deemed to be covered by the reference to 'public order' in paragraph 3 of the Article.

This supports the conclusion that the purpose of the third sentence of Article 10(1) of the Convention is to make it clear that states are permitted B to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole."

On the basis of the above authorities and indeed the concession made by the C applicant I am satisfied that the regulation of the broadcasting services is not unconstitutional or, put differently, is a permissible derogation. I now turn to deal with the issue of whether the particular impugned sections go beyond the limit permissible in terms of the Constitution.

Are the impugned sections of the act beyond the restrictions permissible D in terms of the constitution?

I have concluded that in general terms legislation providing for regulation of the electronic media is constitutionally permissible. Indeed many constitutions, including the Zimbabwean Constitution, expressly permit derogation from the fundamental rights contained therein. However, such derogation or restriction has to meet certain criteria or requirements to bring it within the E ambit of what is constitutional.

The following are some of the criteria that a restriction has to satisfy for it to be constitutional.

(a) the restriction has to be prescribed by law; [15]

(b) the restricting law must be foreseeable; F

(c) the restricting law must be subject to effective control; [16]

(d) the restricting law must not negate the essential of the right in question; [17]

(e) the restricting law must be reasonably required to protect the right of others. [18] G

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A In the case of *Nyambirai, supra,* this court concluded that in determining whether a law providing for the compulsory payment of contributions by employers and employees was reasonably

justifiable in a democratic society, this court should have regard to the attitude of many other countries towards similar schemes. Similarly in this case it would be instructive if this court should have regard to legislation providing for the regulation of the media in B other countries. I shall now proceed to examine similar legislation in other countries.

United Kingdom

The Broadcasting Act 1990 (as amended) is the Act that regulates the broadcasting industry in the United Kingdom. It vests regulatory powers of the C Broadcasting Industry in two bodies, namely, the Radio Authority and the Independent Television Commission (I.T.C.). Significantly these two authorities exercise regulatory powers over non-state broadcast institutions only. They do not have any say over the British Broadcasting Corporation, whether television or radio. These come under the direct regulation of the British Government through interfacing structures. Thus the highly influential D national and international broadcaster in the United Kingdom is not regulated by any authority outside the British Government.

Section 1 (2) of the Broadcasting Act spells out who appoints the Independent Television Commission:

> (2) The Commission shall consist of- E
>
> (a) a chairman and a deputy chairman *appointed by the Secretary of State;* and
>
> (b) such number of other members appointed by the *Secretary of State,* not being less than eight nor more than ten, as he may from time to time determine." (emphasis is mine)

F This provision is almost identical with s 4 of the Act.

Section 83(2) gives the Secretary of State for Culture, Media and Sport the same powers in respect to appointments to the Radio Authority.

Schedule 1 of the same Act provides the details ofthe Commission. Conditions militating against appointment to the Commission relate to connections with the BBC, the Broadcasting Complaints Commission, the Broadcasting G Standards Council, and financial or business connections with the broadcasting industry. Outside that, the Secretary of State is required to ensure that the special interests of Wales and Scotland are represented on the Commission. 20

H *Woods & Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors* 1994 (2) ZLR 195 at 195B-C

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The remuneration of members of the Commission is determined by the A Secretary of State, as is also the borrowing powers of the Commission. The same powers also relate to the Radio Authority and are spelt out in Schedule 8.

The British Act makes the Commission and the Radio Authority the licensing authorities for non-state television and radio respectively as they do not cover B the BBC.

Section 10 of the British Act gives the Secretary of State or, for that matter, any other Minister of the Crown power and control over broadcast content of licensed private broadcasters. It reads:

> "10.(1) If it appears to him to be necessary or expedient to do so in C connection with his functions as such, the Secretary of State or any other Minister of the Crown may at any time by notice require the Commission to direct the holders of any licences specified in the notice to publish in their licensed services, at such times as may be specified in the notice, such announcement as is so specified, with or without visual images of any picture, scene or object mentioned in the announcement; and it shall be the duty of the Commission to comply with the notice. D
>
> (2) Where the holder of a licence publishes any announcement in pursuance of a direction under subsection (1), he may announce that he is doing so in pursuance of such a direction.
>
> (3) The Secretary of State may at any time by notice require the Commission to direct the holders of any licence specified in the notice to E refrain from including in the programmes included in their licensed services any matter or classes of matter specified in the notice; and it shall be the duty of the Commission to comply with the notice.
>
> (4) Where the Commission:
>
> (a) have given the holder of any licence a direction in accordance with a notice under subsection (3), or F

(b) in consequence of the revocation by the Secretary of State of such notice, have revoked such a direction, or where such a notice has expired, the holder of the licence in question may publish in the licensed service an announcement of the giving or revocation of the direction or of the expiration of the notice, as the case may be. G

(5) The powers conferred by this section are in addition to any power specifically conferred on the Secretary of State by any other provision of this Act.

(6) In relation to any licensed service provided from a place in Northern Ireland, the reference in subsection (1) to a Minister of the Crown includes a reference to the head of any Northern Ireland department." H

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A Section 11 and the Fifth Schedule of the Act which are impugned seem to be modelled on the above provisions of the British Act.

The same Act is also significant in that it lays the basis for the licensing of Television Channels 3, 4 and 5. While the Act specifies a number of criteria for the selection of a licensee, it makes special precautionary provisions for the cash dimension of set criteria. Nominally, s 17 provides that the licence B should go to the highest cash bid. However, s 17(5) qualifies this in a way that betrays the locus of licensing power. It provides that should the Commission have any reason to suspect in respect of an applicant that "any relevant source of funds is such that it would not be in the public interest for the licence to be awarded to him", the application together with supporting documents is C referred to the Secretary of State. The Commission shall not award the licence in such a case unless the Secretary of State has given his approval.

Subsection 17(6) states:

> "On such a reference the Secretary of State may only refuse to give his approval to the licence being awarded to the applicant in question if he is satisfied that any source of funds is such that it would not be in the public D interest for the licence to be awarded."

The above section confers on the British Secretary of State, a political functionary, considerable power to determine what constitutes the public interest for the purpose of refusing or the granting of a broadcasting licence. Section 4 of the Zimbabwean Act constitutes the Broadcasting Authority to E be appointed by the Minister, after consultation with the President, which is composed of no fewer than five and not more than nine members. The Broadcasting Act (United Kingdom) similarly constitutes a body corporate called Independent Television composed of not less than eight and not more than ten members. In both Acts there are limitations in terms of criteria as to who is to be appointed to the regulating Authority.

F In terms of s 6 of the Act the Minister is the licensing authority. The Board shortlists, and by public inquiry, determines the applicants and makes recommendations to the Minister to issue or not to issue a licence to an applicant. See s 10(9).

It would appear that s 4 and 6 of the Zimbabwean Act are modelled on G s 3 and 5 of the British Broadcasting Act. In terms of the British provisions, once appointed, the ITC is the licensing authority. There is no involvement of the Secretary of State in regard to the granting or otherwise of licences except in circumstances set out in s 17(5) *as* read with subs 6 quoted above. Thus the most significant difference between the Zimbabwean and United Kingdom legislation in this regard is that under the Zimbabwean Act the Minister H continues to have decision-making powers over the authority subsequent to its

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appointment, while the United Kingdom Act confers decision-making powers A to the Commission independent from the Secretary of State subsequent to its appointment, except for the special circumstances set out in s 17(5) as read with subs (6) of the United Kingdom Act.

Australia

In Australia the Australian Broadcasting Services Act of 1992 governs the B broadcasting industry. Unlike other Acts which shy away from projecting the national interest, the Australian Act's objects are definitive on protecting Australia's national and cultural interests. Part 1 s 3 of the Act seeks to ensure that "international broadcasting services are not provided contrary to Australia's national

interest" and thus insist that broadcasters promote services that develop and reflect "a sense of Australian identity, character and cultural C diversity". Beyond resisting the swamping of Australian cultural interest by global media structures, the Australian Act also upholds the national interest by ensuring that Australians have "effective control of the more influential broadcasting services". To that end the Australian Act disallows foreign control of broadcasting in Australia (Part 5 s 57). Similarly s 8(1) of the D Zimbabwean Act seeks to control foreign influence of broadcasting in Zimbabwe.

The Australian Act creates the Australian Broadcasting Authority ("ABA") as the licensing and regulating authority. ABA is made up of seven members who are appointed by the Governor-General without reference to any other body or persons outside governmental structures (Part 12 s 155). The Governor E - General also appoints the Chairman and Vice-Chairman from the group who are full-time employees. The responsible Minister for Communications, Information Technology and the Arts can assign, on either a full-time or part- time basis, appointees for specific assignments related to broadcasting. The Minister may also appoint associate members. ABA reports to the responsible F Minister who also has the right to give "written directions" to it in terms of Part 12 s 162. The directives are required to be gazetted "as soon as practicable after giving the direction".

As a licensing authority, ABA can, in terms of Part 4 s 36(2), get "specific directions from the Minister for the purpose of a determination (on licensing)." The Australian Act is more stringent on licensing international broadcasters G than the Zimbabwean Act. In terms of Part 8B and s 121, ABA is required to refer all applicants for an international broadcasting licence to the Minister of Foreign Affairs who must determine the suitability of the applicant in relation to the Australian national interest and compliance with international broadcasting guidelines. Thus section 121 FD specifically provides that: H

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A "(1) If-

(a) an application for an international broadcasting licence is referred to the Minister for Foreign Affairs under subsection 121FB(1) or (5); and

(b) the Minister for Foreign Affairs is of the opinion that the proposed international broadcasting service concerned is likely B to be contrary to Australia's national interest;

the Minister for Foreign Affairs may, by written notice given to the ABA, direct the ABA not to allocate an international broadcasting licence to the applicant."

In terms of content, Part 7 s 113 of the Australian Act, allows the Minister to C specify through a Government Gazette "an event, or events of a kind, the televising of which should, in the opinion of the Minister, be available to the general public." This provision is strikingly similar to s 11 of the Zimbabwean Act.

Ireland

In Ireland the Broadcasting and Wireless Telegraphy Act 1988 and the D Broadcasting Act 2001 govern the broadcasting industry and create the Broadcasting Commission of Ireland and the Broadcasting Complaints Commission. The former licences and regulates only non-state broadcasting activities (public broadcasters are excluded). The latter develops and enforces Codes and Standards for all broadcasters. Both bodies are under the Ministry E of Arts, Heritage, Gaeltacht and the Islands. In terms of s 3(1) of the Irish Broadcasting and Wireless Telegraphy Act, 1988, "A broadcast shall not be made from any premises or vehicle in the State unless it is made pursuant to and in accordance with a licence issued by the Minister".

Both the Broadcasting Commission and the Broadcasting Complaints Commission are appointed by the Government through the responsible F Minister and should consist of not less than seven and not more than nine members, with both genders having not less than three members. Government has the power to remove a member of the Commission for stated reasons. Thus in Ireland a Minister of Government is vested with a lot more power to control the broadcasting industry than is provided for in the Zimbabwean Act.

G The Irish Act also provides for programme content. In terms of the Irish Act all broadcasters are required to be (1) "mindful of the need for understanding and peace within the whole island of Ireland and (2) ensure that the programme material aforesaid reflects the varied elements which

make up the culture of the whole island of Ireland and have special regard for the elements which distinguish that culture, and, in particular, the *Gaeltachtai".*

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The Zimbabwean Act does not go as far as the Irish Act in seeking to control A programme content.

Nigeria

The Nigerian broadcasting sector is monitored and regulated by the National Broadcasting Commission ("NBC"). The NBC does not licence but recommends applications for licensing "through the Minister of Information B and National Orientation" to the President for the grant of radio and television services. It derives its powers from Decree (Act) 38 (1992) and Decree (Act) 55(1999) enacted by the new civilian and democratic Government of Nigeria. The Director General of NBC is appointed by the President through recommendation by the Minister.

Norway C

The Norwegian Broadcasting Industry is governed by Act No 127 of 4th December 1992. The Norwegian Act provides for a Mass Media Authority which does not regulate but is "an administrative body placed under The Royal Ministry of Cultural and Church Affairs" to handle non-state broadcasting and press issues (public broadcasters are excluded). The Broadcasting Division D of the Authority, among other duties, processes applications for broadcasting licences for local radio and television, satellite broadcasting; monitors advertisements and sponsorship in broadcasts; and imposes sanctions against offenders of the Act.

In Norway the Licensing Authority is The Royal Ministry of Cultural and E Church Affairs, under Chapter 2 (General Provisions) section 2:1. Even then, the regulatory powers of the Ministry are heavily circumscribed by the King who enjoys sweeping powers under the Act. The relevant section reads:

> "The Ministry issues licences for broadcasting and local broadcasting. Conditions may be attached to such licences. The King may issue regulations concerning the allocation of licences and the terms and F conditions of licences, *inter alia,* on the operation and revocation etc., of licences, on licensing areas and ownership restrictions. The King may issue regulations concerning circumstances in which a broadcaster is required to comply with Norwegian broadcasting rules. The King may also issue regulations to fulfil Norway's administrative authority for broadcasting and local broadcasting, etc. The ministry may lay down G further rules concerning the tasks of the Mass Media Authority."

The King also has powers to order broadcasters to carry announcements from government authorities "where such announcements are of major importance" (section 2:4). He also has the power to determine content both by way of disallowing it or ordering it. He determines the commercial fortunes of broadcasters by his sweeping powers to regulate advertising and sponsorship H (*Chapter 3:1-4*).

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A The only time the Mass Media Authority has licensing powers is when it comes to local/community broadcasting. In terms of *Chapter 7:1*, the Mass Media Authority:

> "shall grant licences for the operation of local broadcasting services. The Ministry shall appoint a Licensing Council which gives the Mass Media Authority advice and recommendations in connection with the allocation B of licences for local broadcasting services. The Ministry shall determine the mandate and composition of the Licensing Council."

The Norwegian Act confers more powers of control on a government Minister than the Zimbabwean Act.

Complaints against any broadcaster are handled by the Complaints Committee C for Broadcasting Programmes which, in terms of *Chapter 5:1* of the Broadcasting Regulations, is appointed by the responsible Ministry.

United States of America

The Broadcasting Industry of the United States is regulated by the Federal Communications Commission (FCC) that was established by the Communications Act of 1934. The FCC describes

itself as "an independent D United States government agency". Appointment to the five-member Commission is by the United States President "by and with the advice and consent of the Senate" and lasts for five years. Appointments are for full-time service. Commissioners have to be citizens of the US and are required to take an oath of office. The US President also appoints one of the Commissioners E to serve as Chairperson and Chief Executive Officer of the Commission. Significantly three Commissioners out of five "may be members of the same political party." Its budget comes directly from Congress. The FCC is the licensing authority with powers to revoke licences as well as to receive representations from the public. It has the powers to review and adjust application fees. In discharging its functions, the Commission may elect to F delegate some of its responsibilities to a panel of commissioners.

Sweden

In terms of the Swedish Radio and Television Act (1996), Sweden has two licensing Authorities, namely the Swedish Government which licences non- state (public broadcasters are excluded)national and international broadcasters; G and the Radio and Television Authority which licences community broadcasters. The Government is assisted by the Broadcasting Commission which is "a state authority" similar to the Broadcast Authority of Zimbabwe to "examine" and ensure content compliance for radio and television programmes. Specifically, Chapter 2 subs 2 of the Act reads:

H "Licences to broadcast television programmes and licences to broadcast

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sound radio programmes throughout Sweden or to other countries are A issued by the Government."

Thus in Sweden licences are issued by apolitical organ and not an independent authority.

Chapter 9(3) of the Act requires that the Broadcasting Commission, which is constituted by Government, consist of a chairman and six other members, with B deputies also being determined by Government. The same subsection requires that the Chairman and the Vice-Chairman "be active or former professional judges."

The same Act requires that all broadcasters carry announcements "which are of importance for the general public, without charge, if requested by a public authority," a provision similar to s 11 and the Fifth Schedule. C

Equally, broadcasters are required "to prepare a contingency plan for the operations during a high-level alert in conjunction with severe national stresses in peacetime and submit the plan to the Government and to a public authority determined by the Government."

Malaysia D

The Malaysian Broadcasting Industry is governed by the Communications and Multimedia Act (1998) and the Malaysian Communications and Multimedia Commission Act (1998). Section 6 of the Communications and Multimedia Commission Act provides that:

"The Commission shall consist of the following members who shall be E appointed by the Minister:

(a) a Chairman;

(b) a member representing the Government; and

(c) No less than two but no more than three other members".

Section 12 of the same Act provides for the following: F

"(1) The Minister may at any time revoke the appointment of any member of the Commission without assigning any reason therefor.

(2) A member of the Commission may, at any time, resign from his appointment by giving a notice in writing to the Minister."

Section 18 adds:

"(1) The Commission shall be responsible to the Minister. G

(3) The Minister may give to the Commission directions of a general character not inconsistent with the provisions of this Act relating to the performance of the functions and powers of the Commission and the Commission shall give effect to such directions."

The Communications and Multimedia Act 1998/Act 588 clearly puts the H

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A Minister before the Communications and Multimedia Commission which, in terms of s 7 of the Act, must operate on the basis of "directions" from the Minister which must be kept in a register. In terms of the Malaysian Act the Minister "may, from time to time, determine any matter specified in this Act as being subject to Ministerial determination, without consultation with any licensees or persons".

B The same Act, in terms of s 30, makes the Minister of Energy, Communications and Multimedia the licensing authority, with the Commission playing an administrative and advisory role as spelt out in the preceding section. It reads:

> "(1) The Minister shall have due regard to the recommendation of the Commission given under section 29 before making a decision.
>
> C (2) The Minister may, acting on the recommendation of the Commission by written notice —
>
> (a) grant an individual licence in accordance with the provisions of this Part; and
>
> (b) declare that an individual licence granted under this Part be subjected to special or additional conditions."

D The Minister is also responsible for renewing licences (s 34) and for their revocation (s 37-38).

It is apparent from the above that the Malaysian Act confers on the Minister a lot more power than does the Zimbabwean Act.

South Korea

E In South Korea the Broadcasting Act No 6139 of January 12th 2000 regulates the private (public broadcasters are excluded) broadcast industry in South Korea. It creates a nine-member Korean Broadcasting Commission which is appointed by the President of the Republic of Korea, from among "those persons with specialized expertise and who are representatives of different F fields of society" (Art 21(1)). Article 21(2) enjoins the President to appoint three persons from the nine "who are recommended by the Speaker of the National Assembly after consulting with the assembly, men representing each negotiating party of the National Assembly and three persons who are recommended by the Speaker of the National Assembly in consideration of their expertise with respect to broadcasting and ability to represent the G viewers." In making these recommendations, the Speaker is required to present the criteria and grounds for recommendation. Significantly, Art 24(1) considers all the members "public officials in political service."

To protect the independence of the Commission, Art 26 provides that a member shall not be subject to any external direction or interference with his H duty, and shall not be dismissed from his office contrary to his consent except

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for stated offences. Art 9(1) makes the Minister of Information and A Communication the licensing authority. It reads:

> "...a person who intends to operate a terrestrial broadcasting business or satellite broadcasting business shall, upon receiving the recommendation of the Korean Broadcasting Commission, obtain a licence from the Minister of Information and Communication for a broadcasting station as prescribed by the Radio Waves Act." B

The same also goes for cable broadcasters. Renewal of licences is also done by the Minister of Information and Communication, as is also the revocation.

Austria

The Broadcasting scene for non-state actors in Austria is governed by the C Federal Act on the Establishment of an Austrian Communications Authority ("KommAustria") and a Federal Communications Board. In terms of the Austrian Act, broadcast affairs are regulated by two bodies, KommAustria or the Austrian Communications Authority which licenses and regulates all broadcasters, and the Federal Communication Board which controls and supervises the State-owned Austrian Broadcasting Corporation. D

Section 3 of the Act provides for the constitution and management of KommAustria:

"(1) KommAustria shall consist of one Director and the requisite number of staff.

(2) The appointment of the Director and deputy Director shall be E preceded by a public invitation to apply for the position in accordance with section 3 of the Public Tender Act of 1989.

(3) KommAustria is an authority directly subordinate to the Federal Chancellor. As regards its external business practice, it is an independent authority."

Section 6 of the Austrian Act firmly places KommAustria under control of the F Federal Chancellor by underlining that all broadcast matters "shall lie with the Federal Chancellor."

South Africa

The Independent Communications Authority of South Africa Act 2000 establishes the Independent Communications Authority of South Africa G (ICASA) which regulates the broadcasting industry. Section 3 provides that ICASA shall be:

"independent and subject only to the Constitution and the law and must be impartial and must perform its functions without fear, favour or prejudice. The Authority must function without any political or commercial interference." H

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A Significantly, the South African Act protects ICASA from interference from government and political parties. In terms of its constitution and appointment of members, the ICASA Act provides for the appointment of a council of seven councillors who are appointed by the President on the recommendation of the National Assembly, according to the following principles:

(a) participation by the public in the nomination process;

B (b) transparency and openness; and

(c) the publication of a shortlist of candidates for appointment, with due regard to subs (3) and s 6.

The President appoints one of the councillors as Chairperson of the Council. C In terms of s 5(3):

"Persons appointed to the Council must be persons who -

(a) are committed to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of a public service; and

(b) when viewed collectively - D

(i) are representative of a broad cross-section of the population of the Republic; and

(ii) possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting and telecommunications policy, engineering, technology, frequency band planning law, marketing, journalism, entertainment, education, economics, E business practice and finance or any other related expertise or qualification."

A unique feature of the South African Act is s 5(4) which requires that appointed councillors —

"must take an oath or affirm that he or she —

F (a) is committed to fairness, freedom of expression, openness and accountability; and

(b) will uphold and protect the constitution and the laws of the Republic, including this Act and the underlying statutes."

Among persons disqualified as councillors are public servants, members of G parliament, any provincial legislature or any municipal council office bearers or employees of any party, movement or organisation of a political party nature (s 6(c)(d)(e)

The tenure of office of councillors is protected by s 8(2)(3) which provides that removal from office is only after investigations by the National Assembly; H adoption by the same Assembly of a resolution calling for the removal of a

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councillor; and adoption of that resolution by the President who then removes A the councillor.

ICASA is the licensing authority.

Canada

The Canadian broadcasting industry is governed by The Canadian Radio- television and Telecommunications Commission Act and the Broadcasting B Act. The broadcasting sector comes under the regulatory authority of Canadian Radio-television and Telecommunications Commission (CRTC).

The CRTC is constituted in terms of s 3 of the Canadian Radio-television and Telecommunications Commission Act. It is constituted by not more than thirteen full-time members and not more than six part-time members all of C whom are appointed by the Governor in Council. In terms of the same section a member shall hold office during good behaviour for a term not exceeding five years but may be removed at any time by the Governor in Council for cause.

Section 7(2) expressly bolsters the independence of the CRTC when it comes to issuing licences. It states that "No order may be made under subsection (1) in respect of the issuance of a licence to a particular person or in respect of the D amendment, renewal, suspension or revocation of a particular licence". What is more, subs (5) requires that an order to the Commission by the Governor in Council should "be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the making of the order." The order itself is made after the responsible Minister has consulted with the E Commission and, once made, it has to be gazetted.

The responsible Minister has powers to issue directions to the Commission in situations where he is appealed to by an aggrieved broadcaster with a sustainable case. However, the directive would have to be gazetted and brought before each House of Parliament within the first fifteen days of sitting.

Ownership and responsibility for the broadcasting system is vested in Canadians F by operation of the law. Thus the Canadian Broadcasting Act, 1991 provides in section (3) that:

"(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

(b) the Canadian broadcasting system operating primarily in the English G and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

(c) the Canadian broadcasting system should, (i) serve to safeguard, H enrich and strengthen the cultural, political, social and economic

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A fabric of Canada; (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view. B

(d) the programming provided by the Corporation should, (i) be predominantly and distinctively Canadian; (ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions; (iii) actively contribute to the flow and exchange of cultural expression; (iv) be in English and French reflecting the different needs and circumstances of each official C language community, including the particular needs and circumstances of English and French; (v) contribute to shared national consciousness and identity; (vi) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose; and (vii) reflect the multicultural nature of Canada."

Italy

D The Italian Act No 249 of 31 July 1997 governs the private (non-state) broadcasting sector and creates the Italian Communications Regulatory Authority (AGCOM) and provides that AGCOM be "fully autonomous and independent in its judgments and evaluations". AGCOM which has eight Commissioners, is E appointed by both the Senate of the Republic and the Chamber of Deputies, each electing four Commissioners who are "subsequently appointed by a decree of the President of the Republic." Equally, the President of the Authority is "appointed by a decree of the President of the Republic on the proposal of the President of the Council of Ministers in agreement with The Ministry of Communications". This appointment would have to be confirmed by the competent Parliamentary Commissions. The authority is F accountable to Parliament.

New Zealand

The Broadcasting Act of 1989, as amended, governs the private (non-state) broadcasting sector and sets up the Broadcasting Standards Authority. Four members of the authority are appointed by the New Zealand Governor- G General, on the recommendation of the Minister of Broadcasting. One member is appointed after consultation with the broadcasters and another after consultation with public interest groups. The authority reports to Parliament through the Minister of Broadcasting.

The licensing function is largely taken for granted and in carrying out this function the emphasis is on code and standard enforcement, research and H planning.

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France A

In France the broadcasting industry is controlled by a college known as *Counseil Superieur de l'audiovisuel* (CSA), which is "an independent administrative authority" meant to guarantee broadcast freedom in France by regulating private broadcasters (non-state). CSA has nine councillors nominated for six years by Presidential decree. Three of these members, including the B President, are designated by the French President, three by the President of the Senate and three by the President of the National Assembly. CSA issues broadcasting licences to private radio and television companies. In terms of content, its accent falls on "defending France's cultural sovereignty" within the context of European integration. CSA sees the broadcasting media as "a democratic necessity" but maintains that "freedom, however, goes hand in C hand with responsibility". On the basis of the latter, it regulates programming content.

The above comparison of similar legislation in other jurisdictions reveals that there is very little original in the Zimbabwean Act. The Zimbabwean Act is modelled largely on the British Broadcasting Act of 1990 as amended and the Australian Broadcasting Services Act of 1992. Thus, generally speaking, the D provisions in the Zimbabwean Act are to be found in similar legislation in other jurisdictions.

Constitutions of many Commonwealth countries, including the Constitution of Zimbabwe, explicitly provide for derogation of a fundamental right. Such derogation has to be in terms of the law that satisfies the criteria I have referred E to earlier on. Apart from satisfying the said criteria such law must also be *reasonably justifiable in a democratic society.* What is reasonably justifiable in a democratic society is elusive of a precise definition: see *Woods & Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors* 1994 (2) ZLR 195 (S) at 195B-C

In its determination of what is reasonably justifiable in a democratic society the court has to bear in mind that there is always the presumption of F constitutionality in favour of legislation.

Thus in *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S), Georges CJ had this to say at pp 382E - 383F:

> "We were referred to the case of *Attorney-General of Trinidad and Tobago v Ramesh Mootoo* (1974) 28 WIR 304 in which the matter was G canvassed by Hyatali CJ. He cited from a number of cases which in my view indicates the process plainly. Thus in *Crowell v Benson* (1931) 285 US 22 at 62 Hughes CJ stated:
>
> > 'When the validity of an Act of congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' H

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A Again in Black on *The Construction and Interpretation of Laws* (1911) p 110 para 41H is cited as follows:

> 'Every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the B statute with the Constitution and avoid the consequence of unconstitutionality.'

Because the person alleging unconstitutionality must establish it, a burden may rest on that person to establish factually that an act does not fall within the ambit of constitutionality. Many neo-Nigerian constitutions permit derogation from the declared rights defined provided that these derogations C are, to use the phrase in the Zimbabwean Constitution, 'reasonably justifiable in a democratic society'. Even where the Constitution does not make it clear where the *onus* lies as the Zimbabwe Constitution does, the *onus* lies on the challenger to prove that the legislation is not reasonably justifiable in a democratic society

and not on the State to show that it is. In that sense there D is a presumption of constitutionality. As Lord Fraser of Tullybelton stated in *Attorney-General & Anor v Antigua Times Ltd* [1975] 3 All ER 81 at 90:

> 'In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to E show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required.'

In that sense the presumption represents no more than *the Court adopting the view that a legislature, elected by universal adult suffrage and liable* F *to be defeated in an election, must be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society. But situations can arise even in such societies in which majorities oppress minorities, and so the Declaration of Rights prescribes limits within which rights may be restricted. It is only in cases where it is clear that the restriction is oppressive that the Court will interfere.* " (emphasis G is mine)

In *Nyambirayi's* case, *supra, this* court reiterated and expanded on this approach. In this regard Gubbay CJ, at p 12G-13E, had this to say:

> "In *Woods & Ors v Minister of Justice, Legal & Parliamentary Affairs & Ors* 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS); 1995 (1) BCLR 56 (ZS) this court emphasised that an H abridgment of a guaranteed right should not be arbitrary or excessive. It

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was said at 199B-C, 706E-F and 59C-D respectively: A

> 'What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the B individual.'

From a procedural aspect the *onus* is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not. See *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382 *in fine*-383A; 1984 (2) SA 778 (ZS) at 783H. The C standard of proof is a preponderance of probability.

In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right; D

(ii) the measures designed to meet the legislative objective are rationally connected to it; and

(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

I agree with the above approach. This Court has to be satisfied that the E impugned provisions are arbitrary, oppressive and, consequently, not justifiable in a democratic society before striking down such a provision as unconstitutional.

I will now turn to deal with the impugned sections in the order they are set out in the draft order. F

Is section 4(2) and (3) reasonably justified in a democratic society?

Section 4 of the Act provides as follows:

"(1) The operations of the Authority shall, subject to this Act, be controlled and managed by a board to be known as the Broadcasting Authority of Zimbabwe Board. G

(2) Subject to subsection (3), the Board shall consist of not fewer than five members and not more than nine members appointed by the Minister after consultation with the President and in accordance with any directions that the President may give him.

(3) In appointing the members of the Board the Minister shall endeavour to ensure that members are representative of groups or sectors of the community. H

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(4) Third A Schedule shall apply to the qualifications of members of the Board, their terms and conditions of office, vacation of office, suspension and dismissal, and the procedure to be followed by the Board

at its meetings."

Section 4(1) provides for the establishment of the Broadcasting Board (the Board). It is not impugned and there is nothing controversial about it. Section B 4(2) provides that the Board should consist of not fewer than five members and not more than nine members appointed by the Minister after consultation with the President and in accordance with any directions that the President may give. Section 4(3) provides that in appointing members of the Board the Minister shall endeavour to ensure that members are representative of groups or sectors of the community.

C The challenge to ss 4 and 6 of the Act was based on the lack of independence from government control of the regulating authority created under the Act and the undue influence of the Minister in the licensing process. Mr *de Bourbon* submitted that ss 4 and 6 ensure that the responsible Minister, the second respondent, remains firmly in control of the licensing process and the D Broadcasting Authority. He further submitted that the Minister retains ultimate licensing power to issue, renew, amend and suspend, or cancel licences. In essence Mr *de Bourbon's* contention is that the Broadcasting Authority, as constituted in terms of s 4, does not provide sufficient independence for that body and consequently is unconstitutional. In support of this proposition Mr *de Bourbon* cited the case of *Athukorale supra.* I accept that *Athukorale's* E case, *supra* is authority for the proposition that a regulating authority that is unduly dependent on the government is unconstitutional. In determining whether a provision creates a dependent or independent regulating authority the standard three-tier test enunciated in *Nyambirayi's* case, *supra,* provides no guidance as that test does not deal with independence or lack of it of a F regulating authority. A comparison of this section with provisions found in other jurisdictions is therefore instructive.

This section, as already pointed out, is very similar to s 1(2) of the British Broadcasting Act of 1990 which provides that the Independent Television Commission shall consist of a Chairman and a deputy Chairman appointed by the Secretary of State and such other members appointed by the Secretary of G State, not being less than eight nor more than ten as he may, from time to time, determine. Similarly the Australian Broadcasting Services Act 1992 creates the Australian Broadcasting Authority as the licensing and regulating authority. The Australian Broadcasting Authority consists of seven members all appointed by the Governor-General without any reference to any other body or persons H outside governmental structures. In Australia the Governor-General and the

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Minister for Communications, Information, Technology and Arts have other A controlling powers that I have already adverted to in the analysis of the Australian Act above.

In Ireland, as already indicated, members of the regulating authority are appointed by government through the responsible Minister. The government has power to remove a member of the regulating authority for state reasons. B

In Norway the King and the Minister have very wide powers including those of making appointment to the regulating authority.

In the United States appointments to the regulating authority are made by the President with the advice and consent of the Senate. Similarly in Sweden, Malaysia, South Korea, Canada and New Zealand the government makes appointments to the regulating authority. C

In South Africa the government's power to appoint members of the Independent Communications Authority of South Africa is seriously circumscribed by statutory provisions that seek to enhance the plurality of the regulating authority.

In France and Italy more than one arm of government controls the appointments D to the regulating authority.

It is quite apparent from the foregoing that s 4 of the Act is modelled on provisions existing in countries that are generally considered as democratic.

As I have already stated, in impugning s 4 and s 6 the applicant relied on the Sri Lankan case *of Athukorale and Ors v Attorney-General, supra.* It is argued E that the authority created under s 4 of the Act was not sufficiently independent of government control and, therefore, unconstitutional.

The facts in the *Athukorale's* case, *supra,* are these: On 21 March 1997 the Sri Lanka Broadcasting Authority Bill was published in the SriLanka Government Gazette, and was subsequently placed on the order paper of the Sri Lankan F Parliament. The Bill was intended to make provision for the establishment of a new authority, the Sri Lanka Broadcasting Authority, to regulate the establishment and maintenance of broadcasting stations and to provide for the issuance of licences for that purpose. Clauses 3(1), (4), 5(g), 7(7), 10, 11, 17 and 19 of the Bill contained provisions to enable the proposed authority to - supervise, direct and control the content of programmes to be broadcast and G to provide for the control of the authority by government appointees and for the vesting in the minister of powers to remove the chairman and members of the board and to prescribe guidelines to be followed by licensees. The petitioners, by application under Art 126 of the Constitution of Sri Lanka, invoked the jurisdiction of the Supreme Court to determine whether the Bill or any of its provisions was inconsistent with the Constitution and, in H

A particular, Art 14(1)(a) of the Sri Lankan Constitution which provided that every citizen was entitled to freedom of speech and expression including publication.

Clause 3 of the Bill whose constitutionality the court was called upon to determine provided as follows:

> B "3 (1) The administration, management and control of the affairs of the Authority shall be vested in a Board of Directors (hereinafter referred to as 'the Board') consisting of the following:
>
> (a) six *ex officio* members, namely -
>
> (i) the Secretary to the Ministry of the Minister in charge of the subject of Information and Broadcasting or his representative; C
>
> (ii) the Secretary to the Ministry of the Minister in charge of the subject of Defence or his representative;
>
> (iii) the Secretary to the Ministry of the Minister in charge of the subject of Posts and Telecommunications or his representative;
>
> (iv) the Secretary to the Ministry of the Minister in charge of the subject of Education and Cultural Affairs or his representative; D
>
> (v) the Secretary to the Treasury or his representative;
>
> (vi) the Chairman, National Film Corporation of Sri Lanka; and
>
> (b) five other members appointed by the Minister, at least two of whom shall be persons who have had experience in the field of broadcasting. A member appointed under this section is hereinafter referred to as E 'an appointed member' of the Board.
>
> (2) ..."

The Sri Lankan Supreme Court was dissatisfied with the above provision and observed:

> "Having regard to the limited availability of broadcasting frequencies, the F regulation of broadcasting was necessary to ensure the adequate coverage of issues and to prevent the monopolistic domination of the frequency spectrum by the government or by a few individuals. On that basis regulation did not violate the right to freedom of speech but rather advanced it by serving the interests of the whole community and giving listeners and viewers the opportunity to consider a range of points of view. However, in order to safeguard the fundamental right of freedom of G thought and expression, the regulatory body had to be independent of the government. *In the instant case, the regulatory body envisaged by the Bill clearly lacked that independence, since its members were government appointees with no security of tenure, and it was obliged to follow directions given by the minister.* Moreover, the Bill would empower the H minister to interfere with the presentation of programmes and commercial

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> advertising, which would undermine the principles of fairness, infringe A the public right to information and deprive certain broadcasters of sponsorship income was legally unacceptable ..." (emphasis)

The Court was of the view that s 3 of the Sri Lankan Bill did not provide for such an independent regulating authority and concluded:

> "Having regard to the composition of the Board of Directors of the B Authority, the lack of security of tenure in office either of the Chairman or the appointed members and having regard to the power of the Minister to give direction which the Authority is obliged to follow, the Authority lacks the independence required of a

body entrusted with the regulation of the electronic media, which, it is acknowledged on all hands, is the most potent means of influencing thought." C

Clause 3 of the Bill identified the appointees to the regulating authority through their offices and these were government officials subject to government control, therefore, incapable of being independent of government. Section 4 of the Act merely creates the regulating authority and identifies the Minister as the person who appoints members of the authority. Someone has to make the appointments to the authority. Section 4 does not identify who should be D appointed to the authority. It merely provides for the number of appointees and who makes the appointment. The persons to be appointed are not identified in such a manner as to leave the Minister without choice but to appoint people dependent on the government as was the case in *Athukorale's* case, *supra. Athukorale's* case, *supra,* is certainly distinguishable from this case. The provisions of section 3 of the Sri Lankan Bill are very different from section E 4 of the Act.

On this basis I am satisfied that s 4(2) and (3) creates a regulating authority that cannot be said to be overly dependent on government and, therefore, unconstitutional. I am, therefore, satisfied that the challenge to s 4(2) and (3) of the Act should be dismissed. F

However, the same cannot be said of s 6 of the Act. Section 6 seriously undermines the independence of the regulatory authority. Section 6 of the Act makes the Minister the licensing authority. While in terms of the Act the authority processes the applications for a broadcaster's licence, s 10(1) of the Act confers on the Minister unfettered power to veto the granting of a licence G by the authority. This in effect revokes the regulating authority's power to issue licences and confers it on the Minister. In my view the above quoted remarks of the Sri Lankan Supreme Court in *Athukorale's* case, *supra,* apply with equal force to s 6 as read with s 10(1) of the Act.

I accordingly hold the view that s 6 of the Act is unconstitutional because it totally subordinates the regulating authority to the Minister in the process of H granting of broadcasting licences.

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A I now turn to deal with the next s that the applicant seeks to have declared unconstitutional. The applicant seeks, in paragraph 1(c) and (d) of its draft order to have s 8 subsec (1), (2) and (5) and s 22(2) declared unconstitutional.

The above sections provide as follows:

"8. **Persons disqualified to be licensed**

B (1) Subject to subsection (3), a broadcasting licence shall be issued only to individuals who are citizens of Zimbabwe and ordinarily resident in Zimbabwe or to a body corporate in which a controlling interest is held, whether through any individual, company or association or otherwise, by one or more individuals who are citizens of Zimbabwe and ordinarily resident in Zimbabwe.

C (2) For the purposes of subsection (1) 'controlling interest' means —

(a) all of the securities in the body corporate; or

(b) securities representing all of the share capital of the body corporate; or

(c) securities equivalent in value to one hundred *per centum* of the share capital of the body corporate; or D

(d) securities entitling the holders thereof to all the votes in the affairs of the body corporate.

(5) No applicant that is a body corporate shall be qualified to be licensed if any one person holds or controls more than ten *per centum* of the E securities in that body corporate.

22.(2) No person other than a citizen of Zimbabwe ordinarily resident in Zimbabwe shall be a director of a licensee."

Paragraph 2 of the applicant's founding affidavit provides as follows:

F "The applicant is a company duly incorporated with limited liability according to the laws of Zimbabwe, having as its main object the purpose of carrying on a broadcasting service within Zimbabwe. Its address for service for the purposes of this application is that of its undermentioned legal practitioners of record, Messrs Honey & Blanckenberg, 51 Samora Machel Avenue Harare."

G There is no averment anywhere in the founding affidavit that the applicant is controlled by a foreign interest and might fail to obtain a licence on that basis. There is nothing on the papers to indicate that the applicant has been, is, or is likely to be, affected by the provisions of s 22. Indeed s 22 of necessity can only refer to natural persons. The applicant is a company or an artificial

person incapable of being a director of another company. There is no suggestion that H anybody wishing to be a director of the applicant has been, in some way,

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hindered by the provisions of s 22. Given these facts I do not see how the A applicant can be adversely affected by s 8. The applicant does not fall under any of the persons disqualified under this section.

In the case of *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S) this court set some guidelines on what constitutes *locus standi* in constitutional applications in terms of s 24(1) of B the Constitution. In that case the applicant, an opposition political party, sought to challenge the constitutionality of ss 25(1), 26(5) and 158(2)(c) of the Electoral Act on the basis that these provisions abridged the protection of freedom of expression contained in s 20(1) of the Constitution. The party also sought to challenge the constitutionality of s 3 of the Political Parties (Finance) Act [*Chapter 29:04*] on the basis that this provision contravened the C constitutional protections of freedom of expression and assembly. As regards the challenge to sections 25(1) and 26(5) of the Electoral Act this court held at the headnote at p 254:

> "That the applicant had no *locus standi in judicio* to bring the matter before the Supreme Court. In terms of s 24(1) of the Constitution *an applicant has locus standi to seek redress where there has been a contravention of* D *the Declaration of Rights in relation to himself.* The applicant must be able to show a likelihood that it would be affected by the law impugned. It has no right to seek redress either on behalf of the general public or anyone else. The applicant was not entitled to carry the torch for claimants and voters generally. The impugned provisions related to individuals who were claimants or voters. A political party could be neither a claimant nor E a voter and thus it had no *locus standi* in this matter.

On the authority of the *United Parties* case, *supra,* I am satisfied that the applicant has no *locus standi* to challenge ss 8(1),(2),(5) and 22(2).

The applicant next seeks to have s 9 of the Act declared unconstitutional. Section 9 of the Act provides as follows: F

> "9. **Restrictions in relation to the issue of certain licences**
>
> (1) Only one licence to provide a national free-to-air radio broadcasting service and one licence to provide a national free-to-air television broadcasting service shall be issued in addition to the national broadcasting services provided by any public broadcaster.
>
> (2) Only one signal carrier licence shall be issued to a person other than G a public broadcaster.
>
> (3) With the exception of a public broadcaster, a broadcasting licence and a signal carrier licence shall not be issued to the same person."

I have no doubt that the applicant has *locus standi* to challenge this section for a number of reasons. The applicant is applying for a radio broadcaster's H

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A licence. Section 9(1) permits the granting of only one licence to provide a national free-to-air broadcasting service. This limitation to one licensee no doubt must affect the applicant's prospects of success in its endeavour to obtain a broadcasting licence. The more the licences are available for issue the better the prospects of success for the applicant. The limitation by statute to one licence to provide a national free-to-air broadcasting service smacks of the B State wishing to monopolise the airwaves.

In the case *of Capital Radio (Pvt) Ltd v Minister of Information (1)* 2000 (2) ZLR 243 (S) this court issued a *declaratur,* part of which provided as follows:

> "1. The monopoly on broadcasting services created by section 27 of the Broadcasting Act [*Chapter 12:01*] is inconsistent with section 20(1) of C the Constitution of Zimbabwe and is therefore invalid insofar as it vests in the Zimbabwe Broadcasting Corporation the exclusive privilege of carrying on a broadcasting service in Zimbabwe;
>
> 2. Sections 14(1) and 19(2) of the Radiocommunication Services Act [*Chapter 12:04*] are inconsistent with section 20(1) of the Constitution of Zimbabwe and are, therefore, invalid insofar as those provisions D

prohibit any person, other than the Zimbabwe Broadcasting Corporation, from possessing or working a radio station for the purpose of carrying on a broadcasting service in Zimbabwe."

Section 27 of the Broadcasting Act that was struck down in the above case is strikingly similar to s 9(1) of the Act which is being challenged. It read:

"27. No person other than the Corporation shall carry on a broadcasting E service in Zimbabwe."

Mr *de Bourbon,* has argued that s 9 of the Act seeks to entrench a monopoly in the same way as s 27 of [*Chapter 12:01*] that was struck down as unconstitutional in the *Capital Radio (Pvt) Ltd case, supra.* I agree with this submission. Section 9(1) and also (2) of the Act create monopolies, which on F the authority of *Capital Radio (Pvt) Ltd, supra,* are unconstitutional. I do accept that airwaves are a finite resource and that the State has to observe international restrictions when allocating the frequencies. I also believe that there is merit in the contention that the allocation of frequencies should be entrusted to an independent regulating authority which, no doubt, will take into account the constraints relating to the limited frequencies available.

G Section 9(3) does not, in my view, create a monopoly. It merely provides that no person should be a holder of both a broadcasting licence and a carrier licence. If anything, that section militates against monopoly. The applicant's attack on this subsection appears in paras 18.6.3 to 18.6.6 which provide as follows: H

"18.6.3 It does not follow, however, that separation of producing and

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transmitting functions is of benefit to anyone. Broadcasters like Capital A Radio are fully able to produce and transmit their own content and regard this as the full realisation of its right to freedom of expression.

18.6.4 It is submitted that there is no discernible benefit to citizens in the imposition of these provisions. There is no good or cogent reason for this split in function, and it is difficult to see the reason for the inclusion of these provisions in the Act. B

18.6.5 It is Applicant's submission that once again the only benefit that accrues is to the government and the ruling party in that they can now not only control who receives a broadcasting licence (which in effect becomes merely a programme producing licence), but they can also control the transmitting companies. This means that if a broadcaster was to become objectionable to them they could stop the service at the transmission C company because this would be a completely different entity.

18.6.6 It is Applicant's submission that the infringement to its right to freedom of expression is clear. It is not being given the right to be in control of the entities that would produce and transmit its material as is the case with most other broadcasters in the democratic world. This infringement has no discernible benefit to citizens and only seems to D benefit the Second Respondent's thirst for control. Therefore the harm is completely disproportionate to the negligible benefits."

The respondents' response to the applicant's contention is found in para 49 of the opposing affidavit which, in part, provides:

"49. *Ad paragraph 18.6* E

The decision to allow for one other signal carrier licence other than the public broadcaster is once again, to ensure economic viability for both the public and the private signal carrier. It is also justifiable on the grounds that it will ensure simple and practical policing by the First Respondent to ensure compliance by both the signal carrier and broadcasters."

The main thrust of the applicant's argument is that it is economically better not F to split the licences while the respondents maintain the opposite view. The provision no doubt abridges the applicant's freedom of expression. It certainly satisfies most of the criteria required for a law that abridges freedom of speech. The one criterion that is debatable is whether the restriction is reasonably justifiable in a democratic society. As was stated in *Zimbabwe Township* G *Developers (Pvt) Ltd, supra,* there is always a presumption of constitutionality in favour of an Act and it is only in cases where it is clear that the restriction is arbitrary and oppressive, that the court can interfere. I am not convinced this provision is clearly arbitrary and oppressive. Section 9(3) of the Act may be undesirable from an economic point of view but it is not clearly arbitrary and oppressive. There is no basis, therefore, for striking down s 9(3) of the Act. H

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A In any event s 20 of the Constitution is about protecting the freedom of expression *per se* and not on how to exercise that right in the most economically advantageous manner.

The applicant also challenges the constitutionality of s 11 (1) as read with para 9(1)(b) and (c) of the Fifth Schedule, and s 11(4), s 12(1)(f), (2) and (3), ss 15 and 16. It is very clear that these provisions regulate the conduct of business B by successful applicants and holders of broadcasting licences. The applicant does not hold such a licence. The applicant has applied to this court and to the Broadcasting Authority for a broadcasting licence. This court does not have the jurisdiction to grant such a licence. The Broadcasting Authority has not granted the applicant a licence.

C In the result I come to the conclusion that s 4(2) and (3) and s 9(3) of the Act are constitutional. Sections 6, 9(1) and (2) are unconstitutional. The applicant has not established *locus standi to* challenge all the other sections impugned as set out in the draft order. Different judges have come to different conclusions in respect of the different sections of the Act that have been challenged. The net result is as follows:

D (1) The court unanimously finds that ss 4(2) and (3) are constitutional.

(2) The court unanimously finds that the applicant has no *locus standi in judicio* to challenge the constitutionality of s 11(1) as read with para 9(1)(b) and (c) of the Fifth Schedule.

(3) The court unanimously finds s 6, ss 9(1) and (2) unconstitutional and E they are hereby struck down.

(4) The majority of the court finds s 9(3) unconstitutional and it is hereby also struck down.

(5) The majority of the court also hereby dismisses the application to have the following sections struck down as unconstitutional:

(a) ss 8(1) and (2) and s 22(2) F

(b) s 8(5)

(c) s 11(4)

(d) s 12(1)(f)(2)and(3)

(e) ss 15 and 16

G Costs normally follow the result. In the present case both parties were partially successful and the majority of the court has concluded that equity demands that there be no order as to costs.

Sandura JA: I have read the judgment prepared by Chidyausiku CJ and agree that ss 6, 9(1) and 9(2) of the Broadcasting Services Act [*Chapter 12:06*] H ("the Act") are inconsistent with s 20(1) of the Constitution of Zimbabwe

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("the Constitution"). Secondly, I agree that it has not been shown that ss 4(2) A and 4(3) of the Act contravene s 20(1) of the Constitution. Thirdly, I agree, but for a different reason, that the applicant does not have the *locus standi in judicio* to challenge the constitutionality of s 11(1) of the Act, as read with para 9(1)(b) and (c) of the Fifth Schedule to the Act. In my view, the only valid reason for the conclusion that the applicant does not have the requisite *locus* B *standi* is that the conditions set out in para 9(1)(b) and (c) of the Fifth Schedule only apply to a commercial television broadcasting licence. They do not apply to a radio broadcasting licence which, according to the applicant's founding affidavit, is the type of licence sought by the applicant. For the same reason, I agree that the applicant does not have the *locus standi* to challenge the constitutionality of s 11(4)(b), which only affects a television broadcasting C licensee.

However, I disagree with the conclusion that there is no basis for striking down s 9(3) of the Act. In addition, I disagree with the finding that the applicant does not have the *locus standi* to challenge the constitutionality of ss 8(1), 8(2), 8(5), 11(4)(a), 12(1)(f), 12(2), 12(3), 15, 16 and 22(2) of the Act. Before dealing with the question of the applicant's *locus standi,* and determining D whether the challenged provisions of the Act are constitutional, I would like to set out very briefly the factual background in this matter because I consider it relevant to the issue of the applicant's *locus standi.* I would also like to deal with the presumption of constitutionality.

The applicant is a company incorporated with limited liability in accordance E with the laws of Zimbabwe. Its main object is the operation of a radio broadcasting service within Zimbabwe.

Shortly after its incorporation, the applicant discovered that it could not carry out its main object because in terms of s 27 of the Broadcasting Act [*Chapter 12:01*], now the Zimbabwe Broadcasting Corporation Act [*Chapter 12:01*], F the Zimbabwe Broadcasting Corporation *("the* ZBC") had an exclusive monopoly over broadcasting services in Zimbabwe. In addition, ss 14(1) and 14(2) of the Radiocommunication Services Act [*Chapter 12:04*] specifically prohibited any person, other than the ZBC, from possessing or working a radio station for the purpose of carrying on a broadcasting service in Zimbabwe.

Consequently, the applicant, acting in terms of s 24(1) of the Constitution, G filed a court application in this Court challenging the constitutionality of the aforementioned provisions in both Acts. It alleged that the said provisions were inconsistent with s 20(1) of the Constitution and were, therefore, invalid. That contention was conceded by the respondent in that application, who is now the second respondent in the present application.

Accordingly, on 22 September 2000 this Court issued an order declaring that H

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A the aforementioned provisions in both Acts were inconsistent with s 20(1) of the Constitution and were, therefore, invalid. In addition, the Court declared that the applicant was entitled under the law to operate a broadcasting service in Zimbabwe. The relevant part of the order reads as follows:

> "In the premises and for the sake of clarity, it follows that:
>
> The applicant is entitled under the law to operate and provide a broadcast B service from within Zimbabwe.
>
> The applicant is entitled under the law to import into Zimbabwe all radio and other equipment to operate a, commercial radio station and to broadcast within and outside Zimbabwe, subject to the payment of all customs dues and import taxes lawfully levied in terms of the law, and to C possess and utilise such broadcast equipment."

See *Capital Radio (Pvt) Ltd v Minister of Information (1)* 2000 (2) ZLR 243 (S) at 244-C.

Subsequently, the applicant imported one antenna and one transmitter, hired some broadcasting equipment, and began broadcasting on 28 September 2000.

D Thereafter, on 4 October 2000, the Presidential Powers (Temporary Measures)(Broadcasting) Regulations, 2000 ("the Regulations"), published in Statutory Instrument 255A of 2000, were promulgated. These Regulations were subsequently replaced by the Act, which was promulgated on 4 April 2001 and came into effect on that day.

E The applicant's contentions, as set out in its founding affidavit, are that various provisions of the Act restrict its freedoms of expression and association, in contravention of ss 20(1) and 21(1) of the Constitution, and have the effect of restoring the monopoly in broadcasting which was struck down by this court in September 2000. It is further contended that the Act has taken away from the applicant its entitlement to operate a broadcasting service, which was F declared by this court when the monopoly in broadcasting was struck down.

Having set out the factual background, I would like to deal with the presumption of constitutionality. In *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S), 1984 (2) SA 778 (ZS), Georges CJ considered the presumption of constitutionality and identified two meanings G of the phrase. The first meaning is that where a party alleges that a statutory provision is unconstitutional, the *onus* rests on him to show that it is, and the second meaning is that if the challenged provision is capable of two or more interpretations, one of which is consistent with the Constitution, the court would presume that the legislature intended to act constitutionally and would uphold the challenged provision. Emphasising the fact that the presumption H has two meanings, the learned Chief Justice said the following at 383E-F:

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> "I approach the decision of this matter on the basis that it is in these two A senses and these two senses alone that there is a presumption of constitutionality".

Commenting on the first meaning of the presumption he said the following at 383A-E:

> "Even where the Constitution does not make it clear where the *onus* lies, B as the Zimbabwe Constitution does, the *onus* lies on the challenger to prove that the legislation is not reasonably justifiable in a

> democratic society and not on the State to show that it is. In that sense there is a presumption of constitutionality ...
>
> In that sense the presumption represents no more than the court adopting the view that a legislature, elected by universal adult suffrage and liable C to be defeated in an election, must be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society. But situations can arise even in such societies in which majorities oppress minorities, and so the Declaration of Rights prescribes limits within which rights may be restricted. It is only in cases where it is clear that the restriction is oppressive that the court will interfere." D

In my view, the learned Chief Justice was merely saying that the burden of proof rested on the challenger, and that unless the challenged provision was clearly shown to be oppressive it would not be struck down. What he said should not be interpreted to mean that before the court embarks upon the enquiry as to whether a restriction is reasonably justifiable in a democratic society it must be satisfied that the restriction is arbitrary and oppressive and E cannot possibly be saved by the presumption of constitutionality.

In any event, about twelve years after the *Zimbabwe Township Developers* case, *supra,* the Full Bench of this court set out a three-part test which must be satisfied by any restriction of a guaranteed right, before such a restriction can be said to be reasonably justifiable in a democratic society, in *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S). At 13B-E Gubbay CJ said: F

> "From a procedural aspect the *onus* is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not. See *Zimbabwe Township Developers (Pvt) Ltd v Lou 's Shoes (Pvt) Ltd 1983* (2) ZLR 376 (S) at 382 *in fine*- 383A; 1984 (2) SA 778 (ZS) at 783 H. G The standard of proof is a preponderance of probability.

In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right; H

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(ii) the A measures designed to meet the legislative objective are rationally connected to it; and

(iii) the means used (to) impair the right or freedom are no more than is necessary to accomplish the objective.

See *R v Oakes* (1986) 19 CRR 308 at 336-337 (a decision of the Supreme B Court of Canada)."

That is the test which I shall apply in determining whether the statutory provisions challenged by the applicant in this case are reasonably justifiable in a democratic society.

However, because of the importance of freedom of expression in a democratic society, the test is to be applied strictly. As the European court of Human C Rights stated in *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843, at para 63:

> "The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society ... Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, D however, must be narrowly interpreted, and *the necessity for any restrictions must be convincingly established."* (emphasis added)

This application was brought 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 is likely to be contravened in relation to him ... that person... may apply E to the Supreme Court for redress."

I now turn to the challenged statutory provisions and consider whether the applicant has the *locus standi* to challenge them, and whether the provisions in question are consistent with the Constitution.

I Subsections (1) and (2) of section 8

F These read as follows:

> "(1) Subject to subsection (3), a broadcasting licence shall be issued only to individuals who are citizens of Zimbabwe and ordinarily resident in Zimbabwe or to a body corporate in which a controlling interest is held, whether through any individual, company or association or otherwise, by one or more individuals who are citizens of Zimbabwe and ordinarily G resident in Zimbabwe.

(2) For the purposes of subsection (1) 'controlling interest' means -

(a) all the securities in the body corporate; or

(b) securities representing all of the share capital of the body corporate; or

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(c) securities equivalent in value to one hundred *per centum* of the A share capital of the body corporate; or

(d) securities entitling the holders thereof to all the votes in the affairs of the body corporate."

The first issue to consider is whether the applicant company has the *locus standi* to challenge these provisions. I have no doubt in my mind that it has. B That is so because prior to the enactment of the challenged legislation it was lawfully operating a radio broadcasting service and was carrying out the commercial activities for which it had been established. It was exercising its freedom of expression and was unfettered by the restrictive provisions in the two subsections because they were non-existent.

However, that situation changed after the Act came into force because ss 8(1) C and 8(2) preclude foreigners and citizens of Zimbabwe not ordinarily resident in Zimbabwe from investing in the applicant. In fact, the provisions impose a total prohibition on foreign investment in the applicant, which the applicant badly needs, thereby making it very difficult, if not impossible, for the applicant to venture into private broadcasting and run a viable commercial radio station. D

Emphasising its need for foreign investment, the applicant avers as follows in the founding affidavit:

> "The Regulations and the Act have stultified applicant's attempts to obtain the lawful wherewithal (i.e. money etc needed) to broadcast...
>
> None of the equipment used in broadcasting can presently be manufactured E in Zimbabwe and must thus all be purchased outside the country and is often quite expensive ... One must realise that these technologies are not indigenous to Zimbabwe and Zimbabwean broadcasters will have to purchase the technology (which is prohibitively expensive, given the weakness of the Zimbabwean currency) or will have to offer equity to those who produce it in order to obtain access to it." F

In the circumstances, the applicant alleges that its freedom of expression has been abridged. Quite clearly, in terms of s 24(1) of the Constitution the applicant has the requisite *locus standi in judicio* to challenge the constitutionality of ss 8(1) and 8(2) of the Act.

In my view, the fact that the applicant did not, in its founding affidavit, state G whether or not it had foreign shareholders is immaterial. That is so because even if all its shareholders were Zimbabwean citizens ordinarily resident in Zimbabwe, it would still have the *locus standi* to challenge the provisions on the basis that the provisions do not permit it to have the foreign shareholders it desperately needs in order to operate a viable commercial broadcasting service. Thus, any foreign investment in the applicant, whether such investment H

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A takes place before the application for a radio broadcasting licence is made or after the licence has been granted, would disqualify the applicant from being a licensee.

Quite clearly ss 8(1) and 8(2) constitute a restriction on freedom of expression. The only issue left for consideration is whether\the restriction is reasonably B justifiable in a democratic society. To determine that, I shall apply the three- part test set out in *Nyambirai's* case, *supra.*

The legislative objectives given by the second respondent are as follows:

"1. To create employment and a source of income to Zimbabwean citizens, and therefore as a device to protect the economic wellbeing of the country. C

2. To ensure that the use of the broadcasting frequency spectrum, which belongs to Zimbabweans as a whole, is not owned and controlled by foreigners to the exclusion and detriment of Zimbabweans.

3. To ensure compliance and monitoring of the provisions of the Act.

4. For the defence and security of the country."

D I now wish to consider whether the restriction is reasonably justifiable in a democratic society.

Are the legislative objectives sufficiently important to justify a restriction of the freedom of expression?

It seems to me that the second and fourth objectives are, but the others are not.

E Are the measures designed to meet the legislative objectives rationally connected to them?

I do not think they are. In the first place, there is no rational connection between the creation of employment and the total prohibition of foreign investment in private broadcasting. In fact, permitting foreign investment in private broadcasting would be more likely to create employment for F Zimbabweans than a total ban of such investment.

Secondly, there is no rational connection between forbidding non-resident citizens of Zimbabwe from investing in private broadcasting, and the legislative objective of ensuring "that the use of the broadcasting frequency spectrum, which belongs to Zimbabweans as a whole, is not owned and controlled by G foreigners to the exclusion and detriment of Zimbabweans." In this regard, there is no rational basis for treating non-resident citizens differently from citizens who are ordinarily resident in Zimbabwe.

Thirdly, there is no rational connection between the total prohibition of foreign investment in private broadcasting and the legislative objective of H ensuring "compliance and monitoring of the provisions of the Act."

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Finally, there is no rational connection between the total prohibition of A foreign investment in private broadcasting and the defence and security of Zimbabwe. In fact, the second respondent does not say in what way the two are connected.

Are the means used to impair the freedom of expression no more than is necessary to accomplish the objectives? B

I do not think so. In the first place, there must be many other ways of creating employment for Zimbabweans which do not involve a limitation of freedom of expression.

Secondly, the legislative objective of ensuring that the airwaves are not controlled by foreigners can be achieved without a total prohibition of foreign C investment. In fact what the applicant seeks is not an abandonment of control of the airwaves to foreigners, but limited foreign investment which is essential if private broadcasting is to be viable.

Thirdly, the legislative objective of ensuring compliance with the provisions of the Act can be achieved without a total prohibition on foreign investment.

Finally, the defence and security of Zimbabwe can be maintained without a D total prohibition of foreign investment in private broadcasting.

In the circumstances, subsections (1) and (2) of s 8 are not reasonably justifiable in a democratic society, and are therefore in breach of s 20(1) of the Constitution.

In addition, these provisions contravene s 21(1) of the Constitution which E guarantees freedom of association. It is the applicant's constitutional right to associate in business with any person it chooses.

II Section 8 (5)

This subsection reads as follows:

> "No applicant that is a body corporate shall be qualified to be licensed if F any one person holds or controls more than ten *per centum* of the securities in that body corporate."

What this means is that the only company which qualifies to apply for a licence is one which has ten or more shareholders. Quite clearly, this is a restriction on freedom of expression. G

For the reasons which I set out when I considered the applicant's *locus standi* in respect of ss 8(1) and 8(2), I am satisfied that the applicant has the *locus standi* to challenge the constitutionality of s 8(5). In addition, the fact that in its founding affidavit the applicant did not state that it has less than the required minimum of ten shareholders is not fatal. That is so because even if it has ten or

more shareholders, s 8(5) precludes it from reducing that number H to less than ten for whatever reason, even if such a move might be absolutely

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A necessary for the company's survival. In that event the applicant might be compelled to give up private broadcasting.

In the circumstances, the only issue left for consideration is whether s 8(5) is reasonably justifiable in a democratic society.

The legislative objective in respect of this provision is set out by the second B respondent as follows:

> "The frequency spectrum is a finite resource, which is owned by all Zimbabweans. Indeed, all Zimbabweans must have the opportunity to participate in the utilisation, control and ownership of their resource. Restricting the amount of equity that may be owned by one shareholder is one way of ensuring that as many Zimbabweans as possible participate C in the use of their product."

I now wish to apply the three-part test set out in *Nyambirai's* case, *supra.*

Is the legislative objective sufficiently important to justify a restriction on the freedom of expression?

I think it is.

D *Are the measures designed to meet the legislative objective rationally connected to it?*

I do not think they are. In my view, there is no rational connection between the requirement that a broadcasting company must have at least ten shareholders, and the legislative objective of ensuring that as many Zimbabweans as E possible "have the opportunity to participate in the utilisation, control and ownership of their resource." The percentage of ten is arbitrary.

Are the means used to impair the freedom of expression no more than is necessary to accomplish the legislative objective?

I do not think so. The legislative objective could be achieved in other ways, such as increasing the number of national broadcasting licences.

F In the circumstances, the restriction in s 8(5) is not reasonably justifiable in a democratic society, and is, therefore, in breach of s 20(1) of the Constitution.

III Section 9(3)

This subsection reads as follows:

> "With the exception of a public broadcaster, a broadcasting licence and a G signal carrier licence shall not be issued to the same person ..."

It was common cause that this provision constituted a restriction on freedom of expression. The only issue was whether the restriction was reasonably justifiable in a democratic society. That is the issue which I should now determine by applying the test set out in *Nyambirai's* case, *supra.*

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Are the legislative objectives sufficiently important to justify limiting the A *fundamental right to freedom of expression?*

The legislative objectives in respect of this provision are set out by the second respondent in his opposing affidavit as follows:

> "I do not understand how the applicant or any other broadcaster will be prejudiced by this provision. If anything, it is extremely beneficial to them B in that they are relieved of the huge expenditures involved in constructing broadcasting studios, acquiring and importing expensive antennas and transmitters, and employing staff on a permanent basis to maintain it. In the scenario envisaged by the Act, the signal carrier will provide all the expensive aspects of broadcasting listed above, and will, in all probability, provide studios, cameras, etc. All the broadcaster will need to do is walk C into an equipped studio, and commence broadcasting on the frequency allocated to them. This makes great economic sense both to the country and to the individual broadcaster. The country is spared the burden of repetitively buying and importing

> equipment using scarce foreign currency, and the individual broadcasting licensee enjoys the benefits of... low- cost broadcasting." D

Thus, the main objectives given by the second respondent for the restrictive provision in s 9(3) are (1) to ensure low-cost broadcasting; and (2) to save foreign currency.

It is pertinent to note that s 9(3) imposes a very serious limitation on the broadcaster's freedom of expression in that it places the broadcaster at the mercy of the signal carrier licensee. E

In my view, the above objectives are not sufficiently important to justify the limitation of a fundamental right to freedom of expression. The importance of freedom of expression should never be under-estimated. It lies at the foundation of a democratic society and is one of the basic conditions for its progress and for the development of every man: *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 56F-H. F

Is the measure designed to meet the legislative objectives rationally connected to them?

In my view, there is no rational connection between the legislative objectives of s 9(3) set out above, and the measure designed to meet them. There can be G no rational connection between the objectives of providing low-cost broadcasting and saving foreign currency, and the measure designed to meet those objectives, i.e. the requirement that a private broadcasting licence and a signal carrier licence shall not be issued to the same person. H

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A *Are the means used to impair the freedom of expression no more than is necessary to accomplish the objectives?*

Put differently, the question is whether the restrictive provision in s 9(3) is the least drastic means by which the stated objectives of the section may be accomplished. I have no doubt in my mind that the answer to that question is a negative one. There must be many other ways of achieving the stated B objectives which are less drastic than limiting the fundamental right to freedom of expression.

In the circumstances, I am satisfied that the restriction in s 9(3) is not reasonably justifiable in a democratic society and is, therefore, in breach of s 20(1) of the Constitution.

C IV. Section 11(4)

This reads as follows:

> "Not less than *ten per centum* of total programming content broadcast by any licensee shall be -
>
> (a) in any of the national aboriginal languages other than Shona and D Ndebele; and
>
> (b) in the case of a television broadcasting licensee, in a manner that may be understood by audiences who have a hearing impairment."

Quite clearly, the applicant has the *locus standi to* challenge the constitutionality of s 11 (4)(a). Although it has not yet been issued with a radio broadcasting E licence, it has indicated its intention to apply for one and if that application succeeds the applicant's freedom of expression would be restricted, in contravention of s 20(1) of the Constitution. The Declaration of Rights is, therefore, likely to be contravened in relation to it.

However, in respect of s 11(4)(b), I am satisfied that the applicant does not have the requisite *locus standi* to challenge the constitutionality of that F provision. That is so because s 11(4)(b) affects a television broadcasting licensee only, and the applicant has not indicated that it intends to apply for a television broadcasting licence.

As I am satisfied that s 11(4)(a) constitutes a restriction on freedom of expression, I proceed to consider whether the restriction is reasonably G justifiable in a democratic society.

The legislative objective set out by the second respondent in respect of this provision is to cater for minority language groups. I now wish to subject that objective to the three-part test.

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Is the legislative objective sufficiently important to justify a restriction on the A *freedom of expression?*

I think it is.

Are the measures designed to meet the legislative objective rationally connected to it?

I do not think so. There is no rational connection between the requirement that B at least ten *per centum* of the total programming content broadcast by a licensee shall be in any of the national aboriginal languages other than Shona and Ndebele, and the legislative objective of ensuring that minority language groups are catered for. The determination of the percentage of ten is not rational but arbitrary. C

Are the means to impair the freedom of expression no more than is necessary to accomplish the objective?

I do not think so. In my view, there are other ways of achieving the legislative objective without imposing a restriction on the private broadcaster's freedom of expression. For example, the ZBC, with four national radio broadcasting stations and one national television broadcasting station, could easily cater for D the needs of the minority language groups. It seems to me that this area should be the preserve of the public broadcaster which relies upon public funds. In any event, private broadcasters are in business to make profits for their shareholders, and it may not be within their business plan to cater for minority language groups. E

In the circumstances, s 11(4)(a)is not reasonably justifiable in a democratic society and is, therefore, in breach of s 20(1) of the Constitution.

V. Section 12(1)(f)

This reads as follows:

> "(1) A licence shall be in the prescribed form and shall specify — F
>
> (f) the sources and manner of funding of the licensee."

In my view, the applicant has the *locus standi to* challenge the constitutionality of this provision. It has indicated its intention to apply for a radio broadcasting licence but genuinely fears that the requirement that the licence itself should G specify such confidential information would create a chilling effect and scare its donors who might fear being victimised. The provision is, therefore, a restriction on freedom of expression. The only issue for consideration is whether the provision is reasonably justifiable in a democratic society.

The legislative objective for this provision is set out by the second respondent as follows: H

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> A "The requirement indicating sources of funding is essential ... The Broadcasting Authority, in assessing the suitability of a client, must be convinced on the financial position and stability of an applicant. It must also be able to ascertain the genuineness and authenticity of the financial statement given to it. If the source and manner of funding is not stated, how will the authority be able to ascertain this?
>
> B The financial stability of an applicant is absolutely essential to enable the First Respondent to ensure that the licences are not given to persons who cannot possibly commence operations in terms of their licences, and therefore seek to obtain a licence for speculative and profit-making purposes. The provision is meant to ensure stability and continuity of broadcasting services. This provision also assists the First Respondent in C ensuring that the other provisions of the Act have been complied with. For example, provisions relating to cross-ownership ... This ensures transparency in the process, and ensures that the public can readily ascertain whether the persons who have a direct interest in the allocation of licences ... secretly and corruptly try and benefit from the process."

Thus, the main objectives given by the second respondent for the restrictive D provision in s 12(l)(f) are: (1) to assist the Broadcasting Authority ("the Authority") in assessing the suitability, financial position and stability of an applicant for a licence; (2) to assist the Authority in ascertaining the genuineness and authenticity of the financial statement given to it by an applicant; (3) to ensure that licences are not issued to persons for speculative and profit- making purposes; (4) to ensure the stability and continuity of broadcasting E services; (5) to assist the Authority in ensuring that the other provisions of the Act, such as those relating to cross-ownership, have been complied with; and

(6) to ensure transparency in that the public can readily ascertain whether the persons who have a direct interest in the allocation of licences secretly and corruptly try to benefit from the process.

F I will now consider whether the restriction in s 12(l)(f) is reasonably justifiable in a democratic society. I will apply the three-part test already referred to in this judgment.

Are the legislative objectives sufficiently important to justify a restriction on the freedom of expression?

G Quite clearly they are not. As already stated, freedom of expression constitutes one of the essential foundations of a democratic society. It is so important that it cannot be restricted on the basis of the objectives given by the second respondent and which I have set out above.

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Are the measures designed to meet the legislative objectives rationally A *connected to them ?*

In my view, they are not. Firstly, there is no rational connection between the objective of assisting the Broadcasting Authority in assessing the suitability, financial position and stability of an applicant, and the requirement that the licence must specify the sources and manner of funding of the licensee. B

Secondly, there is no rational connection between the objective of assisting the Authority in ascertaining the genuineness and authenticity of the financial statement given to it by an applicant, and the requirement that the licence must specify the sources and manner of funding of the licensee. The genuineness of the financial statement can be determined by an examination of the applicant's assets and bank account. The sources of the funds are irrelevant in C that exercise.

Thirdly, there is no rational connection between the objective of ensuring that licences are not issued to persons for speculative and profit-making purposes, and the requirement that the licence must specify the sources and manner of funding of the licensee. D

Fourthly, there is no rational connection between the objective of ensuring the stability and continuity of broadcasting services, and the requirement that the licence should specify the sources and manner of funding of the licensee.

Fifthly, there is no rational connection between the objective of assisting the Authority in ensuring that the other provisions of the Act have been complied E with, and the requirement that the licence should specify the sources and manner of funding of the licensee.

Finally, there is no rational connection between the objective of ensuring that the persons who have a direct interest in the allocation of licences do not secretly and corruptly benefit from the process, and the requirement that the licence should specify the sources and manner of funding, bearing in mind that F there are many ways of disguising identity.

Are the means to impair the freedom of expression no more than is necessary to accomplish the objectives?

In my view, the answer to this question is a negative one. I am satisfied that there are other ways of achieving the legislative objectives set out above which G do not bring about a limitation on the freedom of expression. For example, the financial position of an applicant can be determined by examining the applicant's assets and bank account. In that exercise, the identity of the person who supplied the assets or the money in the bank account is irrelevant.

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A In the circumstances, the restriction in s 12(1)(f) is not reasonably justifiable in a democratic society and is, therefore, in breach of s 20(1) of the Constitution.

VI Sections 12(2) and 12(3)

Section 12(2) provides that a licence, other than a community broadcasting B licence, shall be valid for a period of two years, and s 12(3) provides that a community broadcasting licence shall be valid for a period of one year. In my view, these provisions constitute a restriction on the freedom of expression.

That is so because the very short licence duration exerts a serious chilling effect on freedom of expression in at least two ways. Firstly, it discourages prospective investors from setting up a broadcasting service, as they avoid C taking the risk of the licence not being renewed and sustaining heavy financial losses. Secondly, the constant need to have the licence renewed every year or every two years seriously compromises the editorial independence of the licensees, bearing in mind that there is no presumption in favour of licence renewal as is the case in other countries.

D Having said that, I would like to deal with the applicant's *locus standi.* In my view, the applicant has the *locus standi* to challenge both provisions.

With regard to s 12(2), the applicant has indicated that it intends to apply for a national radio broadcasting licence. If that application succeeds, the applicant will be bound by s 12(2) and the restriction on freedom of expression will apply to it. Quite clearly, the applicant has the *locus standi* to challenge E the provision in terms of s 24(1) of the Constitution on the basis that its right to freedom of expression is likely to be contravened.

As far as s 12(3) is concerned, although the applicant did not indicate in its founding affidavit that it intended applying for a community radio broadcasting licence, in its answering affidavit it stated that it was in effect keeping open F its options as to whether or not to seek a community radio broadcasting licence. I am, therefore, satisfied that it has the *locus standi* to challenge s 12(3) in terms of s 24(1) of the Constitution, again on the basis that its right to freedom of expression is likely to be contravened.

In any event, both s 12(2) and s 12(3) specify the duration of radio broadcasting licences, one being a national broadcasting licence and the other being a G community broadcasting licence. But both licences are for the purpose of furthering the applicant's main object, which is the operation of a radio broadcasting service. In addition, ss 12(2) and 12(3) are so intertwined and the duration of each licence is so short that it would be impossible to determine the constitutional validity of s 12(2) without in effect determining the H constitutional validity of s 12(3).

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I now wish to set out the legislative objectives of ss 12(2) and 12(3) before A determining whether the two provisions are reasonably justifiable in a democratic society.

In respect of s 12(2), the legislative objectives given by the second respondent are as follows:

> "to ensure compliance with the Act; B
>
> to raise revenue for the State, and therefore, the public;
>
> to encourage competitiveness and therefore the provision of a high-quality service."

In respect of s 12(3), the legislative objective is set out by the second respondent as follows: C

> "... the purpose of a community broadcasting licence is to allow certain communities the right within specific licence areas, to broadcast to their respective communities. We have thousands of communities in our country, which are very diverse, and sometimes have conflicting interests ... The State has an obligation to allow each and every community in this country to express themselves, but can only do that in the context of the D limited frequencies that are available within Zimbabwe. Therefore, *restricting the validity of a community broadcasting licence to just one year, non-renewable, is one way of ensuring that at some point every community will have had the opportunity to broadcast."* (emphasis added)

Quite clearly, the second respondent is labouring under the misapprehension E that a community broadcasting licence is non-renewable. It is pertinent to note that s 14, which deals with renewals, does not say that.

Nevertheless, I will now consider whether the restriction on freedom of expression imposed by ss 12(2) and 12(3) is reasonably justifiable in a democratic society. F

Are the legislative objectives sufficiently important to justify a restriction on the freedom of expression?

In my view, the legislative objectives in respect of s 12(2) are not, but those in respect of s 12(3) may be.

Are the measures designed to meet the legislative objectives rationally connected to them? G

There can be no doubt that they are not. In respect of s 12(2), it is pertinent to note that the second respondent does not say how the short licence duration of two years ensures compliance with the

Act, or assists in raising revenue for the State, or encourages competitiveness and the provision of high quality broadcasting services. H

Sandura Ja

A Similarly, in respect of s 12(3) the second respondent does not say why a licence duration of one year, as opposed to a longer period, for community radio broadcasting would ensure "that at some point every community will have had an opportunity to broadcast."

Are the means to impair the freedom of expression no more than is necessary to accomplish the objectives?

B In my view, the means are certainly more than is necessary to accomplish the legislative objectives. I say so because there are other ways of achieving the legislative objectives which would not bring about a limitation on the freedom of expression. For example, the police can ensure that a licensee complies with the Act.

C In the circumstances, the restriction on freedom of expression in terms of ss 12(2) and 12(3) is not reasonably justifiable in a democratic society. Accordingly, the statutory provisions in question are in breach of s 20(1) of the Constitution.

VII Sections 15 and 16

D Section 15(1) gives the second respondent the power to amend a licence or any term or condition of a licence for various reasons, after consulting the Broadcasting Authority of Zimbabwe ("the Authority") and giving the 1icensee an adequate opportunity to make representations in the matter in terms of s 15(2).

E Similarly, s 16(1) gives the second respondent the power to suspend or cancel a licence for various reasons, after consulting the Authority and giving the licensee seven days within which to make representations in the matter in terms of s 16(2). In addition, s 16(3) provides that after receiving the licensee's representations the second respondent shall, if in his opinion that course is justified, request the Authority to institute a public inquiry for the purpose of F determining whether or not the licence should be suspended or cancelled.

In addition to that, s 16(5) provides that if at the conclusion of the inquiry, and on the basis of the recommendation of the Authority, the second respondent is satisfied that the licence should be suspended or cancelled, he shall suspend or cancel the licence or take such other action as he considers appropriate.

G Quite clearly, the applicant has the requisite *locus standi* to challenge both sections, as it alleges that its right to freedom of expression is likely to be abridged.

In my view, ss 15 and 16 are in breach of s 20(1) of the Constitution because they give to the second respondent, who is a Government Minister, the power to amend, suspend or cancel licences. It is well established that such H regulatory powers should be exercised by independent regulatory bodies

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Sandura Ja

which are free from political interference. The reason for this requirement is A obvious. A politician may be tempted to use his regulatory powers to deprive those private broadcasters perceived to be critical of the government and its policies of their licences and freedom of expression.

In addition, s 15(1)(c) and (d), and s 16(1)(h) constitute a restriction on freedom of expression for a different reason. B

Subsections(1)(c) and (1)(d) of s 15 read as follows:

> "Subject to this section, the Minister, after consulting the Authority, may at any time amend a licence or any term or condition of a licence —
>
> (c) if the Minister considers the amendment necessary to reflect the true nature of the service, system or business which the licensee is conducting; or C

(d) if for any other reason the Minister considers the amendment necessary or desirable in the public interest."

And s 16(l)(h) reads as follows:

" Subject to this section, the Minister, after consulting the Authority, may suspend or cancel any licence if there is evidence that — D

(h) the licensee has acted in a manner prejudicial to the defence, public safety, public order, public morality or public health of Zimbabwe."

Whilst it is correct that certain restrictions on the freedom of expression are saved by s 20(2) of the Constitution, it is only those that are authorised by law which are saved. In my view, the restrictions in s 15(1)(c) and (d) and s 16(1)(h) E are not authorised by law.

In *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S) at 560E-561 C, this court considered the meaning of the phrase "under the authority of any law" and said the following:

"The phrase 'under the authority of any law' is worded differently from such equivalent phrases as 'provided by law', 'prescribed by law' or 'in F terms of law', used in other constitutional and human rights instruments ... Yet the meaning of these phrases is substantially the same ...

In *The Sunday Times v The United Kingdom* (1979-80) 2 EHRR 245, the European Court of Human Rights was required to consider what was meant by the expression 'prescribed by law' in article 10(2) of the G Convention on Human Rights. The majority of the court held at 271 (para 49):

'In the court's opinion, the following are two of the requirements that flow from the expression "prescribed by". First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated H

2003 (2) ZLR p297

Sandura Ja

A with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail ...'

It is crucial, therefore, that the law must be accessible and formulated with sufficient precision to enable a person to regulate his conduct."

B In my view, the provisions in ss 15(1)(c) and (d) and 16(1)(h) do not pass the above test. The grounds on which the second respondent may amend, suspend or cancel a licence are vague and imprecise, and give the second respondent an unlimited discretion to interfere with licences.

Accordingly, the said restrictions do not fall into the category of those "under C the authority of any law", and are, therefore, not saved by s 20(2) of the Constitution.

VIII Section 22(2)

This section provides that no person other than a citizen of Zimbabwe ordinarily resident in Zimbabwe shall be a director of a licensee.

D In my view, the applicant has the *locus standi to* challenge the constitutionality of this provision for the same reasons that it has the *locus standi* to challenge s 8(1) and (2). For the reasons that I gave when I dealt with the constitutionality of s 8(1) and (2), I find that s 22(2) is in contravention of s 20(1) of the Constitution. It has the same effect as a total prohibition on foreign investment in private broadcasting, which the applicant badly needs.

E In addition, s 22(2) is in contravention of s 21(1) of the Constitution which guarantees freedom of association. It is the applicant's constitutional right to associate in business with any person it chooses.

Finally, I wish to point out that after this court reserved its judgment in this matter, the Broadcasting Services Amendment Act No. 6 of 2003 was promulgated. This Act amended and repealed some of the sections in the F principal Act which had been challenged by the applicant. The views I have expressed in this judgment do not take into account the recent changes to the principal Act.

In the circumstances, I would have issued the following order:

1. The following provisions of the Broadcasting Services Act [*Chapter* G *12:06*] are unconstitutional and are hereby struck down;

a. Section 6;
b. Section 8(1),(2) and (5);
c. Section 9(1),(2) and (3);
d. Section 11(4)(a);
e. Section 12(1)(f),(2) and (3);

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Cheda Ja

f. Section 15;
g. Section 16; and
h. Section 22(2)

2. The costs of this application shall be borne by the first and second respondents, jointly and severally, the one paying the other to be absolved.

CHEDA JA: I have read the judgment prepared by Chidyausiku CJ and that prepared by Sandura JA.

I agree with them that ss 6, 9(1) and 9(2) of the Broadcasting Services Act [*Chapter 12:06*] ("the Act"), are inconsistent with s 20(1) of the Constitution of Zimbabwe ("the Constitution").

I also agree with the conclusions of the two concerning ss 4(2) and 4(3) which have not been shown by the applicant to contravene s 20(1) of the Constitution. As for ss 8(1),(2) and (5) and s 22(2) I agree with Chidyausiku CJ that it is up to the applicant to establish its *locus standi* to challenge that section. The applicant has not made its position clear regarding its status and how it is affected by these provisions. If its composition falls within the prohibited conditions, or if its securities do, then it has not stated that in order to put itself within the ambit of s 24(1) of the Constitution. I would conclude, as does the Chief Justice, that its *locus standi* has not been established.

It is difficult to see how these provisions can be said to stultify the applicant's attempts to obtain money needed to broadcast and equipment when the applicant says it has been previously broadcasting. There is no averment as to how the equipment it has was obtained or that it was a result of foreign investment. The securities held by the applicant have not been disclosed and it is not known how they are structured.

I agree with Sandura JA that s 9(3) places a serious limitation on freedom of expression by the restriction that a broadcasting licence and a signal carrier licence should not be issued to the same person. This means the one party may stifle the other's freedom of expression if it refuses to co-operate. This is certainly an unjustified restriction and it interferes with the applicant's freedom of expression. It should be struck down.

Section 11 (1) in conjunction with para 9(b) and (c) of the Fifth Schedule are also challenged. These provisions relate to television licences while the applicant is applying for a radio broadcasting licence. The applicant has no *locus standi* to challenge them.

As for s 11(4) there seems to be no good basis for challenging a provision intended to benefit the public. The challenge should be dismissed.

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Cheda Ja

The applicant also challenged s 12(1)(f)(2) and (3). Subsection (1)(f) requires that the source and manner of funding be specified in the licence. No reason is given for this. This is the sort of information that can be required on the application form for a licence instead of being on the licence itself.

It is not the broadcaster that issues the licence. If the licensing authority will have that information by the time it issues the licence it is up to it to include it. There is no duty on the applicant as it does not issue the licence to itself.

On the other hand, if there is no provision in the Act for such information to be provided by the applicant there is no basis for having such information on the licence.

However, it is for the licensing authority to obtain the information and I do not find it to be inconsistent with s 20(1) of the Constitution to require such information in view of the provisions of s 8.

Section 12(2) provides that a licence, other than a community broadcasting licence, shall be valid for a period of two years.

It is difficult to understand how a person or company can be expected to D acquire what the second respondent accepts is expensive equipment in the form of antennas and transmitters in order to broadcast just for two years. This is most discouraging as there is no guarantee of renewal. This provision clearly acts as a deterrent to those who may wish to set up as broadcasters. It is a serious interference with the right and freedom of expression.

E It is not necessary for the court to consider what period can be said to be acceptable or constitutional.

In the case of *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S) this court dealt with a similar point regarding the threshold set for political parties to qualify for financial assistance. The provision was struck down because the threshold was too high, without having to state what was F constitutional or acceptable. This decision follows the one in the Canadian case of *Barrette & Payette v A-G Canada* (1993) 14 CRR (2nd) 166.

Section 12(3) refers to a community broadcasting licence whose validity is for a period of one year. I consider that the applicant has no *locus standi* to challenge this section as it is not applying for a community broadcasting G licence.

Sections 15 and 16 give the Minister power to amend or cancel a licence where he considers it necessary to do so. Sub-sections (2) to (5) provide the procedure to be followed in the event that the Minister wishes to exercise powers given him by ss 15 and 16.

In my view there is provision for a fair hearing and there is no breach of the H provisions of s 20 of the Constitution.

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Malaba JA

Accordingly the following sections, as listed in the Draft Order, are to be A struck down:

Para (b) s 6;

Para (e) 9(1), 9(2) and 9(3);

Para (h) 12(1)(f), (2)

The rest of the application is dismissed. B

Malaba JA: The applicant ("Capital Radio") had made a direct

application to this court in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution") for an order declaring specific sections of the Broadcasting Services Act [*Chapter 12:06*] ("the Act") unconstitutional and struck down C on the ground that the provisions thereof are violative of the right to freedom of expression enshrined in s 20(1) of the Constitution, in particular that they are restrictions to the enjoyment of that freedom by broadcasting which are not reasonable in a democratic society. The impugned provisions of the Act are listed in the draft order referred to in the Chief Justice's opinion. The applicant contends that the licensing system created and enforced through the impugned D provisions regulating access to the use of the airwaves as a medium of communication is violative of freedom of expression.

The respondents contend that the impugned provisions of the Act are constitutional, in that not only do they clear the technological impediments to broadcasting but they also promote and ensure that the physically limited E broadcasting facilities placed in the hands of a few broadcasters are used in the public interest.

The first and second respondents also put in issue the *locus standi* of Capital Radio to challenge the constitutionality of certain of the provisions of the Act mentioned in the draft order, making it necessary to determine the question whether Capital Radio complied with the requirements of s 24(1) of F the Constitution to the effect that a person seeking to apply to the court for redress must allege that the impugned provisions of the Act violate, have violated or are likely to violate specific declaration of a right in relation to himself.

Constitutionality of the regulation of broadcasting G

I take the question of the constitutionality of the regulation of broadcasting as a medium of communication.

In challenging the whole licensing system created by Parliament to regulate, through the Act, broadcasting as a medium of mass communication, on the ground that it violates freedom of expression, Capital Radio assumes that a broadcaster has a right of freedom of expression as such secured to him in s 20 H

A of the Constitution in the same way a speaker or a writer enjoys that freedom.

Capital Radio overlooked the fact that broadcasting is a special medium through which people exercise their freedom of expression, that is to say, to transmit and receive information in the free market place of ideas. Unlike the one-to-one communication or the paper upon which the writer expresses himself to the readers, broadcasting as a medium of communication has B inherent or natural physical limitations, making it impossible for all those who would want to use it to do so.

The number of frequencies upon which broadcasting technology depends to convey the information or ideas communicated are limited, such that if broadcasting facilities are to be effectively exploited as a medium of C communication only a few people can use the limited number of airwaves available. If anyone who wished to broadcast had a right to use any frequency regardless of whether there was interference with a prior user a situation would be reached where all spoke without hearing each other. That would be a sure road to chaos and anarchy.

This situation would have occurred in this country following the striking D down of the public monopoly of broadcasting by the decision in the *Capital Radio* case *supra.* In the name of the exercise of freedom of expression, many like Capital Radio would have rushed to use the limited airwaves for television, radio and other forms of communication, thereby choking the medium to no- one's benefit.

E The history of broadcasting legislation in the United States of America illustrates the effect a free-for-all access to the use of broadcasting facilities would have had on freedom of expression. It also shows that regulation of the broadcasting industry is the only way by which Government can fulfil its constitutional obligations to guarantee the enjoyment of freedom of expression by members of the public through this powerful medium of mass communication.

F Before the enactment of the Communications Act 1934, which prohibited radio broadcasting without a licence issued by the Federal Communications Commission, the legislation in the United States had allowed almost free access to broadcasting facilities regardless of whether a particular frequency had a prior user and there was interference with his communication.

G In *National Broadcasting Co v United States* 319 US 190 (1942) Frankfurter J, delivering the opinion of the Supreme Courtof the United States, said at 212-213:

> "These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other H frequencies and increased their power and hours of operation at will. The

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> result was confusion and chaos. With everybody on the air, nobody could A be heard. ...
>
> The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication — its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate B without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile!"

At p 214 His Lordship said:

> "... Congress in order to protect the national interest involved in the new C and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry."

In *Federal CC v Pottsville Broadcasting Co* 309 US 134 (1939) Frankfurter J had pointed out at p 137 that, in enacting the Communication Act 1934:

> "Congress moved under the spur of a widespread fear that in the absence D of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this, Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years.... No license was to be 'construed to create any right, beyond the terms, conditions and periods of the license'."

Lastly, in *Red Lion Broadcasting Co v FCC* 395 US 371 (1969) White J E delivered the opinion of the Supreme Court of the United States on the same subject in these words at 387-389:

> "Although broadcasting is clearly a medium affected by a First Amendment interest, ... differences in the characteristics of news media justify differences in the First Amendment standards applied to them ...
>
> When two people converse face to face, both should not speak at once if F either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human G voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilised in the present state of commercial, acceptable technology. H

Malaba JA

> A It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communication Act 1934 ...
>
> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable B First Amendment right to broadcast comparable to the right of every individual to speak, write or publish... It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communications possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum."

C The use of regulations is therefore essential to efficient broadcasting facilities.

What happened prior to the enactment of the Act was that the Government of Zimbabwe had, by means of the licensing system, made communication by television and radio broadcasting available to the Zimbabwe Broadcasting Corporation only, thereby creating a public monopoly of the use of the airwaves in violation of the interests of private commercial broadcasters in D respect to whose freedom of expression no licensing system had been created to enable them to exploit broadcasting technology. In enacting the Act, the Government responded to an evident need to provide a licensing system which would regulate broadcasting by public and private broadcasters, at the same time ensuring that the public retained its right to dissemination and reception E of information through the same medium consistent with the right to freedom of expression secured to all of them, including those who would have been refused broadcasting licences.

I therefore do not consider that the licensing requirements of the Act limit in principle the rights guaranteed by s 20(1) of the Constitution, as the freedom to impart and receive information through licensed broadcasting is also F guaranteed. Freedom of every person, including the broadcaster, to express and communicate ideas without restraint, whether orally or in print or by other means of communication, should not be confused with the privilege conferred upon broadcasters to use broadcasting facilities.

Locus Standi

G I now turn to consider the question of the *locus standi* of Capital Radio in these proceedings. The first respondent raised this issue by contending that Capital Radio has not alleged the facts it was its duty to allege in terms of s 24(1) of the Constitution to acquire the right of access to apply for redress to the court in respect of certain of the impugned provisions of the Act. The H provisions of s 24(1) of the Constitution are set out in the Chief Justice's opinion.

Malaba JA

The only time the Supreme Court has original jurisdiction to hear an A application for the redress of an infringement of a declaration of aright is when the applicant has alleged that the declaration of a

particular right has been, is being or is likely to be violated in relation to himself (if he is not acting in the representative capacity mentioned therein).

It appears to me that, on a proper construction of the language of s 24(1) of the B Constitution, where a person has not made the necessary allegations of the facts stipulated therein, the question of the constitutionality of the provisions of a statute cannot be a matter for determination by the court because the person would have no right to be heard.

I appreciate the fact that in *Law Society of Zimbabwe & Ors v Minister of Finance* 1999 (2) ZLR 231 (S) McNally JA said the court was disposed to take C a broad view of the question *of locus standi* in matters where the applicant was an organisation bringing a representative action on the allegation that a declaration of rights was being contravened in relation to its members or persons it represented. The organisation would at least have made the necessary allegation of the facts required to be made in terms of s 24(1) of the D Constitution for a person to acquire the right to make an application to the Court for redress.

I do not think the principle of a broad view of *locus standi* taken in matters of the nature dealt with the *Law Society's* case *supra* is applicable to a case where the *locus standi* of a party is challenged on the ground that no allegation of the requisite facts prescribed in s 24(1) of the Constitution for founding *locus* E *standi have* been made.

The principles applicable to the determination of the question of *locus standi* under s 24(1) of the Constitution were stated in *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S), where at 258B-C Gubbay CJ said: H

> "... s 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 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 *Retrofit (Pvt)* G *Ltd v Posts and Telecommunications Corporation & Ors* 1995 (2) ZLR 199 (S) at 207H-208A, 1995 (9) BCLR 1262 (ZS) at 1269 E-G, 1996 (1) SA 847 (ZS)at 854 D-F."

In applying the principles enunciated in the *United Parties* case *supra* to the facts of this case I am of the opinion that Capital Radio has not made allegations of the facts which would entitle it to challenge the constitutionality H

Malaba JA

A of the following provisions of the Act:

(1) s 8 subss (1), (2) and (5);

(2) s 22 subs (2);

(3) s 11 (1), as read with s 9 (b) and (c) of the Fifth Schedule;

(4) s 11 subs (4) para (b); and B

(6) s 12 subs (5).

Section 8

The effect of the provisions of s 8 (1) and (2) of the Act is to prohibit the granting of a broadcasting service licence to a body corporate in which all the securities are *not* owned by citizens of Zimbabwe who are ordinarily resident C in the country. Subsection (5) of s 8 of the Act prohibits the granting of a licence to a body corporate in which more than ten per cent of the securities are held by one person.

In order to acquire the right to challenge the constitutionality of these provisions Capital Radio had to allege that they have violated the right to D freedom of expression in relation to itself by prohibiting it from applying for a broadcasting services licence. It had to allege the fact that all its securities are not owned by citizens of Zimbabwe who are ordinarily resident in the country and that more than ten per cent of its securities are held by one person. Capital Radio did not make allegations of these facts in its founding affidavit.

In para 31 of the opposing affidavit the second respondent stated:

E "Section 8 - Persons Disqualified to be Licensed

> There is nothing in the papers to show that the applicant, or any of its members, are not citizens and ordinarily resident in Zimbabwe. I therefore wonder on what basis the applicant lodges this complaint. Certainly, the applicant has no *locus standi* to challenge sections which, according to F the papers, cannot possibly affect it."

There is no doubt that s 8 of the Act is a law relating to who may not hold a broadcasting licence. It restricts the classes of persons who may hold broadcasting licences. If Capital Radio fell into the class of people who could not be granted a broadcasting services licence by operation of the provisions of s 8 (1), (2) and (5) of the Act, it was expected to challenge the second G respondent's averments in its replying affidavit. In para 18 of its replying affidavit, Capital Radio dealt with the matter on the basis that the provisions of s 8 (1), (2) and (5) of the Act prevented foreigners who had capital from investing in the broadcasting business.

The reasonable inference to be drawn from what Capital Radio said in the H replying affidavit is that it is not one of the corporate bodies affected by the

provisions of s 8(1), (2) and (5) of the Act and that there was no contravention A of the right to freedom of expression arising from those provisions. Incidentally, s 3 of the Canadian Broadcasting Act stipulates that the broadcasting system should be effectively owned and controlled by Canadians. *Re N. B. Broadcasting Co Ltd v CRTC* 13 DLR (4th) 77 at 86.

Section 22(2) B

The effect of s 22 (2) of the Act is that the granting of a broadcasting services licence to a corporate body in which any person other than a citizen of Zimbabwe ordinarily resident in the country is a director is prohibited. Capital Radio did not allege in its founding affidavit that one or all of its directors are not citizens of Zimbabwe ordinarily resident in the country.

Section 11(1), as read with 9 (b) and (c) of the Fifth Schedule C

Section 11(1) of the Act, as read with s 9 (b) and (c) of the Fifth Schedule, prescribes the terms and conditions subject to which each *commercial television* broadcasting licence would be issued.

In para 20 of the replying affidavit it is stated on behalf of Capital Radio that:

> "The applicant wishes to obtain a *radio broadcasting licence,* as with the D old regulations, the Act provides scope for only one national radio broadcaster apart from the public broadcaster."

As s 9(1) of the Act*,* under which paras (b) and (c) of the Fifth Schedule fall, clearly relates to terms and conditions to which a commercial television broadcasting licence would be subjected, Capital Radio's interest in exercising E freedom of expression by radio broadcasting was not infringed by the provisions of the Act relating to commercial television broadcasting.

Capital Radio had no *locus standi* to challenge provisions of the Act which did not contravene the declaration of rights in relation to it.

Section 11(4)(b) F

For the same reason Capital Radio has no *locus standi* to challenge the constitutionality of the provisions of s 11(4)(b) of the Act because it imposes on a holder of a television broadcasting licence an obligation to ensure that not less than ten per cent of the total programming content broadcast is in a manner that may be understood by audiences who have a hearing impediment. G

Section 12(3)

Section 12 (3) of the Act fixes the period of validity of a community broadcasting licence at one year. Capital Radio has not applied for a community broadcasting licence. It has therefore no *locus standi* to challenge the constitutionality of this provision of the Act. H

Malaba JA

A **Other Sections**

I am of the view that Capital Radio has *locus standi* to challenge the constitutionality of the rest of the provisions of the Act, including those that relate to the terms and conditions of the broadcasting services licence under which Capital Radio would have to operate in the event of it being granted a commercial radio broadcasting services licence. The nature, content and B duration of the rights Capital Radio would enjoy as a radio broadcaster are required by the Act to be defined by the terms, conditions and period of the licence granted.

Since the only time Capital Radio can control the use of airwaves to facilitate the dissemination and reception of information or ideas by the public in the C exercise of the freedom of expression is under a licence, the terms and conditions of which are prescribed by the impugned provisions of the Act, Capital Radio is able to decide before it is granted the licence whether or not the terms and conditions under which it would be required to broadcast are violative of its constitutional rights or not.

In my view, it would be too late for Capital Radio to challenge the D constitutionality of the provisions of the Act, after it has agreed to be bound by the terms and conditions of the licence.

I therefore agree with the Chief Justice in holding that Capital Radio has *locus standi* E *to* challenge the constitutionality of the provisions of ss 4(2), 4(3), 5, 9(1) and 9(2). I also agree with Sandura JA that Capital Radio has *locus standi* to challenge the constitutionality of the provisions of ss 11(4)(a), 12(1)(f), 12(2), 15 and 16.

It is accepted by the respondents that the impugned provisions of the Act constitute restrictions on the enjoyment of freedom of expression by broadcasting. I am not convinced, however, that the concession is valid in F respect to the provisions of s 12(l)(f).,

The question for determination in each case is whether the restriction to the enjoyment of freedom of expression brought about by the impugned provision has been shown not to be reasonably justifiable in a democratic society. In *Osborne v Canada (Treasury) Board* (1991) 82 DLR 321 reference was made to the test which is used to determine whether a provision imposing restrictions G upon a declaration of rights is reasonably justifiable in a democratic society. One must look at the objective the Government seeks to achieve by the provision. The objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. If the objective is found to meet the above requirement, the means chosen to accomplish the objective must be H examined. The means must be reasonable and demonstrably justifiable in a

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free and democratic society. This is what is called the proportionality A requirement. It has three aspects:

(1) the existence of a rational link between the measures under review and the objective;

(2) a minimal impairment of the right or freedom; and

(3) a proper balance between the effects of the limiting measures and the B legislative objective.

In *Staffman v Vancouver General Hospital CIT* (1990) 76 DLR (4th) 700 Forest J explained the proportionality aspect of the test in these terms:

> "The challenged law is then subjected to a proportionality test in which the objective of the impugned law is balanced against the nature of the right it violates, the extent of the infringement and the degree to which the C limitation furthers other rights or policies of importance in a free and democratic society."

It is apparent from the application of the test in *Osborne's* case *supra* that in ascertaining the objective of the provision, the means used and the effect of the restriction on the constitutional right or freedom, the court undertakes the D construction of the language used in the provision.

In Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S) the above test was also stated as involving answers to three questions, which are whether:

1. the legislative objective is sufficiently important to justify limiting a fundamental right;
2. the measures designed to meet the legislative objective are rationally E connected to it; and
3. the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

In ascertaining the legislative objective, it is permissible to take into account F what the Minister charged with the administration of the Act says is the objective of the impugned provision.

One reason for this approach is that it is imperative that, when the effective exercise of rights so necessary to the maintenance of democracy is claimed to have been abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reason advanced" in support of the challenged G provisions.

The second reason is the venerable principle to the effect that the interpretation placed on the impugned provisions by those charged with the responsibility of its execution should be followed unless there are compelling indications that it is wrong. The effect of this principle is that the court should satisfy itself H

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Malaba JA

A by interpreting the provision that what the Minister claims to be the objective of the impugned provision is correct.

I now apply these principles. I agree with the Chief Justice that the provisions of ss 4(2) and 4(3) have not been shown to be unconstitutional. I also agree with his finding that s 6 of the Act is unconstitutional. It is clear from the limitation on the number of individuals who may be chosen to use the scarce B public resource of airwaves that the granting of broadcasting services licences is not a mere matter of electromagnetic engineering for the sake of keeping signals clear.

The limited and restricted number of broadcasting frequencies, the decision as to who shall be permitted to use them, and on what terms and conditions and C for what periods of time, requires the exercise of a discretion of the highest order and the most careful application of the principles of equitable treatment to all the classes and interests affected. *Columbia Broadcasting v Democratic National Committee* 412 US 772 (1973) at 815.

Freedom of expression finds its true meaning when its enjoyment is protected from interference by Government. To place the power to decide who gets a D broadcasting services licence in the hands of the executive arm of Government when there is an independent body, exposes the granting of licences to the threat of the danger of political interference with the exercise of freedom of expression by broadcasting.

The mere legislative preference for one body as the licensing authority rather E than the other is, in my view, inadequate justification for a provision, the effect of which has the potential of diminishing the effective exercise of rights so necessary to the maintenance of democracy. In many democratic countries the body that allocates airwave frequencies is the licensing authority. In this case the fact that the allocation of frequencies is done by the Broadcasting Authority, whilst the licensing authority is the Minister, has the effect that a E person who has been allocated a frequency on which to broadcast may have it then taken away from him by the Minister and the frequency allocated to someone else who then gets the licence to broadcast. In my view, in regulating the activities of the public and private broadcasters the Act created a single broadcasting system, the control of which needed to be in the hands of an G independent public authority such as was created under s 4.

I agree that s 9(1) of the Act is unconstitutional. The objective of providing that there shall be one other national free-to-air radio broadcaster apart from the Zimbabwe Broadcasting Corporation, to protect the public broadcaster from competition with private broadcasters, is not sufficiently important to H justify limiting the fundamental right to freedom of expression by broadcasting.

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Malaba JA

The stated objective suggests that the restriction is not based upon the limited A number of frequencies. The fixing by legislation of the number of private free- to-air national radio broadcasters to one does not take into account the rapid changes in broadcasting technology. Prohibition of competition in the market place of ideas by broadcasting is not in the public interest which demands that there be plurality of ideas and opinions from many different sources. B

In *Federal CC v Pottsville Broadcasting Co supra* Frankfurter J said at 138:

> "Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."

I also agree with Sandura JA that the provision of s 9(3), to the effect that "with C the exception of a public broadcaster, a broadcasting licence and signal carrier licence shall not be issued to the same person", is unconstitutional. It is clear to me that, although the second respondent suggested that the objective of the provision was to protect private broadcasters from the huge capital investment required in the establishment of a signals carrier station, the real purpose was D to protect the public broadcaster from competition by placing the control of signals in the hands of one party and the control of the carrier thereof in another. The paternalistic reason given to justify the restriction of the freedom of the broadcaster to own a signals carrier cannot save the restriction from being unreasonable and unjustifiable in a democratic society

Section 11 (4)(a) provides that not less than ten per cent, of total programming E content broadcast by any licensee shall be in any of the national aboriginal languages of Zimbabwe other than Shona and Ndebele.

It is clear that the objective of the provision is the protection of the rights of members of the public who speak minority languages to receive information and ideas in the languages they understand. As the second respondent F rhetorically but aptly put it, in para 60 of the opposing affidavit,:

> "Of what relevance and use is s 20 of the Constitution if people cannot understand what is being broadcast to them, either because they speak a different language to everyone else ..."

The constitutionality of s 11(4)(a) was challenged on the ground that the provision imposed on private broadcasters duties which ought to be borne by G the public broadcaster which should represent and serve everyone in the community as a result of the taxes paid to the fiscus. It was contended on behalf of Capital Radio that a private broadcaster has a primary duty to serve its shareholders by making profits. It may therefore not be within the business plan of a private broadcaster to serve every language group. H

2003 (2) ZLR p311

Malaba JA

A Capital Radio has not denied the fact that airwaves are a public resource and their use by the preferred few on licence is a special privilege. The overriding principle has to be that, whilst licensees enjoy the privilege to use what is essentially public property for commercial gain, they remain trustees of the public interest component of their use of the airwaves. The right of those members of the public who speak minority languages to transmit and receive B information or ideas through the broadcasting medium controlled by a licensee in the language they understand overrides the interest of the licensee to make a profit from broadcasting and the right applies to information broadcast by both private and public broadcasters.

In the *Columbia Broadcasting* case *supra* at 803 Stewart J said:

> C "... Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favour of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right D of the broadcasters, which is paramount."

The Legislature fixed the minimum programming content to be broadcast in any minority language at ten per cent. That is a requirement the Legislature considered was necessary as a means of securing the objective of the impugned provision. The requirement is in clear language and constitutes in my view minimal impairment of the broadcaster's constitutional right to freedom of E expression.

The requirement of a definite minimum programming content to be broadcast in any of the minority aboriginal languages at a time convenient to the broadcaster is a measure rationally connected to the objective of protecting these groups' right to information in line with the ends and purposes of the F right to freedom of expression enshrined in s 20(1) of the Constitution. It cannot, in my view, be said the enjoyment of freedom of expression by broadcasting would on the part of the broadcaster be rendered impossible by the decision of the Legislature, in the exercise of its relatively wide discretion, to fix the minimum programming content to be broadcast at ten per cent. It has not been shown what constitutional principle has been violated by the G decision of Parliament to fix the minimum programming content to be broadcast in the languages prescribed at ten per cent. In my view, it has not been shown that the provisions of s 11(4)(a) of the Act are not reasonably justifiable in a democratic society.

I now consider the constitutionality of ss 12(l)(f) and 12(2) of the Act. H Section 12(1)(f) of the Act provides that a licence shall be in the prescribed

Malaba JA

form and shall specify the sources and manner of funding the licensee. Section A 12(2) of the Act provides that a licence, other than a community broadcasting licence, shall be valid for a period of two years.

Section 12(l)(f) of the Act illustrates the kind of problem one can encounter in basing the finding of the objective of the impugned provision on the interpretation of the Minister only. It is clear from the construction of B s 12(l)(f) of the Act that what the Minister says is the objective in para 64 of the opposing affidavit is with respect wrong. For that reason it is necessary to set out the whole of s 12(1) of the Act. It reads as follows:

> **"Form and period of validity of licence**
>
> (1) A licence shall be in the prescribed form and shall specify — C
>
> (a) the name and address of the licensee; and
>
> (b) the date of issue and expiry of the licence; and
>
> (c) any terms and conditions in addition to those imposed by this Act subject to which the licence is issued; and
>
> (d) any other matters which the Minister considers necessary to give effect to this Act; and D
>
> (e) in the case of a corporate licensee, the shareholding structure of the licensee and the names and other relevant details of the directors; and
>
> (f) the sources and manner of funding of the licensee."

The objective of subs (1)(e) of s 12 of the Act is clearly the certification of the E legal status of the licensee, that it did not belong to a class of corporate bodies or applicants to whom, according to s 8 (1) and (2), as read with s 22 subs (2) of the Act, broadcasting licences could not be issued.

To establish what the objective of s 12(1)(e) of the Act is, one has to construe the provision with reference to s 8 (1) and (2), as read with s 22 (2) of the Act. Similarly, the objective of s 12(1)(f) of the Act, which is an impugned F provision, is ascertainable by reference to s 8 (6) of the Act (as amended by s 10 of Act No. 26 of 2001), providing that no person whose broadcasting service or signal transmission station is wholly or partly funded by foreign donations or contributions shall be licensed.

It must be remembered that the objective of s 12 of the Act as a whole is not G to compel disclosure of information upon which the licensing authority can decide whether or not to grant a licence to the applicant. The purpose of s 12 of the Act is to use a licence as a certificate of the truthfulness of the particulars recorded therein. The recorded sources and manner of funding would, on the face of the document, be a certification of compliance with the provisions of s 8 (6) of the Act. The obligation to specify in the licence the particulars of the H

Malaba JA

A facts prescribed in s 12(l)(f) of the Act is placed on the licensing authority. I agree with Cheda JA that it is not the broadcaster who has to specify in the licence the necessary particulars. The provision cannot be said to be unconstitutional.

The challenge to the constitutionality of s 12(2) of the Act raises the question B of what is essentially the result of the exercise of legislative discretion. I do not think it is a question that can be resolved on the basis that the decision by Parliament to fix the period of validity of the licence at two years was arbitrary.

There is, in my view, no question of arbitrariness once Parliament has exercised its wide legislative discretion, because it then owes no-one a duty to explain how it arrived at that figure. The fact is simply that the legal period C of a valid licence is two years.

The argument that the period is too short for a business venture involving large capital investment in transmission and ancillary broadcasting assumes that it is the financial interests of the broadcaster that is of paramount D importance in determining the period of a broadcasting licence.

What is of paramount importance in determining the period of a broadcasting licence is not the financial interests or convenience of the broadcaster, but the interest, convenience or necessity of the public.

In the United States of America for example, the period of a radio broadcasting licence was set at three years, notwithstanding the fact that investment in broadcasting stations required large capital outlays. In the *Federal CC* case E *supra* Frankfurter J said at 138:

> "... it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years."

In *Authukorale and Ors v Attorney General of Sri Lanka* 1 BHRC 610 the F question was whether the period of one year to which the Broadcasting Authority Bill sought to limit the time of broadcasting licences was unconstitutional. De Silva CJ said:

> "... licence holders have the responsibility of meeting the requirements imposed on them to ensure that the interests of the pubic at large may be safeguarded. Perhaps the period of one year may inhibit the investment of G large amounts of money in establishing stations. Yet, as we have seen, a licence to broadcast is a temporary privilege and while in issuing a licence the authority must, among other things, consider the needs of competing communities and the programmes offered by competing stations to meet those needs the authority must have the right, where the public interest requires it, to alter its allocations of frequencies, to reflect changing needs H and circumstances."

Malaba JA

The period of the licence may therefore be fixed by Parliament, taking into A account the need to prevent the development of private monopolies in the broadcasting sector or to be able to change the allocations of frequencies. The point is made by the second respondent that one of the reasons for fixing the period of broadcasting licences at two years was to provide licensees with the opportunity to account for their privileged use of the frequencies allocated to them. B

Parliament determined, in the exercise of its wide discretion, that the period of two years was the most effective means by which to enforce the constitutionally mandated goal of ensuring that freedom of expression by broadcasting is enjoyed by the public.

In my view, it has not been shown that s 12(2) of the Act is unconstitutional. C

I consider the constitutionality of the provisions of ss 15 and 16 of the Act.

Section 15 of the Act provides that:

> "(1) Subject to this section, the Minister, after consulting the Authority, may at any time amend a licence or any term or condition of a licence -
>
> (a) to correct any error in the licence; or D
>
> (b) if the licensee requests and is granted an amendment; or
>
> (c) if the Minister considers the amendment necessary to reflect the true nature of the service, system or business which the licensee is conducting; or
>
> (d) *If for any other reason the Minister considers the amendment* E *necessary or desirable in the public interest.*
>
> (2) Before amending a licence in terms of subsection (1), otherwise than at the request of the licensee, the Minister shall direct the Authority to notify the licensee in writing of the nature of the amendment he proposes to make and of his reasons for wishing to make the amendment, and shall give the licensee an adequate opportunity to make representations in the F matter." (my emphasis)

Capital Radio challenges the constitutionality of s 15 of the Act on two grounds. The first is that it gives the power to amend licences to the Minister, in this case, the second respondent. It contends that the power to amend licences should lie with the broadcasting authority. The second ground is that G s 15(1)(d) of the Act gives the second respondent too wide a power to be exercised arbitrarily.

On the first ground, the power to amend a licence is usually given to the licensing authority. The question whether the power to amend the terms and conditions of a licence should be given to a Minister raises the question whether he should be the licensing authority. Since the Minister was constituted H

Malaba JA

A by s 6 to be the licensing authority, it could not, in my view, be said that giving him the power to amend the terms and conditions of the licences to be issued by him was unconstitutional for being in breach of the freedom of expression.

On the second ground, I am not convinced that s 15(1)(d) of the Act has been shown to be unreasonably unjustifiable in a democratic society. In the first place, the object of the provision is clear and it is to ensure that licences reflect B public interest. The amendment of the licence can only take place where public interest makes it necessary or desirable. The criterion of public interest is not so indefinite as to permit the Minister to exercise the power to amend a licence arbitrarily or capriciously.

In the *Federal CC* case *supra* the Supreme Court of the United States C considered whether a section of the Communications Act 1934, which required the licensing authority to take into account "public convenience, interest or necessity" in granting, revoking or amending a licence, was an over- broad standard. Frankfurter J at p 138 said:

> "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of D stations, 'public convenience, interest or necessity' was the touchstone of the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."

E In *Federal Radio Com. v Nelson Bros B & M Co.* 289 US 267 (1932) Hughes CJ, delivering the opinion of the Supreme Court of the United States, said at 285:

> "In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires'. This criterion is not to be F interpreted as setting up a standard so indefinite as to confer an unlimited power. The requirement is to be interpreted by its context, by the nature of radio transmissions and reception, by the scope, character and quality of services..."

It is clear from the authorities that s 15(1)(d) of the Act is not so over-broad as to confer on the Minister a power to act arbitrarily or capriciously.

G The section has not, in my view, been shown not to be reasonably justifiable in a democratic society.

I am also not convinced that the provisions of s 16 of the Act are unconstitutional. Section 16(1) of the Act provides that the Minister, after consulting the Authority, may suspend or cancel any licence if there is evidence that:

H "(a) the licence was issued in error or through fraud or the misrepresentation

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Malaba JA

or non-disclosure of a material fact by the licensee; or A

(b) the licensee has contravened any provision of this Act that is applicable to him; or

(c) the licensee misrepresents the service or system he offers to the public; or

(d) the licensee has ceased to provide the service or system specified in B the licence; or

(e) the licencee has failed to comply with any term or condition of the licence; or

(f) in the case of a licensee which is a body corporate, the licensee has been provisionally or finally wound up or placed under judicial management; or C

(g) in the case of a licensee who is an individual, the estate of the licensee has been provisionally or finally sequestrated; or

(h) the licensee has acted in a manner prejudicial to the defence, public safety, public order, public morality or public health of Zimbabwe; or

(i) the licensee has repeatedly breached one or more provisions of the D code of conduct applicable to the licensee in terms of section *twenty- four,* or any standards determined in terms of section *twenty-five.* "

Before taking any action under s 16(1) of the Act the Minister is required to direct the authority to notify the licensee of his intention to suspend or cancel the licence and to give the licensee an opportunity to defend his licence. If what E the licensee has said in showing cause why the licence should not be suspended or cancelled warrants further investigation, the Minister is required to

request the Authority to institute a public inquiry. If the licence is nonetheless suspended or cancelled following recommendations of the Authority after the inquiry, the licensee has aright of appeal to the Administrative Court. F

It is clear that the procedure the Minister is compelled to follow and the matters he is enjoined to take into account before suspending or cancelling a broadcasting licence militate against arbitrary or capricious use of power. The infringement or restriction on the licensee's freedom of expression is limited to the clearly defined extent where it has been shown that he has either G committed a criminal offence or one of the specific acts of misconduct related to broadcasting. There is no over-breadth here allowing for arbitrary or capricious exercise of power because the "prohibited conduct" triggers the inquiry and these acts are specified in clear language for any licensee to know.

The objective served by the provisions of s 16(1) of the Act is clear and legitimate. In my view, the objective of prohibiting fraudulent or dishonest use H

Gwaunza JA

A of broadcasting licences is important enough to warrant the restriction on freedom of expression. Suppression of conduct which contravenes the provisions of the Act, common law or any other statute cannot be viewed as a contravention of freedom of expression because that right does not include a right to act unlawfully.

Accordingly, I would declare unconstitutional ss 6, 9(1), 9(2) and 9(3) of the B Act and dismiss the applicant's contentions in respect of the rest of the sections of the Act specified in the draft order.

Gwaunza JA: I agree with Malaba JA's reasoning and conclusions as regards the following sections: 4(2); 4(3); 6; 9(1); 9(2); 9(3); 11(4)(a), 12(l)(f).

C 1 also concurred with Sandura JA's reasoning and conclusions as regards the following sections: 12(2); 15; 16.

Honey & Blanckenberg, applicant's legal practitioners

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

1 *United Parties v The Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S)
2 Herbstein & Van Winsen: *The Civil Practice of the Supreme Court of South Africa* 4 ed, at 364.
Zimbabwe Teachers Association & Ors v Minister of Education & Culture 1990 (2) ZLR 48 at 51B *et seq*.H
3 *Minister of Home Affairs v Fisher* [1980] AC 329 at 329; *Dow v Attorney-General* 1992 LRC (Const) 623-3; *Muhozya v Attorney-General DSM)* Civil Case No 206/93 (Tanzanian High Court decision, unreported)
4 *S v Zuma & Ors* 1995 (4) BCLR 401 SA; *Sakal Papers v Union of India* AIR 1962 SC 305 G
5 *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S)
6 *New Patriotic Party v Inspector General of Police* Judgment of the Supreme Court of Ghana 4/93 (unreported)
7 *Dow v Attorney-General (supra), Derbyshire County Council v Times Newspapers* 2 WLR 449 H
8 *Muhozya v Attorney-General, supra*
9 PLD 1993 SC 473
10 *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49
11 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No 5, para 70
12 Rights of Access to the Media at page 3
13 2000 (1) ZLR 552 (S) at 558CD-E
14 (1997) 2 BHRC 610
15 *In re Chikweche* 1995 (1) ZLR 235 (S)
16 *Athukorale* v *Attorney-General supra; State of Bihar* v *Misra* AIR 1971 SC 1667 at 1675, *Malundika* v *The People,* Supreme Court of Zambia 95/95 (unreported); *Pumbun* v *Attorney-General* [1993] 2 LRC 317
17 *S v Makwanyane & Anor* 1995 (6) BCLR 665(CC), *New Patriotic Party v Inspector General of the Police, supra*
18 *R* v *Oakes* (1986) 19 CRR 366, *Nyambirai* v *NSSA & Anor* 1995 (2) ZLR 1 (S)

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SOUTHDOWN HOLDINGS LTD v MARIWA 2003 (2) ZLR 318 (H)

Citation	2003 (2) ZLR 318 (H)
Case No	Judgment No. HH-161-03
Court	High Court, Harare
Judge	Hungwe J
Heard	8 October 2003
Judgment	8 October 2003
Counsel	*E W W Morris,* for the applicant Mr *Gasa,* for the respondent
Case Type	Application for summary judgment
Annotations	No case annotations to date

Flynote

Appeal — *noting of — effect — stay of execution pending appeal — whether* C *applies to all tribunals or only to superior courts — appeal from decision of Labour Tribunal — not a bar to an application for summary judgment based on decision made under an employment code of conduct*

Employment — *code of conduct — decision made under — not suspended pending appeal to Labour Tribunal— not suspended by taking Labour*

Tribunal's decision *on appeal* D

Headnote

The respondent was dismissed from his employment with the applicant in terms of the applicable code of conduct. One of the benefits of his employment was occupation of a house on the applicant's estate. An appeal under the code of conduct failed, as did an appeal to the Labour Tribunal. The respondent noted an appeal to the Supreme Court against E the decision of the Labour Tribunal. When the applicant sought the eviction of the respondent from the house, the respondent argued that noting the appeal had the effect of suspending the judgment appealed against.

Held, that where a party aggrieved by a judgment of an administrative F authority or tribunal and the enabling statute does not provide for the suspension of the judgment pending an appeal, the party may seek to make an appropriate application to the High Court for an order for stay of execution. Here, when the applicant sought the eviction of the respondent from its house, it based that right, not on the decision of the Labour Tribunal, but on the decision made in terms of the registered code G of conduct. A decision made in terms of a code of conduct is not suspended by an appeal to the Labour Tribunal, and the decision was not suspended by noting an appeal from the Tribunal's decision. H

Hungwe J

Cases referred to A

Mushaishi v Lifeline Syndicate & Anor 1990 (1) ZLR 284 (H)

Phiri & Ors v Industrial Steel & Pipe (Pvt) Ltd 1996 (1) ZLR 45 (S)

South Cape Corp (Pty) Ltd v Engineering Mgmt Svcs (Pty) Ltd 1979 (3) SA 534 (A)

UTC (Zimbabwe) (Pvt) Ltd v Chigwedere 2001 (1) ZLR 147 (S)

B *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H)

Case information

E W W Morris, for the applicant

Mr *Gasa,* for the respondent

Judgment

C **Hungwe J:** This is an application for summary judgment. The applicant is the plaintiff in HC 13541-99 where it issued summons against the present respondent, the defendant in that earlier case, seeking an order confirming the defendant's right to occupy the principal residence at Roscommon Estate, Chipinge, with effect from 20 February 1999 in terms of due process that culminated in the order declaring the respondent lawfully dismissed from his D employment with the applicant. The applicant also sought an order of ejectment of the defendant from that principal residence at Roscommon Estate, payment of holding over damages of $1 000 per month from 13 August 1999 to date of vacation or ejectment as well as costs of suit.

When the respondent entered an appearance to defend, the applicant filed this E application for summary judgment.

The application arose out of a series of hearings beginning with an inquiry by the applicant as employer into allegations that the respondent, its employee, had wilfully disobeyed a lawful order for the return of a stove. He lost in that hearing. He appealed to the relevant appellate authority in terms of the Code and again lost. He then noted an appeal with the Labour Relations Tribunal. F He lost again.

In the meantime, he continued to occupy the company house. The company grew impatient with the respondent and sought an order confirming that the respondent's right to reside ended when he (the respondent) was confirmed lawfully discharged from employment. The discharge from employment was G produced by the appellate authority in terms of the code of conduct in place at his place of employment.

The respondent took the point that once he had appealed against the decision of the Labour Relations Tribunal, that step had the effect of suspending the judgment under appeal. Further, the applicant ought to have, if it intended to execute the judgment under appeal, approached the Labour Relations Tribunal H for leave to execute that judgment.

Hungwe J

In support of the argument advanced against the grant of the order sought, A reliance was placed on *Phiri & Ors v Industrial Steel & Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S) and *Mushaishi v Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (H).

The lodging of an appeal suspends the operation of the judgment appealed against. That is in the public law domain. Judgment can only be executed B pending appeal only with the leave of court which gave the judgment.

The point which is then made in support of the respondent's contention is that as this is not the court which granted the judgment under appeal, the applicant has approached a court which has no jurisdiction to entertain the matter. That being so, the application for summary judgment should fail.

In *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) C Gillespie J had reason to discuss the point whether an appeal from an administrative tribunal had the effect of suspending the decision of that tribunal pending the appeal. After a view of the authorities, especially the decision of Corbett JA (as he then was) in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1979 (3) SA 534 (A) he came D to the conclusion that the grant or withholding of a

stay of execution is, at common law, a matter of discretion reserved to a court in which such a discretion is reposed and that in the absence of any statute specifically conferring such a discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgment pending an appeal from that authority, such discretion cannot exist (at p 599A-B). It cannot order the E suspension of its own judgment pending an appeal. The only basis upon which its judgment or order can be supposed to be stayed is where the enabling statute provides for the situation. He, however, also accepted that his conclusion did not mean that a person aggrieved by a decision, judicial or administrative, which is not covered by any enactment providing for its suspension pending F appeal, and who wishes to appeal and whose prospects of success are sufficient, is left without remedy as he can approach this court to move the appropriate order of stay or interdict.

I take this passage as authority for the proposition that where a party seeks to execute a judgment of an administrative authority or tribunal but the enabling statute does not provide for the suspension pending an appeal, the party may G seek to make an appropriate application for such leave from this court. If that reading is correct, then it follows that one must first examine the relevant statute and determining the status of the judgment under appeal.

It seems to me however that the present matter can be distinguished from the matters discussed by Gillespie J in *Vengesai's* case *supra.* H

2003 (2) ZLR p321

Hungwe J

A In the present case the question that fell for decision is whether the fact that respondent is appealing against the decision of the Labour Relations Tribunal in the Supreme Court is a complete bar to the order of eviction sought based on the order made in terms of the code of conduct.

The decision appealed against is one made by his employer in terms of a code of conduct. The responded has appealed against that decision in the Labour B Relations Tribunal and lost. He has taken his appeal to the Supreme Court. It seems to me that when the applicant seeks the eviction of the applicant from its residence, it bases that right not on the decision of the Labour Relations Tribunal but on that decision made in terms of the registered code of conduct.

The respondent is in the same position as the respondent in C *UTC (Zimbabwe) (Pvt) Ltd v Chigwedere* 2001 (1) ZLR 147 (S). Where an appeal is one against the decision made in terms of the code of conduct the matter is one of private law. It cannot be equated with a ministerial decision or a decision made by a labour relations officer or the Labour Tribunal *(per* Gubbay CJ at p 148 F).

A decision made in terms of the code of conduct is not suspended by an appeal to the Labour Relations Tribunal. The question is, would it then be suspended D if an appeal is made from that Tribunal to the Supreme Court?

One must examined the exact substance of the appeal in order to determine when it is being appealed against. It seems to me that where the appeal is essentially against the determination by the employer acting in terms of the code of conduct, the same reasoning as applied in *UTC* case *supra* should E obtain.

That this must be so appears to be reinforced by the fact that the issue before me now is unlikely to be ever resolved in his favour as the employer will still exercise his right and pay damages in the event that the respondent is successful in the appeal. As a matter of private law, an appeal to the Labour F Relations Tribunal or the Supreme Court does not bar the appellant's eviction from the applicant's residence.

Because the right to reside in the principal residence at Roscommon Estate was one of those benefits attached to the respondent by virtue of his employment with the applicant, the moment his contract of employment terminated, so did his right to reside in the residence at Roscommon Estate. G If the respondent's right to receiving a salary is suspended pending the determination of the appeal, there would be no basis upon which it could be argued that he is entitled to continue to reside at Roscommon Estate.

I am satisfied that the appeal in the Supreme Court by the respondent did not suspend the operation of the decision appealed against.

2003 (2) ZLR p322

Hungwe J

There will be the following order for summary judgment as follows: A

(a) an order confirming the defendant's right to occupy the principal homestead at Roscommon Estate, Chipinge terminated with effect from 20 February 1999 in accordance with the particulars of claim, Annexure "A" hereto.

(b) An order ejecting the defendant from the principal homestead on Roscommon Estate, Chipinge. B

(c) Payment in the sum of $5 000 damages per month or part thereof in respect of the defendant's unlawful occupation and holding over calculated from 13 August 1999 to the date upon which the defendant vacates or is ejected from the principal homestead of Roscommon Estate, Chipinge.

(d) Costs of suit. C

Wintertons, plaintiff's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/MAWUTA v SEC FOR FINANCE 2003 (2) ZLR 323 (H)

MAWUTA v SEC FOR FINANCE 2003 (2) ZLR 323 (H)

Citation	2003 (2) ZLR 323 (H)
Case No	Judgment No. HH-169-03
Court	High Court, Harare
Judge	Hungwe J
Heard	31 January 2002
Judgment	8 October 2003
Counsel	The applicant in person *Musamhanga,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administrative law — *fair hearing — oral hearing — requirement for* C *witnesses to give evidence in presence of person charged — person excluded while witnesses gave evidence — procedural irregularity justifying setting aside of proceedings — recalling witnesses for cross-examination not sufficient*

Headnote

The applicant, a public servant, was charged with a disciplinary offence. He D was denied the right to be legally represented at the hearing. When the witnesses gave evidence, he was excluded.

Although he was told that the witnesses would be recalled for cross-examination, only two out of the six witnesses were recalled.

Held, that where an oral hearing takes place, it must do so with the person charged being present to hear all the evidence against him so that he can, E if he wishes, seek to controvert it. It was an irregularity for the disciplinary committee to have excluded the applicant from the hearing at the time when six witnesses' evidence was being led. The procedure adopted flew in the face of the spirit of an oral hearing, which was the intent and purpose of the regulations. It went against the grain of what constituted F a fair hearing. It offended one's sense of fairness and justice. It could not be cured by recalling each witness to afford the applicant an opportunity to cross-examine that witness. Any cross-examination that followed upon this procedure would be a sham and a travesty of justice. The proceedings were flawed by this irregularity and would be set aside.

Cases cited G

Jiah & Ors v PSC & Anor 1999 (1) ZLR 17 (H)

Legislation considered

Public Service (Maintenance of Services) Regulations (SI 1 of 2000), H ss 44(1) & (3), 45 (2) & (4) & 46 (1)

2003 (2) ZLR p324

Hungwe J

Case information

The applicant in person A

** *Musamhanga,* for the respondent

Judgment

Hungwe J: This is an application for a review of the decision of the respondent discharging the applicant from employment on the following general grounds: B

a) the suspension of the applicant and the preferment of charges has no foundation and is invalid for want of jurisdiction;

b) procedural irregularities constituted by:

(i) refusal to furnish particulars of the charge and documents in preparation of a hearing; C

(ii) leading evidence in the absence of the applicant thereby depriving him of the opportunity to confront his accusers;

(iii) defect in the charges.

The events leading to this application can be summarized as follows.

The applicant was employed as a tax officer at Harare 1 Tax Office, Harare. On D 3 May 2001 he was served with a letter preferring misconduct charges against him signed by Mr G Pasi, then Commissioner of Taxes. A letter suspending him from his official duties was served together with the letter preferring misconduct charges.

On 8 May he wrote back to the Commissioner of Taxes in response as was required of him in terms of the Public Service Regulations SI 1 of 2000. In that E response he cites in detail the defects in both the procedure adopted and the essence of the charges preferred in order to prepare for a detailed hearing, if any, were to be convened.

On 6 July 2001 he was served with a notice of hearing scheduled for 16 July 2001. On 10 July 2001 he requested for documents and information necessary F for preparing for the hearing. Mrs Shamano of the Human Resources Section, on whom the letter was served, refused him the particulars sought on the basis that the particulars sought were "confidential and for the purposes of the State".

On 12 July 2001 he decided to address a letter to the chairman of the disciplinary committee outlining his complaints about the procedures adopted, G suggesting that when the hearing of the Ministry's case concludes, the matter be postponed to allow him an opportunity to secure legal representation and give instructions to his legal practitioner. He would have audio-taped the proceedings. These suggestions were not responded to in writing.

What then transpired is that at the hearing he asked for permission to tape H record the proceedings. This was rejected on the basis that only the chairman

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2003 (2) ZLR p325

Hungwe J

A is permitted to record or cause the proceedings to be recorded. He asked for the matter to be postponed so that he could secure legal representation. This again was refused.

Proceedings commenced with the charges being read. He was asked to respond to the charge. The response he had written was available to members of the committee who then indicated that they would seek clarifications from him B and proceeded.

After he had been questioned by members of the committee, he was asked to go out of the room in which the hearing was being held to allow evidence to be led from the witnesses. He protested this step but complied nonetheless as he was told he would be allowed to cross-examine the relevant witnesses.

C Indeed after six witnesses had given their evidence he was called back. Only two out of the six witnesses were recalled to allow him to cross-examine them.

After this hearing he was served with a letter dated 19 September 2001, finding him guilty of all the charges and discharging him from the Public Service with effect from 19 September 2001.

D The application was opposed. In the opposing affidavit Mr Tati Chigudu, the then Acting Secretary for Finance, said that the respondent denied most of the specific allegations by the applicant. He maintained that the letter carrying the charges of misconduct was sufficiently detailed to inform the applicant of the nature of the allegations against him. There was no need to tally the charges to the factual allegations as the information was sufficiently within the E knowledge of the applicant.

The respondent makes a revealing admission in paras 17, 18 and 19. In these paragraphs respondent admits that:

(1) The disciplinary committee at the hearing heard evidence of six witnesses in the absence of the applicant, whom they expressly excluded for the F purpose.

(2) Out of the six witnesses whose evidence was led in this fashion, only two were called for presentation to the applicant for cross-examination.

(3) The evidence led in the applicant's absence was never presented to him for his comment.

G It was argued on behalf of the respondent that as there was substantial compliance with s 45(2) of SI 1 of 2000 the procedural irregularities complained of cannot be held to be fatal to the proceedings.

Reliance was placed on *Jiah & Ors v PSC & Anor* 1999 (1) ZLR 17 (H). That case is distinguishable on the grounds that it dealt with the Public Service H (Maintenance of Services) Regulations, SI 258 of 1990.

2003 (2) ZLR p326

Hungwe J

Section 44 of the Regulations deals with the procedure before and immediately A following allegations of misconduct. Where a member is suspended on misconduct, the disciplinary authority shall conduct or cause to be conducted such investigations as may be necessary (subs (1)). On completing investigations, if it is found that an allegation of misconduct should be preferred against the member, the disciplinary authority is obliged, within B seven days after completion of the investigation, to inform the member, in writing, of the nature of the allegation against him and call upon him to submit a written reply to the allegation within fourteen days. It is also obliged, within that same period, to furnish the member with copies of any material documentary evidence relating to the allegation or afford the member an opportunity to have sight of such evidence whenever possible. C

In terms of s 44(3), where the disciplinary authority is not the Commission, as is the case here, the authority shall, within seven days of receiving the member's reply, determine whether the member has a case to answer, and if it so determines, it shall within the seven days make a report in the form set out in the Fourth Schedule to the Head of Ministry. Where the disciplinary D authority is a head of department, as here, it shall notify the member in writing and refer the matter to a

disciplinary committee for hearing in accordance with s 47, making available to the committee a copy of the report referred to above as well as any relevant documentary evidence relating to the allegation.

In terms of s 45, within seven days of receiving the documents referred to above, the disciplinary committee shall give no less than seven days' notice to E the member concerned of the time, date and place of hearing of the allegation of misconduct against him.

Subsection (2) permits the committee to conduct the proceedings without the need to observe the rules of procedure and evidence ordinarily applicable in criminal or civil proceedings, provided, however, that the member is afforded F the opportunity to respond to every allegation of misconduct and that substantial justice is done.

Subsection (4) allows the committee to proceed to consider the allegations of misconduct in the absence of the member if the member fails to attend the hearing without a reasonable excuse after having been duly notified.

It is within the parameters of these two sections (44 & 45) that I have to G consider whether the claims to procedural irregularity have been substantiated and if so whether these are fatal to the proceedings.

The regulations set procedural criteria which afford an accused member a fair hearing. This can be inferred from the language used, the terms set for both the authority and the member in terms of time limits, access to evidence prior to H

Hungwe J

A the hearing, entitlement by both parties to legal representation and the requirement of notice of hearing being served on the member and that he be present at the hearing.

As G Feltoe observes in *A Guide to Zimbabwean Administrative Law* 3 ed at p 36:

> B "As it is an oral hearing, it follows that the hearing must take place with the person charged being present to hear all the evidence against him so that he can, if he wishes, seek to controvert it. It would thus be an irregularity if evidence was heard from a witness testifying against the person charged in the absence of the latter".

It is an irregularity for the committee to have excluded the applicant from the C hearing at the time when six witnesses' evidence was being led. It flies in the face of the spirit of an oral hearing which is the intent and purpose of ss 44 and 45. It goes against the grain of what constitutes a fair hearing. It offends one's sense of fairness and justice. It cannot be cured by recalling each witness to afford the applicant an opportunity to cross-examine that witness. Any such cross-examination that follows upon this procedure is a sham and a travesty D of justice. The proceedings were flawed by this irregularity.

The totality of the procedure adopted by the committee was a denial of a fair hearing. It is fatal to the enquiry. The decision arrived at in this manner cannot be allowed to stand.

I may point out that the disciplinary committee is permitted to make findings E of fact and make recommendations based on those facts (s 46 (1)). Yet the disciplinary committee in the case, instead of recommending a finding of guilty on the charges to the disciplinary authority as provided in subs (1), made that determination itself. It does not have such powers. Those powers are vested in the disciplinary authority.

The applicant sought an order setting aside the proceedings of the disciplinary F authority, another order declaring that he be deemed to have been in continuous employment from the time of his suspension and an order directing that he be paid in full his salary, bonuses and other benefits up to date.

As this review concerned itself with the procedural propriety of the hearing, the court cannot make a finding on the merits. That is the appropriate province G of the disciplinary mechanism in the Public Service Commission and the Labour Court. With the recent amendment of the Labour Relations Act [*Chapter 28:01*] by the Labour Relations Amendment Act No 17 of 2002, this matter has to be finally determined through the Labour Court.

Hungwe J

In the premises I make the following order: A

1. The misconduct proceedings instituted against the applicant and the subsequent findings be and are hereby set aside.
2. There will be no order as to costs.

Applicant in person B

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/VEHICLE DELIVERY SERVICES (ZIMBABWE) (PVT) LTD v GALAUN HOLDINGS LTD 2003 (2) ZLR 329 (H)

VEHICLE DELIVERY SERVICES (ZIMBABWE) (PVT) LTD v GALAUN HOLDINGS LTD 2003 (2) ZLR 329 (H)

Citation	2003 (2) ZLR 329 (H)
Case No	Judgment No.HH-171-03
Court	High Court, Harare
Judge	Hungwe J
Heard	29 May 2003
Judgment	8 October 2003
Counsel	*E W W Morris,* for the applicant *P C Paul,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Conflict of laws** — *foreign judgment — enforcement of — Zimbabwean defendant entering appearance to defend in foreign court — service of process effected according to the lex fori — foreign court having jurisdiction*

Practice and procedure — *judgment — foreign judgment — enforcement of* D *— Zimbabwean defendant entering appearance to defend in foreign court — must be taken to have consented to jurisdiction of that court — not then necessary that summons be served in Zimbabwe in terms of the Civil Matters (Mutual Assistance) Act [Chapter 8:02] — judgment enforceable in Zimbabwe under Act*

Headnote

E The respondent had obtained a civil judgment sounding in money against the applicant in the High Court of Zambia, for damages arising out of a vehicle accident that occurred in Zambia, and had obtained an order registering that judgment in Zimbabwe in terms of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*]. The applicant sought to set0020 F aside that order. It argued that

the fact that the applicant entered an appearance to defend in Zambia was not sufficient on its own to confer jurisdiction on the Zambian High Court without an unequivocal consent by the applicant to the jurisdiction or an attachment of the applicant's property to found or confirm jurisdiction. The Act requires that any process issued by a foreign court be endorsed by a magistrate for service G in terms of our law, if he is satisfied that such process was lawfully issued by that foreign court. Since the summons issued by the High Court of Zambia was not so endorsed by the magistrate for service or served in terms of s 13 of the Act, then such process was a nullity; and since the judgment was secured in terms of this nullity, there was no judgment to H speak of.

2003 (2) ZLR p330

Hungwe J

Held, that s 13 is complementary to other methods available to parties for the A service of foreign process. It does not preclude service in some other manner allowed by law. The fact that the respondent did not choose to adopt this available method of service of process was not fatal.

Held, further, that in matters of procedure the court applies the *lex fori.* The Zambian court had jurisdiction over the matter on the basis that the cause B of action arose within its jurisdiction, so it was entitled to look to its own law of procedure with regard to service and, if it was satisfied that service was effected, to assume jurisdiction. Service was effected on the applicant and the applicant reacted by entering appearance to defend through its Zambian legal representatives.

Held, further, that to hold that correct service was effected would enhance the C efficacy of the rules of court. It is in any case within the court's discretion to condone the failure to comply with a directory provision of the Act.

Application dismissed with costs.

Cases cited

Hickey v Hickey 1959 (2) R&N 504 (NR) D

Purser & Anor v Sales & Anor 2001 (3) SA 445 (SCA)

Legislation considered

Civil Matters (Mutual Assistance) Act [*Chapter 8:02*], s 13 E

Case information

E W W Morris, for the applicant

P C Paul, for the respondent

Judgment

Hungwe J: The respondent sued the applicant in the High Court of Zambia for certain damages arising out of a motor vehicle accident. It obtained F judgment against applicant in Zambia on 19 June 2002 in the sum of US$27 970 and ZK6 417 562. That judgment remains unsatisfied.

The respondent applied to a judge in chambers in case No. HC 6704/02 for the registration of the Zambian High Court order in terms of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*]. On 31 January 2003, the respondent obtained leave to register the order. G

In this application the applicant seeks the setting aside of that order which registered the Zambian High Court order.

The respondent opposes the application. H

2003 (2) ZLR p331

Hungwe J

A The applicant makes three points, *viz:*

(a) that it is not Vehicle Delivery Services (Pvt) Ltd but Vehicle Delivery Services (Zimbabwe) (Pvt) Ltd;

(b) the respondent proceeded against the wrong defendant in that, as it was only an agent of Vehicle Delivery Services (Pty) Ltd of South Africa a disclosed principal, the respondent was not entitled to proceed against B it but the disclosed principal;

(c) In any event the fact that the applicant entered an appearance to defend in Zambia on its own was not sufficient to confer jurisdiction upon the Zambian High Court without an unequivocal consent by the applicant to the jurisdiction or an attachment of the applicant's property to C confirm or found jurisdiction.

On that basis the applicant contends that, as there was absence of jurisdiction by the Zambian Court, enforcement of such a judgment is against public policy or contrary to law.

In response, the respondent maintained that the applicant was correctly cited as the defendant in the Zambian action where it, through its legal practitioners D in Zambia, entered appearance and filed a plea before abandoning the action. The Zambian High Court exercised jurisdiction over the matter.

Mr *Paul,* for the respondent, filed comprehensive heads dealing with the points raised by the applicant in its founding affidavit.

So exhaustive were the heads in dealing with the question of jurisdiction that E Mr *Morris* in his heads conceded that they were unanswerable. Indeed, Mr *Paul* set out the law in that regard. Mr *Morris* only argued the case for service of summons in Zimbabwe.

The applicant, however, says that there was no proper service of summons in Zimbabwe, hence the Zambian High Court could not have found that the F matter was properly before it, if the point had been raised. Whilst that argument raised by Mr *Morris* in his heads sounds ingenious, I am not persuaded to hold that the fact that there appears to be some lack of compliance with the provisions of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*] is fatal to the application for registration of the Zambian High Court order.

G I understood the point raised by Mr *Morris* in his heads to be this. The provisions of the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*] require that any process issued by a foreign court be endorsed by a magistrate for service in terms of our law, if he is satisfied that such process was lawfully issued by that foreign court. Since the summons issued by the High Court of H Zambia was not so endorsed by the magistrate for service or served in terms

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Hungwe J

of s 13 of that Act, then such process was a nullity. Since the judgment was A secured in terms of this nullity there is no judgment to speak of. There is therefore nothing to register in this court. So went the argument.

It seems to me that s 13 of the Act is complementary to other methods available to parties for the service of foreign process. It sets out the procedure which can be adopted by a foreign plaintiff if he wishes to take advantage of its B provisions. It does not preclude service in some other manner allowed by law: see *Hickey v Hickey* 1959 (2) R&N 504 (NR). The fact that the respondent did not choose to adopt this available method of service of process to my mind is not fatal to its case.

Further, in matters of procedure, the court applies the *lex fori.* Thus, where a court has jurisdiction over a matter on the basis that the cause of action arose C within the jurisdiction, that court applies the *lex fori* to determine any procedural matters as may arise in that particular case. On that basis, the Zambian High Court was entitled to look at its law of procedure with regard to service. If it was satisfied that service was effected, it was entitled to assume jurisdiction. D

In any event, the applicant from its conduct appears to have consented to the jurisdiction of the High Court of Zambia. When served with summons, the applicant filed an appearance to defend through its Zambian attorneys. Pleadings proceeded without any objection to the court's jurisdiction at all. Somewhere along the line it is not clear whether before or after *litis contestatio* — it defaulted and the respondent took out judgment. Clearly, it E could not be heard to say now that it did not consent to jurisdiction. Consent to jurisdiction, once given, cannot be withdrawn: see *Purser & Anor v Sales & Anor* 2001 (3) SA 445 (SCA).

The respondent urged me to find that since the applicant had not raised the question of service as an issue in its application and proceeded to seek F condonation of its own irregularity, this court ought to also condone whatever irregularity there might appear to be in the service of the summons

by the respondent. The papers show that service was effected on the applicant. The applicant reacted to that service. It was acceptable service, so it could seem, according to the laws of Zambia. I am of the view that to uphold that correct service was effected would enhance the efficacy of the rules of court. Even if G I were wrong in holding that view, it is within the court's discretion to condone the failure to comply with a directory provision of the Act.

I can exercise that discretion in favour of the respondent if I am satisfied that it enhances the efficacy of the rules of court. In the present case, the facts show that the applicant committed a delict in Zambia. It was sued by the respondent. It defended that action in the Zambian courts. It now resists execution of a H

2003 (2) ZLR p333

Hungwe J

A judgment obtained against it in Zambia on the various grounds that it has raised. I have found against the applicant. The respondent has a judgment that was registered in this court on 31 January 2003. The applicant in this application seeks to have the order of this court registering that judgment set aside.

B In the premises I am unable to find that the applicant has made a case for the setting aside of the order of this court dated 31 January 2003. The application is therefore dismissed with costs.

Atherstone & Cook, applicant'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 2/MACNEIL & ANOR v HASKINS 2003 (2) ZLR 334 (H)

MACNEIL & ANOR v HASKINS 2003 (2) ZLR 334 (H)

2003 (2) ZLR p334

Citation	2003 (2) ZLR 334 (H)
Case No	Judgment No.HB-99-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	10 February 2003
Judgment	9 October 2003
Counsel	*R Moyo-Majwabu,* for the applicants *N Mazibuko,* for the respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure — *provisional order — interim relief— interdict* C *pendente lite — criteria — prima facie case shown*

Headnote

The applicants sought an order that a partnership existed between the parties in relation to a stand and improvements thereon in the Hwange district. Pending final relief, they sought an interim interdict preventing the respondent from (1) selling or otherwise alienating the property and (2) D occupying, using or benefitting from the use of the property.

Held, that the applicants were at this stage seeking an interdict *pendente lite,* the purpose of which is the preservation of the *status quo,* or the restoring thereof, pending the final determination of the parties' rights. It does not affect or involve the final determination of the parties' rights of such E rights. In an application for an interim interdict the applicant has to establish a *prima facie* case on a balance of probability. Once the applicant succeeds in establishing a *prima facie* case then the court has no discretion whether or not to grant the provisional order sought.

Held, further, that in an application for such an interdict, the first issue to determine is whether the applicant has established existence of a clear F right. To do so, the applicant must show:

(1) an infringement of his rights by the respondent, or at least a well grounded apprehension of such an infringement, and

(2) the absence of any other satisfactory remedy, and

(3) that the balance of convenience favours the granting of an interlocutory interdict (though where they can establish a clear right together with G (1) and (2) they would be entitled to claim a final interdict).

Held, further, that the applicants had established a *prima facie* case on a balance of probabilities; and that they were entitled to an interim interdict restraining the respondent from selling or alienating the property, but no more, *pendente lite.* H

2003 (2) ZLR p335

Ndou J

Cases cited A

Apleni v Min of Law & Order 1989 (1) SA 195 (A)

Harnischfeger Corp & Anor v Appleton & Anor 1993 (4) SA 479 (W)

Highstead Entertainment (Pty) Ltd v Min of Law & Order & Ors 1994 (1) SA 387 (C)

Knox D'Arcy Ltd and Others v Jamieson and Others 1995 (2) SA 579 (W)

B *Mabhodho Irrigation Group v Kadye & Ors* HB-8-03

McLeod v Rolindo HH-47-02

Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd 1997 (1) SA 646 (C)

Roper Trust v District Administrator, Hurungwe & Ors 2001 (2) ZLR 345 (H)

Case information

C *R Moyo-Majwabu,* for the applicants

N Mazibuko, for the respondent

Judgment

Ndou J: The applicants seek an order against the respondent in the following terms:

D "**Terms of Final Order sought**

That you show cause to this honourable court why a final order should not be made against you in the following terms:

1. That a partnership, involving John Leyland Macneil, David Leslie Macneil and Andrew Thomas Haskins, be and is hereby declared to E exist in respect of stand No. 8 Sibankwana, in Hwange

District Council and the improvements thereon, which stand is hereby declared to be owned jointly and in equal shares by the 3 parties hereto.

2. That the said stand and improvements thereon be valued by a reputable valuer who shall produce a report on his valuation. F
3. That after valuation, either applicants or respondent may offer to buy out the other by paying the 1/3 value to each of the others, failing which the said stand is to be sold to the best advantage and the net proceeds of sale shared equally amongst the parties;
4. That respondent pays the costs of suit.

G **Interim Order granted**

Pending confirmation or discharge of this provisional order, the applicant is granted the following relief:

1. That respondent be and is hereby interdicted from selling or in any way alienating stand No. Sibankwana in the Hwange District Council *(sic).* H
2. That pending the determination of this partnership dispute, respondent

Ndou J

be and is hereby interdicted from occupying, using or benefitting A from the use of the and stand and improvements thereon.

Service of the order

A copy of this order, together with a copy of the chamber application hereof shall be served upon the respondent by the Deputy Sheriff of this court." B

The respondent opposes the application.

THE APPLICANT'S CASE

The applicant's case is that on or about September 2001 the three parties decided to form a partnership which would lease to buy a vacant stand in the Hwange District on which they would construct a house. Having agreed on the C idea of a partnership, they approached the Hwange Rural Council and made an application for stand No. 8 Sibankwana, in the name of the respondent. The application for the stand was successful and, after the respondent had signed the necessary agreements for the stand, they set about raising funds for the construction of a house and having the building plans drawn up. The nature of their partnership agreement, which they did not reduce into writing, was that D they were going to be equal partners in that venture, contributing equally to the construction and the related expenses. They appointed and hired Hwange Builders to build the house and out buildings on the said stand. The house and outbuildings were put up at the costs of $6 058 028.34 and $1 220 009.58 respectively. These costs were raised by all the parties equally, it being agreed E that they owned the project jointly and in equal shares. The applicant even bought a fridge, a freezer, 4 x ¾ beds and a 4 plate stove for the project. As they engaged Hwange Builders they made it clear to them that this was a joint project and when they negotiated all the stages of the project and paid the contract price the latter were aware and understood the project to be a partnership undertaking, as evinced by the supporting affidavit deposed to by F Andrew Simon Walsh, an estimator at Hwange Builders. After the construction of the house and out buildings were completed, on or about 30 September 2002, for some totally unknown reason, the respondent informed the applicants that their partnership would not work and he suggested that the applicants should make him an offer to buy him out. The applicants made an offer to pay him $ 10 million for his stake in the project. The respondent rejected their offer G and told them never to set foot on the project or he would call the police. From then on, the respondent has refused to discuss the partnership issue of the project with the applicants. When the applicants realised that they were not making any progress inresolving the partnership agreement with the respondent, the applicants, through their legal practitioners, invited the respondent to make a counter offer to their $10 million offer they had made to him. Although H

Ndou J

A the respondent does not specifically deny the existence of the partnership, the essence of his position is that the applicants contributed funds for the construction of the house but that the applicants should drop their claim to it in exchange for him reducing what he is claiming from them by $5 million. The applicants say they do not owe the respondent any money and that they do not

know anything about the alleged agreement for him to assist them with the B manufacture of stamp mills. In any event, the applicants do not see the relevance of this alleged agreement to the partnership agreement. The applicants are concerned that respondent is enjoying the sole use and access to the project which the three parties spent a lot of money on but denies them the right to do so, contrary to the spirit of the original agreement between the parties.

C The applicants' view is that, in view of the respondent's attitude and his expressed position of the project, it is in the interests of justice that this court grants them a declaratory order to the effect that there is a partnership involving all the three parties in equal shares. The applicants fear that since the stand in question is registered in the name of the respondent alone, there is a great danger that the respondent may be tempted to sell or alienate it, resulting D in serious prejudice to them. As such, they feel that it is in the interests of justice that the respondent be interdicted from alienating the stand pending the dispute. The applicants consider that the trust between them and the respondent, which should necessarily exist between partners, no longer exists and as such it is just and equitable that an order dissolving the partnership should be issued, directing that the assets of the partnership be valued by a E reputable valuer and that the parties thereto be given an option to buy the other(s) out. The applicants also state that, in order to prevent the respondent having continued advantage over the other partners, in the form of use of the project to their exclusion, their prayer is for an order interdicting him from using or benefiting from the house.

F **THE RESPONDENT'S CASE**

The respondent states that it is not correct that he and the applicants agreed to form a partnership which would lease to buy a vacant stand in Hwange District on which to construct a house. He says that the true position is that he approached the Hwange Rural District Council long before the date G mentioned by the applicants. He made the application in May 2001, i.e. some 4 months before the alleged formation of the partnership. He produced the receipt in respect of the application fee paid on 8 May 2001 as well as a letter from Hwange Rural District Council confirming his application which was made on 8 May 2001. His application was successful and he was issued with H stand No. 8 Sibankwana Township, Hwange.

Ndou J

He subsequently signed a "Lease to Buy" agreement with the Ministry of A Local Government, Public Works and National Housing (which he attached to his opposing papers) on 3 June 2002. He states that the applicants approached him in July 2001 about the manufacture of stamp mills, as he was an expert having made and run and maintained stamp mills for the past eight years or so. The parties agreed that he would assist them in the manufacture B of stamp mills, and that they would pay him a commission of 10 percent of the value on the order of each stamp mill. Having known each other for a long time, since they were boys, they never bothered to reduce the agreement into writing, and it remained an oral agreement. Subsequent to that agreement, he then made the applicants aware that he had been allocated a stand, being stand No. 8 Sibankwana Township in Hwange, and that he would be required to start C construction on the stand very soon. He was aware that some stamp mills were being sold, but he was not being given his 10 percent commission. He asked the applicants for his commission but they brushed him off and said that they would pay him in due course. He says, perhaps to cover up for their failure to pay his commission, the applicants agreed to contribute towards the construction of a residential dwelling on stand No. 8 Sibankwana Township. There was no D formal partnership agreement entered into, either in writing or orally, save that there was a loose arrangement that the applicants would jointly contribute towards half the costs of the construction and he would contribute the other half. He says that at no time did they agree that the two applicants would subsequently move into the residential dwelling. He is adamant that he is the E sole owner of the stand notwithstanding this loose arrangement that he referred to above. With respect to the house, the applicants contributed $2 509 117.88, whilst with respect to the outbuildings they paid $1 220 009.58, bringing the total to $3 729 127.46. He says that the applicants contributed a further amount of around $1 000 000 for the construction of hand railings around the verandah and retaining wall, carports, hot pots, bathroom and shower room suite, making their total contribution to about $4 700 000. He concedes that Hwange Builders were used for the construction work. He says the applicants owed him far more than what they had contributed towards the construction of the house. He says he told the applicants that they had to terminate their business arrangements and that they pay him his commission for whatever stamp mills they

had sold to date, and set off what they F contributed towards the construction of the house against that. He stated that he knows for a fact that as at that time at least fifty-five stamp mills had been sold, an income of $220 000 000, thereby entitling him to a commission of $22 000 000. He is enjoying sole use and access to the residential dwelling on stand No. 8 Sibankwana on account of being the registered owner, so he says. He says, in any event, in terms of the "Lease to Buy" agreement, a third party H

Ndou J

A cannot obtain any rights or title to the stand without the prior written consent of the lessor. Without such written consent, any agreement between him and the applicants for them to acquire title (which agreement is denied) would be invalid. The lease to buy agreement, therefore, precludes the applicants from having any share in the property. He stated that he had no intention of disposing of the stand or in any manner alienating it. For that reason, he says B that the matter is not urgent. He asks, in any event, why should he be interdicted, when at law, the applicants cannot take title to the disputed stand. He, however, says he is quite happy to pay the applicants the $4 700 000 which they contributed towards the construction of improvements on the stand, subject to them paying him $22 000 000 in respect of the stamp mills.

C He avers that there are serious material disputes of facts, thus the applicants proceeded inappropriately by filing an application. He submits that the application has no merit, nor is it urgent. He states that on the papers it is impossible to tell whether in fact there was a partnership agreement, and if so the terms hereof. He submits that this is a proper matter for action rather than for an application. As such, he prays that the application be dismissed with D costs on a higher scale.

It seems to me that the applicants are seeking an interdict *pendete lite.* The purpose of an interdict *pendente lite* is the preservation of the *status quo,* or the restoring thereof, pending the final determination of the parties' rights. It does not affect or involve the final determination of the parties' rights: see E *Apleni v Minister of Law & Order; Lamani v Minister of Law and Order & Ors* 1989 (1) SA 195 (A), at 200J-201C, *Highstead Entertainment (Pty) Ltd t/a "The Club " v Minister of Law and Order & Ors* 1994 (1) SA 387 (C) at 390A-B; *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd 1997(1)* SA 646 (C) at 651 D-E; *McLeod v Rolindo* HH-47-02 and *Civil Procedure in the Supreme Court by* Harms at 503 and 512. The gravamen of the application is F to interdict the respondent from selling or alienating the disputed property. In such application for an interim interdict, the applicants have to establish a *prima facie* case on a balance of probability. Once the applicants succeed in establishing *a prima facie* case, then the court should grant the provisional order sought. In *Trustees of the Roper Trust v District Administrator, Hurungwe & Ors* 2001 (2) ZLR 345 (H) at 350C-D Chinhengo J said:

> G "It is trite that this court will issue a provisional order with interim relief if the applicant has established a *prima facie* case and the interim protection he seeks is merited: see *Kuvarega v Registrar-General & A nor* 1998 (1) ZLR 188 (H) at 193B. Order 32 r 246(2) of the High Court of Zimbabwe Rules 1997 provides that-

Ndou J

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

Where, therefore, a *prima facie* case has been established a judge has no discretion whether or not to grant the provisional order sought. On being satisfied that *a prima facie* case has been established the judge must ("shall") B grant the order. The question in every such case is whether the applicant established *a prima facie* case. This is a question I have to ask in *casu.* If the answer is in the affirmative then the only discretion I have will be in respect of the variation, if need be, of the draft order filed by the applicants. As the applicants are seeking a interdict the first issue to determine is whether they have established the existence of a clear right. Thereafter, i.e. if they have C established a clear right, they must show:

(a) an infringement of their right by the respondent or at least a well grounded apprehension of such an infringement, and

(b) the absence of any other satisfactory remedy, and

(c) that the balance of convenience favours the granting of interlocutory relief (i.e. an interdict, though where they can establish a clear right D together with (a) and (b) they would be entitled to claim a final interdict): *Knox D'Arcy Ltd and Others v Jamieson and Others* 1995 (2) SA 579 (W); *Harnischfeger Corporation & Anor v Appleton & Anor* 1993 (4) SA 479 (W) *and Mabhodho Irrigation Group v Kadye & Ors* HB-8-03.

In this case, it is common cause that the applicants contributed to the E construction of the house and outbuildings in the disputed stand. According to them this was pursuant to a partnership agreement whereas the respondent prefers to call it a "business arrangement" or "loose arrangement". Whatever it is called, the respondent concedes that it creates some rights as he offers to pay $4 700 000 in terms thereof. This relationship between the parties creates rights. This is the only logical explanation for the exchange of the large sums F of money. The applicants paid Hwange Builders for the improvements on the stand. These payments are obviously not donations. In the circumstances, I hold the view that the applicants established the existence of a clear right. On account of the respondent's conduct as outlined in their papers, the applicants have shown a well grounded apprehension of infringement of their right. As G the stand is in the name of the respondent, there is nothing that would stop the respondent from selling it to an innocent third party thereby prejudicing the position of the applicants. They therefore do not have any other satisfactory remedy and the balance of convenience favours the granting of the interim relief sought. In the circumstances, the applicants have established *a prima facie* case and the interim protection that they seek is merited. I, however, feel H that in their draft order the applicants seek more than what they were able to

Ndou J

A justify and, as such, there is a need for a variation of the draft order. I have a discretion to do so in terms of order 32 r 246(2) *supra.* In any event, the respondent will suffer no prejudice from the varied draft order being granted as he deposed to the fact that he has no intention of disposing of or alienating the property.

I vary the interim order granted to read:

> B "Pending confirmation or discharge of this provisional order, the applicants are granted the following relief:
>
> That the respondent be and is hereby interdicted from selling or in any way alienating stand No. 8 Sibankwana Township, Hwange District."

The rest of the terms of the draft provisional order otherwise remain as they C are reflected.

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

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

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MURINGANIZA v MUNYIKWA 2003 (2) ZLR 342 (H)

Citation 2003 (2) ZLR 342 (H)

Case No Judgment No. HB-102-03

Court High Court, Bulawayo

Judge Ndou J

Heard 9 October 2003

Judgment 9 October 2003

Counsel *T Ndlovu,* for the plaintiff
Miss *N Moyo,* for the defendant

Case Type Civil action

Annotations Link to case annotations

Flynote

Customary law — *marriage — formalities required — strict adherence to* C *ritual not essential — undissolved previous marriage under Marriage Act — second marriage void — division of matrimonial property*

Family law — *customary marriage — marriage null and void on the grounds that it was bigamous — woman unaware that marriage bigamous — court may nonetheless order division of matrimonial property* D

Headnote

The defendant married the plaintiff under customary law, having been told by him that his previous marriage had been dissolved. In fact it had not been dissolved. The parties' customary law marriage was not registered. They setup home and had a child. She contributed financially to the acquisition of their home. The parties became estranged and separated. The plaintiff sought the eviction of the defendant from the home. He claimed that there E was no customary law marriage because *roora* had not been paid and because the marriage to his first wife subsisted.

Held, that in customary law, strict adherence to ritual formulae is never absolutely essential for the validity of a marriage. There was evidence that *roora* had been paid, though not in the normal way. F

Held, further, that in such cases, customary law should apply unless the justice of the case demands otherwise. As a claim for division of the matrimonial assets was not recognised under customary law, the general law should apply. If customary law were to apply, then it would not be possible to extend any relief to the defendant beyond her traditional entitlements of *umai* or *mavoko* property. In the circumstances, this G would have been unjust.

Held, further, that because the plaintiffs first marriage had not been dissolved, the marriage to the defendant was bigamous. Nonetheless, in these circumstances the court could divide the property in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*], and thus the claim for ejectment must fail. H

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Ndou J

Cases cited A

Jena v Nechipote 1986 (1) ZLR 29 (S)

Mabuza v Mbatha [2003] 1 All SA 706 (C)

Makovah v Makovah 1998 (2) ZLR 82 (S)

Makwiramiti v Fidelity Life Assurance & Anor 1998 (2) ZLR 471 (S)

Mashingaidze v Mashingaidze 1995 (1) ZLR 219 (H)

B *Matibiri v Kumire* 2000 (1) ZLR 492 (H)

Mtuda v Ndudzo 2000 (1) ZLR 710 (H)

Muhlmann v Muhlmann 1981 (4) SA 632 (W)

Sibanda v Sibanda HH-9-02

Legislation considered C

Customary Law and Local Courts Act [*Chapter 7:05*], s 3 Matrimonial Causes Act [*Chapter 5:13*], s 7(1)

Case information

T Ndlovu, for the plaintiff

D Miss *N Moyo,* for the defendant

Judgment

Ndou J: The plaintiff initially instituted these proceedings by way of an urgent chamber application against the defendant for the return of items which he had been dispossessed of by the defendant, *viz* a Standard Chartered Visa electronic card and Link Save ATM card, Stanbic ATM card, driver's licence, E Standard Chartered Bank cheque book and Meikles VIP cards. The plaintiff also sought an order for eviction of the defendant from stand number 14447 Selbourne Park, Bulawayo.

The defendant did not oppose the former relief sought but opposed the latter. She opposed the order for eviction. The gravamen of her opposition is that, F first, she is customarily married to the plaintiff and thus entitled to a half share of the matrimonial property, and second, that she played a significant role in the acquisition and development of stand number 14447 Selbourne park. In particular, she stated that she personally ploughed no less than $110 000 into the construction of the cottage on the stand. The provisional order on the return of the items listed above, having been confirmed, the claim for eviction G was referred to trial.

At the pre-trial conference the parties agreed that the issues for determination at the trial were:

"(a) Did plaintiff solely acquire and develop stand number 14447 Selbourne Park, Bulawayo? H

(b) Is the defendant entitled to a share in the property on the basis of her

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relationship with plaintiff or on any other basis? A

(c) Does the plaintiff have the right at law to seek the eviction of defendant?"

The main thrust of the dispute is whether there is in existence a customary marriage between the parties. Once this is determined the other issues will fall into place. The other issues will only become relevant once this court has B decided that there is a valid customary marriage between the parties. Evidence led mainly covered the requirements for a valid customary law marriage.

Common cause facts

The parties met in Harare in 1988-9 when the plaintiff was a student at the University of Zimbabwe. A love relationship developed. As a result of their C liaison they had a child, Josephine in 1990. The child died on 26 April 1992. They have one surviving child, Franscisca born on 28 March 1992. After the birth of the late Josephine the parties started living together under the same roof. It is common cause that the plaintiff, in 1989, informed the defendant that he was married to one Ketina Manyethu. According to the defendant, the plaintiff indicated then that he was in the process of divorcing Ketinah. He D obviously disputed this issue. The said marriage was conducted under the then Marriages Act [*Chapter 37*] on 13 September 1975 and still subsists. The plaintiff refers to Ketinah as his "enstranged wife". On 27 April 1992 the parties' families met in Gweru, i.e. after the burial of the late Josephine. There is, however, a dispute on the purpose of the meeting. According to the plaintiff, on the one hand, the agenda of this meeting had nothing to do with marriage E negotiations but to discuss damages as the defendant's parents had threatened to boycott the burial and also take unspecified action against him. The defendant, on the other hand, says that the meeting commenced the process of their customary marriage.

The parties stayed together in Gweru and moved together to Bulawayo. In F Bulawayo the plaintiff applied to be placed in the City of Bulawayo housing list on 24 September 1996. In the housing

application form he completed details relating to wife/spouse in the following terms —

"13 Details Relating to Wife/Spouse —

Name: *Philippa*

ID Number: 27-061090 C 27 G

District: Gutu

Maiden Name: Munyikwa"

The stand was "acquired" during the absence of the plaintiff. He was overseas at the time, studying. It is common cause that before his departure he made arrangements with his bankers to enable the defendant to make withdrawals. H

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Ndou J

A Indeed withdrawals were made and some of the money went to the acquisition fees for the stand. The defendant was plaintiff's *defacto* spouse. She did most of the running around to have the stand acquired and developed and infrastructure constructed thereon. She also ploughed in some of her own funds. In short, she played a material role in the acquisition and development of the property. It is not clear why the plaintiff's counsel submits that Ketinah B has a stake in the stand in view of the fact that we use an accrual system in matrimonial causes. The property in issue was acquired during the time plaintiff and Ketinah had since ceased staying together.

Plaintiff's case

The plaintiff gave evidence to the following effect. He met the defendant in C Harare in 1988. He informed her that he was married and that the marriage still subsisted. He used to visit his wife at Norton. He wore a marriage band at the time and he would, with the defendant's knowledge, visit his wife and children. He never customarily married the defendant nor did he promise to do so and/or divorce his wife. He solely acquired and developed the stand in question. He also assisted the defendant to acquire a house in Nkulumane D number 16457 by paying the deposit and sundries which totalled $7 000. He also paid eleven instalments before the defendant sold the Nkulumane property. He said that he contributed considerably to the purchase of the said property. The plaintiff revealed that he paid some money to the defendant's parents, not as *roora* bride consideration but as an appeasement fee after the E death of the parties' child. He did this to enable her parents to come and pay their condolences to the parties. The plaintiff conceded that he made a further payment to defendant's father, a sum of $2 500, which the latter intended to use to buy maize bags. He testified that he deposited this amount into defendant's brother Renias Munyikwa's bank account. He stressed that this was not consistent with the Shona customary way of paying *roora/lobola.* He F has not given understandable evidence on whether this was a mere donation or a loan. I am satisfied that the plaintiff was a poor witness. He, lived with the defendant as man and wife and two children were born of the union. He lived with the defendant as a family. There be no doubt he and the defendant shared assets. His testimony that the defendant did nothing for the duration of the union cannot be believed. He is trying to cling to his marriage to Ketinah in G order to get the disputed property for himself. He has no intention of sharing it with Ketinah. He is using the marriage to his enstranged wife, who has no interest in this matter, for selfish reasons. In his application for the disputed property he registered the defendant as his wife/spouse. He did not register Ketinah. This was a clear falsehood on his part. Why did he himself describe H their liaison as amounting to a marriage? The plaintiff is no fool. He is not

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Ndou J

lacking in education and sophistication. His evidence in court is contradictory A to what the said document states and the life that he and the defendant were leading as a couple.

Defendant's case

She testified as follows. At the time they met in Harare she was working and he was a student at the University of Zimbabwe. She stated that the plaintiff B did in fact indicate to her at the time that he was married to Ketinah Manyetu, but said that they had since separated. The plaintiff furnished her with proof of a marriage certificate in terms of s 12(3) of the then African Marriages Act

[*Chapter 105*]. She produced the copy as an exhibit. She was not aware, and the plaintiff did not bring it to her attention, that he and Ketinah had subsequent to the above mentioned customary marriage gone onto solemnize C a civil marriage in terms of the then Marriages Act [*Chapter 57*]. The plaintiff informed her that he was in the process of dissolving his customary marriage to Ketinah and eventually gave the impression that he had done so. She believed him. She stayed with him without formalising their relationship. However, after the death of their child they decided to regularise the relationship. D In 1992 they did so customarily. The resultant customary marriage was however not registered. In 1995 they moved to Bulawayo. She says that although it was the plaintiff who applied for the disputed stand, she was instrumental in the acquisition thereof whilst he was overseas furthering his studies. She acquired the vacant stand in 1998 and used both his and her money in the acquisition and the development of the stand. She injected not E less than $110 000 into the construction of the cottage. She was adamant that the payments that the plaintiff made to her family were *roora/lobola.* She disputed the plaintiff's version that it was appeasement fee. I hold the view that defendant is an impressive witness. She was not shaken by the determined cross examination that she was subjected to. I find that she was labouring under the impression that he was married to Ketinah under the African F Marriages Act and that such marriage was on the rocks at the time they met. Further I find that she was under the impression that the plaintiff had ended the said marriage by the time they got married in 1992.

Jethro Muchineripi

He stated that he acted as a go-between *(munyai)* between the plaintiff's family G and that of the defendant. He travelled to Gutu with the plaintiff's people and negotiated the marriage between the parties. The plaintiff's delegation did not have sufficient funds on them. This resulted in an arrangement being made that payment be made through a bank deposit to minimise travel costs as the representatives were resident far apart. This arrangement was made for convenience's sake. As a headman he did not find such arrangement strange. H

Ndou J

A I am satisfied that this witness is credible. This matter cannot be resolved by findings of credibility alone. The matter is further characterised by legal questions which have to be determined. These legal questions are by no means easy to resolve.

The first question is one of the unregistered customary marriage. In my view, once there is evidence that the innocent party, as the defendant in this case, is B under the impression that the parties were conducting a customary marriage, failure to comply with one of the requirements is not necessarily fatal. I agree with Hlope JP in *Mabuza v Mbatha* [2003] 1 All SA 706 (C) who quoted, with approval, the following passage from *A Source book of African Customary Law for Southern Africa* by T W Bennett at p 194:

> C "In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual *formulae* was never absolutely essential in close knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified, similarly, the wedding might be abbreviated by reason of poverty or the need to expediate matters."

D This is a case where the Shona custom of handing over *roora/lobola* was modified to cut down costs. The modern banking facility was used. There certainly is nothing "most bizarre" arising out of this. This is an act of desperation on the part of the plaintiff by trying to resort to strict observance of requirements or formalities of Shona custom. The above South African authorities should, however, be read in conjunction with the provisions of s E 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] which provides, *inter alia,* that customary law shall apply in civil cases where, regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. It also provides that customary law shall apply unless the justice of the case otherwise requires.

F As the parties were, *in casu,* married under an unregistered customary law union I agree with Chatikobo J's remark in *Matibiri v Kumire* 2000 (1) ZLR 492 (H) at 496A-B:

> "The claim is, in essence, based on the fact of the plaintiff having been married to the defendant customarily. What she claims is, in effect, a share in the matrimonial assets acquired by the parties, whether jointly or G separately, during the subsistence of the customary law union. It is a claim which is not cognisable at customary law because, upon dissolution of an unregistered customary law union, the

property acquired by the parties during the union becomes the property of the husband unless it can be classified as *umai* or *mavoko* property. See *Jena v Nechipote* 1986 (1) ZLR 29 (S)."

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See also *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H) at 714 and *Jengwa v Jengwa* A 1999 (2) ZLR 121 (H) at 128D. In *Mtuda v Ndudzo supra* at 714E to 715D Garwe J (as he then was) rightly observed:

> "There can be no doubt that the concept of joint ownership of immovable property is a concept unknown to customary law. Tacit universal partnership is a general law concept which is unknown to customary law. So too is the B equitable distribution of property acquired during an unregistered customary union.
>
> There has been legislative — even judicial — hesitance to clarify the legal status of claims arising out of such unions. Decisions emanating from this court and the Supreme Court have not made the situation any clearer. As Chatikobo J noted in *Matibiri v Kumire supra* different judges have, C sadly, approached the matter in different ways. My approach in this case will no doubt add to the confusion. What is clear, however, is that most judges in this jurisdiction are agreed that justice needs to be achieved in these cases and that, in the absence of clear legislative provisions, this might be achieved by judicial innovation. Dealing with the interpretation of s 3 of the Customery Law and Local Courts Act, Chatikobo J remarked in *Matibiri v Kumire supra* ... D
>
> '... the section provides that customary law shall apply to the specific areas "unless the justice of the case otherwise requires". In my view, the truly logical construction to place on the phrase "unless the justice of the case otherwise requires" is that if the application of customary law does not conduce to the attainment of justice then the common law should apply... Faced with such an unsatisfactory situation and bearing in mind E the injustices which would flow from the failure to provide a remedy, the court must do its best to adapt the unsatisfactory and undeveloped concepts of customary law to the changed social and economic circumstances of an African woman who finds herself in a customary law union which disentitles her to a share in the "matrimonial property" even though for all intent and purposes she was a wife in every respect except F the non-solemnization of the union. The remedy could only be found by adopting a reforming exercise in which the court embarks on a rule creating function so as to provide a remedy where none previously existed ...'
>
> The need for the law to be dynamic and to accommodate change has been stressed in *Zimnat Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (S) G at 153E-154F. The position is now settled that courts have the latitude in appropriate cases to make law."

I am satisfied that the general law should apply, as it is clear that customary law does not apply to the dispute between the plaintiff and the defendant. In terms of s 3, if customary law were to apply, then it would not be possible to extend any relief to a woman in the defendant's position beyond her traditional H

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Ndou J

A entitlements of umai or mavoko property. In the circumstances, this would have been unjust. The justice of this case requires that the matter be dealt with otherwise than in accordance with customary law. This court has a discretion to apply the general law, under which the defendant is entitled to make a claim based on her contributions to the marriage on the basis of unjust enrichment or equity. Tacit universal partnership is not applicable here -*Mtuda v Ndudzo* B *supra* at 716D to 717A; *Muhlmann v Muhlmann* 1981 (4)SA(W)632at634; *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 (H).

In this case, as I understand it, I do not have to distribute the matrimonial assets but to determine whether the defendant has sufficient interest in the disputed property to fend off the plaintiff's claim for eviction. From the above it is clear C that on this issue I would have to rule in her favour. This, however, is not the end of the matter. It is now clear that the plaintiff was married to Ketinah Manyetu at the time he went through a marriage with the defendant. The said marriage to Ketinah is monogamous and in terms of the Marriage Act [*Chapter 5:11*] and the said marriage still subsist. There is, therefore, no valid marriage between the plaintiff and the defendant. In *Makwiramiti v Fidelity Life* D *Assurance & Anor* 1998 (2) ZLR 471 (S) at 473C-F Gubbay CJ said:

> "The learned judge was undoubtedly correct in his view that the marriage of the deceased and Rosemary was bigamous and, consequently, illegal and of no validity. This was because at the time it was contracted the deceased was married to Rosaria under a monogamous or civil type marriage entered into under the Marriage Act. By embracing a monogamous E regime, the deceased was deemed by law to have waived his customary privileges in respect of polygamy and, for as long as he remained married, to have submitted to

the general law of the land. He is precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from absolute incapacity to marry."

See also *Sibanda v Sibanda & Anor* 2002 (1) ZLR 622 (H) at 626, *per* F Smith J.

I have found that the defendant was not aware of the existence of a monogamous civil marriage. She was, however, aware that there was a registered bigamous customary law union which had been subsequently dissolved prior to her union. This means that the parties' "marriage" is in fact a putative marriage. G In *Makovah v Makovah* 1998 (2) ZLR 82 (S) at page 89B-C Muchechetere JA expressed himself as follows:

"In my view, the appellant's defence was generally dishonest. He got involved with an unmarried person when he was married without revealing his marital status. This was in spite of the fact that he was a Chairman of the Young People's Christian Movement and a member of the Catholic H Church. He went as far as registering his marriage fully aware that he was

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Ndou J

married in church and that his subsequent registered marriage would be A bigamous. He even allowed another lie to be entered on the subsequent registration certificate — that the respondent was his first wife. After all that he has the temerity to defend the respondent's suit on the basis that their marriage was bigamous. That, in my view is the height of dishonesty."

Then after setting out the provisions of s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] the learned Chief Judge continued at p 90B-D: B

"In my view, the above provisions cover a marriage, such as the present one, which is declared null and void. If it were not the case it would work an injustice and hardship on a party, such as the respondent in this case, who laboured and contributed towards the marriage and the accumulation of the matrimonial property under the impression that the marriage was C valid. It would also unjustly enrich a dishonest party such as the appellant in this case simply because the property in question is either registered in his name or is under his control. Such a position is unconscionable and the legislature by using 'nullity of marriage' must have envisaged that a situation such as the present one would be covered. I should state that such situations are very common in African society because of the failure by many to realise that once they contract a 'church' marriage their marriage D becomes monogamous.

In the circumstances, the trial judge acted properly in applying the provisions of s 7 of the said Act on the issue of the division of matrimonial property."

The plaintiff acted dishonestly by disclosing only the bigamous marriage to E Ketinah. He now produces a subsequent monogamous marriage certificate to defeat the defendant's claims.

From the foregoing I am of the opinion that the defendant is entitled by virtue of s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] to a fair share of the matrimonial estate, but the question is, what is a fair share? I do not have to answer this question because I am here dealing with a claim for her eviction F from the disputed property. The gravamen of the plaintiff's basis for such eviction is that she is not entitled to a share in the disputed property or the matrimonial estate. In light of my above finding that she is entitled to a fair share, his claim for eviction must fail. The defendant is staying on the disputed property. In fact, she has been staying there since the development thereon G provided minimum infrastructure for residency. The plaintiff is living elsewhere. He has stopped paying for the rates due to the local authority. She paid off arrears to fend off legal action by the latter. She stays in the disputed property with the parties' only child. I have already found that she contributed to the acquisition and development of the disputed property number 14447 Selbourne Park, Bulawayo. The balance of convenience favours her continued stay until H the matrimonial estate is distributed.

Ndou J

A The plaintiff does not have a right to evict the defendant in light of her proof that she is entitled to a fair share on account of the putative marriage and her contribution. The plaintiff did not establish that he solely acquired and developed stand number 14447 Selbourne park.

I accordingly order that the plaintiff's claim for eviction of the defendant from stand number 14447 Selbourne Park, Bulawayo be and is hereby dismissed B with costs.

Cheda & Partners, plaintiff's legal practitioners

Sibusiso Ndlovu, defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/KAWONDE v DUN & BRADSTREET (PVT) LTD 2003 (2) ZLR 352 (H)

KAWONDE v DUN & BRADSTREET (PVT) LTD 2003 (2) ZLR 352 (H)

Citation	2003 (2) ZLR 352 (H)
Case No	Judgment No. HH-158-03
Court	High Court, Harare
Judge	Karwi J
Heard	19 February 2003
Judgment	15 October 2003
Counsel	Plaintiff in person S *Wernberg,* for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Damages — *assessment — actio injuriarum — defamation — legal practitioner — incorrect publication of plaintiff's name in gazette of bad debtors — failure to immediately withdraw publication when true position pointed out*

Delict — *defamation — what is — incorrect publication of plaintiff's name in list of bad debtors — failure to correct error when it was pointed out — continued publication defamatory*

Headnote

The plaintiff's name was published in the defendant's gazette of debtors after he had default judgment entered against him. In fact he had paid the debt to the creditor as soon as he had received the summons, so he obtained rescission of the judgment. The defendant did not immediately publish the fact that the default judgment had been rescinded. It was only several months later, when the plaintiff tried to obtain credit, that he discovered that his name was in the gazette. Although he drew the defendant's attention to the true position, the defendant did not correct the error for another six months. The plaintiff claimed damages for defamation.

Held, that when the defendant first published the information complained of, that publication was privileged by virtue of the fact that the judgment in question had not been rescinded and also that the defendant did not know and had no way of ascertaining that payment of the capital and costs associated with the claim had been effected prior to the granting of the default judgment. However, once notified that its publication was not justified, the defendant had an obligation from then on to expunge the plaintiff's name from its list of bad debtors. Any continued publication of the information complained of became wrongful, unlawful and defamatory because it was not

true (the judgment had been rescinded) and the defendant had been made fully aware of that fact. That publication lowered the plaintiff in the estimation of others and injured his standing and reputation. H

Karwi J

A *Held,* further, that with regard to the quantum of damages, it was relevant to consider that although the defendant's initial publication was privileged, the defendant did not take measures to stop the continued publication or continued appearance of the offensive publication after it was advised and requested to stop. The plaintiff was a registered legal practitioner. There was no apology. He had to take legal action to protect his B reputation. The matter was contested to the end.

Cases referred to

Chinamasa v Jongwe Printing & Publications (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)

C *Mujuru v Moyse & Ors* 1996 (2) ZLR 642 (H)

Zvobgov Kingstons Ltd 1986 (2) ZLR 310 (H)

Zvobgo v Modus Publications (Pvt) Ltd 1995 (2) ZLR 96 (H)

Case information

Plaintiff in person

S Wernberg, for the defendant

Judgment

D **Karwi J:** The plaintiff in this matter is a legal practitioner and has been so since 1992. He is a sole partner of a legal firm. He instituted legal action against the defendant claiming damages in the sum of $2 000 000 arising out of alleged defamation of his character, his case being that defendant, during the period March to December 1999, published material that was defamatory E of the plaintiff.

The plaintiff's claim is based on the following facts:

On 31 December 1997 summons was issued against him in case number HC 32072/97 at the instance of Delta Corporation t/a Angwa Furnishers (Pvt) Ltd. On 20 January 1998, the plaintiff paid the amount claimed by Angwa F Furnishers to Messrs Coghlan, Welsh and Guest, the legal practitioners for Angwa Furnishers.

On 13 February 1998 Angwa Furnishers (Pvt) Ltd obtained default judgment against the defendant despite the fact that plaintiff had already paid his debt in full and did not owe anything to Angwa Furnishers (Pvt) Ltd at that stage. G On the 23 February 1998 the defendant made an the application for rescission of the default judgment. On 24 March 1998 the plaintiffs application for rescission was granted unopposed.

On 31 March 1998, the defendant published in its publication called Dun's Monthly Consumer Gazette that the plaintiff had a judgment against him in favour of Delta Operations t/a Angwa Furnishers for goods sold and delivered H in the sum of $3 019.96.

Karwi J

Some time before 3 August 1998 the plaintiff attempted to buy goods on credit A unsuccessfully and was referred to the defendant. On 3 August 1998 the plaintiff wrote to the defendant enclosing a copy of the rescission of judgment and seeking that the defendant "expunge his name from its list of bad debtors". The letter was hand delivered by the plaintiff at the defendant's place of business. B

On 16 September 1998, plaintiff wrote to the defendant demanding that the defendant "expunges" the plaintiffs name from the defendant's black list within forty-eight hours, failing which the plaintiff would apply for an interdict restraining the defendant from continuing to defame the plaintiff. He also warned that he would seek defamation damages if the demand was not complied with. C

On 22 September, the defendant wrote to the plaintiff through its lawyers, Messrs Surgey, Pittman and Kerswell, stressing that if the plaintiff wanted the rescission of judgment to be published, the plaintiff would have to pay an administrative charge of $200. This prompted an application by the plaintiff, which was filed on 2 October 1998 and served on the defendant's legal D practitioners on that day. The application was opposed. Despite the opposition, the application was successful. The plaintiff was granted an interdict restraining the defendant from continuing further publication of the applicant's name to the world on its list of bad debtors and uncreditworthy persons. The defendant was also ordered to completely expunge the applicant's name from the list of bad debtors and uncreditworthy persons. The rule *nisi* was confirmed in E November 1998.

On 31 December 1998, the plaintiff attempted to purchase goods on credit from two shops, TV Sales and Hire and Truworths. He was denied credit and referred to the defendant. On 31 January 1999 the defendant published the fact of the rescission of judgment against the plaintiff in its Dun's Monthly Gazette. F

The plaintiff gave evidence in court testifying to the above position. These facts were found to be undisputed by the defendant. This was clear from the evidence of Mr Chris Mlala Chipembere, who represented the defendant. Mr Chipembere, who was employed by the defendant for 38 years, most of which time he was its publications manager, also stated that the Gazette in question G was published on 31 March 1998 and that once information is published in the Gazette, such information would remain in their computers for five years. The defendant's subscribers would either phone in to request for information or check in the Gazette. On phoning, staff at the defendant would check for the information requested by the subscriber from the computer. Mr Chipembere added that any retraction or withdrawal of information published would be H

Karwi J

A done in one of two ways i.e. where defendant was convinced that judgment should not have been entered, a retraction would be automatic once the error is discovered. And if judgment had been correctly obtained, the debtor would pay an administration fee of $200 if he later obtains a rescission of that judgment. Mr Chipembere also emphasised that his company does not rely on information from defaulters, but from plaintiffs. It was apparent from his B evidence that the defendant was made aware that judgment had been erroneously entered against the plaintiff in August 1998, but did not publish a reversal until 31 January 1999, apparently because either the plaintiff not paid the administration fee of $200 or the matter was then in the hands of defendant's lawyers' or both. He said that a retraction was published in January 1999, C following the defendant's lawyers' advice to do so.

There are clearly three issues to be decided in this matter:

(a) whether or not, in the circumstances of the case, publication by the defendant that judgment had been entered against the plaintiff was defamatory; D

(b) whether or not failure to publish a withdrawal immediately after the plaintiff had demanded same was tantamount to publication of defamatory material;

(c) whether or not the plaintiff was defamed and, if so, what would be the appropriate quantum of damages in the circumstances of this case?

The first issue to be decided is whether the publication by the defendant was E defamatory. From the chronology of events in this case, it would appear clear that the publication complained of occurred on 31 March 1998. At the time of publication a judgment had been entered against the plaintiff in default. It is the defendant's case that, if judgment had been rescinded, which we now know to be a fact, the defendant had no knowledge of that fact and had no means of F obtaining that information before publication of its March edition. The defendant has argued further that at the time of the publication of the March edition of its Gazette, the defendant had no knowledge of the fact that plaintiff had effected payment of the debt owed to Angwa Furnishers. The defendant further submitted that it had no knowledge that the default judgment obtained by Angwa Furnishers had been erroneously obtained through the negligence G of Angwa Furnishers. I agree with the defendant on this. Moreover, it would be apparent that the plaintiff himself only became aware of the publication on 3 August 1998 when he tried unsuccessfully to purchase goods on credit. That is when he made defendant aware of the rescission of judgment on that very day.

The court was told by Mr Chipembere, the Publications Manager of the H defendant, that once information is punched into the computer, that information

Karwi J

remains in the computer for five years. Any subscriber of the defendant can A access that information during that period of five years. The court was given to understand that the defendant had and has a duty to communicate to its subscribers the fact that judgment has been entered against a debtor. The defendant's subscribers are usually entities which are in the business of giving credit facilities to consumers and as such it is in their interest to know who B pays and who does not pay debts in order to avoid advancing credit facilities to same. In terms of the way the defendant operates, any information published, whether on the computer or in the Gazette, would remain valid for five years from the time of its publication, unless that information is withdrawn.

It seems to me that when the defendant first published the information complained of by the plaintiff on 31 March 1998, that publication was C privileged by virtue of the fact that the judgment in question had not been rescinded and also that the defendant had no knowledge at that stage and had no way of ascertaining that payment of the capital and costs associated with the claim had been effected prior to the granting of such judgment.

The situation, however, changed completely as from the 3 August 1998. It was D on that day that the plaintiff, on discovering that he could not be granted credit facilities from certain shops because of the publication, made the correct position to be known by the defendant. He sought that the defendant should "expunge his name from its list of bad debtors". The defendant failed to do what was requested until 31 January 1999, some six months down the line. It must be remembered that the effect of any publication of any information by E the defendant in its computer or Gazette is to subsist for five years from the date of that publication. It is therefore clear to me that publication continues to subsist for five years despite the fact that the act of publication was once.

It is because of this fact that I am of the view that the defendant, once notified on 3 August 1998 that its publication was not justified, had an obligation from F then on to "expunge the plaintiff's name from its list of bad debtors". Any continued publication of the information complained of on the defendant's computers and Gazette became wrongful, unlawful and defamatory as from 3 August, 1998. In defining an action for defamation, in *Zvobgo v Kingstons Ltd* 1986(2) ZLR 310 Reynolds J stated at p 317 that:

> "...the essence of the action, in my view, lies in determining whether the G imputations made tend to lower the plaintiff in the estimation of others, or to injure his standing and reputation."

Indeed, a publication by the defendant that there was a default judgment against the plaintiff from 3 August up to 31 January 1999 became defamatory because (a) that was not true — the judgment had been rescinded — and (b) the defendant was made fully aware of that fact, yet did nothing for six months. H

Karwi J

A That publication lowered the plaintiff in the estimation of others and injured his standing and reputation. I therefore find the publication to have been defamatory.

The next issue to be decided is what would be the appropriate quantum of damages in the circumstances of this case? The defendant has urged that the quantum of damages being claimed *in casu* is, in light of other awards that have B been made by the court, outrageous and unjustifiably high and unprecedented. In support of this argument, itsd counsel he has quoted the following cases: *Zvobgo v Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H) in which a senior politician and then Government Minister was awarded damages in the sum of $20 000 after having been portrayed as heartless for allegedly trying to stop C charitable organizations from assisting Patrick Kombayi, who had been shot in the run-up to the 1995 general elections and had subsequently been hospitalized in the United Kingdom. *In Chinamasa v Jongwe Printing & Publications (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) damages to the tune of $30 000 were awarded to a respected lawyer who held the position of Attorney- General. In the publication concerned it had been alleged that the plaintiff was D being investigated by the police in connection with fraud perpetrated by him whilst he was in practice. And in *Mujuru v Moyse & Ors* 1996 (2) ZLR 642 (H) the editor of a publication which accused the plaintiff of engaging in dishonest and corrupt dealings was found at p 657 to have been "pandering to the readers' insatiable appetite for scandal" in making allegations against a person of extremely high reputation. The court granted damages in the sum E of $40 000.

In assessing damages in this matter, I have taken into account the fact that although initially, the defendant's publication was privileged, it did not take measures to stop the continued publication or continued appearance of the offensive publication after it was advised and requested to stop. It continued F to do so for six more months. I have also taken into account the fact that the plaintiff is a registered legal practitioner and has been since 1992, who has worked as a prosecutor and magistrate. He is a sole partner of a legal firm. He employs a staff of ten people. There was no apology made to him at all. He had to take legal action to protect his reputation. I also took into account the fact that this matter was contested to the end. I also took into account that there was G a withdrawal by the defendant, albeit six months down the line. I also accept the argument by the defendant that the plaintiff may have failed to take measures to mitigate damages to his reputation by paying the $200 administration fee demanded by the defendant.

After considering all the circumstances of this case and the reality that the H Zimbabwe dollar has seriously lost value since the cases referred to above, it

Karwi J

is considered appropriate to award damages against the defendant in favour of A the plaintiff in the sum of $150 000 with interest a *tempore morae* and costs of suit.

Kawonde & Company, legal practitioners for the plaintiff

Wintertons, legal practitioners for defendant B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/MASEDZA v GOSPEL OF GOD CHURCH 2003 (2) ZLR 359 (H)

MASEDZA v GOSPEL OF GOD CHURCH 2003 (2) ZLR 359 (H)

Citation	2003 (2) ZLR 359 (H)
Case No	Judgment No. HH-164-03
Court	High Court, Harare
Judge	Hungwe J
Heard	20 December 2001
Judgment	15 October 2003
Counsel	*G C Chikumbirike,* for the applicant *G E Mandizha,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Property and real rights — *servitude — right of access to grave (iter ad* C *sepulchrum) — whether exists in modern law — what person seeking right of access to grave must show*

Headnote

The plaintiff's late father was buried on the property of the church of which the deceased had been head and from which the plaintiff had seceded. He D sought to establish a right to visit his father's grave (which had become a shrine for the church), arguing that the old Roman servitude of *iter ad sepulchrum* existed and applied to him.

Held, that a real servitude over land cannot exist on its own. It was necessary for the plaintiff to show that he was the owner or occupier of a dominant tenement or at least that the right of access reposed in him personally as E a *ius in re aliena.* This he had failed to show. In addition, even if the Roman law would have given a limited right of access to one's parent's grave, in this case the grave was more than a mere grave: it was a shrine, a place of worship which was capable of ownership.

Case cited F

Cape Town & District Waterworks Co (Ltd) v Elders Executors (1890) 8 SC 9

Case information

G C Chikumbirike, for the applicant

G *G E Mandizha,* for the respondent

Judgment

Hungwe J: The applicant seeks the following order:

That the applicant, members of his family, descendants of the late Johanne Masowe Magaga and members of the Gospel of God Church aligned to the H applicant be and are hereby allowed visitation rights known as *iter ad*

2003 (2) ZLR p360

Hungwe J

sepulcrum at least twice a year for a period of one month to the grave of the A late Johanne Masowe Magaga at times which they will agree with the leaders of the respondent.

a) That the agreement to exercise the right of *iter ad sepulcrum* be exercised after giving at least 30 days notice from the date at which such visitation shall occur. B

b) That the applicant and members of his family be allowed to exercise the right of *iter ad sepulcrum* at least once every month for a period of seven days.

c) Costs of suit.

In his founding affidavit the applicant makes the following averments. The C respondent is a church which was founded by his father the late Baba Johanne Masowe Masedza in the early 1930s. His father fled the country taking with him his family including himself. His father established the church in South Africa, Botswana, Zambia, Mozambique and Kenya. Before his death he had indicated his wish to be buried at a hill in Gandanzara. This spot would become the church's shrine, being the burial place of the Church's founder D and prophet.

The applicant came back to Zimbabwe together with others of his descendants and church members. When he attempted to visit the shrine, his father's burial site, the leaders of the respondents would not allow it. There was a split in the church. He described the build-up to the schism in the church leading to E sometimes violent disruptions of worship at the site, the legal wrangles that followed, culminating in several orders by this court and other inferior courts. None of this has resolved the schism. As he is the eldest son of the founder of the respondent and an adherent of his father's teachings, he seeks an order through which he, together with other followers and family members, will be able to fulfil the religious teachings of their father and founder member of the F respondent without let or hindrance from the other faction that now runs the respondent.

The respondent's council through its general secretary disputes the applicant's *locus standi* to launch the present application. In its opposing papers it disputes the wishes of the late Baba Johanne Masowe as espoused by the G applicant. It states that during his lifetime the founder father of the respondent Baba Johanne Masowe, had renounced all his earthly possessions including his own traditional cultural beliefs and practices. He had given himself to the service of the Lord and expressed his wish to be embalmed at what would then become the church's holiest shrine in Gandazara, Rusape. The respondent, had by the time of his death become charged with the administration of his H

2003 (2) ZLR p361

Hungwe J

A estate including the burial of Baba Johanne Masowe and leadership of the respondent.

His teachings are a charge to the respondent and a responsibility it still carries out to this day.

The respondent then gave a background of the genesis of the present doctrinal B schisms that have split the congregation right down the middle.

The result of the split, the respondent says, is that the applicant formed his own church which espouses certain doctrinal heresies which amount to an antithesis of everything the late Baba Johanne Masowe stands for. That doctrinal dispute and subsequent division is the real reason why the two factions cannot worship together. That is why it was incumbent upon the respondent to prevent C the applicant from visiting the holy shrine, as such a visit for whatever purpose would desecrate the shrine.

In argument Mr *Chikumbirike* for the applicant urged me to find that the right known as *iter ad sepulcrum* recognised in the old Roman and Roman-Dutch law ought to be extended to the applicant. By virtue of that right the applicant D is, as a direct progeny of the late Johanne Masowe Masedza, entitled to visit the grave of his father. He correctly pointed out that in South Africa this right now exists through codification.

As the law in this country is as that at the Cape Colony since 1890, the same right is to be recognised as law in this country.

E Simply put, the applicant has a right of way recognised at law which entitles him to visit his father's grave. It is in the exercising the right that the court ought to grant the order sought.

As pointed out by counsel for the applicant, there is no authority for the proposition that was advanced on the applicant's behalf.

I must investigate first if the right claimed is one that is recognised as part of F our law.

The applicant has elected to bring this application on the basis that he is the son of the founding father of the respondent who is buried at the shrine situated on the property owned by the respondent. He accepts that as owner the respondent is entitled to refuse entry upon its property as holder of the real G right in that immovable property. I will therefore assume, although this has not been proved, that the respondent is the registered holder of title to land upon which the shrine is situated.

Before one can be recognised as a holder of any right in another person's property, that person ought to demonstrate that he holds some recognised real H right in that immovable property, *aius in re aliena.*

2003 (2) ZLR p362

Hungwe J

By far the most important class of real right less than ownership are servitudes. A These were recognised in the Roman Law by Gaius (2.14.17). W W Buckland (1921) in "A Textbook of Roman Law from Augustus to Justinian" defines a servitude thus:

> "A servitude was essentially a right or group of rights forming part of *dominium,* but separated from it and vested in some person other than the B *dominus.* From another point of view it was a burden on ownership, a *ius in rem* in another person, to which the owner must submit".

R W Lee *An Introduction to Roman-Dutch Law* 4 ed 167 defines servitudes thus:

> "A servitude is a real right enjoyed by one person over or in respect of the property of another, whereby the latter is required to suffer the former to C do, or himself to abstain from doing, something upon such

property for the former's advantage" *Voet,* 7.1.1. *Grotius* 2.33.4.

Relying on *Voet,* Lee says that:

> "The person for whose benefit such right is constituted may either enjoy it as incidental to and inseparable from immovable property of which he is D owner, or may enjoy it personally and without reference to any property of which he is owner. In the first case the right is termed a real or praedal servitude; in the second case it is termed a personal servitude".

Wille *Principles of South African Law* 8 ed p 316 also relies on the same passage from *Voet* (7.1.1.), when he defines a servitude as:

> "... a right belonging to one person, in the property of another, entitling the E former either to exercise some right or benefit in the property, or to prohibit the latter from exercising one or other of his normal rights of ownership."

A personal servitude is one which may be constituted in favour of any person, and it may exist over movable or immovable property. On the other hand a praedal servitude can be constituted over immovable property alone, and be of F some benefit to the owner of another piece of immovable property (Wille *supra).*

The consequence of these distinctions is that a real or praedal servitude is a fragment of the ownership of an immovable detached from the residue of ownership and vested in the owner of the adjoining immovable as necessary G to such ownership and for the advantage of such immovable. Though ownership is divided and vested in two persons, the detached fragment is, as a rule, insignificant as compared to what remains. It is therefore common to speak of the person to whom the residue belongs as the owner of the land while the person in who the detached right is vested is said to have a *ius in re aliena.* Thus personal servitudes approach more nearly to ownership in scope of H

Hungwe J

A enjoyment and have little in common with real servitudes except the name.

Real or praedal servitudes are distinguished as being rural or urban depending on the use to which the dominant tenement is put. The most easily recognised traditional servitudes are:

(a) the right of way B
(b) water rights
(c) rights of pasture
(d) right of cutting wood.

It will be seen that in each category several other sub-rights are recognised. Thus four sub-rights were recognised in the old Roman or Roman-Dutch law. C These are:

(a) *iter* (foot path)
(b) *actus* (driving cattle)
(c) *via*

Modern writers such as Silberberg & Schoeman in *The Law of Property* D 3 ed recognised that although the number of praedal servitudes is now said to be practically unlimited it is important to refer to certain well established kinds of servitudes so as to ascertain if any such servitude does indeed exist. They also recognise the three, i.e. right of way, way of necessity and water servitudes, as the more readily recognised servitudes.

E *Iter,* or right of foot path (*voetpad)* is recognised as a variety of the right of way amongst rural servitudes. Specifically it entailed the right of walking across the land of another.

In the old Roman Law *res divini iuris* was divided into *res sacrae, res religiosae* and *res sanctae* (Inst 2.1.8.). *Res sacrae* were those things which had been consecrated to God by a pontiff as a result of a *lex* or *sanctus* F *consultum* e.g. churches and temples, and only if publicly consecrated. On the other hand things could become *religiosae* by the private burying of a corpse on one's own premises or on another's land with the owner's consent. (Digest 1.8.6.4.) An empty tomb was similarly considered *res religiosa. Res sanctae* were things protected by sanctions e.g. city walls and gates (Silberberg & Schoeman).

G Writing about the first two categories, Lee says there could be no servitude on *res sacrae* or *religiosae* as this was inconsistent with religion. He says that a *res* cannot be *religiosa* without the consent of all those having *iura in rem;* but expresses that there are difficulties in *res sacrae* which the old authorities do not explain.

2003 (2) ZLR p364

Hungwe J

It seems to me that the reason for the prohibition of servitudes on *res religiosae* A may be founded on the reverence surrounding religion which stood the risk of being confused as to whether it was God who was being worshipped or the human being in whose favour the right is granted. Even if I am wrong on this view, whatever the correct position may have been in the old Roman-Dutch Law, Silberberg and Schoeman categorically state that the classification of B things as *divini iuris* is obsolete as they are now *res in commercio.* See also, *Cape Town District Waterworks Co (Ltd) v Elders Executors* (1890) 8 SC 9.

The contention by the applicant is that by virtue of this status in respect of the corpse that is interred at Gandanzara Shrine owned by the respondent he is entitled to institute rights on the basis of *iter ad sepulcrum.*

As the applicant bases his claim on a praedal servitude, he had to first establish C that the shrine is situate on a servient estate and that he, as owner or occupier of a dominant tenement had a right that reposed in him personally as *ius in re aliena.*

As discussed above a real or praedal servitude (as claimed here) in the old authorities, cannot exist on its own. There must be on the applicant's own D admission as reflected in his heads at paragraph 4 page 3:

> "The servitude of an *iter* giving access to a burial place will remain a matter of private property, and consequently it can be released to the owner of the servient estate; moreover it can be acquired even where the religious nature of the burial place is already established".

It seems to me that the application was bound to fail on other grounds than E those given above.

Finally, the Emperor in the Digest, speaks of"... *iter* giving access to a burial place..." seems to suggest that the right given was merely one of access to a grave. Access denotes the right to enter, a place in this case a graveyard. Or it can refer to the way by which one can reach a place. Thus if say your father's F grave is created on a farm which is now under the control of some totally strange family, under this decree one could gain access to visit the grave through the shortest way from the public road on specific days or occasions.

Secondly the place the applicant seeks to visit is not a graveyard. It is more. It is a shrine, a place of worship which is capable of ownership. It is more than a grave. It does not, to my mind, qualify G as a burial place and cannot qualify as such by any analogy.

Having failed to establish the right, it is not necessary for me to discuss whether or not the applicant has *locus standi.* It is implicit in my reasoning that he has not established *locus standi.* My reason for this view is that the immovable property belongs to respondent. The applicant has failed to H establish *a ius in re aliena* over the shrine.

2003 (2) ZLR p365

Hungwe J

A In the premises his application is dismissed with costs.

Chikumbirike and Associates, applicant's legal practitioners

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Source:

DOS SANTOS v DE ANDRADE 2003 (2) ZLR 366 (H)

Citation	2003 (2) ZLR 366 (H)
Case No	Judgment No. HB-101-03
Court	High Court, Bulawayo
Judge	Cheda J
Heard	22 August 2003
Judgment	23 October 2003
Counsel	*T Hara,* for the applicant *J James,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *execution — pending appeal — appeal noted out* C *of time — application before Supreme Court for condonation — execution refused*

Headnote

The respondent obtained judgment against the applicant and sought to execute the judgment. The applicant had, in the meantime, belatedly noted an appeal against the judgment. He applied to the Supreme Court D for condonation of the late noting of the appeal and for leave to appeal, and to the High Court for an order staying execution. The respondent argued that since the Supreme Court had to determine the validity of application for condonation, there was technically no appeal before the Supreme Court.

Held, that as the applications were pending before the Supreme Court, the E court had no right to determine the validity of the reasons for the dilatoriness on the part of the applicant. As long as there was an issue for determination by the Supreme Court, the High Court had no power to entertain an issue the result of which would render the issue before the Supreme Court irrelevant. F

Cases referred to

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

De Lange v Bonini 1906 TH 25

Reid & Anor v Godart & Anor 1938 AD 511

South Cape Corp (Pty) Ltd v Eng Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (A) G

Case information

T Hara, for the applicant

J James, for the respondent H

Cheda J

Judgment

A **Cheda J:** This application is against the writ of execution and subsequent removal of applicant's property by respondent.

The brief history of the matter is that on 17 February 1996 the applicant, together with his wife Julieta Gouveia Monteiro Dos Santos, acknowledged their indebtedness to the respondent in the sum, of 16 000 contos (16 million Portuguese escudos), which translated to Z$ 1 400 000. which was money lent B and advanced to the applicants in 1989.

On 20 April 1998 the respondent issued summons against the applicant and his wife for the recovery of the said sum of $ 1 400 000. The applicants entered appearance to defend. Trial dates were set down for 29 and 30 May 2001 but the trial did not take off, resulting in the matter being postponed to 15, 16 and C 17 January 2002 as trial dates. On 15 January 2002, the applicants' legal practitioners unsuccessfully applied for a postponement, resulting in a judgment being granted against them. The applicant then applied for rescission of judgment which was dismissed on 24 May 2002. On 29 November 2002 the respondent applied for and was granted a writ of execution against the applicants for the sum of Z$ 16 000 000 and $305 000. Suffice to say that the D debt of $305 000 is admitted and therefore nothing turns on it.

On 2 December 2002 the applicant filed an application for condonation for late filing of notice of appeal and a notice of appeal with the Supreme Court. Mr Hara's argument is very simple and straightforward. He argues that the applicant has applied for condonation for late noting of appeal and a notice of E appeal, therefore the respondent should not proceed with the execution of judgment. On the other hand, Mr *James* argues that the applicant has been dilatory in his handling of this matter which leaves one with one conclusion, being that the applicant's action is designed to frustrate respondent.

I believe that the sole issue here is whether or not in view of the applicant's appeal to the Supreme Court, the respondent should nonetheless be allowed F to proceed with his writ. There are two distinct applications before the Supreme Court. There is an application for condonation for late filing of notice of appeal and a notice of appeal. Mr *James* for the respondent argued that the respondent should be allowed to execute his judgment on the basis of applicant's lack of interest in pursuing this matter to finality. This is borne out G by the fact that the applicant previously sought to postpone the hearing on two occasions and has failed to note his appeal timeously. This is a valid argument indeed, but it fails to take into account one major aspect pertaining to the applications before the Supreme Court. As long as these applications are pending before the Supreme Court, this court in my view has no right to determine the validity of the reasons for such dilatoriness on the part of the H applicant.

Cheda J

Mr *Dube* on the other hand argued that execution should be stayed pending A appeal. It is trite law that the execution of a judgment is automatically suspended upon the noting of an appeal. See *De Lange v Bonini* 1906 TH 25; *South Cape Corp (Pvt) Ltd v Engineering Management Services (Pvt) Ltd* 1977 (3) SA 534 (A). The Appellant Division made it clear so many years ago that generally the execution of a judgment is automatically suspended upon B noting an appeal and cannot be carried out except with the leave of the court which granted the judgment. It should also be noted that, to obtain such leave, the party in whose favour the judgment was given must make a special application.

In fact this is our common law position. See *Reid & Anor v Godart & Anor* 1938 AD 511 at 513 where De Villiers JA stated: C

> "The foundation of the common law rule as to the suspension of a judgment on the noting of appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by levy under a writ or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from."

See also *Arches (Pvt) Ltd v Guthrie Holdings (Pvt)* Ltd 1989 (1) ZLR 152 (H). D

The Supreme Court is yet to determine the validity of the application for condonation, therefore in theory there is no appeal before that court. However, in the circumstances that application has to be

dealt with by the Supreme Court first and no other court.

The question therefore is whether having observed that, technically speaking, E there is no appeal before the Supreme Court, this court should then disregard the two applications before the Supreme Court and determine respondent's prayer to execute. It is my opinion that as long as there is an issue for determination by the Supreme Court, this court has no power to entertain an issue the result of which will render the issue before the Supreme Court F irrelevant. It is the Supreme Court which is empowered to determine both applications before it, as they have been filed. The question of whether applicant has complied with the rules and procedures of noting an appeal is the domain of the court to which the appeal has been noted and certainly not this court.

For the reasons stated above this application succeeds with costs. G

Moyo-Hara & Partners, applicant's legal practitioners

James, Moyo-Majwabu & Nyoni, respondant's legal practitioners H

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JIAWU MANUFACTURERS v MITCHELL COTTS FREIGHT ZIMBABWE (PVT) LTD 2003 (2) ZLR 369 (H)

Citation	2003 (2) ZLR 369 (H)
Case No	Judgment No. HH-104-03
Court	High Court, Harare
Judge	Ndou J
Heard	20 May 2002; 5 June 2002;11 June 2002; 17 June 2002
Judgment	20 October, 2003
Counsel	*J R Tsivama,* for the plaintiff *R Ranchod,*for the defendant
Case Type	Civil action
Annotations	Link to case annotations

Flynote

C **Contract** — *breach — damages — purpose of award of damages — what plaintiff must prove — date at which amount of loss to be calculated*

Contract — *exemption clauses — principles applicable — when such clauses are valid — goods left in storage later found to be missing — exemption notice not timeously brought to attention of person contracting nor* D *easily ascertainable — defendant liable for loss*

Headnote

The plaintiff claimed damages for the loss of a large number of television sets that it had left with the defendant for storage. The defendant claimed that it was not liable because of an exemption clause in the contract. It admitted that the televisions may have been stolen by its employees. The E exemption clause referred to the general trading conditions for the shipping agents' association. The plaintiff's attention was not drawn to these conditions and its representative did not see them.

Held, that the excluding or limiting term must be brought to the attention of the party against whom its protection is sought or otherwise be within his knowledge. The time the excluding or limiting term is alleged to have F been given is also of great importance. Such a term will not avail the *proferens* unless the other party was aware of it before the contract was entered into. A belated notice is valueless. In any case, a party cannot exempt himself from liability for the wilful misconduct or criminal or dishonest activity of himself, his servants or agents.

G *Held,* further, that the fact that a breach of contract has occurred is not, in itself, sufficient to merit an award of damages. It must be shown, in addition, that loss has been suffered. The plaintiff must prove his damages; they will not be presumed. The court is nevertheless obliged to assess the damages as best as it can. The aggrieved party is not entitled to be put into a better position than he would have been in had the H contract been performed. The date of breach is important but the extent

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of loss, the amount to be awarded, and the amount assessed or calculated A can only be determined at a later date.

Cases cited

Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd & Anor [1983] 1 All ER 101 (HL) B

Aldersdale v Hendon Laundry Ltd [1945] KB 189; [1945] 1 All ER 244 (CA)

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Canada Steamship Lines Ltd v Regem [1952] 1 All ER 305 (PC) C

Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe 1988 (1) ZLR 304 (S); 1990 (1) SA 582 (ZS)

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Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)

J Spurling Ltd v Bradshaw [1956] 2 All ER 121 (CA)

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Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd & Anor 1977 (2) SA 709 (W)

Minister of Education v Stuttaford and Co (Rhodesia) (Pvt) Ltd 1980 (4) SA 517 (Z) F

Munhuwa v Mhukahuru Bus Services (Pvt) Ltd 1994 (2) ZLR 382 (H)

Olley v Marlborough Court Ltd [1949] 1 All ER 127 (CA)

*Peard v Rennie and Sons (1*895) 16 NLR 175

Probart v South African Railways and Harbours 1926 EDL 205

Rhodesia Cold Storage & Trading Co Ltd v Liquidator Beira Cold Storage Ltd 1905 (2) Buch AC 253 G

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SM Goldstein & Co (Pty) Ltd v Gerber 1979 (4) SA 930 (A)

Sommer v Wilding 1984 (3) SA 647 (A)

Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd 1971 (1) RLR 1 (A) H

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A *Swart & Anor v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A)

Swart v van der Vyver 1970 (1) SA 633 (A)

Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd 1991 (1) ZLR 190 (S)

Tubb (Pvt) Ltd v Mwamuka 1996 (2) ZLR 27 (S)

Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 B

Voest Alpine Intertrading Gesellschaft mbH v Burwill and Co SA (Pty) Ltd 1985 (2) SA 149 (W)

Case information

J R Tsivama, for the plaintiff

C *R Ranchod,for* the defendant

Judgment

Ndou J: The plaintiff claimed payment of the sum of $816 000 in respect of the replacement cost of 102 television sets missing from the defendant's premises while they were in storage. The defendant has denied liability for the amount claimed.

D Alex Lou, the managing director of the plaintiff, testified. He testified that in 1999 the plaintiff entered into an agreement with the defendant whereby the latter was to store the former's black and white television sets for reward. He produced the defendant's "Goods Received Note" 5825 issued and signed by the latter's representative on 5 November 1999 under file Ref: WH 157/99. In E December 1999, the defendant charged the plaintiff bonded ware house storage fees to the tune of $27 370.75. The invoice was produced. It is beyond dispute that the plaintiff paid this amount.

Thereafter, the plaintiff withdrew the television sets in lots. The total number of lots was thirty-four, and for each he produced a "Delivery Note Book" invoice issued by the defendant. A reconciliation of the total number of F television sets deposited by the plaintiff and those withdrawn establishes that a total of one hundred and two were not accounted for. All this factual situation is established by documents from the defendant. In the circumstances there is no doubt that the 102 television sets went missing from the custody in its bonded storage warehouse.

G The fact that those 102 television sets went missing from the defendant's bonded storage warehouse does not necessarily mean that the latter is liable to pay replacement costs. The plaintiff must still establish that the defendant is, in law, liable. Once this is established, then the plaintiff must establish the quantum of such liability.

I am satisfied with the quality of the testimony of Mr Lou on how the television H sets went missing and the total number missing. In order to avoid paying for

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Ndou J

the missing television sets, the defendant placed substantial reliance on the A so-called Shipping and Forwarding Agents Association of Zimbabwe's "Standard Trading Conditions".

Although this was the second time that the plaintiff was using the defendant's bonded storage warehouse, Mr Lou testified that he was made aware of the existence of these conditions, but he did not see the document containing the B same at the time of the agreement. He testified that he went to the defendant to obtain a copy of these "conditions" on several occasions and he was informed that the copy was kept at their Head Office and that the document could only be made available to him by the defendant's managing director. Up to the time that these proceedings were launched the defendant had not made the document available to him. He said that the document was eventually made C available a few days before the commencement of this trial to his legal practitioner. I

believe his testimony in this regard. In any event, the defendant did not lead evidence to contradict this part of his testimony.

He said he amended his claim to $816 000 i.e. $1 800 per set because he was claiming the replacement cost, so he took into account the impact of inflation D on his original claim. To arrive at that figure, he also consulted another company which imported and assembled similar black and white television sets i.e. Sino Electrical.

Under cross-examination, he conceded that the small print in the defendant's invoices and letterheads made reference to trading conditions. He, however, was adamant that he did not see a copy of these conditions. For the record such E reference is phrased as follows:

> "All goods are handled subject to the trading conditions of the Zimbabwe Shipping and Forwarding Agent's Association, a copy of which is available for inspection at the registered head office of the company."

At the bottom of the "Bonded Warehouse Tariff" which the witness conceded F that he had in his possession the following words appear:

> "(b) All handling, storage and transport of goods at owner's risk ..."

I should highlight that the initial document issued by the defendant when the television sets were deposited on 5 November 1999 makes no reference to the trading conditions or owner's risk. When the television sets were deposited a "Goods Received Note" was issued by the defendant. This document makes G no reference whatsoever to the trading conditions or owner's conditions and these only commenced appearing in defendant's invoices over a month and a half later. All subsequent documents bore the reference to the trading conditions.

The plaintiff also called Stanley Gutsa, sales manager at Sino Electrical (Pvt) H Ltd. His testimony was to deal with the aspect of the value of the television

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A sets. His evidence did not take the case any further as he was not familiar with prices of the type of television set which is the subject matter of these proceedings.

The defendant called one witness, Brian Likhuma, the executive manager. He explained the defendant's previous dealings with the plaintiff. He conceded that the defendant had no explanation for the missing television sets except B that there was a problem at their bonded storage warehouse. He said Mr Lou's position after the discovery of the missing television sets was that he wanted the sets replaced. He stated that in terms of clause 19 of the trading conditions, as the value claimed exceeded $300 000 the liability of the defendant should be calculated in terms of the "value declared for customs" i.e. $440 per C television set.

Under cross-examination, he conceded that the television sets could have been stolen by the defendant's employees. He said police were called but their investigations came to naught. He said that he did not personally bring the contents of trading conditions to Mr Lou's attention. He only assumed one Mr McKenzie did so, but later accepted that there is no evidence showing that any D representative of the defendant did in fact bring to Mr Lou's attention. He also confirmed that the conditions were not kept at the bonded storage warehouse where this transaction took place but at the registered office of the defendant. He said that he had no alternative value to give to the court to show that the value given by Mr Lou was inflated.

E In support of its case, the defendant relies on the trading conditions, in particular clauses 18, 19 and 25. It is necessary to state what these clauses provide:

> "18. The company shall not in any circumstances be liable for consequential loss, however caused.
>
> 19. In no case shall the liability of the company exceed the value of the F goods or the value declared by the customer for insurance, customs or carriage purposes or the following respective amounts, whichever figure is the least:
>
> (a) Inward and outward consignments received or to be forwarded by airfreight- Z$50 per consignment; G
>
> (b) Inward and outward consignments received as to be forwarded by sea freight or other surface carriage, excluding parcel post - Z$25 per consignment.
>
> If it is desirable that the liability of the company should not be governed by these limits, written notice thereof must be given to the company before any goods or documents are entrusted to the company, together with a H statement of the value of the goods. Upon receipt of such notice, the

Ndou J

company may agree to its liability being increased to a maximum amount A equivalent to the amount stated in the notice, in which case it shall be entitled to effect special insurance to cover its maximum liability and the party giving the notice shall be deemed by so doing to have agreed and undertaken to pay to the company the amount of the premium, payable by the company for such insurance. The company shall not be responsible for loss of profits in any circumstances ... B

25. Pending forwarding and delivery, goods may be warehoused or otherwise held at any place or places at the sole discretion of the company at the customer's risk and expense."

It is common cause that these television sets were not cleared with customs by the defendant but by a company known as Polio Freight Services. All that the C defendant did was to store television sets in its warehouse after such clearance by customs. Would the trading conditions apply in such circumstances? I think so on account of clause 1 which provides:

"1. The following conditions apply to all business undertaken by all clearing and forwarding agents .... " (my emphasis).

My understanding is that the standard conditions amount to nothing more than D the so-called exemption and limitation clauses in a contract. In *Bristow v Lycett* 1971 (2) RLR 206 (A) at 221G-H and 1971 (4) SA 223 (RA) at 236, Beadle CJ said:

"The exemption clause is, after all, nothing more than a clause in a contract. There is no special magic to an exemption clause in this case. Its meaning E must be ascertained in the same way as any other clause in a contract, by ascertaining what the parties must have intended it to cover, and bearing in mind the rules applicable to implied or tacit contracts."

In *Swart & Anor v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202, (Translation) Rumpff CJ said:

"What must naturally be accepted is that, when the meaning of words in a F contract have to be determined, they cannot possibly be cut out and posted on a clean sheet of paper and then considered with a view to then determining the meaning thereof. It is self-evident that a person must look at the words used having regard to the nature and purpose of the contract and also at the context of the words in the contract as a whole."

In *Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd* 1991 (1) ZLR 190 (S) at 195C, Korsah JA said: G

"At common law, the right of a contracting party to claim damages for a breach of contract may be excluded by the express terms of the contract, provided that the language employed to do so is plain. Even liability for negligence may be excluded if words are used which sufficiently indicate H

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A that the parties intended, in the context of the agreement, that such should be the case."

In other words, if the words of an exclusionary clause are sufficiently clear then effect must be given to them by a court of law. In the same case, McNally JA discussed the court's reaction to such clauses. At 203B-G, the learned Judge of Appeal said:

B "The courts, primarily in England but followed in South Africa and Zimbabwe, were hostile to these exemption clauses. Their attitude is expressed, as only he can do it, by Lord Denning in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at 296-7; [1983] 1 All ER 198 (CA) at 113-4. The decision was approved on appeal in [1982] 2 AC 803; [1983] 1 All ER 737 (HL) and Lord Denning's C reasoning was specifically approved in the speech of Lord Diplock. This is what Lord Denning said:

'None of you nowadays will remember the trouble we had, ... with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were held to be binding on any person who took them without objection. No one ever did object. He D never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract". But the freedom was all on the side of the big concern with the use of the printing press ... It was a bleak winter for our law of contract ... Faced with this abuse of power, the strong against the weak, by the use of the small print of the conditions, the judges did what they could E to put a curb on it. They still had before them the idol, "freedom of contract". They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. The weapon was called "the true construction of the contract". They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put F on them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability, or that in the circumstances the big concern was not entitled to

rely on the exemption clause ... But when the clause was itself reasonable and gave rise to a reasonable result, the judges upheld it, at any rate when the clause did not exclude liability entirely G but only limited it to a reasonable amount'."

At 204F-G to 205A, the learned Judge of Appeal further said:

"I do not think we should pretend, that the court's approach to the interpretation of exemption clauses is based on a search for the 'true meaning'. I think we must accept that we are dealing with what I would H call 'policy-based interpretation'.

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The cases in England and South Africa and Zimbabwe show, to my mind, A quite clearly, that the courts interpret exemption clauses in a way which can only be described as artificial. A great deal of ingenuity is expended in trying to show that these artificial interpretations are in fact true and natural interpretations. I do not think the effort is worth the candle. It is the old story of the courts claiming that they do not make law but only interpret it. That is not so: see *Blower v van Noorden* 1909, TS 890 at 905, B *Liverpool City Council v Irwin* [1976] QB 319 at 332; [1975] 3 All ER 658 (CA) at 666; *Zimnat Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (S); 1991 (2) SA 825 (CS) *in fine.* I say this because later in this judgment, I will refer to cases whose approach to the interpretation of exemption clauses cannot, to my mind, be defended on the grounds of grammar or logic. They are 'policy-based interpretations;. They are well C - established in the law. I agree with them. But I do not defend them on the basis that they interpret language truly and naturally. They can only be defended on the ground that they are accepted and well-established policy-based interpretations."

(The cases alluded to by McNally JA *supra* are, *inter alia, Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha and Another* 1964 (3) SA D 561 (A) at 571 H; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A); *Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd* 1981 (3) SA 216 (C); *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd & Anor* [1983] 1 All ER 101 (HL) at 105H-106A; *Alderslade v Hendon Laundry Ltd* [1945] KB 189; [1945] 1 All ER 244 (CA) at 245; *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* E 1988 (1) ZLR 304 (S) at 319-320; 1990 (1) SA 582 (ZS) at 594; *Canada Steamship Lines Ltd v R* [1952] 1 All ER 305 (PC); *SA Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) at 419C-E and *Min of Education v Stuttaford and Co (Rhodesia) (Pvt) Ltd* 1980 (4) SA 517 (Z).

The position was aptly articulated by Gubbay CJ in *Tubb (Pvt) Ltd v* F *Mwamuka* 1996 (2) ZLR 27 (S) at 31E-F to 32A-G as follows:

"At common law, the right of a party to sue for loss or damage to property may be excluded by the express terms of the contract entered into. But any claim to such exemption of liability should be examined in accordance with the following well-established propositions:

(1) The words of the exclusionary clause must be read as part of the G contract as a whole... They must be sufficiently clear and comprehensive so as to require a court to give effect to them ...

(2) Any ambiguity as to the meaning or scope of the excluding or limiting term must be resolved against the party who inserted it - the *proferens.* It is for the latter to prove that the words used clearly and aptly embrace the contingency that has arisen: see *Shubara Ranch* H

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A *(Pvt) Ltd v Shield of Zimbabwe Insurance Co Ltd* 1988 (2) ZLR 306 (S) at 309H-310A.

(3) If there is no express reference to negligence in the exemption clause, the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence on the part of *the proferens* and/or his servants; and if they are, whether 'the head of damage may B be based on some ground other than negligence ...'

(4) Where the existence of an 'owner's risk' clause excluding liability for negligence is not in dispute, the burden of establishing any other possible ground of liability, such as gross negligence or *dolus,* rests upon the claimant: see *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 643 B and *Stocks & Stocks (Pty) Ltd v T J Daly &* C *Son (Pty) Ltd* 1979 (3) SA 754 (A) at 760E-F.

(5) The excluding or limiting term must be brought to the attention of the party against whom its protection is sought; or otherwise be within his knowledge: see *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd&Anor* 1977 (2) SA 709 (W) at 713H-714A. Where an 'owner's risk' notice is displayed so conspicuously that a normal D person could hardly have failed to see it, an inference that it was seen will be drawn.

(6) The time when the excluding or limiting term is alleged to have been given is of great importance. Such a term will not avail *the proferens* unless the other party was aware of it before the contract was entered into. A belated notice is valueless. To give effect to it would be to alter E unilaterally the terms of the contract: see *Olley v Marlborough Court Ltd* [1949] 1 All ER 127 (CA) at 134C-D; *Peard v Rennie & Sons* (1895) 16 NLR 175 at 183;

(7) A court may, however, presume notice of the exempting term from previous dealings between the parties: see *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121 (CA) at 125H-I; F

(8) A party cannot exempt himself from liability for the wilful misconduct or criminal or dishonest activity, of himself, his servants or agents; or perhaps, even from the loss of or damage to the *merx* resulting from gross negligence on his or their part: see Christie *The Law of Contracts in South Africa* 2 ed at 213-214."

G I proceed to apply these legal principles to the facts *in casu.* Here the *proferens* inserted the exempting and limiting terms in a document kept at the registered office of the company and not at the operational centres, such as the bonded warehouse where contracts are entered into. In some, and not all, documents and letterheads used at the operational centres there is reference to the existence of such exempting or limiting conditions at the registered office of H the defendant company. From the evidence, the initial document signed at the

time of the entering of contract did not contain such reference to the existence A of the trading conditions. There is no evidence that these limiting or exempting clauses were specifically brought to the attention of witness Lou at the time of entering the storage agreement. Although later invoices and correspondence had such small print pointing to the existence of the trading conditions this would, in my view, amount to not more than a valueless belated notice: see B *Olley v Marlborough Court Ltd supra* and *Peard v Rennie & Sons supra.* In this matter, the parties, however, had two previous dealings. The defendant previously stored glass for the plaintiff with no problems. Secondly, the plaintiff unsuccessfully tried to source import finance from the defendant. In the circumstances, the plaintiff had access to the defendant's documentation bearing the reference to the trading conditions and as such the fact that the first C document did not make reference to the storage conditions would not make a difference. I will presume that the plaintiff had access to documents making reference to the existence of the standard conditions from the parties' previous dealing: see *J Spurling Ltd v Bradshaw supra.*

Credible evidence of Mr Lou establishes that the exempting or limiting D clauses were not specifically brought to his attention or otherwise within his knowledge at the time the plaintiff entered into the agreement with the defendant. After the agreement was sealed, there was a stage where he became aware of their existence and enquired. The bonded warehouse did not have copies of the trading conditions. Instead, he was referred to the defendant's registered office. At the latter, he was informed that such trading conditions E were kept by the managing director of the defendant. The latter was not present. He made subsequent attempts to get a copy but in vain. As alluded to above, he only saw a copy well after the commencement of these proceedings. In the circumstances, the excluding or limiting term was not brought to the attention of the plaintiff: see *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd & Anor supra.* In this case, the exclusionary clauses 18, 19 F and 15 are sufficiently clear and comprehensive so as to require that I give effect to them provided that they meet the other requirements set out by Gubbay CJ in *Tubbs (Pvt) Ltd v Mwamuka supra.* The clauses have details on the question of liability in different scenarios.

The *proferens* has also proved that the words used in the standard trading G conditions clearly and aptly embrace the contingency that has arisen in this case. The television sets went missing from the bonded warehouse where they were being stored for reward. There is express reference to negligence in the exemption clauses. The provisions cover negligence on the part of the *proferens* and its servants.

The problem here is that the excluding or limiting terms were not brought to H the attention of the plaintiff timeously. As highlighted above, a belated notice

A is valueless. As stated above, the *proferens* believed that the television sets went missing as a result of theft. From the size of the sets and the quantum involved that is the most probable or plausible explanation. As highlighted above, the defendant cannot exempt itself from liability for theft by its employees. Applying the policy interpretation to these aspects, I find that the disappearance of the television sets is not an act covered by the exemption B clauses. The breach of contract is, in any event, fundamental and as such the exemption clauses cannot exempt the defendant from liability for such fundamental breach.

On the value of the missing television sets it is trite that the fact that a breach of contract has occurred is not, in itself, sufficient to merit an award of C damages. It must be shown in addition, that loss has been suffered. The plaintiff must prove its damages; they will not be presumed. If the plaintiff proves no damages none will be awarded: see *Rhodesia Cold Storage and Trading Co Ltd v Liquidator Beira Cold Storage Ltd* 1905 (2) Buch AC 253, R H Christie *The Law of Contract in South Africa supra* at 524; *Swart v van der Vyver* 1970(1)SA 633 *(A) at 643C; Sommer v Wilding* 1984 (3) SA 647 D (A) at 6561, 664D-665H; *Scott & Anor v Poupard & Anor* 1971 (2) SA 373 (A) and AJ Kerr *The Principles of the Law Contract 4* ed at pp 573-4. The onus is on the plaintiff to adduce evidence to prove the damages which it claims to have suffered but the court is nevertheless obliged to assess the damages as best as it can: see *S M Goldstein & Co (Pty) Ltd v Gerber,* 1979 (4) SA 930 (A) at 937G; *Wilding supra* at 664D-665H and *Probart v South African* E *Railways and Harbours* 1926 EDL 205 at 224-5. In contract, the plaintiff has other remedies at his disposal besides damages. Unlike damages for delict, damages for breach of contract are not intended to recompense the innocent party for his loss, but to put him in the position he would have been in if the contract had been properly performed: see F *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1. In this case, at p 22 Innes CJ said:

> "So that we must apply the general principles which govern the investigation of that most difficult question of fact - the assessment of compensation for breach of contract. The sufferer by such breach should be placed in the position he would have occupied had the contract been performed, so far G as that can be done by the payment of money, and without undue hardship to the defaulting party."

This is the primary residual rule. Both the detrimental and the beneficial results of the breach of contract must be taken into account. The aggrieved party is not entitled to be put into a better position than he would have been in had the contract been performed: see *Holmdene Brickworks (Pty) Ltd v* H *Roberts Construction Co Ltd supra* at 687 C; *Katzenellenbogen Ltd v Mullin*

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1977 (4) SA 855 (A) at 875 C and *Bonne Fortune Beleggings Bpk v Kalahari* A *Salt Works (Pty) Ltd & Ors* 1973 (3) SA 739 (NC) at 744 A.

To be recoverable, the loss must be of a kind and extent which might have been contemplated or foreseen by the parties when they entered into the contract: see *Dennill v Atkins* 1905 TS 282 at 288-9; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550; B *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd supra* at 22 and *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd supra* at 687D-H.

The next issue in this matter is the date with reference to which loss is to be determined. In *Voest Alpine Intertrading Gesellschaft mbH v Burwill and Co SA (Pty) Ltd* 1985 (2) SA 149 (W) at 152C; *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N) at 674 G and C *Munhuwa v Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382 (H) at 388E, it was stated that damages are to be assessed or calculated as at the date of breach. I agree with the learned author A H Kerr *supra* at p 641 that these statements seem obscure. What seems to be intended in these cases is that damages are assessed or calculated by means of a formula in which the date D of breach or termination of the contract, depending on the circumstances is important. The date of breach is important but the extent of loss, the amount to be awarded, the amount assessed or calculated, can only be determined at a later date. From the evidence before me, the television sets were selling at $2 000 at the time that it was discovered that they were missing. The amended value was $8 000 each. This is far less compared to the testimony of Mr Lou E and Mr Gutsa who gave the value at the time of the trial at $14 000 and $18 000 respectively. Given the state of our economy, it is very difficult for parties to give the replacement costs with some measure of precision. I am, however, satisfied that the plaintiff adduced sufficient evidence to show that it suffered damages as a result of the missing 102 television sets imported for resale. I am therefore, obliged in this case to assess the damages as best as I can. I should F strive to place the plaintiff in

the position it would have occupied had its television sets stored with the defendant been returned to it. I have to avoid placing undue hardship to the defendant. I have to strike a balance. With this in mind, and the date of the breach, and all other surrounding factors highlighted in my judgment I find that the value of $8 000 will place the G plaintiff in a position it would have been had the 102 television sets not gone missing in the defendant's custody. This type of loss was reasonably foreseen by the parties.

From my judgment, it is now clear why I dismissed the application for absolution from the instance at the close of the plaintiff's case. At that juncture, I formed an opinion that there was sufficient evidence on which a H

Ndou J

A court might make a reasonable mistake and gave judgment for the plaintiff: see *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at p 5 and *Munhuwo v Mhukahuru Bus Services supra* at 313G-384A.

From the foregoing, I am satisfied that the plaintiff proved its case on a balance of probability and I order as follows: B

1. That judgment be and is hereby granted in favour of the plaintiff against the defendant for the payment of the sum of $816 000 with interest thereon calculated at the fixed rate from date of the service of summons to date of payment in full.
2. Costs of suit.

C *Sawyer & Mkushi,* plaintiff's legal practitioners

Hussein, Ranchod & Co, defendant's legal practitioners

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MAGOGE v ZIMNAT LION INSURANCE CO (PVT) LTD & ANOR 2003 (2) ZLR 382 (H)

Citation	2003 (2) ZLR 382 (H)
Case No	Judgment No. HH-190-03
Court	High Court, Harare
Judge	Smith J
Heard	29 October 2003
Judgment	29 October 2003
Counsel	Details not suplied
Case Type	Stated case
Annotations	No case annotations to date

Flynote

Damages — *delictual — mitigation of — no duty on plaintiff to mitigate loss* C — *limit to defendant's liability — onus on defendant to show that loss due to plaintiff's unreasonable actions*

Headnote

The plaintiff's car was damaged as a result of the negligence of a bus driver, D the second defendant, whose company was insured by the first respondent. In addition to the cost of repairs, the plaintiff claimed damages for loss of income while his car was off the road. He was an insurance broker and had to have a car in order to carry on his business. Public transport was impractical and it would have cost more to hire a car than he claimed as loss of income. The defendants argued that the plaintiff had a duty to E mitigate his loss by having the car repaired sooner and by hiring a car.

Held, that there is no duty on a plaintiff who is claiming delictual damages to mitigate his loss. The so-called mitigation rule is an application of the general principle that a plaintiff should not be the author of his own loss. A defendant is not liable for all loss suffered by the plaintiff; he is only liable for such part of the plaintiff's loss as is properly caused by the F defendant's breach of duty. The mitigation "rule" relates not to what the plaintiff in fact did, but to what he should have done. It is in essence a claim based on negligence — his failure to do what a reasonable man would do if placed in the position of the person claiming damages. There is thus a duty on a plaintiff not to aggravate his damages by his own wanton or careless conduct. If he does so aggravate his loss, then he will G not be entitled to recover damages in respect of the damage attributable to such conduct on his part. The *onus* of establishing such aggravation lies upon the defendant.

Held, further, that the plaintiff could not have had the car repaired any sooner than he did, because he did not have the money to do so; and hiring a car would have been even more expensive. H

2003 (2) ZLR p383

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Cases referred to A

Cargo Carriers (Pvt) Ltd v Nettlefold & Anor 1991 (2) ZLR 139 (S)

da Silva & Anor v Coutinho 1971 (3) SA 123 (A)

Hazis v Transvaal & Delagoa Bay Invstm Co Ltd 1939 AD 372

Shrog v Valentine 1949 (3) SA 1228 (T)

B *The Solhult* [1983] 1 Lloyd's Rep 605 (CA)

Judgment

Smith J: The second defendant (hereinafter referred to as "Chiwara") was driving a vehicle along Simon Mazorodze Road in Harare when he knocked into the car that the plaintiff (hereinafter referred to as "Magoge") was driving. It was what is known as a "hit and run". Subsequently Chiwara paid an C admission of guilt fine on a charge of driving without due care and attention. The repairs to Magoge's car cost $27 168, which amount was paid by the first defendant (hereinafter referred to as "Zimnat"). Magoge was an insurance broker. He used his car for the purposes of his business. Due to the accident he was unable to use his car from the date of the accident, which was 9 December 2000, until it was repaired and returned to him on 4 April 2001. He D estimated that his loss of earnings during that period amounted to $406 931. He issued summons claiming that amount from the defendants.

The defendants requested further particulars which were supplied as follows. The drive shaft of Magoge's car was broken, so it was incapable of moving. Chiwara was driving a minibus. After the accident he just drove off without E stopping. Magoge made a report at the head office of Kukura Kurerwa Buses that their driver had caused an accident, but Chiwara denied that he had been involved in the accident. It was only after Chiwara was informed that a forensic test would be

conducted on Magoge's car and the minibus that Chiwara had been driving that he admitted that the minibus had been involved in the accident. Chiwara then paid the admission of guilt fine. That was in March F 2001. Zimnat effected payment for the repairs on 4 April 2001 and that was when the repairs were done. Magoge did not have the money to pay for the repairs and so he had to wait until Chiwara admitted liability, before he could give the go-ahead for the repairs to be done.

The defendants denied liability for the loss of income as Magoge had signed G a release form on 3 April 2001 releasing the defendants from any further claims after the vehicle repairs and towing charges were paid. Alternatively, they averred that the claim was grossly exaggerated and that Magoge had not done enough to minimise his loss.

At the pre-trial conference it was agreed that there was no issue as to liability and that the parties should try to reach a settlement, failing which they could H file written submissions and the matter would be determined as a stated case.

Smith J

The submissions by Magoge were as follows. The delay of four months was A caused by the defendants. He acted swiftly in reporting the accident to the police and in notifying the defendants. However, the defendants did not accept liability until sometime in March. He tried to mitigate his loss by reporting the accident expeditiously. He tried to carry on his business as an insurance broker using public transport, but that started to destroy his market because B his clientele did not look kindly on a broker who did not have his own car and had to use public transport. It would have cost him $433 200 a month to hire a car to use while his car was immobilised. He did not have the money to be able to pay for the repairs to his car.

Magoge filed an affidavit setting out how he had calculated his damages. He pointed out that he earned his income by way of commission, not salary. His C earnings in a day or a month were spread over 24 months and he was credited with 85 per cent for the first year and 15 per cent for the second. His commission was a percentage of the premium the client paid to the insurance company each month. Therefore the business he procured each month showed a return of 85 per cent over the first 12 months and 15 per cent over the second 12 months. Consequently, any loss of business was reflected in a loss of D earnings over the following 24 months. The cumulative loss he suffered because he could not obtain clients for four months amounted to $406 931. Because he did not procure any business for four months, he did not meet the targets set by the insurance company for which he was working for the two years following the accident. Because of that failure, the company concerned E had terminated his services.

In their submission, the defendants did not dispute liability but disputed the quantum. They submitted that Magoge had a duty to mitigate his loss. He should have had his car repaired earlier. It took about one week for his car to be repaired. The fact that it was out of use for four months was because of his failure to have the repairs done expeditiously. Alternatively, he should have F hired a car so that he could continue carrying on his business.

In The Solhult [*1983*] 1 Lloyd's Rep 605 (CA) at 608 Sir John Donaldson MR said:

> "A plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase 'duty to mitigate'. He is completely free to act as G he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly... caused by the defendant's breach of duty".

McNally JA, in *Cargo Carriers (Pvt) Ltd v Nettlefold & Anor* 1991 (2) ZLR 139 (S), cited the above and then went on to say at 142 F-143 A: H

Smith J

> A "Roman-Dutch authority is to the same effect: See generally Corbett and Buchanan *The Quantum and Damages in Bodily and Fatal Injury Cases* 2 ed at p 10 para 8. There the point is made (relying on Halsbury) that there is a further duty on a plaintiff not to aggravate his damages by his own wanton or careless conduct: 'If he does so aggravate his loss, then he will not be entitled to recover damages in respect of the damage attributable B to such conduct on his part. Again the *onus* of establishing such aggravation lies upon the defendant'. Broadly the same principles are enunciated in McKerron *The Law of Delict* 7 ed at p 139.

Finally it is clear that even where a plaintiff, in an attempt to mitigate his damages, actually aggravates them he can recover the greater amount if it can be shown that he acted reasonably. As Browne-Wilkinson LJ put it C in *Metelmann, supra* at 634 col 2:

> 'If I am right in holding that the sale on the terminal market on Jan 21 was a reasonable attempt to mitigate the loss two results follow. First, any additional loss suffered by Metelmann as a result of such sale is recoverable from NBR. Therefore in addition to the basic damages Metelmann is entitled to be compensated for the additional damage D flowing from the attempt to mitigate.'"

In that case, a vehicle had been involved in an accident and needed repairs. Had the repairs been done expeditiously, they would have cost $60 000. However, the respondents had delayed in having the repairs done, with the result that the costs had increased to $70 000. The court held that there was an onus on the respondents to justify the delay. As they had not discharged the onus, it could E not be said that the delay was reasonable or, indeed, that it was in consequence of an intention to mitigate damages. Accordingly the court ruled that the reasonable cost of the repairs was $60 000.

In the heads of argument submitted by both parties reference is made to "*Shrogg v Valentine* 1949 (3) SA 1228 (T) at 123". Both purport to quote from F the judgment saying:

> "A plaintiff must take all reasonable steps to mitigate his loss"

and in one set of heads there is added:

> "and any loss suffered by him as a result of his failure to mitigate is not recoverable as he only has himself to blame for having suffered so much".

G It is curious that in both cases the plaintiff is spelt "Shrogg" and not "Shrog" and both refer to p "123" which is incorrect as the fourth digit is missing. I have read very carefully the judgment referred to and cannot find the extract that is cited in the heads. The only relevant statement I can find is at p 1237 where Clayden J said:

> H "The question to be decided here, in my opinion, is whether a person who

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> has taken steps to mitigate his loss is bound to prove that those steps were A reasonable before he can recover the expense thereof".

I can find no statement to the effect that a claimant for damages has a duty to mitigate his loss. The learned judge did refer to *Hazis v Transvaal & Delagoa Bay Investment Co Ltd* 1939 AD 372 at 388 where Stratford CJ said that:

> "Both on principle and on precedent the burden of proving that the B claimant for damages did not take reasonable steps to mitigate the damage which he actually suffered is upon the one who asserts that those reasonable steps were not taken".

However, before the words quoted above, Stratford CJ said:

> "This rule about mitigating damages relates not to what the claimant in fact did, but to what he should have done. It is in essence a claim based on C negligence — neglect to do what a reasonable man would do if placed in the position of the person claiming damages. The defendant in such claim says 'admitting that in fact you suffered these damages, you have only yourself to blame for having suffered so much, or at all, because you did not take reasonable steps to protect yourself and, therefore, me'".

In Joubert's *The Law of South Africa* vol 7 para 31, dealing with Mitigation, D the learned author says:

> "A plaintiff who fails to mitigate his damage may have his damages reduced. It is sometimes said that the plaintiff is under a 'duty' to mitigate his loss, but it is clear that the doctrine of mitigation does not rest upon any 'duty' towards the defendant. The mitigation rule is an application of E the general principle that a plaintiff should not be the author of his own loss".

In *Da Silva & Anor v Coutinho* 1971 (3) SA 123 (A) at 145C-E Jansen JA said:

> "On the facts of this case the alleged negligence, here invoked by the respondent, relates to the principle that a plaintiff should not be the author of his own loss, a principle which also bears upon the so-called 'duty to F mitigate damages'. As said by *Mayne & McGregor on Damages,* 12th ed., para. 62:
>
> > 'A plaintiff may have his damages cut down because his own conduct has constituted contributory negligence, has rendered some of the damage too remote, or has constituted a failure to mitigate the damage which may be defined as a failure on the part of the plaintiff to take reasonable steps G either to reduce the original loss or to avert further loss. This covers the whole ground of contributory negligence and mitigation, but damage may be too remote from causes other than the

plaintiff's conduct, whether acts of third parties, or natural events: this factor does of course distinguish remoteness from the other two, but since the difficulties to be discussed arise only with cases of remoteness stemming from the H

Smith J

A plaintiff's conduct, cases of remoteness beyond these are not included in the present context'.

The distinction between contributory negligence in this sense and a failure to mitigate appears to be a fine one *(Mayne & McGregor,* para 63- 65, *Glanville* Williams *Joint Torts and Contributory Negligence,* paras 67 *et seq.,)* and the two concepts appear to have in common that they do B not rest upon any 'duty' towards the defendant."

In this case, Magoge has quantified his damages. The defendants have not challenged the method used by Magoge to do so. They have relied on the defence that he had not attempted to mitigate his damages. In fact, there was no duty on his part to do so. Even if there were such a duty, Magoge has established that he could not effect the repairs sooner, because he could not C afford to pay for them. Furthermore, if he had hired a car, it would have been evenmore expensive.

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

(a) $406 931, with interest thereon at 30 per cent per annum from 9 December D 2000 to date of payment; and

(b) costs of suit.

Magoge Legal Practitioners, legal practitioners for plaintiff

E *Atherstone & Cook,* legal practitioners for defendants

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Source:
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EASTVIEW GARDENS RESIDENTS' ASSOCIATION v ZIMBABWE REINSURANCE CORPORATION LTD & ORS 2003 (2) ZLR 388 (H)

Citation	2003 (2) ZLR 388 (H)
Case No	Judgment No. HH-174-03
Court	High Court, Harare
Judge	Paradza J
Heard	10 January 2003; 29 May 2002
Judgment	5 February 2003*
Counsel	*A Mambosasa,* for the applicant *F Girach,* for the respondents
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Contract — *formation — option — what constitutes — letter from owner of flats to tenants indicating desire to sell and inviting tenants to purchase — not a binding option*

Practice and procedure — *parties — representation — secretary of* D *association — whether entitled to bring action on behalf of members of association — constitution of association permitting him to do so*

Headnote

The tenants in a block of flats received a letter from the estate agents, stating that the owner intended to sell the flats by sectional title and giving the tenants until the end of the month to accept. Six days later, the estate E agents sent a letter to the tenants, saying that the offer had been withdrawn and that the flats would be sold block by block, and offering the tenants the opportunity to buy from the block that was being sold at any given time. After objection from the applicant association, which represented the tenants, a second estate agent wrote to the tenants, giving F them first refusal to buy the flats they occupied, and stating that if they failed to exercise the right of first refusal, the flats would be offered for sale to the public. Over a third of the tenants purchased their flats accordingly. The association argued that the first letter was binding on the owner. The respondents challenged the association's secretary's right to represent all the tenants. G

Held, that as long as the deponent places before the court enough evidence, as in this case, in the form of the constitution of the association, that

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Paradza J

A should satisfy the court that the deponent has authority to act for and on behalf of the association and its members. *Held,* further, that a letter written by the owner of the flats to members of the association disclosing a desire to sell the flats to the sitting tenants at a particular price and inviting them to respond by a particular date does not B amount to a binding option. It was no more than an offer to treat.

Cases cited

Boyd v Nel 1922 AD 414

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (CA)

Direct Response (Pvt) Ltd v Shepherd 1993 (2) ZLR 218 (H)

C *Ferguson v Merensky* 1903 TS 657

Hersch v Nel 1948 (3) SA 686 (A)

Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C)

Case information

A Mambosasa, for the applicant

D *F Girach,* for the respondents

Judgment

Paradza J: This matter came before me as an opposed application, firstly on 10 January 2002, on which date the matter was postponed *sine die* with no order as to costs by consent. The reason was that the applicants were unable to secure the services of another legal practitioner after their counsel, Mr E Kututwa, had left the partnership where he was employed. It is not clear why he could not represent the applicants, although it was made known to me that he was still available elsewhere. The matter came before me again on 29 May, 2002, but the matter did not take off for unclear reasons. At this stage the applicants were now being represented by Mr Chaoma and the

respondents by Mr *Girach.* The matter finally came before me on 5 February, 2003, this time with applicants being represented by Mr *Mambosasa* and the respondents still being represented by F Mr *Girach.* Argument was heard from both counsel and at the conclusion of the hearing I dismissed the application with costs on an attorney and client scale. In delivering my judgment in open court I gave my reasons for arriving at that decision. I believe my reasons were recorded in G open court for the benefit of any of the parties who wanted to take the matter up on appeal. As far as I was concerned that was the end of the matter as it was out of my hands.

A perusal of the court record does not show me that any of the parties who were present on the day requested the Registrar to have a transcript of the record so that they could proceed to note their appeal. The record does not have any letter H or correspondence from any of the parties notifying me of their intention to

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Paradza J

lodge an appeal and at the same time requesting my full reasons for my A judgment. The first letter on record came from Hussein, Ranchod and Co. That letter is dated 23 June, 2003 which was addressed to the Registrar of the High Court. The letter simply requested a transcript of the record of the proceedings, at the same time undertaking to pay the Registrar's charges for transcribing the record. In that letter no indication was made that it was the intention of the applicants to lodge an appeal. B

The second letter written by Hussein, Ranchod and Co is dated 22nd August 2003, addressed to my clerk. That letter refers to the applicants' notice of appeal which Hussein, Ranchod and Co say they had filed without my reasons for judgment. Upon having sight of those two letters I took the liberty of contacting Mr Hussein of that firm to find out whether a notice of appeal had C been filed as there was nothing on record to indicate anything to that effect. He advised me on the telephone that indeed a notice of appeal was filed but it did not state the grounds of appeal. He undertook to provide me with a copy of that notice of appeal. At the time of preparing this judgment a copy of the notice of appeal has not been furnished to me.

The other copies of correspondences on record were delivered by Costa and D Madzonga to the Registrar on 12 August 2003. They are what appears to be their own file copies of the correspondence between my clerk and Costa and Madzonga. The originals of those copies are not on record. The first letter is dated 1 February 2003 advising my clerk that Costa and Madzonga had been served with a notice of appeal, a copy of which they purport to attach to that E letter to my clerk, and at the same time requesting my reasons for the judgment as a matter of urgency to ensure that the appeal is heard expeditiously.

The second letter from Costa and Madzonga is dated 11 March 2003, again addressed to my clerk. That letter purports to attach a certain Supreme Court judgment which I believed I requested during the hearing of the matter but F which judgment had not been furnished to me. The letter was a follow up to find out whether the reasons for judgment were available so that the matter could proceed.

The last letter from Costa and Madzonga is dated 30 April 2003. It was a mere follow up on the letters of 7 February 2003 and 11 March 2003. The letter seems to indicate that assurance had been given to them that the judgment G would be available and ready for them in March this year. It is not clear who made those assurances. All I can say is that at that stage the matter was out of my hands as I had delivered my judgment in open court and no formal request had been made to me, at least looking at the court record, requesting me to provide my full reasons for judgment. H

2003 (2) ZLR p391

Paradza J

A I have, today, received a letter from the Judge President attaching a letter written by the Secretary for Justice, Legal and Parliamentary Affairs, which letter reads as follows:

> "I refer to our telephone conversation of the morning of the first instant in the above connection.
>
> Honourable Mr Justice Paradza presided over the above matter which is B being appealed against. Messrs Hussein, Ranchod and Company's letter of 22 February, Justice Paradza's clerk attached hereto refers.
>
> Applicant is very anxious to prosecute its appeal with a minimum of delay. I should, in the circumstances, be grateful if Honourable Justice Paradza could kindly give his reasons for judgment in the matter at his

earliest convenient time".

C It is with this background that I find it necessary that I provide again my reasons for the judgment for the simple reason that the proceedings that were recorded at the time would by now have lapsed in the sense that if no notification was made timeously to the Registrar with regard to the intention to appeal against myjudgment, the tape recording would have been used for other purposes. The D judgment which I now provide cannot obviously be the same wording as the one I provided in court. All that can be said now is that the applicants have not followed the proper procedures as expected of them in approaching me to enable me to provide the full reasons for judgment. Instead, they have chosen to involve arms of the Executive, when in fact their lawyers know the correct procedure which should have been followed in an effort to execute their E appeal. All that I can say at the moment is that litigants, through their legal practitioners, should do all they can in terms of the laid down rules of court when they want to bring a matter to court. They should be discouraged from invoking the assistance of members of the Executive or of any other arm of Government as that would set a bad precedent and create a wrong impression F that the Executive can tell the judiciary and/or other arms of Government what to do.

I now deal with the application itself proper. This application has a long history behind it. The applicant is an association of residents of a place called Eastview Gardens in Harare. It is not disputed that the association is a legal entity capable of bringing this application on behalf of the residents. Its G secretary filed an affidavit to the following effect.

The residents represented by the applicant amount in total to 384 members. They are tenants of the first respondent and reside in a complex of flats known as Eastview Gardens.

On 9 February 2001 the 384 members received letters from the second and H third respondents notifying them of an intention to sell the flats to the

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Paradza J

residents by virtue of them being sitting tenants in the complex. The letter A reads as follows:

> "Dear Sir/Madam,
>
> Re: Proposed Sale of Eastview Gardens
>
> Reference is made to the above matter. B
>
> The owners of Eastview Gardens, the Zimbabwe Reassurance Company Limited, have advised that they shall be selling the premises you are leasing from them. The sale shall be on a sectional title basis and each flat shall have title deeds on transfer.
>
> As a sitting tenant, we are hereby giving you notice of the owner's C intention to sell the flat and advise that we are offering you to purchase if you are interested in doing so. The purchase price for the flat is...
>
> May you please advise us in writing whether or not you will be taking up the offer as soon as possible or in any event by 28 February, 2001. In addition, if you are taking up the offer, may you please call at our offices D in person to complete the necessary formalities by the same date."

The applicant argued in the founding affidavit and elsewhere that that letter created a right of pre-emption to buy or not to buy the flat. Alternatively, through the adoption of the doctrine of estoppel, respondents were estopped from revoking the offer. Paragraph 5 of the applicant's founding affidavit E reads in part as follows:

> "It is contended further by applicant on behalf of its members that an offer is a unilateral contract which becomes bilateral only when the offer is accepted."

I shall deal with this aspect later. For now it is suffices to say that before 28 F February 2001 the first respondent withdrew its offer and sought to amend the offer in such away that the members would still have the right to purchase their flats but this time with the added provision that the seller would sell the flats "block by block". The letter from the first respondent reads in part as follows:

> "Please be advised that the offer made to purchase the unit you occupy has been withdrawn. This follows the decision by the seller to sell the flats G block by block. *However should you wish to purchase a unit in Eastview Gardens, now, you may choose from the block that shall be selling at any one point in time.*
>
> *In any event you will still need to confirm your interest in purchasing your unit by close of business on 28 February, 2001" (my emphasis).* H

Paradza J

A That letter from the second respondent was dated 15 February 2001. Nothing seems to have happened from that date to 27 February, when one N Chauma representing the applicant sought a meeting with the respondents in order to clarify some areas which they were not clear about. We are not told whether the meeting went ahead but a letter was written on 28 February 2001, the date of the deadline, by the same Mr N Chauma, the chairman of the applicant B registering an objection in the manner in which the sale of the flats was being handled. In particular, the applicant was not happy that its members were not being given the opportunity to buy the flats they were residing in directly. Also, the applicant was unhappy that the sale was being conducted through a third party, presumably the third respondent. The applicant in that letter was also not happy with the pricing of the flats which he described as not being C uniform. Thirdly, the applicant was objecting to tenants buying flats which were occupied by other tenants and thus creating a potential conflict between its members. Lastly, in that letter the applicant was suggesting that the whole idea of selling the flats be shelved until various issues with the tenants were clarified.

D On 8 March 2001 the third respondent wrote another letter to the tenants, members of the applicant, offering to sell the flat which the tenants occupied. Part of that letter dated 8 March 2001 reads as follows:

> "Dear Sir/Madam,
>
> E RE: FLAT NO: .....EASTVIEW GARDENS
>
> Our letter refers to introduce ourselves as the selling agents for the flat you occupy. As the sitting tenant we would like to offer you the first refusal to purchase the flat.
>
> We are giving you seven days notice to make your offer to buy the same F failing which the flat will be offered to the public. Your offer should be made to the writer within the stipulated period and your failure to respond will be assumed as a rejection of our proposal. Therefore we would like you to allow our prospective buyers to view your flat at a reasonable time."

From the opposing affidavit filed by the respondents it would appear that some of the members of the applicant indeed responded and accepted the offer and G proceeded to purchase the flats they were occupying. One of those was Mr Chauma, the applicant's chairman, who wrote a letter to first respondent on 15 February 2001. His letter reads as follows:

> "Dear Sir/Madam,
>
> H RE: OFFER TO BUY FLAT NO: D 216 ZAMBEZI COURT

Paradza J

> I do hereby register my intent to buy the flat no D216, Zambezi Court, A Eastview Gardens. I propose to make payment as follows:
>
> 25% cash deposit and a balance payable by Mortgage Loan. Awaiting your reply.
>
> Yours faithfully, B
>
> Y N Chauma
>
> Tenant".

All in all, a total of 128 tenants expressed their desire to purchase their flats. C Those who had the means to purchase the flats went to second respondent's offices and signed Agreements of Sale and paid what they undertook to pay. Today those tenants are the happy owners of the flats they were living in.

The issues that need consideration are firstly, whether the deponent to the founding affidavit has, in terms of the constitution he relies on, the authority to bring this matter on behalf of the members of the Association, and, D secondly, whether the respondents were correct in deciding to ignore the applicant's members who had not taken up the offer made by the respondents.

I have already stated above that the deponent purports to act for 384 members of the applicant Association. This issue is seriously challenged by the respondents, on the basis that the deponent cannot purport to act for 384 E members when in fact there are over 128 members of the Association who took up the offer of the respondents, including the chairman of the Association. That, to me, puts in issue the averment, if any, by the deponent that he had authority to act for the entire membership of the Association.

In his founding affidavit, the deponent avers that he is the Secretary of the applicant Association, which Association is vested with the mandate to F represent all the residents of Eastview Gardens on

all issues pertaining to the rights of tenants of Eastview Gardens. Para 6.1 of the Applicant's constitution authorises the Executive Committee, of which the deponent is a member, to:

> "institute and defend legal proceedings on behalf of the Residents' Association, and for that purpose sign and execute any necessary Powers of Attorney." G

It is important to note the deponent does not purport to act for every member of the Resident's Association. The deponent stated that whatever he was doing was as laid down in the applicants' constitution, namely, to represent residents in any legal proceedings they may choose to institute or defend.

In *Direct Response (Pvt) Ltd v Shepherd* 1993 (2) ZLR 218 (H) Adam J considered the circumstances under which a litigant may successfully challenge H

2003 (2) ZLR p395

Paradza J

A the authority of the person who purports to act for another person, in that case a company. He concluded that where a deponent does not state that he or she is duly authorised to depose to that affidavit on behalf of others the court will not readily conclude that such person had no authority to so depose to an affidavit. The court should consider each case on its own merits in arriving at a conclusion. Watermeyer J in the case of *Mall (Cape) (Pty) Ltd v Merino* B *Ko-operasie Bpk* 1957 (2) SA 347 (C), stated that in the case of an artificial person like a company or co-operative company coming before the courts, or an association as in the case of the applicant:

> "there is judicial precedent for holding that objection may be taken *if there is nothing before the court* to show that the applicant has duly authorised the institution of notice motion proceedings. Unlike an individual an C artificial person can only function through its agents and it can only take decisions by the passing of resolutions *in the manner provided by its constitution*... The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on D its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf (my emphasis)."

I am satisfied that the constitution which has been annexed to the deponent's affidavit clearly authorises the Executive Committee to institute and defend E any legal proceedings on behalf of the residents. Under the circumstances it may not be necessary that each of the residents files a supporting or verifying affidavit to show that indeed the deponent had authority to depose to the affidavit on behalf of everybody. To me enough evidence has been placed before me to convince me that indeed the deponent acting for the applicant Association was duly authorised to act as he did. It is not material whether F some of the people opted to purchase the flats or not. Some people may take a cautious approach in life but that does not mean they have not authorised their Secretary to institute proceedings on their behalf. As stated by Adam J in *Direct Response (Pvt) Ltd supra,* it is very wise for a deponent to state in his affidavit that he has been duly authorised to swear to an affidavit on behalf of a particular person in the absence of that argument in the affidavit. As long G as the deponent places before the court enough evidence, as in this case, in the form of the constitution of the Association, that should satisfy the court that indeed the deponent has authority to act for and on behalf of the applicant Association and its members.

That leaves me to deal with the second issue on whether the respondents were H correct in deciding not to sell the flats to the members of the applicant's Association, assuming that such a decision was indeed made.

2003 (2) ZLR p396

Paradza J

In his founding affidavit, the applicant is of the view that the letter of offer A which was written by the first respondent to each member of the applicant Association creates in each member of the Association a right of pre-emption to buy or not to buy the flats they were living in. The question to decide therefore is, could it be said that the letter referred to above indeed created that right either of pre-emption or first refusal, which the applicant in its founding B affidavit seems to liberally interchange? What the applicant is saying is that the offer contained in that letter was drafted in such away that the offerer could not withdraw the offer as he had bound himself *by contract* with the offeree not to withdraw it.

The contract I am referring to is what has been termed an option. The question therefore is whether the applicant's members and the respondents had created C an option once a letter had been written to the applicant's members offering to sell the flats at whatever price.

The applicant in his heads of argument does not seem to argue at all in a convincing manner as to how that option is created in the circumstances. In the legendary case of *Hersch v Nel* 1948 (3) SA 686 (A) at 695, an authority known D to all students of the law of contract, the true nature of an option is clearly analysed in two different parts, namely, an offer to enter into the main contract, together with a concluded subsidiary contract (the contract of option), binding the offeror to keep that offer open for a certain period. See also *Boyd v Nel* 1922 AD 414.

A letter written by the first respondent to members of the applicant Association E disclosing a desire to sell the flats to the sitting tenants at a particular price and inviting them to respond by a particular date does not to me amount to an option. To me, therefore, no right of pre-emption was created at all and the applicant misdirected itself in thinking that such a right had been created under the circumstances. What the applicant should have simply read into that F letter was that this letter was a simple offer inviting the members of the applicant Association to come and negotiate with a view to enter into an Agreement of Sale. It amounts to nothing but an invitation to treat, or to an offer to negotiate, or what has been known in English law as an offer to chaffer (See *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA) In *Ferguson v Merensky* 1903 TS 657 Innes CJ was quick to conclude that statements G contained in a so-called letter of offer which advises the offeree to take any further steps *if he wishes to take up the matter* have the effect of not making such an offer a genuine offer in the legal sense (my emphasis). In that case the words

> "You may write to him if you like to follow up the matter"

were held not to be an offer because it was accompanied by a mention of the H

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A seller's agent and those words. In the present case the letter reads in part:

> "As a sitting tenant we are hereby giving you notice of the owner's intention to sell that flat and advise that we are offering to purchase *if you are interested in doing so*" (my emphasis).

That would not create an option as it means there is no contract between the B parties whatsoever. Anything which would happen would arise as a result of any interest on the part of the offeree, that is, if he were interested to take up the offer. I am therefore satisfied that applicant in its founding affidavit proceeded on a complete wrong premise. It envisaged and saw the existence of the right of pre-emption or an option which was not there. To me the letter to the members of the Association was a simple offer giving the offeree a C certain time period in which to respond. The response by the offeree through its Association, the applicant, was not positive. On 28 February 2001 a letter was written by the Chairman of the applicant suggesting that the issue of the sale of the flats be "shelved". What it points towards is a clear rejection of the offer.

As if that were not enough, correspondence continued to be exchanged D between the parties and on 8 March 2001, the third respondent, acting on the instructions of the second respondent, made another offer to the members of the applicant, giving them a week to decide, otherwise they were going to proceed to sell the flats to the public. Nothing seems to have been concluded out of the subsequent offer. What this means is, therefore, that the argument E by the applicant that the respondent withdrew the offer before the expiry of the initial period of offer is neither here nor there. It became irrelevant when subsequently other offers were made to the same applicant's members, which again they refused to take up. One must ask the question, what would the owner of the block of flats, who is eager to sell, do in the face of attempts to shelve the whole idea of a sale and clear rejection from the people who were F offered to purchase the flats? The obvious answer would be that the seller would proceed to sell as mentioned in the letter from the third respondent to third parties. Nothing in the contract of lease or anywhere was provided to the court to show that the seller was not entitled to proceed as he did. No contract existed whatsoever binding the seller not to sell the blocks of flats. In the light of the above, it is quite clear that the respondents were correct in deciding not G to proceed with the sale of the flats to people who had clearly failed to utilise an opportunity which had been created for them without any undue pressure being made to bear upon the respondents. It was for the above reasons that I made the order dismissing the application with costs on the higher scale.

On the issue of costs, I was of the view that the applicants had unnecessarily H frustrated the seller by delaying the court process for such a long time

Paradza J

unreasonably and for their own benefit. Repeatedly they had come to court A unprepared when the matter was set down for hearing. They had come to court without a legal practitioner and the matter was postponed several times. As I indicated earlier, this matter could have been heard in January 2002. A year elapsed before the matter was heard finally in February 2003. All the postponements were at the instance of the applicant. The longer it took, the B more convenient it was for the applicant as they would be assured of a longer stay in the flats. For the applicants to come to court now and purport to accept an offer which was made and which they should have accepted at the relevant time to me is unacceptable. If they were interested in purchasing the flats, why did they not accept the offer at that early stage? This matter would not have come to court. Time has obviously moved to their advantage and that explains C why they purport to accept the offer at this late hour.

The court cannot create a contract for them. An opportunity was created for them which they allowed to let go and by-pass them. The application they filed in court was completely baseless and frivolous. They should, in the circumstances, be slapped with a punitive order as to costs. They have wasted D their time and everybody's time, including the court's time, in bringing such a matter to court. Costs should be paid on an attorney and client scale.

Ziume & Co, legal practitioners for applicants

Zamchiya & Costa, legal practitioners for respondents E

* *Editor's note:* the judgment was dated 5 February 2003, but, as explained by the learned judge, the judgment in its present form was not delivered until 30 October 2003.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/KYRIAKOS & KYRIAKOS v CHASI & ORS 2003 (2) ZLR 399 (H)

KYRIAKOS & KYRIAKOS v CHASI & ORS 2003 (2) ZLR 399 (H)

Citation	2003 (2) ZLR 399 (H)
Case No	Judgment No. HB-115-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	31 July 2003
Judgment	6 November 2003
Counsel	*S Mazibisa,* for the applicants *H Shenje,* for the first to sixty-fourth respondents Sixty-fifth respondent in person Sixty-sixth respondent in person

Case Type Civil Application

Annotations No case annotations to date

Flynote

Appeal — *execution of judgment pending appeal — when should be granted* C — *appeal noted to gain time and to prevent applicants from using their own property*

Headnote

The applicants ran a mine. When the mine ran into financial difficulties, approval was given for the retrenchment of the employees and an D agreement was reached with the parties concerned. The employees left the mine. Thereafter, the first two respondents forcefully evicted the applicants from the mine, accusing them of economic sabotage, and brought the former employees, the remaining respondents, back. The applicants obtained an order for eviction of the respondents. When the respondents noted an appeal against the order, the applicants sought E execution pending appeal.

Held, that among the factors to consider were the prospects of success on appeal, including the question as to whether the appeal was frivolous or vexatious or had been noted, not with a *bona fide* intention of seeking to reverse the judgment, but for some indirect purpose - for example, to gain time or harass the other party. It was clear that the former employees F wanted to resile from the written agreement. Instead of approaching the courts for a remedy they took the law into their own hands when they went back to the mine and forced the applicants from their property. Their action did not amount to a lawful way of resiling from a written agreement. The appeal was not noted with the *bona fide* intention of G seeking to reverse the judgment but to gain time and harass the applicants from using their lawfully acquired property. Their purpose was to unlawfully stop the applicants from conducting their mining operations. The respondents had adequate remedies available under the labour laws.

2003 (2) ZLR p400

Ndou J

Cases cited A

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

Dabengwa & Anor v Min of Home Affairs & Ors 1982 (1) ZLR 223 (H)

Du Randt v Du Randt 1992 (3) SA 281 (E)

Lincoln Court (Pvt) Ltd v ZDECO (Pvt) Ltd 1990 (1) ZLR 158 (H)

Masukume v Mboma & Anor HB 46 03 B

South Cape Corp (Pty) Ltd v Eng Mgmt Svcs (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)

ZDECO (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd 1991 (2) ZLR 61 (H) C

Case information

S Mazibisa, for the applicants

H Shenje, for the first to sixty-fourth respondents

Sixty-fifth respondent in person

Sixty-sixth respondent in person D

Judgment

Ndou J: On 26 June 2003 Cheda J ruled in favour of the applicants in HC 1245/03 and ordered against first to 64th respondents in the following terms:

"Terms of the final order sought:

1. That the provisional order granted in this court interdicting all the E respondents from entering Goldman Syndicate Mine situate at Umguza District and barring all the respondents from entering *(sic)* with running of the mine be and is hereby confirmed.
2. That all the respondents jointly and severally be and are hereby ordered to pay costs of suit on an attorney-client scale. F

Interim Relief Granted

Pending the finalisation of the matter, the applicants be granted the following relief:

1. That the first and second respondents and their organisation be and are hereby interdicted from entering Goldman Syndicate Mine, from harassing the applicants, authorising any letters to them *(sic)* and G interfering with the day to day running of the mine by the applicants or their agents.
2. That the third respondent up to the sixty-third respondents be and are hereby interdicted from entering Goldman Syndicate and from harassing the applicants and their employees and from interfering with the day to day running of the mine by the applicants or their H agents.

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3. All the A respondents be and are hereby ordered to vacate Goldman Syndicate Mine located in Umguza District within 24 hours of service of this order failing which the Deputy Sheriff together with the Officer In Charge for Sauerstown Police Station and/or any of his assignees be ordered to forcibly evict the respondents and their accomplices."

B On 4 July 2003 the first 64 respondents noted an appeal against the judgment of Cheda J based on the following two grounds.

"1. The learned judge erred in finding as a fact that the appellants had no right to remain in the premises.
2. The learned judge erred in granting an order for eviction without hearing the appellants."

C The noting of the appeal by the first 64 respondents automatically suspends 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 the noting of the appeal, not merely the process of execution: *Zaduck v Zaduck (2)* 1965 RLR 635 (G); 1966 (1) SA 550 (SR); D *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) and *Masukume v Mbona & Anor* HB-46-03.

The applicants have now approached this court by way of special application for leave to execute the judgment pending the appeal. As pointed out above, the common law rule is that the noting of the appeal automatically suspended E the execution of the judgment. What the applicants seek is the exception to this rule.

In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd supra* at page 545D-F Corbett JA aptly stated the factors to which a court would have regard in exercising its discretion in considering an F 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 right 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 normally have regard, *inter alia,* to the following factors: G

1. the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted.
2. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused;
3. The prospects of success on appeal, including more particularly the H question as to whether the appeal is frivolous or vexatious or has been

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Ndou J

noted not with *bonafide* intention of seeking to reverse the judgment A but for some indirect purpose e.g. to gain time or harass the other party; and

4. Where there is the potentiality of irreparable harm or prejudice to both appellant andrespondent, the balance of hardship or convenience, as the case may be."

These views were approved in our jurisdiction: *Dabengwa & Anor v Minister* B *of Home Affairs & Ors* 1982 (1) ZLR 223 (H); *Van t'Hoff v Van t'Hoff & Ors (2)* 1988 (1) ZLR 335 (H); *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H); *Lincoln Court (Pvt) Ltd v ZDECO (Pvt) Ltd* 1990 (1) ZLR 158 (H) and *ZDECO (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H) C

In the last case Smith J emphasised the context within which this rule operates. I agree with these words of caution which the learned judge stated at p 64 C

"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* D *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 prospect of success? That may well be the position where no E 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 F 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 G would be stultified, then this court would, in effect, be usurping 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 *bonafide* 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 staving off the evil H

Ndou J

A day, that the lower court may order execution to proceed in such circumstances."

Briefly, the facts are the following:

The applicants are business partners operating a partnership under Goldman Syndicate Mine which is situated in Umguza area of Bulawayo. The mine concentrates on gold mining, processing and selling. The first and second B respondents are father and son respectively running an organisation called SKC Consulting Services t/a Manifest Security Services and Zimbabwe Indigenous Economic and Mines Action Group located at 21 Fort Street, Bulawayo. It is not clear whether they represent the other 63 respondents as "consultants" or as an "action group".

C The other respondents (with the exception of the Deputy Sheriff and Police respondents) are all former employees of the applicants. On 31 May 2003 they all sought to be paid their retrenchment packages. They were paid by way of bank cheques which they encashed at National Merchant Bank. These respondents invited and were represented by the Zimbabwe Federation of Trade Unions (ZFTU) during the negotiations of the said retrenchment D packages. All this time the first and second respondents, who were not employed by the mine, were up and about spewing various allegations of fraud, racism etc against the applicants and members of their management team. They wrote letters to the Reserve Bank and the President's Office about their concerns. The retrenchment packages were calculated and agreed upon by the E third to 64th respondents, the applicants and ZFTU. Upon receipt of their dues each one signed an acknowledgement phrased as follows:

"Confirmation of receipt of all my dues paid to me by Goldman Syndicate as a package, which includes leave days, holidays, overtime, back-pay, notice, severance ... I do hereby sign for the receipt of all my money in cash/cheque and promise to vacate the premises soon ..."

F The matter was finalised and the third to 64th respondents vacated the mine. Thereafter the first and second respondents came into the fray and held meetings with third to 64th respondents. In a

nutshell they accused the applicants of economic sabotage. On 21 June 2003 the first and second respondents "evicted" the applicants and their employees from the mine. This gave rise to the application in HC 1245/03 which was granted *ex parte.* The G respondents approached this court and sought a stay of execution of the order made in HC 1245/03. In case number HC 1306/03 Chiweshe J on 22 July 2003 dismissed the application with costs on the basis that the first and second respondents lacked the requisite *locus standi in judicio.* What is clear is that the third to 64th respondents entered into an agreement with the applicants H that is their employer witnessed by a trade union oftheir choice. They reduced

Ndou J

their agreement to writing. On advice of first and second respondents they A wanted to resile from the written agreement. Instead of approaching the courts for a remedy they went back to the mine and forced the applicants from their property. They took the law into their own hands. Their action does not amount to a lawful way of resiling from a written agreement. The applicants approached the courts for relief. They succeeded and the respondents made a B valiant attempt to stay execution of that order. Having failed they noted the appeal. Looking at the notice of appeal there are no prospects of success. The appeal was not noted with *a bona fide* intention of seeking to reverse the judgment but for some indirect purpose. It was noted to gain time and harass the applicants from their lawfully acquired property. Their purpose is to unlawfully stop the applicants from their mining operations. If the third to C 64th respondents are not satisfied with the retrenchment packages, this country has a sound labour regime to address those concerns. There is the Labour Tribunal and the Labour Court created for such labour disputes. Self- help cannot be understood in such a situation. Court processes should not be used to advance lawlessness. The balance of hardship best favours the applicants. I find that the applicants made a case for the granting of the D application in accordance with the demands of the preponderance of equities.

I accordingly grant special leave to the applicants to execute their order in the HC 1245/03 in terms of the draft.

Cheda & Partners, applicant's legal practitioners E

H Shenje & Partners first and sixty-fourth respondents' legal practitioners

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Source:
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S v BERE 2003 (2) ZLR 405 (H)

Citation	2003 (2) ZLR 405 (H)
Case No	Judgment No. HB-116-03
Court	High Court, Bulawayo
Judge	Chiweshe J & Ndou J
Heard	11 November 2002
Judgment	6 November 2003
Counsel	*S S Mlaudzi,* for the appellant Mrs *M Cheda,* for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Appeal — *criminal case — lengthy delay between conviction and hearing of* C *appeal — effect — cumulative delay to be considered*

Criminal procedure (sentence) — *appeal — factors to be considered — lengthy delay between trial and hearing of appeal — delays partly due to appellant and partly to other factors — cumulative delay to be considered*

Headnote

D The appellant, a former prison officer, had been sentenced to a term of imprisonment for the theft of cheques received for salaries and other disbursements. The trial began about a year after the appellant was arrested. Most of that delay could be attributed to the appellant. The trial was completed some three years after it began. The delay was caused by a combination of factors including those occasioned by the appellant, the E respondent and the unavailability of the trial magistrate. Another four years passed before the appeal was heard. The delay in hearing the appeal was mainly occasioned by the appellant, although the State was to some extent guilty of acquiescence with the long period of delay.

Held, that the cumulative delay had to be considered. Three years was a long time to finalise the trial, even accepting that the proceedings were very F long. On its own this form of delay would warrant interference with the sentence. The sentence should be set aside, not because it was not appropriate when it was imposed, but on account of the undue delay.

Cases cited

Barker v Wingo 407 US 514 (1972)

G *Bell v Director of Public Prosecutions of Jamaica & Anor* [1985] 2 All ER 585 (PC)

Fikilini v A-G 1990 (1) ZLR 105 (S)

Mlambo, Re 1991 (2) ZLR 339 (S)

R v Cameron [1982] 1 CRR 289; [1982] 6 WWR 220

S v Corbett (1) 1990 (1) ZLR 205 (S)

Ndou J

S v Dube & Anor 1989 (3) ZLR 245 (S) A

S v Kundishora 1990 (2) ZLR 30 (S)

S v Madzima HH-36-84

S v Malgas & Anor HH-40-84

S v Mbada S-184-90

S v Mlambo 1994 (2) ZLR 410 (S) B

S *v Moyo* 1988 (2) ZLR 79 (H)

S v Msindo and Ors HH-25-02

S v Nemutenzi 1992 (2) ZLR 233 (H)

S v Nyoni HB-26-84

S v Ramushu & Ors S-25-93 C

S v Ruzario 1990 (1) ZLR 359 (S)

S v Soko S-118-92

Case information

S S Mlaudzi, for the appellant

Mrs *M Cheda,* for the respondent D

Judgment

Ndou J: The appellant was employed by the Ministry of Justice, Legal and Parliamentary Affairs in the Prison Service. He was the Officer In Charge at Bulawayo Prison until 31 December 1994. Part of his duties was to receive cheques from the Salary Service Bureau meant for his subordinates and E prisoners. The cheques were for travelling and subsistence claims, salaries for the subordinates and gratuity payments for prisoners. The cheques would be sent by registered mail addressed to the appellant. On receiving the registered mail containing the cheques:

(a) the appellant was supposed to open the mail in the presence of a witness;

(b) he was supposed to record the cheques in the Remittance Register; F

(c) the witness would sign in the Remittance Register; and

(d) the person receiving the cheque or cash was supposed to sign in this register.

Between 18 March and 23 December 1994 the appellant received cheques by registered mail meant for his subordinates and prisoners. He did not enter them G in the Remittance Register. He signed them and put a date stamp and encashed them at the bank. The total amount involved was $11 709,13. The only issue is whether he converted this amount for his own use. He was charged with and convicted of eleven counts of theft by conversion. He was sentenced to 24 months' imprisonment with six months suspended on the usual conditions of good behaviour. H

Ndou J

For the record, he was arrested at the beginning of 1995. His trial commenced A on 29 April 1996. He was sentenced on 1 April 1999. He protests the finding of guilt and punishment imposed.

Against conviction

It is common case that in all the eleven (11) counts charged, the appellant received the cheques and encashed them. The appellant's case was that he had B distributed the cash represented by the cheques to the intended recipients as soon as was reasonably possibly. The appellant gave no explanation for holding onto the cheques for a long time after receipt. The appellant stated that after encashment he would merely hand over the cash to the cashier without any witness to such handing over or any formal entry in the Remittance Register indicating that he handed over the cash to the cashier. He stated that C he left it wholly up to the cashier to make the relevant entries.

Regarding five cheques, which were for advance salaries for staff going on leave, the appellant's general explanation was that when the officers concerned complained that they had not received their money by the time they were due to proceed on leave, he arranged for them to sign short receipts and draw equivalent cash from the Khami Prison Canteen Fund. He could not explain D why he failed to link these advances with cheques he himself received and encashed. As Officer In Charge he would have enquired from Head Office about these queries.

[The learned judge then outline the evidence given by various witness, and continued:]

E The trial court's finding is that the appellant is not worth believing. He was found to be a liar. After a detailed assessment of the evidence the trial court found the appellant guilty on all counts. The basis of the conviction is mainly on credibility of the witnesses. In this appeal the appellant attacks their credibility. It is settled that the assessment of the credibility of a witness is the domain of the trial court. In *Sv Mbada* v S-184-90 at p 7 of his cyclostyled F judgment Gubbay CJ stated as follows:

> "An appellate court must never overlook that the trial court's living through 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 atrial court of the credibility of the witnesses is wrong, an appellate court must be

persuaded that the finding defies reason and common sense. G Questions of credibility *are par excellence* the province of the trial court."

In *S v Soko* S-118-92 at p 8 of his cyclostyled judgment Ebrahim JA stated as follows:

"A court of appeal will not interfere with a trial court's assessment on credibility lightly. There has to something grossly irregular in the H proceedings to warrant such interference. This is because the trial court

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Ndou J

by having the witness before it is better able to make an assessment on A demeanour and all other factors relevant in assessing credibility. The Appeal Court on the other hand is confined to the record."

In *S v Mlambo* 1994 (2) ZLR 410 (S) Gubbay CJ stated at 413:

"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 B court unless satisfied that it defies reason and common sense."

There is nothing irregular in these proceedings to warrant interference with the findings of credibility by the court *a quo.* The judgment of the trial court is detailed and well reasoned. The findings do not defy reason and common sense. It seems to me that the convictions are clearly unassailable and the appeal against conviction has to be dismissed. C

Against sentence

The appellant's protestation seems to be that the sentence imposed is manifestly excessive so as to induce a sense of shock. In assessing the appropriateness of a sentence I stand guided by what Gubbay CJ said in *S v Ramushu & Ors* SC-25-93 at p 5 of his cyclostyled judgment:

"But in every appeal against sentence save where it is vitiated by irregularity D or misdirection, the guiding principle to be applied is that the sentence is pre-eminently 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." E

See also *S v Msindo & Ors* HH-25-02.

The appellant was a senior prison officer in charge of a major remand prison in Bulawayo. He abused his position and stole funds intended for his subordinates and prisoners. Total amount converted by the appellant is $11 709,16. At the time of the sentence that was a lot of money which invariably attracted a custodial sentence in the region imposed by the trial F court. In *S v Nyoni* HB-26-84 for theft of $11 720 by a 28 year old first offender from an employer, an effective sentence of four years' imprisonment was found appropriate.

In *S v Madzima* HH-36-84 a theft of $ 10 348 by a clerk employed by the State, and a first offender who had made full restitution, an effective sentence of three years was found to be appropriate. In *S v Malgas & Anor* HH-40-84 a G theft of $11 783,00 from the State by its employee, an effective sentence of three years was found to be appropriate. There was no misdirection by the learned magistrate. Under normal circumstances this finding should have brought the appeal to its finality. But there is *in casu* a question of the inordinate delay.

In this matter there was, first, a delay of around a year in commencing the trial. H

Ndou J

A Second, there was a further delay of three years in completing the trial. Third, there was a further delay of three and half years in setting down the appeal hearing. It took around eight years to bring this matter to finality. The appellant has been out on bail. His services with the Prison Service were terminated during this period. Upon termination the Prison Services recovered the stolen money from the appellant's terminal benefits. The delay is partly attributed to B the appellant in connection with his legal representation. The State did not press for the finalisation of the matter expeditiously.

Delay in commencing the trial

A delay in bringing an accused person to trial may result in the setting aside of the sentence eventually imposed by the trial court—*S v Moyo* 1988 (2) ZLR 79 (H). The pre-trial delay in this matter is around a year and I do not think this C on its own would justify the setting aside of the sentence imposed by the court *a quo.* Most of this delay was occasioned by the appellant.

Delay in finalising the trial after commencement

What was said in *S v Moyo supra* is, in my view, of equal application to the delay in finalising the trial after0020commencement. *In casu,* there was a delay of D around three years. The delay here was caused by a combination of factors including those occasioned by the appellant, the respondent and the unavailability of the trial magistrate. Three years is a long time to finalise such a case, even while accepting that the proceedings were very long as evidenced by the voluminous record of proceedings. On its own this form of delay would warrant interference with the sentence.

E **Delay in hearing the appeal**

This delay is almost four years. The appeal was first set down for hearing in the year 2000. Then it was an appeal against sentence only. The matter was removed from the roll as the appellant's legal practitioner indicated that the appellant intended to seek the court's indulgence to file an appeal against conviction as well. The latter application was successfully made by the F appellant. Thereafter the appeal was subsequently set down on a number of times and for one reason or another failed to take off. The main reason appears to be that the appellant's legal practitioner was ill (and he subsequently passed away). Another legal practitioner took over. Four years is generally an unreasonable delay in hearing the appeal. Sentences imposed by trial court may be set aside or reduced in cases where there was an unreasonable delay G in hearing the appeal: *S v Dube & Anor* 1989 (3) ZLR 245 (S). In *S v Corbett (1)* 1990 (1) ZLR 205 (S) at 213B-C Dumbutshena CJ stated:

> "The guidance provided by these four factors is not only relevant to delayed trials, it is equally relevant to unduly delayed appeals. In considering whether an appellant's sentence should be set aside and substituted by a less severe one on the ground that there has been inordinate delay in the H prosecution of his appeal, it is important to pay heed to the four factors

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Ndou J

> identified by Powell J. Briefly stated, the court has to decide whether the A delay was presumptively prejudicial to the appellant in that the appellant would have served his sentence or a greater part of it were it not for the delay."

For the purpose of completeness the four factors were stated by Powell J *(supra)* in the judgment of the Supreme Court of the United States in *Barker* B *v Wingo 407* US 514 (1972). These four factors were approved by the Supreme Court in *Fikilini v A-G* 1990 (1) ZLR 105 (S). Powell J stated the four factors at 530-532 as follows:

> "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. C Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.
>
> Closely related to the length of delay is the reason the government assigns D to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the E defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.
>
> We have already discussed the third factor, the defendants' responsibility to assert his right. Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the F reason for the delay, and more particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is

being deprived of the right. We emphasise that failure to assert the right will make it G difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial was designed to protect. This court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that H the defence will be impaired. Of these, the most serious is the last,

Ndou J

A because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

B See also *Bell v Director of Public Prosecutions of Jamaica & Anor* [1985] 2 All ER 585 (PC); *R v Cameron* [1982] 6 WWR 220; *S v Nemutenzi* 1992 (2) ZLR 233 (H); *S v Kundishora* 1990 (2) ZLR 30 (S); *S v Ruzario* 1990 (1) ZLR 359 (S) and Re *Mlambo* 1991 (2) ZLR 339 (S). The delay in hearing the appeal is mainly occasioned by the appellant. Individually I doubt whether this delay would suffice to justify the setting aside of the sentence imposed by the court C *a quo.*

Not only did he author the greater portion of the delay but he, as rightly pointed by Mrs *Cheda,* for the respondent, did not make any meaningful effort to achieve early finalisation. The prosecution, equally, did not make meaningful attempts to achieve early completion of the matter. The State is to some extent guilty of acquiescence with the long period of D delay. For the greater part of the delay the State was, after all, the *dominus litis.*

All the above factors must be weighed in order to arrive at a just decision. The cumulative delay has to be considered. Is it socially acceptable to order the appellant to undergo imprisonment in the year 2003 for a sentence imposed by the trial court on 1 April 1999? In my view, the application of the four factors lucidly expanded and comprehensively discussed in *Barker v Wingo* E *(supra)* must be done. I hold the view that the sentence should be set aside, not because it was not appropriate when it was imposed, but on account of the undue delay as outlined above.

Accordingly, the appeal against conviction in all the eleven counts be and is hereby dismissed. But the appeal against sentence succeeds to the following F extent: The sentence of 24 months' imprisonment with six months suspended on the usual conditions of good behaviour is set aside and substituted as follows:

"All eleven counts treated as one for the purpose of sentence. 18 months' imprisonment wholly suspended for five years on condition the accused in that period does not commit any offence involving theft or dishonesty G and for which he is convicted and sentenced to imprisonment without the option of a fine."

Chiweshe J concurred

H *S K M Sibanda & Partners,* appellant's legal practitioners

Attorney-General's Office respondent's legal practitioners

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REDRIVER DEVELOPMENT (PVT) LTD v PROVENANCE SUPPORT CO 2003 (2) ZLR 412 (H)

Citation 2003 (2) ZLR 412 (H)

Case No	Judgment No. HH-183-03
Court	High Court, Harare
Judge	Paradza J
Heard	13 January 2002
Judgment	12 November 2003
Counsel	*Miss J Chamboko,* for the plaintiff *T Magwaliba,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract — *exemption clauses — validity — clause purporting to protect* C *party if other party terminates agreement for whatever reason — whether valid*

Practice and procedure — *pleadings — plea to summons — need for plea to admit or deny all allegations made in summons or declaration — effect of failure to do so* D

Headnote

The plaintiff sued for a refund of money it had paid the defendant to install software on its computers. The plaintiff alleged the software had not been installed in a professional manner, as required by the contract between the parties, and provided particulars of how the defendant had E failed to comply with the contract. In its plea, the defendant did not answer the plaintiff's allegations, but simply relied on an exemption clause in the standard-form contract which stated that no refund would be made if the plaintiff were to terminate the contract for whatever reason. In evidence, however, the defendant sought to prove that the software had been installed professionally in accordance with the F contract.

Held, that by relying on the exemption clause as the sole leg of its defence, the defendant risked being left with no leg to stand on if that defence failed. A defendant must deal effectively with all the allegations in the summons and declaration, if any, and must admit or deny them; any G allegation that is not denied is deemed to be admitted. The defendant had not therefore put in issue the plaintiff's allegations that it had failed to provide services professionally.

Held, further, that the courts will not enforce an exemption clause in a contract if it is found that there is an element of fraud or cheating in whatever degree and that a litigant is trying to hid behind the clause so H as to avoid an obvious liability. To do so would be against public policy.

2003 (2) ZLR p413

Paradza J

A *Held,* further, that even though the exemption clause in this case purported to exempt the defendant from liability under whatever circumstance, the parties could hardly have intended that the clause should be construed so as to exonerate the defendant if it failed to perform its contractual obligations at all or if its performance proved useless, or if it committed a breach going to the root of the contract. The defendant could not B therefore rely on the clause.

Cases cited

Hall-Thermotank Natal (Pty) Ltd v Hardman 1968 (4) SA 818 (D)

Morrison v Anglo Deep Gold Mines Ltd 1905 TS 775

Tpt & Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd 1991 (1) ZLR 190 (S) C

Legislation considered

High Court Rules, 1971 (RGN 1047 of 1971), O 3 rr 12 & 13

Case information

D *Miss J Chamboko,* for the plaintiff

T Magwaliba, for the defendant

Judgment

Paradza J: The plaintiff in this matter claimed payment of the sum of E $56 120 being moneys paid to defendant for the provision of certain software, an accounting package known as Provenance MIS. The plaintiff alleged in its claim that despite payment having been made in anticipation of the provision of the software, the defendant, in breach of the contract between the parties, failed to supply the software in such a professional manner as the defendant had undertaken to do.

F The following exhibits were produced by consent of both parties: a Commercial Bank of Zimbabwe Ltd cheque issued by the plaintiff in favour of the defendant in the sum of $56 120dated 14 February 1999; and a document forming the agreement between the plaintiff and defendant entitled "Provenance MIS Supply Agreement". I will deal later with whether this document indeed G formed the entire agreement of the parties. Third to be produced was a letter of demand sent by the plaintiff's legal practitioners, Messrs Gula-Ndebele and Partners, dated 24 February 2000 addressed to the defendant.

In its pleadings the defendant admitted that such a contract was indeed entered into between the defendant and the plaintiff and signed by both parties on 13 December 1999. Needless to say that contract is indeed the one produced by H consent as Exhibit 1.

Paradza J

The defendant stated in its plea that clause No 12 of the Contract exempted A it from liability once payment had been made and in the event of any one of the parties wishing to terminate the contract. Clause 12 of Exhibit 1 reads as follows:

> "**12. Enforcement of Rights**
>
> Any failure by either party to enforce any of its rights under this agreement B shall not constitute a waiver of its rights and either party shall at all times have the right to enforce the same at any time".

I will deal later with whether this clause applies to this case or not.

The defendant stated further in its plea that it did supply the software as agreed. I understand that to mean that what defendant is saying is that because C it supplied the software that was the end of it. However, the defendant did not answer in its plea specifically the plaintiff's averment that the defendant had failed to provide the software and service as professionally as the defendant had undertaken to do.

What is clear from the pleadings, and in particular the defendant's plea, is that the defendant sought to rely on what it called an exemption clause and D vigorously averred that that clause should be given effect. I can do no better than re-state the defendant's plea word for word to show the basis upon which the defendant was denying liability. It reads as follows:

> "The Defendant pleads to the Plaintiff's claim as set out in the summons commencing action as follows:
>
> 1. The Defendant admits that the Plaintiff and the Defendant entered E into a contract for the Defendant to supply and install a computer software package to the Plaintiff's computers.
> 2. The contract was reduced to writing and signed on behalf of the parties on the 13th of December 1999.
> 3. In terms of clause 13 of the said contract, the parties agreed that the F contract would be the sole and exclusive memorandum of the agreement between the parties.
> 4. In terms of clause 12 to the agreement, any payments made by the Plaintiff to the Defendant in terms of the agreement would not be refundable to it 'for whatever reason'.

5. The Defendant supplied the software package to the Plaintiff's G computers. In terms of the agreement and *(sic)* Plaintiff paid the sum of $56 120 which is now subject to the Plaintiff's claim.

6.. The Plaintiff is not therefore entitled to a refund of any amount paid to the Defendant in terms of the contract as set out in clause 12 thereof. H

2003 (2) ZLR p415

Paradza J

A Wherefore the Defendant prays for the dismissal of the Plaintiff's claim with costs."

It is therefore clear, from the above, that the defendant did not plead to the various averments raised by the plaintiff as to the other terms and conditions of the contract. Instead, the defendant sought to exclude liability by putting its full weight on what the defendant refers as an exemption clause, exempting B it from liability of refunding the money that it had received from plaintiff for the purposes of supplying the service and software paid for. In so doing, the defendant put itself at very high risk of doing what is normally referred to as "standing on one leg". The danger of doing so is obvious. In the event of that leg being injured in one way or another or being incapacitated for whatever reason, the defendant finds itself with no leg to stand on. It is therefore C important, under the circumstances, that in drafting pleadings the clever legal practitioner would best advise his client to deal with all the averments as they appear in the plaintiff's claim.

I heard argument in open court from the defendant's legal practitioner, Mr *Magwaliba,* to the effect that the plaintiff's claim was brief and not explicit D in stating the plaintiff's claim. I will respond to that argument by saying that it all depends on the nature of the claim. The High Court Rules provide various situations when a summons can be issued with, or without a declaration. Mr *Magwaliba* is perfectly aware of the summons issued in terms of r 12 of the High Court Rules and summons issued in terms of r 13 of the same rules. Rule 12 makes it incumbent upon a litigant to attach a declaration for the simple E reason that a claim may not be based on a liquid document or may not be a liquidated claim. Rule 13 deals with more straightforward claims arising out of liquid documents, acknowledgments and agreements that clearly set out the cause of action. I believe that in this matter, although there is no endorsement on the summons itself issued by the plaintiff, the claim was based on a written F contract, and under those circumstances a declaration may not be necessary.

In any case, the usual procedure a litigant should adopt would be to either raise an exception, or to seek further particulars, or resort to some procedure as laid down in the rules to ensure that, before a plea is entered, he is fully aware of the exact nature of the claim he has to answer. Indeed, in this case, the defendant sought further particulars which were supplied by the plaintiff. A G plea was subsequently filed which clearly stated the basis of the defendant's defence. Mr *Magwaliba's* argument that there was no declaration filed to expand on the nature of the plaintiffs claim to me loses value and therefore has no merit. To raise such an issue during the trial usually happens in circumstances where a litigant realises some fault in the defence raised. I am H not suggesting at this stage that there is some fault in the defendant's plea.

2003 (2) ZLR p416

Paradza J

The law is trite when it comes to deal with pleadings in general. As already A stated above a defendant who decides to restrict himself to one defence in his plea will stand or fall by that defence. What this means is that a defendant, as in this case, who chooses to rely solely on the exemption clause as his defence will succeed if he is able to show that that exemption clause at law can be properly relief upon as a defence. He will, on the other hand, fail if the law does B not recognise for one reason or another the exemption clause as valid and enforceable.

To put more clarity to this point, a plea to a claim must satisfy all the requirements as laid down in the law. The Rules clearly state this point for the benefit of every litigant who comes before the court. A defendant must deal effectively with all the allegations in the summons and declaration, if any. He C must admit or deny them. If he denies them he automatically puts them in issue. If he fails to deny any allegation whatsoever, such allegation is deemed to be admitted. (See Herbstein & Van Winsen *Civil Procedure of the Superior Courts in South Africa* 3 ed at p 318.) To plead and raise a defence of general issue is not permissible. D

I am satisfied that in its plea the defendant has not put in issue the allegation of failing to provide professional service to the plaintiff in supplying the software. It has also not put in issue the

allegation that the defendant undertook to supply such software in a professional manner. I must say that in evidence the defendant's only witness sought in detail to show and convince the court that what the defendant did was not only professionally done but was E done in accordance with the contract. The witness, Mr Godfrey Siyawareva, stated in evidence that he initially conducted a demonstration of how the software worked. Having done so successfully and to the satisfaction of the plaintiff he was paid and proceeded to load the software in plaintiff's computers. He does not deny that after loading the software there were problems that the plaintiff faced. As far as he was concerned the plaintiff's F representative, one Miss Rugare Rugara, did not avail herself for training. That could be the explanation for failing to configure and use the software to the plaintiff's best benefit. As far as he was concerned, the software modules were supplied as per Annexure A to the Agreement, Exhibit 1.

The witness's evidence is seriously disputed by the plaintiff. Miss Rugara G stated in evidence that they were looking for a package which could do certain things expressly stated to the defendant. After loading the software, the software would not even do the basics that the plaintiff expected. After complaining to the defendant, Miss Rugara realised there was no hope and subsequently sought software from elsewhere, which worked perfectly. She then asked for a refund, which was accepted initially but later rejected on the H basis of the exemption clause in the contract.

Paradza J

A Her evidence to me was, to say the least, sensible and well supported in material respects by a Mr Misimirembwa. The suggestion by the defendant that she had made a false claim because she had not proved to the court that she was not using the defendant's software is to me far-fetched. I belief the plaintiff's evidence totally.

On the other hand, the defendant's evidence is not based on its pleadings. Its B value in that regard is thus seriously diminished. If allowed, the defendant's evidence would have the effect of taking the plaintiff by surprise. All I can say is that the defendant demonstrated too much confidence and over-reliance on the defence he proffered at the expense of the defence he could have raised by dealing with the merits of the case as contained in the plaintiff's claim.

C I now deal with the exemption clause that the defendant refers to in its plea. I have already quoted word for word the provisions of clause 12 of the Agreement. Before I proceed it must be accepted that, although it is generally agreed by the parties that this document forms the basis of the contract agreed by the parties, there were other aspects of the agreement which were not contained in the document. The reason is that the document comes in the D nature of a standard company document which is supplied to customers on engagement, not a document prepared as a result of negotiations of the various terms and conditions by the contracting parties. That is the reason, for example, the agreed purchase price, the subject of this claim, is not provided for anywhere in that document. The defendant also mentioned implementation E of the agreement in phases. That is again not contained in that document. The exemption clause that the defendant therefore sought to rely on is contained in a standard agreement form printed prior to the parties even meeting to contract. I am not suggesting it should be regarded as not binding. I am saying so because the law has a way of dealing with such exemption clauses which are contained in such documents.

F Christie, in *The Law of Contract in South Africa* 2 ed p 212 has this to say about exception clauses in such documents:

> "The legal adviser of a company or public body who is instructed to draft a standard form contract... will almost certainly include what has come to be known as an exemption or an exception clause. To reduce the uncertainties for which management will have to make allowances in its G planning and costing he will seek to define as closely as possible the extent of the company's legal liability to customers, and he will find that the most convenient way to do this is by a clause exempting the company from liabilities it would otherwise be obliged to accept. Wishing to do as good a job as possible for his client or employer he will probably draft his clause in such away as to give his company the maximum protection, and H the company will accept this clause and incorporate it in its standard form

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Paradza J

> of contract without seriously considering whether it needs it or not. For A example, the cost of accepting the risk of liability and insuring against it may be less than the loss of goodwill and the cost of litigation

involved in adopting and relying on a stringent exemption clause, but how often does a company take such matters into account? So what starts as a legitimate aid to planning and costing so easily becomes an expensive trap for the unwary customer. B

Obviously the law cannot stand aside and allow such traps to operate unchecked, and the courts have protected the public from the worst abuses of exemption clauses by setting limits to the exemptions they will permit and by interpreting exemption clauses narrowly".

Turpin, in an article in the 1956 South African Law Journal at p 144 described such clauses in a contract as "imposed terms". C

Christie concludes that the courts will decide what is permitted and what is not permitted on the basis of the dictates of public policy. In the case of *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 at 779, Innes CJ in discussing the established rule that a man contracting freely and without duress is free to waive any of his rights, stated as follows: D

"Now it is a general principle that a man contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights. There are certain exceptions to that rule, and certainly the law will not recognise any arrangement which is contrary to public policy".

It is clear, therefore, that contracts that are *contra bonos mores* will not be enforced once they are found to be such. If any element of fraud or cheating E in whatever degree is found to exist and the litigant concerned is trying to hide behind an exemption clause so as to avoid an obvious liability the courts will not enforce such a clause. To treat the situation in a manner that results in enforcing such a clause would clearly be protecting and encouraging dubious and fraudulent ways of doing business among parties to the contract. Put clearly, it would be against public policy. F

I must express my indebtedness to the submissions made by Miss *Chamboko* in her closing argument. I can do no better than paraphrase what she says in her argument.

Although the plaintiff in its pleadings repeatedly referred to clause 12 of Exhibit 1, I believe, and it appears to be agreed, that the correct clause should G be clause 11. That clause reads as follows:

"**11. Assignment of Agreement**

The agreement is not transferable to any purchaser or other licensee of the software or to any other software vendor and no refund will be made if the licensee terminates this agreement for whatever reason. Both parties H further agree that this agreementmay not be assigned to any third parties."

2003 (2) ZLR p419

Paradza J

A This clause has two main parts. Firstly, the penalty part and secondly the exemption from liability part. The penalty part of this clause is on the no refund aspect. Section 2 of the Contractual Penalties Act [*Chapter 8.04*] defines "penalty" and " penalty stipulation" as follows:

"'Penalty' means — B

(a) any money which a person is liable to pay; or

(b) anything which a person is liable to do or perform; or.

(c) any money, right, benefit or thing which a person is liable to forfeit; under a penalty stipulation;

'Penalty stipulation' means a contract or provision in a contract under which a person is liable — C

(a) to pay any money; or

(b) to do or perform anything; or

(c) to forfeit any money, right, or thing as a result or in respect of—

(i) an act or omission in conflict with a contractual obligation; or D

(ii) the withdrawal of any person from a contract;

whether the liability is expressed to be by way of penalty, liquidated damages or otherwise."

The second part, which refers to "for whatever reason" is a typical exemption clause, exempting liability of a party to a contract under whatever circumstance.

Miss *Chamboko* argues that it is trite that such a clause cannot exonerate E defendant if it is found that such a clause contemplates a situation where the parties have performed their contract and not where there has been a fundamental breach. In the case of *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) it was stated that an exemption clause was only limited to protect the plaintiff against false or imperfections on the product of its labours which F were otherwise in accordance with the contract. Henning J had this to say at p 835E-F:

> "I do not propose to attempt to define the expression' fundamental breach of contract,' but I apprehend it to include (a) non-performance by a contracting party of his obligations, (b) performance which is useless for its intended purpose, and (c) performance which is so defective as to G constitute a breach going to the root of the contract."

Looking at the language of clause 11 of Exhibit 1, the court should not be persuaded to think that the parties intended that the defendant would be exonerated from liability if it failed to perform its obligations at all or if its performance proved useless, or it committed a breach going to the root of the contract. After all, the parties must have had in mind that both of them would H carry out the terms of the contract in full. It is most unlikely that they

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Paradza J

contemplated that the plaintiff would be excused from the consequences of A a fundamental breach. See also the judgment of Korsah JA in the case of *Transport and Crane Hire(Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd 1991* (1) ZLR 190 (S). It was held in that case that the breach of a contract was a fundamental breach, and the exemption clause would not exempt the respondent from liability from such fundamental breach. B

I totally agree with those submissions. At the same time I am not persuaded by Mr *Magwaliba 's* arguments which I found in most cases arose out of issues which were not specifically pleaded in the pleadings upon which the defendant relied. He argues strongly, while accepting the existence of an exemption clause, that the contract in issue should be regarded as a consumer contract and therefore governed by the Consumer Contracts Act. C

I have difficulties in accepting his argument for the simple reason that his client the defendant is the one who was providing a service. The Consumer Contracts Act is aimed at protecting consumers in the position of the plaintiff. The Act creates provisions that give relief to such parties as the plaintiff where the contracts are regarded as unfair or contain unfair provisions or where the D exercise of a power, right or discretion under such a contract is or would be unfair. The defendant is trying to escape liability by invoking a clause which the plaintiff says is not fair, more precisely unenforceable. Under the circumstances, I am of the view that the plaintiff has proved its case on a balance of probabilities. The plaintiff is therefore entitled to the relief sought.

In conclusion I therefore make the following order: E

(a) Judgment is hereby granted in favour of the plaintiff in the sum of $56 120 as claimed in the summons;

(b) Defendant is ordered to pay interest at the prescribed rate of 25 per cent *per annum* calculated from 24 February 2000 to date of full payment;

(c) Defendant is ordered to pay costs of suit. F

Gula-Ndebele & Partners, plaintiff's legal practitioners

Magwaliba Matutu & Kwirira, defendant's legal practitioners G

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WOODS v COMMISSIONER OF PRISONS & ANOR 2003 (2) ZLR 421 (H)

Citation 2003 (2) ZLR 421 (H)

Case No Judgment No. S-137-02

Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	27 June 2002
Judgment	17 November 2003
Counsel	Mrs *J B Wood,* for the applicant *A Dururu,* for the respondents
Case Type	Constitutional Application
Annotations	Link to case annotations

Flynote

C **Constitutional law** — *Constitution of Zimbabwe, 1980 — Declaration of Rights — s 12 — right to life — nature of right protected by s 12*

Constitutional law — *Constitution of Zimbabwe, 1980 — Declaration of Rights — s 15 —protection from inhuman or degrading treatment or punishment — what constitutes inhuman or degrading treatment or punishment — refusal to permit prisoner undergo medical test —* D *whether inhuman or degrading treatment — refusal to exercise prerogative of mercy towards prisoner serving life sentence — whether renders imprisonment inhuman or degrading*

Constitutional law — *Constitution of Zimbabwe, 1980 — s 311— President's prerogative of mercy—when exercisable—refusal to exercise prerogative* E *in regard to prisoner serving life sentence — whether renders sentence inhuman or degrading*

Words and phrases — *inhuman or degrading punishment or treatment — Constitution of Zimbabwe, 1980 — s 15 — what constitutes inhuman or degrading punishment or treatment*

Headnote

F Not all forms of maltreatment amount to inhuman or degrading treatment prohibited by s 15 of the Constitution. It has been held that to be inhuman, treatment must cause intense physical and mental suffering or be recognisably barbarous, savage, brutal or cruel. In regard to degrading treatment, the relevant notions are those of humiliation and debasement G which, in relation to prisoners, must be other than the general or usual element of humiliation associated with imprisonment after a criminal conviction.

The hope of release from prison is inherent in the statutory mechanisms which incorporate the President's prerogative of mercy under s 311 of the Constitution. It is exercisable at any time according to the circumstances, H and the fact that the President has refused in the past to exercise it in

relation to a prisoner serving a sentence of life imprisonment does not A render the sentence an inhuman or degrading punishment.

Section 12 of the Constitution, which protects the right to life, prohibits deliberate acts of violence directed at the person of another with the intention of killing him or her; the right protected is the right not to be intentionally killed except in the instances specified in the section.

The applicant was a prisoner who had served nearly 15 years of a sentence of B life imprisonment imposed on him for murder. He wanted the prison authorities to transfer him to South Africa for medical tests to ascertain whether he was suffering from a life-threatening heart complaint. The tests that had been done on him in Zimbabwe were equivocal, and the medical officer of the prison in which he was incarcerated concluded that C he was not seriously ill at all. He had twice petitioned the President for the exercise of the prerogative of mercy, but the petitions were unsuccessful. He applied to the Supreme Court in terms of s 24 of the Constitution for an order

that the prison authorities' refusal to transfer him to South Africa for medical tests amounted to inhuman or degrading treatment in contravention of s 15(1) of the Constitution; he also alleged D that their refusal violated his right to life guaranteed by s 12(1) of the Constitution. In addition, he claimed that the President's failure to exercise the prerogative of mercy in his case destroyed any hope he might have of regaining his freedom and turned his life sentence into an inhuman and degrading punishment.

Held, that before the court could find that the prison authorities' refusal to E transfer him to South Africa constituted inhuman or degrading treatment, the applicant had to show that he had a serious medical need for the tests or that he was seriously ill, and that with full knowledge of his affliction the prison authorities refused him access to tests which would have led to the treatment of his disease; an inference would then have been made F that the object of their decision was the infliction of unnecessary and wanton pain on him. All that the evidence established, however, was that the authorities had refused to allow him to undergo an additional test on the ground that it was not necessary. This could not found a case for a contravention of s 15 of the Constitution.

Held, further, that the President's prerogative of mercy could still be G exercised in favour of the applicant at any time in the future. It could not therefore be said that the applicant had been abandoned in prison so as to render his continued sentence an inhuman and degrading punishment.

Held, further, that it could not be said that when the prison authorities refused to transfer the applicant to South Africa they intended to bring about his death. Their refusal was not a contravention of s 12 of the Constitution. H

2003 (2) ZLR p423

Malaba JA

Cases cited A

Blanchard & Ors v Minister of Justice 1999 (2) ZLR 24 (S)

Conjwayo v Min of Justice & Anor 1991 (1) ZLR 105 (S)

De Freitas v Benny & Ors [1976] AC 239 (PC)

Estelle v Gamble 429 US 97 (1976)

B *Reckley v Min of Public Safety & Immigration & Ors* (2) [1996] 1 All ER 562 (PC); [1996] 1 LRC 401

Republic of Ireland v United Kingdom (1979-80) 2 EHRR 25

S v Tcoeib 1996 (1) SACR 390 (NmS); 1996 (7) BCLR 996

Woods & Ors v Min of Justice & Ors 1994 (2) ZLR 195 (S)

Legislation considered C

Constitution of Zimbabwe, 1980: ss 12, 15 & 311

Case information

Mrs *J B Wood,* for the applicant

A Dururu, for the respondents

Judgment

D **Malaba JA:**

Introduction

This is an application in terms of s 24(1) of the Constitution of Zimbabwe E ("the Constitution") for redress, on the allegation that there have been violations of ss 15(1) and 12(1) of the Declaration of Rights by the respondents in relation to the applicant.

The applicant ("Woods") is fifty years old. He is a D-class prisoner serving a sentence of imprisonment for life at Chikurubi Prison, which is a maximum F security State prison. Mr Woods had originally been sentenced to death for murder by the High Court on 18 November 1988. That

sentence was commuted to a life sentence by this court on 10 December 1993, following a declaration that the death penalty had become an inhuman and degrading punishment because of the delay in its execution. From the date when the death sentence was passed he has been in custody for close to fifteen years.

G At the time of commission of the crime of murder Woods was a Zimbabwean citizen, having been born in this country, but was granted South African citizenship by descent in 1994. The first respondent ("the Commissioner") has the administrative command, superintendence, control and direction of prisons and of the Prison Service in Zimbabwe. The second respondent ("the H Minister") is responsible for the administration of the legislation governing

the operation of prisons and the Prison Service. He has the power to give the A Commissioner general directions of policy.

The Relevant Statutory Provisions

The powers the respondents exercise in the discharge of their duties in connection with the administration of prisons are contained in the provisions of the Prisons Act [*Chapter 7:11*] ("the Act") and the Prisons (General) B Regulations, 1996 (SI 1 of 1996) ("the Regulations"). Under the Act the Commissioner exercises his powers through officers in charge of prisons whom he appoints. All matters in connection with a particular prison would therefore fall under the direct supervision and control of its officer-in-charge. The officer-in-charge of Chikurubi Maximum Security Prison would be answerable to the Commissioner for the treatment to which Woods was C subjected.

Section 64 of the Act provides that every person confined in a prison shall be in the lawful custody of the officer-in-charge and, subject to the Act, shall remain in such lawful custody and be subject to prison discipline during the whole period of his imprisonment. D

The Minister is empowered by s 36(1) of the Act to appoint as a medical officer of a prison any medical practitioner who is registered as such in accordance with the Health Professions Act [*Chapter 27:19*]. A medical officer has the general care of the health of the prisoners.

Under s 32 of the Regulations a medical officer *must* examine all prisoners E who complain of illness; treat all sick prisoners; notify the officer-in-charge of all cases of serious illness; and make such written recommendations to the officer-in-charge regarding the treatment, isolation or care of sick prisoners as he thinks fit. An officer-in-charge is bound by s 18(1) of the Regulations to comply, whenever it is practicable, with the lawful and reasonable recommendations of a medical officer of the prison. F

At the end of every four years' imprisonment of a prisoner serving a life sentence the Commissioner is required under s 121(1) of the Act to forward a report on the prisoner to the Minister, who may submit it to the President of Zimbabwe ("the President"). The Commissioner must submit a report on a prisoner serving a life sentence at any time if asked to do so by the Minister or when instructed to do so by the President. G

If a medical officer is of the opinion that the life of a prisoner is likely to be endangered by his further confinement in prison, or a sick prisoner is unlikely to survive his sentence, or the mental health of a prisoner appears likely to become impaired by his further incarceration in prison, he must, under s 34 of the Regulations, submit a written report to the officer-in-charge of the prison, H

A giving his opinion and the reasons for his opinion. The officer-in-charge is bound to immediately forward the written report to the Commissioner for onward transmission to the Minister, who may submit it to the President.

The Facts

The facts or circumstances upon which Woods seeks redress from this court B are set out in the founding affidavit and documents annexed thereto. They are to this effect. On a date undisclosed, but in July 1993, Woods woke up in severe pain which lasted for thirty minutes in the chest, left arm

and neck. He felt faint and breathless. The following day Woods saw Dr Ahmed, who was the medical officer for Chikurubi Maximum Security Prison. Doctor Ahmed was of the opinion that the symptoms Woods complained of having experienced C were suggestive of coronary angina (severe pain caused by a disease in the arteries supplying blood to the tissues of the heart). The doctor gave Woods valium to calm his nerves and aniseed to place under his tongue in the event of another attack. There were subsequent visits by Woods to Dr Ahmed, the details of which are not disclosed in the papers. It is important to note that there is no suggestion that Woods was feeling pain on the first visit to Dr Ahmed D or on any of the subsequent visits to the medical officer.

In April 1994 Woods was allowed to consult medical doctors operating from centres outside prison. He saw Dr Ian Ternouth, a heart specialist and cardiologist based at Parirenyatwa Hospital. On 11 September 1996 Dr Ternouth put Woods on an electrocardiogram ("ECG") test to ascertain E whether he had a coronary artery disease. The object of the test was to check, amongst other things, abnormal rhythms and ischaemia (a condition resulting from reduction or interruption of the supply of blood and oxygen) which would ordinarily show in a person suffering from a coronary artery disease. Dr Ternouth described the procedure conducted and the results thereof in the supporting affidavit deposed to on 26 July 1998 as follows: F

> "5.1 On the 11th of September 1996 I conducted an ECG test on Mr Woods. He had a resting and effort test done. He completed forty- five steps in the master's staircase. He developed some chest pains at twenty-seven steps.
>
> 5.2 His resting ECG was normal, but there were minor changes i.e. some minor ST depression on a couple of leads. There were 'T' wave G changes in one of the leads.
>
> 5.3 My conclusions were that these wave changes were not definitely abnormal but they were not definitely normal either.
>
> 5.4 Based on the results of my examination and the symptoms that Mr Woods complained of, I concluded that Mr Woods could be H having angina.

Malaba JA

> 5.5 Coronary angina is a life threatening heart ailment which in some A instances is stressed or environmentally related, but more often than not hereditary, in that it has the same risk factors, some of which are generic, like cholesterol."

What is clear from Dr Ternouth's affidavit is the fact that there was no diagnosis of a coronary artery disease. B

On 21 February 1997 Dr Ternouth had Woods undergo another diagnostic test called "stress dobutamine tetrafosmine". The procedure and its results are again explained in Dr Ternouth's supporting affidavit:

> "6.2 Dobutamine is a drug that increases heart and pulse rate. Stress dobutamine is a two-stage procedure that has approximately 93 per cent specificity and 90 per cent sensitivity for detecting coronary C artery perfusion. The test was conducted according to a standard dobutamine protocol.
>
> 6.3 During the procedure the patient experienced no chest pain. The ECG showed him to develop sinus tarcycardia, i.e. a very fast rate of 150 beats perminute. This was the target level. The resting and effort ECG during the entire procedure was normal. D
>
> 6.4 The drugs caused a major cardiac load - cardiac work load is a product of the pulse rate and blood pressure and we had increased the patient's cardiac output by about four times."

The above-mentioned diagnostic test revealed more information as to whether Woods was having a coronary artery disease. The results were that Woods did E not produce the electrocardiographic changes usually seen in patients suffering from coronary angina. He did not experience any chest pains during the entire procedure despite the high stress levels.

Dr Ternouth had, on 14 February 1997, arranged for Woods to have perfusion scan images of his heart taken. On 18 February 1997 Dr N D Jonker, a diagnostic radiologist based at the Diagnostic Imaging Centre in Harare, F examined the perfusion scan images. He noted a minor area of dead tissue in the inferior wall of the left ventricle. That was an irreversible defect. He also noted evidence of an occurrence of mild stress-induced ischaemia within the septum (layer of tissue dividing the two chambers) of the left ventricle. Dr Jonker, however, observed that there were no signs of an area of threatened G myocardium (i.e. damage or injury to the muscular substance of the heart).

The same perfusion scan images were examined by Dr Basson of the Pretoria Academic Hospital/Cardiology Department in South Africa. He confirmed the results of Dr Jonker's analysis. Dr Basson concluded that there was no short-term effect on the proper functioning of Woods' heart. In other words, his heart was functioning normally. There was no evidence of him having H

A coronary angina. Dr Basson indicated, however, that in the long term a disability could develop in Woods' heart which could progressively lead to increased need for medical care.

The results of the diagnostic tests to which Woods had been subjected caused Dr Ternouth to write to his (Woods') legal practitioner on 15 April 1997 B saying:

> "... if I had a patient who was not incarcerated and who complained of the same symptoms that Mr Woods complained of, then I would refer that patient for a *coronary angiogram.* The probability of the patient having a coronary heart disease is low but is not zero. Obviously in Mr Woods' case the possibility of secondary gain cannot be excluded. His symptoms, however, are very classical of coronary angina. He does not have the C electrocardiographic changes that we usually see in angina but the ECG has a 20 per cent false negative rate and it is possible that Mr Woods falls in this group. Certainly if Mr Woods was a free man and came to me complaining of the symptoms then I would recommend that he have a coronary angiogram."

D What Dr Ternouth was in effect saying was that all that remained were the symptoms Woods had complained of because the diagnostic tests conducted on him had not revealed evidence of coronary angina. A coronary angiogram would be an additional diagnostic tool, the use of which was at the discretion of those in whose custody Woods remained. Had there been conclusive evidence that Woods was suffering from a coronary artery disease, the object E of putting him on an angiogram would be the discovery of the exact cause thereof, such as blockages in the arteries.

On 28 May 1997 Dr Ternouth wrote another letter, in which he made reference to the results of the interpretation of the perfusion scan images. He again emphasised that the diagnostic test conducted on Woods so far had not detected coronary angina. He said:

> F "These scans show evidence of probable previous myocardial infarction. They do not show areas of threatened myocardium. Mr Woods, however, has symptoms that strongly suggest that he has coronary artery disease. His electrocardiograms with stress and his perfusion scans with stress do not show supporting evidence for coronary artery disease but these tests are not perfect tests. If Mr Woods was not incarcerated and presented to G me as a patient with symptoms of anginal type of chest pains which is what he complains about then I would have no hesitation in referring him for a coronary angiogram to determine whether he had coronary artery disease or not.
>
> As you are well aware Mr Woods is incarcerated and barring political H settlement may be incarcerated for some time. The possibility exists that

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> the symptoms he is complaining of may not be totally genuine, there is a A possibility that he is complaining of his symptoms in order to get referral outside this country."

According to Dr Ternouth's expert opinion, the probability of Woods developing a coronary artery disease was quite low. He put the chance of that happening at 5 per cent to 10 per cent. He affirmed the existence of the B possibility that Woods had simulated symptoms of coronary angina for purposes of secondary gain to be transferred to South Africa. Dr Ternouth could not have had that opinion if the medical evidence indicated that Woods had a coronary artery disease.

Dr Ternouth then went to New Zealand on sabbatical leave. Mr Woods was seen by Dr Muzamhino on 2 May, 25 July and 21 December 2000. He was C treated for a peptic ulcer. On 18 December 2000 he saw Dr A Freemantle at a private surgery in Harare. He complained of having experienced dizziness, a headache, blurred vision and numbness in the left hand some seven months before the day he visited Dr Freemantle.

Dr Freemantle was of the opinion that what Woods was complaining of were D symptoms of a "transient ischaemic attack" (a mini-stroke), that is to say, a temporary reduction or interruption of the supply of blood and oxygen to the brain due to a b locked or narrowed artery. To ascertain whether that condition had actually occurred Dr Freemantle recommended that Woods be subjected to three diagnostic tests. These were:

(a) A Colour Doppler Test - to assess the condition of the neck or carotid E arteries for any impediment to the smooth flow of blood to the brain;

(b) An A.C.T. Brain Scan - for the detection of any residual brain damage; and

(c) An Echocardiogram - for the assessment through sound waves of the condition of the heart muscles and blood tests for any small clots. F

The first two tests were later done. No abnormalities were detected in the carotid arteries and the brain. The echocardiogram had not been performed at the time the application was heard. An electrocardiogram was instead conducted. It did not reveal any abnormalities in Woods' cardiac functions. It was not said in the papers whether the echocardiogram would probably have produced different results. G

Be that as it may, Woods was seen by Dr Masenda, the medical officer for Chikurubi Maximum Security Prison, on 31 January 2001. As indicated earlier on, it was the duty of Dr Masenda, as the medical officer, to establish by examination of Woods whether he was seriously ill. Dr Masenda arranged for Woods to have an ECG test. This was done. He had a blood sample taken H

A from Woods. It was tested for haemoglobin concentration and serum cholesterol levels. Mr Woods' blood pressure was measured. Dr Masenda had the Colour Doppler and A.C.T. brain scan tests recommended by Dr Freemantle done. All these diagnostic tests and measurements revealed no malfunction in Woods' heart.

The opinion formed by Dr Masenda in his capacity as the medical officer of B Chikurubi Maximum Security Prison was that Woods was not seriously ill at all. He concluded from all the medical evidence, including the interpretation of the perfusion scan images, that Woods was not suffering from a coronary artery disease. There was, therefore, no need to put him on an angiogram. Dr Masenda associated himself with Dr Ternouth's statement in the letter of C 28 May 1997, that the symptoms Woods had complained of may have been simulated for secondary gain.

As the medical officer on whom the Act and Regulations placed the general health of prisoners, and with whose lawful and reasonable recommendations the respondents were to comply, Dr Masenda's opinion on Woods' condition of health was bound to be accorded considerable weight by the respondents D in deciding whether or not to accede to his request for a transfer to South Africa on medical grounds.

The written request was submitted to the respondents on 24 October 2000. Mr Woods claimed that he needed to have a coronary angiogram in South Africa. The specialised diagnostic test is not available in Zimbabwe. The respondents E turned the request down on the ground that as a prisoner Woods had no right as such to be transferred to another country on medical grounds and that there was no evidence that he suffered from a life-threatening disease.

On two occasions, in 1997 and 1998, Woods had unsuccessfully petitioned the President for the exercise of the prerogative of mercy and an order that he be released from prison.

F The Application

Dissatisfied with the decision of the respondents and the unsuccessful petition for the exercise of the President's prerogative of mercy, Woods lodged this application. He charged that his constitutional rights were violated. The refusal by the respondents to transfer him to South Africa where G he wanted to have a coronary angiogram was said to have violated his right not to be subjected to inhuman or degrading treatment. The decision not to exercise the prerogative of mercy in his favour was said to have destroyed in him all hope for the restitution of freedom in his lifetime. The loss of hope of ever regaining his liberty allegedly turned the life sentence Woods was serving H into an inhuman and degrading punishment in contravention of s 15(1) of the

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Constitution. There was also an allegation to the effect that the refusal by the A respondents to transfer Woods to South Africa to have a coronary angiogram violated his right to life entrenched for him under s 12(1) of the Constitution.

The Relief Sought

In the event of a finding that the refusal by the respondents to transfer him to South Africa constituted a violation of s 15(1) of the Constitution, Woods B prayed that an order directing the respondents to transfer him to an "appropriate prison authority" in that country be granted. In the event of a finding that the life sentence had become an inhuman and degrading punishment in contravention of s 15(1), or that the refusal to transfer him to South Africa amounted to an infringement of his right to life, Woods prayed that an order that he be released from custody be given. C

The Constitutional Provisions

Section 15(1) provides that:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment." D

Section 12(1) provides that:

> "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."

Section 311, which contains the President's prerogative of mercy, provides that: E

> "(1) The President may, subject to such lawful conditions as he may think fit to impose —
>
> (a) grant a pardon to any person concerned in or convicted of a criminal offence against any law; or
>
> (b) grant a respite, either indefinite or for a specified period, from the execution of any sentence for such an offence; or F
>
> (c) substitute a less severe punishment for that imposed by any sentence for such an offence; or
>
> (d) suspend for a specified period or remit the whole or part of any sentence for such an offence..."

The Analysis G

All the circumstances stated above have to be considered in determining the constitutional questions raised by this application. The contention that the refusal by the respondents to transfer Woods to South Africa to have a coronary angiogram constitutes inhuman and degrading treatment takes account of the fundamental principle of the law to the effect that prisoners as H

Malaba JA

A human beings are entitled to all basic human rights enshrined in the Constitution except those withdrawn from them by law expressly or by implication: *Woods & Ors v Minister of Justice Legal Parliamentary Affairs & Ors* 1994 (2) ZLR 195 (S) at 198C; *Blanchard & Ors v Minister of Justice* 1999 (2) ZLR 24 (S) at 29F.

In punishing a person by incarcerating him or her, the State renders him or her B unable to care for himself or herself, at the same time preventing others from assisting him. In *Estelle v Gamble* 429 US 97 (1976), the Supreme Court of the United States of America held that "an inmate must rely on prison authorities to treat his medical needs". It was, however, held in *Gamble's* case *supra that* it was "deliberate indifference" on the part of prison administration C to "serious medical needs" or "serious illness" of a prisoner constituting "unnecessary and wanton infliction of pain" which amounted to "cruel and unusual punishment" under the Eighth Amendment of the American Constitution. The court made it clear that not every claim by a prisoner that he had not received adequate medical treatment or medical diagnosis stated a violation of the Eight Amendment.

D In *Conjwayo v Minister of Justice & Anor* 1991 (1) ZLR 105 (S) Gubbay CJ at 112H-113A said:

> "Section 15(1) is a provision that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment or institutionalised treatment of offenders be exercised within the ambit of civilised standards. Punishment or treatment incompatible with the E evolving standards of decency that mark the progress of a maturing society, or which involve the infliction of unnecessary suffering, is repulsive."

Section 15(1) clearly prohibits certain forms of ill-treatment. *Conjwayo's* case *supra* makes it clear that it is not all forms of maltreatment which are F prohibited by s 15(1).

Article 3 of the European Convention on Human Rights provides that "no-one shall be subjected to torture or to inhuman or degrading treatment or punishment". It contains notions similar to those used in s 15(1) of our Constitution. In *Republic of Ireland v United Kingdom* (1979-1980) 2 EHRR 25,

the European Court of Human Rights considered the meaning of Article 3. G The majority held that Article 3 prohibited ill-treatment which had to attain a minimum level of severity, that is to say, it had to cause intense physical and mental suffering. Judge Fitzmaurice in a dissenting judgment said the ill- treatment had to be recognisably "barbarous", "savage", "brutal" or "cruel", "which is the least that is necessary if the notion of the inhuman is to be H attained". The learned judge said at p 134:

2003 (2) ZLR p432

Malaba JA

> "For my part, I consider that the concept of 'inhuman' treatment should be A confined to the kind of treatment that (taking some account of the circumstances) no member of the human species ought to inflict on another, or could so inflict without doing grave violence to the human, as opposed to the animal, element in his or her make up. This I believe is the sense in which the notion of 'inhuman' treatment was intended to be understood in Article 3 - as something amounting to an atrocity, or at B least a barbarity. Hence it should not be employed as a mere figure of speech to denote what is bad treatment, ill-treatment, maltreatment, rather than, properly speaking, inhuman treatment."

On the meaning of "degrading treatment" the court in the *Ireland case supra* accepted that the relevant notions were those of "humiliation" and "debasement". The majority held that that "humiliation" and "debasement" C had to be other than the general or usual element of humiliation associated with imprisonment after a criminal conviction. In other words, Woods should not have been "humiliated" simply by the decision which went against his wishes. That would be a typical consequence of any negative decision. Section 15(1) of our Constitution clearly implies that there should be a D distinction between the "degrading treatment" it prohibits and general or usual treatment. Judge Fitzmaurice at p 134 of the *Ireland* case *supra* said "degrading treatment" was:

> "... intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked E in front of strangers..."

Accepting that the refusal to transfer Woods to South Africa where he wanted to undergo an angiogram test is "treatment", can it be said it constitutes "inhuman" treatment or "degrading" treatment? A refusal by prison authorities of a request by a prisoner does not in itself constitute a form of inhuman or F degrading treatment. Taking into consideration all the circumstances of this case, it cannot even be said that the decision of the respondents was an ill- treatment of Woods. Even if it was an ill-treatment, I am satisfied that he failed to show facts on which a finding that the decision constituted "inhuman" treatment or "degrading" treatment could be made.

In the first place, he had to show that he had a serious medical need for the G diagnosis he wanted to be subjected to in South Africa or that he was seriously ill. He had to show by objective evidence that, with full knowledge that he was afflicted with a disease, the respondents refused him access to a diagnosis which would have led to the treatment of the disease. An inference would then have been made from such facts that the object of the decision was unnecessary and wanton infliction of pain on him. H

2003 (2) ZLR p433

Malaba JA

A In this case, the medical evidence placed before the respondents was to the effect that Woods was not suffering from a life-threatening disease. Medical examinations had established that he did not suffer from a coronary artery disease. The medical opinion of Dr Masenda who, as the medical officer of Chikurubi Maximum Security Prison, had the care of the health of prisoners and monitored the state of health of Woods, was that he did not need to B undergo a coronary angiogram test. The respondents had the medical opinions of Dr Ternouth and Dr Masenda to the effect that Woods could have simulated the symptoms of a coronary artery disease to gain transfer to South Africa. They were entitled as laymen to place considerable weight on the opinions of medical experts. Their decision was in accordance with medical evidence and there is no indication at all that they refused Woods' request for a transfer to C South Africa because they derived pleasure in seeing him in pain. The nature of the medical evidence considered by the respondents did not provide them with knowledge of Woods having a serious medical need to be treated.

At the end of the day, all the respondents did was to refuse to allow Woods to undergo an additional diagnostic test on the ground that it was not D necessary. That, in my view, cannot found a case for a contravention of s 15(1) of the Constitution.

In *Gamble's* case *supra* a prisoner had been injured when a bale of cotton fell on him while he was unloading a truck. He thereafter had complained of a back injury. He was seen by a number of prison medical doctors and treated with E pain relievers and muscle relaxants. The prisoner (Gamble) later instituted an action in which he complained that the Prison Service had failed or refused to have him undertake adequate diagnosis of his back injury. The prisoner alleged that the failure by the Prison Service amounted to "cruel and unusual punishment" in contravention of the Eighth Amendment. Mr Justice Marshall, delivering the opinion of the majority, said at p 107:

> F "The doctors diagnosed his injury as a lower back strain and treated it with bed rest, muscle relaxants, and pain relievers. Respondent contends that more should have been done by way of diagnosis, and treatment, and suggests a number of options that were not pursued.
>
> The Court of Appeals agreed, stating:
>
> > 'Certainly an X-ray of (Gamble's) lower back might have been in order G and other tests conducted that would have led to appropriate diagnosis and treatment for the daily pain and suffering he was experiencing.'
>
> But the question whether an X-ray - or additional diagnostic techniques or forms of treatment- is indicated is a classical example of a matter for medical judgment. A medical decision not to order an X-ray, or like H measures, does not represent cruel and unusual punishment."

2003 (2) ZLR p434

Malaba JA

In this case, the decision of the respondents not to transfer Woods to A South Africa to have a coronary angiogram was based upon the medical judgment of Dr Masenda to the effect that the additional diagnostic test was not necessary. In my view, that decision cannot be said to constitute "inhuman" treatment or "degrading" treatment.

Imprisonment for Life B

Mr Woods contended that the failure to exercise the President's prerogative of mercy in his favour on the two occasions when he petitioned for its exercise turned the life sentence he is serving into an "inhuman punishment". The submission was that the rejection of his petitions destroyed all hope in him of ever regaining freedom before the end of his natural life. C

The argument in support of the submission was based on an *obiter dictum* by Mahomed CJ in *S v Tcoeib* 1996 (1) SACR 390 (NmS), 1996 (7) BCLR 996. In that case the Supreme Court of Namibia had to decide whether a sentence of imprisonment for life for murder was a "cruel, inhuman or degrading treatment or punishment" in contravention of Article 8(2)(b) of the Constitution of Namibia. Speaking for all the members of the court, Mahomed CJ held that D a sentence of imprisonment for life, which was a discretionary sentence in Namibia, did *not per se* violate the relevant constitutional prohibition against cruel, inhuman or degrading punishment. Having decided what on the facts was necessary to determine, Mahomed CJ went on to say at 397i-398d (SACR), 1004H-1005B (BCLR):

> "... there is no escape from the conclusion that an order deliberately E incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilised community and can therefore only be upheld if it is demonstrably justified. In my view, it cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition F for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. Such circumstances might include sociological and psychological re-evaluation of the character of the offender which might destroy the previous fear that his or her release after a few years might endanger the safety of others or evidence which might otherwise show that the offender has reached such an advanced age or G become so infirm and sick or so repentant about his or her past, that continuous incarceration of the offender at State expense constitutes a cruelty which can no longer be defended in the public interest. To insist, therefore, that regardless of the circumstances an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul H of the offender also a feeling of such despair and helplessness."

2003 (2) ZLR p435

Malaba JA

A It appears to me that the hope of release from prison is inherent in the statutory mechanisms which incorporate the President's prerogative of mercy. The prerogative of mercy is exercisable at

any time depending upon the circumstances, which may include the prisoner's age and state of his health.

A prerogative of mercy is an exercise of the President's personal discretion. It can be exercised without the involvement of the prisoner. In this case, the B prerogative of mercy has not been exercised in favour of Woods and there is no telling whether and when it might be exercised. It was unreasonable for Woods to entertain the belief that the President's prerogative of mercy would never be exercised in his favour during his life in prison when its exercise has no time limit. Mr Woods clearly laboured under a misconception of the C essence of a prerogative of mercy.

In *Reckley v Minister of Public Safety & Immigration & Ors (No. 2)* [1996] 1 All ER 562 (PC), [1996] 1 LRC 401, a decision of the Privy Council, Lord Goff of Cheveley cited with approval another decision of the same court in *de Freitas v Benny & Ors* [1976] AC 239. After stating that at common law the prerogative of mercy has always been a matter which lies solely in the D discretion of the sovereign, Lord Diplock said in the *de Freitas* case *supra* at 247G:

> "Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of E mercy."

By its very nature the President's prerogative of mercy can still be exercised in favour of Woods at any time in future. It cannot be said that he has been effectively abandoned in prison as a "thing" without any residual dignity and without any hope of restitution of freedom in his lifetime.

The contention advanced on the sentence of imprisonment for life having F become an inhuman and degrading punishment because the President's prerogative of mercy has not been exercised must fail.

I do not consider it necessary to decide, as called upon to do by Mr *Dururu,* for the respondents, whether s 15(6) of the Constitution is applicable to the facts of this case since I have taken the view that there has been no G contravention of s 15(1) of the Constitution.

The Right to Life

The submission was that the refusal by the respondents to transfer Woods to South Africa to have a coronary angiogram was tantamount to condemning him to a "lingering death". The argument was premised upon the presumption H of the fact that Woods had been shown to be suffering from a life-threatening

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Malaba JA

disease such as coronary angina and that the respondents had knowledge that A he suffered from such a disease. The presumption has no basis on the facts.

Even if it had a factual basis, the argument would not establish a violation of s 12(1) of the Constitution, which is clearly not applicable to the facts of this case. Section 12(1) of the Constitution prohibits deliberate acts of violence directed at the person of another with the intention of killing him or her. The B right protected (in a person) by s 12(1) of the Constitution is the right not to be intentionally killed except in the instances specified therein. It cannot, by any stretch of the imagination, be said that when the respondents refused to transfer Woods to South Africa where he wanted to have a coronary angiogram they intended to bring about his death. The evidence clearly shows that at the time the respondents made the decision they did not know that Woods was C suffering from a life-threatening disease. The medical evidence placed before them was that he was not suffering from a life-threatening disease.

Conclusion

The application is accordingly dismissed with no order as to costs. D

Chidyausiku CJ, Sandura JA, Cheda JA & Ziyambi JA concurred.

Coghlan, Welsh & Guest, applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/BURDOCK INVESTMENTS (PVT) LTD v TIME BANK OF ZIMBABWE LTD & ORS 2003 (2) ZLR 437 (H)

BURDOCK INVESTMENTS (PVT) LTD v TIME BANK OF ZIMBABWE LTD & ORS 2003 (2) ZLR 437 (H)

Citation	2003 (2) ZLR 437 (H)
Case No	Judgment No. HH-194-03
Court	High Court, Harare
Judge	Makarau J
Heard	28 October 2003
Judgment	19 November 2003
Counsel	*O Ziweni,* for the applicant *T Mawere,* for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C **Practice and procedure** — *joinder — when may be ordered — nature of right that party seeking joinder must show — need to show a direct legal relationship or a real right in subject matter of dispute*

Practice and procedure — *parties — locus standi — applicant not a party to dispute — need to show that could have obtained order for joinder*

Headnote

D The first defendant, a bank, obtained judgment against a debtor. A piece of land, mortgaged by the debtor to the bank, was declared to be executable. Two years earlier, the applicant had bought the land from the debtor and subdivided it as part of a housing scheme. When it became aware of the E sale in execution, the applicant approached the bank with an offer to pay the debt, and the sale in execution was cancelled. The Registrar of Deeds had, when the judgment was obtained, placed a caveat against the title deeds to the property. The applicant sought an order uplifting the caveat against receipt of a certain sum of money. There was no explanation as to how the sum was arrived at. The bank challenged the applicant's *locus* F *standi.*

Held, that joinder of parties, and thus *locus standi,* follows as of right from the joint legal relationship between the parties, as decision affecting the rights of one necessarily affects the right of the other because of the special legal relationship between partners and joint owners or contractors. Where joinder cannot be demanded as of right, it may be granted if the G court is satisfied that the applicant has a legal interest in the subject matter of the action that could be prejudicially affected by the judgment. A real right in property may be a sufficient and direct interest upon which *locus standi* can be grounded, but not every right will be sufficient to establish *locus standi.* The interest must be legal and direct. A legal right is not merely a financial interest in the matter. The right must be a legal H obligation or position that can be held, enforced, or defended against all

Makarau J

the parties to the litigation in which joinder is sought. An interest that is A sufficient to found *locus standi must he* based on a direct legal relationship between the parties. The legal interest must be such that to proceed without the party seeking joinder or intervention amounts to denying that party the right of audience before the court passes a judgment that adversely affects the legal position of that party.

Held, further, that in this case, the applicant could not claim as of right that B it ought to have been joined to the initial proceedings under which a judgment was obtained against the debtor by the bank. It had no joint proprietary interest with the debtor in the property nor did it have a direct legal relationship with the bank. Its interest in the property was a financial one only. C

Cases referred to

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)

Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O)

Morgan & Anor v Salisbury Municipality 1935 AD 167

Nyamweda v Georgias 1988 (2) ZLR 422 (S) D

Sheshe v Vereeniging Municipality 1951 (3) SA 661 (A)

United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (2) SA 409 (C)

Case information

O Ziweni, for the applicant E

T Mawere, for the first respondent

Judgment

Makarau J: On 29 September 2000, the first respondent obtained judgment from this court against one Kenneth Golden Mpiwa ("Mpiwa"), The judgment was in the sum of $2 202 546.99 together with interest thereon at the F rates of 56.5 per cent per *annum* a from 6 October 1997 to 9 April 1999,57.5 per cent *per annum* from 10 April 1999 to 24 May 1999, 61.5 per *cent per annum* from 25 May 1999 to 30 August 1999 and 63.5 per cent from 1 September 1999 to date of payment in full. In terms of the judgment, certain piece of land, mortgaged by Mpiwa to the first respondent, was declared specially executable. G

In or about May 1998, the applicant had purchased the same piece of land from Mpiwa for the sum of $ 1 874 000. The applicant is a company that specialises in housing development schemes. After the purchase, the applicant proceeded to subdivide the land into smaller portions before in turn selling the portions to various purchasers. H

Makarau J

A In due course, a sale in execution of the property was duly scheduled and advertised by the second respondent for and on behalf of the first respondent. When the applicant became aware of the scheduled sale, it approached the first respondent and made certain overtures, the result of which was a cancellation of the sale in execution. It is common cause that the applicant had offered to pay the debt due by Mpiwa to the first respondent. After the sale had been B cancelled, the parties entered into negotiations for the settlement of Mpiwa's indebtedness. The negotiations broke down, prompting the applicant to file this application.

When the property was attached in execution, the Registrar of Deeds placed a caveat against the title to the property. The caveat remains so endorsed. It is C trite that, unless it is uplifted, no registration of a real right can be effected against the title to the property.

Faced with the real possibility that it could not effectively deal with the piece of land, the applicant, in this application, seeks an order compelling the first respondent to cause the caveat to be uplifted

against receipt of the sum of $4 405 093.98 and for the deed of transfer in respect of the land to be released D to it within three days of the uplifting of the caveat.

The first respondent has opposed the application and has challenged the applicant's *locus standi in judicio* to bring these proceedings. Whether the applicant has *locus standi* is the sole issue that I have to determine in this application.

E It is not in dispute that the applicant is not seeking to vary or rescind the judgment between first respondent and Mpiwa. What it is seeking to do is to compel the respondent to accept discharge of the judgement debt by accepting payment of the sum of $ 4 405 093.98. The applicant seeks this order against the respondent on the basis that it has a direct and substantial interest in the property that is the subject matter of the judgment. It is in my view, convenient F at this stage to note that no schedule has been attached to the applicant's papers showing how the sum of $4 405 093.98 has been arrived at and its relationship, if any, to the judgement debt as set out in the first paragraph of this judgement.

It appears to me from the authorities that the courts have evolved certain G principles to guide on what constitutes direct and substantial interest, sufficient to ground *locus standi* in certain circumstances. A convenient starting point in reviewing the authorities may be the case *of Morgan & Anor v Salisbury Municipality* 1935 AD 167. In that case it was broadly laid out that joinder, and therefore *locus standi,* could be demanded as of right in cases of joint H ownership, partnerships, joint contractors and in all cases where there was is

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Makarau J

a joint financial or proprietary interest. While the list of situations where A joinder is a right as laid out in the case has since been held not to be exhaustive, the principle that there are situations where joinder can be demanded as of right has not been challenged. The broadly laid out principle was affirmed in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) and in *Sheshe v Vereeniging Municipality* 1951 (3) SA 661 (A). It was in the B *Sheshe* case that it was recognised that the court has discretion to grant joinder in cases other than those laid out in the *Morgan* case. In my view, in the cases listed in the *Morgan* case, *locus standi* is not an issue for debate but follows as of right from the joint legal relationship between the parties. The jurisprudential justification for this principle is, in my view, not hard to find. It lies in the fact that any decision affecting the rights of one necessarily affects C the right of the other because of the special legal relationship between partners and joint owners or contractors. Proceeding to issue a judgment in such cases in the absence of a partner or a joint owner or contractor will offend against the *audi alteram partem* rule in respect of the party not joined as a decision will be made against such a party's rights without affording him or her a chance to be heard. It is trite that a court may not make an order that will affect a party D that is not before it.

It is settled in law that where joinder cannot be demanded as of right, then it may be granted by a court after such a court has been satisfied that the applicant has a legal interest in the subject matter of the action that could be prejudicially affected by the judgment. E

In *Nyamweda v Georgias* 1988 (2) ZLR 422 (S), while the court did not enunciate any legal principle upon which it was acting, it *mero motu* postponed the hearing of an appeal to allow a bond holder in the property in dispute in the appeal to elect whether or not it wanted to be joined to the proceedings. The respondent had purchased a house in the name of his mistress and in the High Court had won an order directing the appellant to F transfer the property to him. The property was mortgaged to a building society. Part of the High Court order was to the effect that the liability to the building society be discharged before transfer was effected to the respondent. McNally JA had this to at p 424B-D:

> "When the appeal first came before us we were concerned that insufficient G thought had been given to the interests of the third party involved, namely the Building Society. It has a real right in the property by virtue of the registered mortgage bond. Granted the order of the high court was conditional on 'a discharge by the plaintiff of the mortgage registered by the defendant over the said property in favour of Central Africa Building Society'. Nonetheless, it was our view that the Building Society should H be advised of the situation so that it could determine its attitude on the question of joinder."

Makarau J

A It would appear to me that although the Supreme Court did not advert to any legal principle in the matter, it recognised that the holder of a real right may be joined to proceedings where the property over which the right exists is in dispute. As such right may be adversely affected by the judgment. In other words, the court recognised that a real right in property may be a sufficient and direct interest upon which *locus standi* can be grounded.

B It is also clear from the authorities that it is not every right that will be sufficient to establish *locus standi.* The interest must be legal. It must be direct.

In my view, it is easier to understand what a legal interest in this regard is by defining what it is not. It is not merely a financial interest in the matter. The right must be a legal obligation or position that can be held, enforced, or C defended against all the parties to the litigation in which joinder is sought. In the authorities, the two qualities of the interest are often dealt with together. Thus, the interest has been described as a direct and substantial legal interest in the subject matter of the judgement. See *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (2) SA 409 (C) and *Amalgamated Engineering Union v Minister of Labour (supra).* In my view, it is easier to D understand the legal nature of the interest when all its qualities are viewed together.

The interest that is sufficient to found *locus standi* must be based on a direct legal relationship between the parties. Thus it has been put in the *Shashe* case (humorously in my view) that it is unacceptable that in "an action for the E ejectment of his tenant, a landlord must join to the action as defendants his tenant's milkman, vintner or charwoman." Apart from indicating the era when the proposition was found unacceptable, the point is made that there is no direct legal relationship between the tenant's milkman, winemaker and charlady and the landlord. To allow all these to be parties to the action for eviction is as absurd as suggesting that guests in a hotel can resist any action F to evict the hotelier by the landowner. Thus in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another,* it was held that the generally accepted view is that a subtenant has no legal interest in the contract between the landlord and the tenant, although he may have a very substantial financial or commercial interest therein that may be prejudicially affected by the G judgment. In coming to this decision, the court relied among others, on the decision in *Henri Viljoen (Pvt) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O), where, after reviewing several authorities on the subject of joinder and intervention, it was held that direct and substantial interest for the purposes of joinder and intervention is a legal interest and excludes any indirect and commercial interests.

2003 (2) ZLR p442

Makarau J

A legal interest must be such that proceeding without the party seeking joinder A or intervention amounts to denying that party the right of audience before the court passes a judgment that adversely affects the legal position of that party. An explanation of this concept is clearly given by Horowitz AJP in the *Henri Viljoen* case when he discusses the legal relationship obtaining amongst a landlord, a tenant and a subtenant. The learned judge reasoned that where a B landlord sues a subtenant for ejectment, the tenant has to be joined in the proceedings as the rights of the subtenant are derived from the rights of the tenant and a resolution upon the rights of a subtenant *vis-à-vis* the property owner also involves an adjudication on the rights of the tenant. However, when the landlord sues his tenant, the rights of the subtenant are not in issue in the proceedings as the position and rights of the tenant shield these. The C subtenant has no legal interest in the contract between the landlord and the tenant although he may have a very substantial financial or commercial interest therein.

It is my respectful opinion that the above represents the law and practice of this court in matters of joinder and intervention by parties in proceedings before this court. Before a party may be joined or may be allowed to intervene in D proceedings before the court, he or she must establish a direct and substantial interest in the subject matter of the judgment. The interest must be such that the judgment cannot be carried into effect without adversely affecting the legal position of the party mis-joined and in circumstances where the defence of *res judicata* will not be raised against that party in future proceedings to protect E that interest.

In the application before me, the applicant cannot claim as of right that it ought to have been joined to the initial proceedings under which a judgment was obtained against Mpiwa by the respondent. It

has no joint proprietary interest with Mpiwa in the subject matter nor does it have a direct legal relationship with the first respondent. F

In my view, the applicant has no legal interest in the judgment between the respondent and Mpiwa, although it clearly has a very substantial financial interest in the subject matter of the judgement. Using the analogy of the relationship between a landlord and a subtenant used in the *United Watch* case, it would appear to me that the applicant is placed in a similar position G to that of a subtenant. There is no direct legal relationship between it and the respondent. Both owe the other no obligations and cannot compel each other to perform or discharge any duties. Thus, whatever interest the applicant has in the subject matter of the judgment remains financial or commercial and does not amount to a legal interest upon which it can claim *locus standi* in proceedings between the respondent and Mpiwa. H

Makarau J

A In the result, the application is dismissed with costs.

Ziweni & Co, applicant's legal practitioners

Ziumbe & Mtambanengwe, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/ZIMBABWE LAWYERS FOR HUMAN RIGHTS & ANOR v PRESIDENT OF ZIMBABWE & ANOR 2003 (2) ZLR 444 (H)

ZIMBABWE LAWYERS FOR HUMAN RIGHTS & ANOR v PRESIDENT OF ZIMBABWE & ANOR 2003 (2) ZLR 444 (H)

Citation	2003 (2) ZLR 444 (H)
Case No	Judgement No. S-12-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA, Ziyambi JA, Malaba JA & Gwaunza JA
Heard	17 March 2003
Judgment	20 November 2003
Counsel	*J B Colegrave,* for the applicants Mrs *Y Dondo,* for the respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe, 1980 — Declaration of* C *Rights — s 20 —freedom of expression — right to receive information — whether entitles members of public to see reports of commissions of inquiry and compel their publication*

Constitutional law — *Constitution of Zimbabwe, 1980 — s 31K — non* D *- justiciability of presidential decisions — publication of reports of commissions of inquiry — whether President may be compelled to publish reports*

Headnote

Despite the importance attaching to the right to freedom of expression granted by s 20(1) of the Constitution, it can only be exercised subject E to observation of, and respect for, other people's rights or those rights stipulated in subs (2) of the section. The rights of others are equally important and deserve protection; the interest of the State and other persons cannot be overlooked.

In 1981 the then President established a commission of inquiry to investigate disturbances at military encampments in Bulawayo, and in 1984 a F committee of inquiry was established to inquire into events in Matabeleland. The reports of the commission and the committee were never published. The applicants applied to the Supreme Court in terms of s 24(1) of the Constitution for an order directing the President to publish the reports, claiming that the applicants' right to receive G information under s 20 of the Constitution was being hindered by the President's continued failure to make the reports public.

Held that as long as the President declined to publish the reports on the basis of the interest of the State and safety of other persons, he could not be compelled to publish them. H

Cheda JA

A *Semble* the decision not to publish the reports was made in the exercise of the President's prerogative powers conferred by the Constitution; for the court to order him to publish the reports would require disclosure of the manner in which the President reached that decision, a matter which s 31K of the Constitution rendered non-justiciable.

Cases cited B

Munhumeso & Ors. in re 1994 (1) ZLR 49 (S) *PF-ZAPU v Min of Justice (2)* 1985 (1) ZLR 305 (S)

Legislation considered

C Constitution of Zimbabwe, 1980, ss 11, 20 & 31K

Case information

J B Colegrave, for the applicants

Mrs *Y Dondo,* for the respondents

Judgment

D **Cheda JA:** The first applicant is a *universitas* which was established in February 1996. Its main purpose is to foster a culture of human rights in Zimbabwe and encourage the growth and strengthening of human rights at all levels of Zimbabwean society. In particular it strives to protect, promote, deepen and broaden the human rights provisions of the Constitution of E Zimbabwe ("the Constitution"). The second applicant is a charitable and educational trust established according to the law of Zimbabwe in 1984.

The first respondent is the President of the Republic of Zimbabwe. The second respondent is the Attorney-General of the Republic of Zimbabwe, who is cited in terms of s 24(6) of the Constitution of Zimbabwe ("the Constitution").

By S I 204A of 1981, the then President of Zimbabwe appointed a Commission F of Inquiry into disturbances at Armed Encampments in Zimbabwe. The appointments were in terms of s 2(1) of the Commissions of Inquiry Act [*Chapter 10:07*]. The Commission of seven members, chaired by Mr Justice Dumbutshena (as he then was), is referred to as "the Dumbutshena Commission".

G The terms of reference for the Commission were:

(a) to inquire into the mutinous disturbances which took place during February 1981 at:

Glenville Military Camp,
Ntobazinduna Military Camp, and
H Entumbane ZANLA and ZIPRA Camps

Cheda JA

for the purposes of determining the causes underlying, or which led to, the A mutinous behaviour and of identifying, if possible, the persons and organisations responsible for planning or promoting the disturbances; and

(b) to make recommendations for the resolution of the problems identified.

The Statutory Instrument further directed that the Commission should continue B in full force and virtue until it had finally reported upon the matters aforesaid, that it report to the President with all convenient speed the information upon matters submitted for its consideration, and that it has the liberty to report to him its proceedings from time to time.

Subsequent to the appointment of the Dumbutshena Commission, and in C 1984, Mr Chihambakwe, a legal practitioner, was appointed to head what has been referred to as a Committee of Inquiry ("Chihambakwe's Committee"). No instrument has been found to show if this Committee was appointed in terms of the Commissions of Inquiry Act or not. There is no report from Chihambakwe*'s* Committee and it has not been properly established what this Committee was appointed to do in the absence of the appointing instrument D and the report.

As for the Dumbutshena Commission, the Report was never published. The applicants now seek an order in the following terms:

"IT IS ORDERED THAT —

1. The President of the Republic of Zimbabwe cause to be made public E through the Government Printer within sixty (60) days of the date of this order at a reasonable cost the reports made to him when he was Prime Minister of the Commission of Inquiry into events concerning Entumbane 1 and 2 known as the 'Dumbutshena Report 1982', and the Chihambakwe Committee of Inquiry into events between December 1982 and March 1983, known as the 'Chihambakwe Report 1984'. F
2. If this application be not opposed there be no order as to costs.
3. If the application is opposed the costs be paid by the State."

The first applicant, being a *universitas,* has rights of its own apart from the rights of its individual members. It is a person in terms of s 113(1) of the Constitution (see also *Company Law in Zimbabwe* by Nkala and Nyapadi G 1995 ed p 15). Its *locus standi* was not questioned by the respondents. Mrs *Dondo,* for the respondents, said she was arguing the case on the basis that the applicants had a right to receive information. In other words, she accepts that the applicants have *locus standi.*

The application is based on s 24(1) of the Constitution, which reads as follows: H

Cheda JA

A "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply B to the Supreme Court for redress."

The applicants contend that they are being hindered in the enjoyment of their constitutional rights to freedom of expression by the respondents' failure or refusal to publish the Reports of the Dumbutshena Commission and the Chihambakwe Committee.

The right complained of is based on s 20 of the Constitution which reads as C follows:

"**20 Protection of freedom of expression**

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and D information without interference, and freedom from interference with his correspondence."

It is on this basis that the applicants want the first respondent to make the two reports available to the public. No clear reason is given for this request. All that the applicants can say is that they are

entitled to the reports, and that, since twenty years have passed, there is no good reason to refuse to publish the E reports.

Generally, most Constitutions that have a Bill of Rights create those rights and at the same time provide exceptions or derogations. The following are examples:

"No person is to be deprived of his liberty except...". (Ghana Constitution);

F "No person shall be deprived of personal liberty except according to procedures established by law." (Namibian Constitution);

"No person is to be deprived of his liberty except ...". (Zambian Constitution);

"No person is to be deprived of life intentionally except ...". (Kenya Constitution); and

G "No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2)." (Section 13(1) of the Constitution of Zimbabwe).

The preamble to the Declaration of Rights in the Constitution of Zimbabwe reads as follows:

2003 (2) ZLR p448

Cheda JA

"**11 PREAMBLE** A

Whereas persons in Zimbabwe are entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this Chapter, and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms *subject to such limitations* B *on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons."* (The emphasis is mine)

The above shows that while the rights created by the Constitution are protected, they are not absolute. They are subject to limitations. C

The provisions of s 20(2) make this even clearer:

"20 (2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -

(a) in the interest of defence, public safety, public order, the economic D interests of the State, public morality or public health;

(b) for the purpose of-

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence; E

(iii) ...

(iv) ...

(v) ...;or

(c) that imposes restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under F the authority thereof is shown not to be reasonably justifiable in a democratic society."

These provisions make it clear that these rights can only be exercised subject to observation of, and respect for, other people's rights, or those rights stipulated in subs (2)(a) of s 20.

In In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 56F-H this court said: G

"The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be underestimated. They lie at the foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man.'"

Even with the above in mind, one should not overlook the fact that whatever H has to be done, the rights of others are equally important and deserve

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2003 (2) ZLR p449

Cheda JA

A protection. The interest of the State and other persons cannot be overlooked.

In this case, the Inquiries were ordered by the President. The reports were to be made to him. It is he who is aware of the contents. He is the one who determined in the circumstances whether it was in the interests of defence, public safety or public order, or in the interest of the State, or not, to publish B the Reports.

Section 7 of the Commissions of Inquiry Act provides as follows:

"It shall be the duty of the commissioners after taking the oath referred to in section five:

(a) to make a full, faithful and impartial inquiry into matters specified in the proclamation; and C

(b) to conduct the inquiry in accordance with the directions, if any, in the proclamation; and

(c) in due course, to report to the President in writing the result of their inquiry; and

(d) when required to do so, to furnish to the President a full statement of D the proceedings of the commission and of the reasons leading to the conclusions arrived at or reported."

It should be recalled that in the Statutory Instrument the President asked the Dumbutshena Commission to even "identify the persons and organisations responsible for planning or promoting the disturbances". This could result in certain persons and organisations being named in the report. In that case the E President should certainly use his discretion if he deems it fit to protect the reputations, rights and freedoms of other persons or the private lives of persons concerned as well as preventing the disclosure of information received in confidence as provided in subs (2)(b) of s 20 of the Constitution.

In refusing to publish the Report, the first respondent relies on the following F grounds:

"1. The Executive authority of Zimbabwe vests in the President and the powers of Executive authority are provided in s 31H of the Constitution.

2. After its inquiry the commission reports its findings to the President. The Act does not impose any obligation on the President to publish G the Report.

3. The findings and recommendations were solely for use by the Government and Government had no legal duty to divulge the findings to the general public.

4. In any case, because of the sensitivity of the matter at the time the Report was presented to Government, it was not reproduced and as H of now it has not been located."

2003 (2) ZLR p450

Cheda JA

These appear in the affidavit of Mr E D Mnangagwa, who deposed to the A affidavit on behalf of the first respondent when he was Minister of Justice.

The extent to which exercise of the President's functions are justiciable is provided for in s 31K of the Constitution:

"**31K Extent to which exercise of President's functions justiciable**

(1) Where the President is required or permitted by this Constitution or B any other law to act on his own deliberate judgment, a court shall not, in any case, inquire into any of the following questions or matters -

(a) whether any advice or recommendation was tendered to the President or acted on by him; or

(b) whether any consultation took place in connection with the performance of the act; or C

(c) the nature of any advice or recommendation tendered to the President; or

(d) the manner in which the President has exercised his discretion."

In my view, publication of the Reports would amount to disclosure of the above issues which in turn would be an infringement of these provisions. D

There are prerogatives exercisable by the President which are conferred on the President by the Constitution and which the courts, all things being equal, cannot enquire into because the President, acting on the advice of Government, is the best judge on matters of policy covered by the prerogatives. (See *Patriotic Front - Zimbabwe African People's Union v Minister of Justice,* E *Legal and Parliamentary Affairs (2)* 1985 (1) ZLR 305 (S) at 315).

The applicants have neither shown nor alleged that there is any prejudice to any person resulting from the failure to make the reports public, except that they are for the information of the public.

As long as the first respondent declines to publish the reports on the basis of the interest of the State and safety of other persons, he cannot be compelled F to publish the reports.

The applicants submitted that after twenty years there is no longer any good reason to keep the Reports confidential. The decision to release the reports on the basis of the period that has passed is a policy decision that can only be made by politicians or Parliament. It is not a legal decision to be made by the G courts.

The derogations in the Constitution can be applied to the reports by the President when he deems it necessary and he is therefore entitled to use his discretion as long as the need to do so is governed by the provisions in the Constitution. H

Cheda JA

A The applicants have not given any reason for wanting the reports to be published, other than that they are of public interest that they be published. On the other hand, the first respondent argues that they were solely for the use of Government and were never intended for the public. It is clear that in so saying the first respondent is relying on the provisions of s 20(2) and the derogations therein, which provides:

> B "(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision —
>
> (a) in the interests of defence, public safety, public order ...
>
> (b) for the purpose of— C
>
> (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
>
> (ii) preventing disclosure of information received in confidence."

The first respondent also points out that the Dumbutshena Report cannot be located.

D I am of the view that no good cause has been shown for the above report to be published and that, in any case, it cannot be published when it cannot be found.

Accordingly, the application cannot succeed.

The applicants asked for costs in their draft order if the application was E opposed. At the hearing no submissions were made by either side on the question of costs. Since this is a matter of national interest, I do not intend to award costs to either party.

I therefore make the following order —

1. The application is dismissed. F
2. There will be no order as to costs.

Chidyausiku CJ, Ziyambi JA, Malaba JA & Gwaunza JA concurred.

Kantor & Immerman, applicants' legal practitioners

G *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 2/WOMEN AND LAW IN SOUTHERN AFRICA & ORS v MANDAZA & ORS 2003 (2) ZLR 452 (H)

WOMEN AND LAW IN SOUTHERN AFRICA & ORS v MANDAZA & ORS 2003 (2) ZLR 452 (H)

Citation 2003 (2) ZLR 452 (H)

Case No Judgment No. HH-202-03

Court	High Court, Harare
Judge	Chinhengo J
Heard	28 August 2003
Judgment	26 November 2003
Counsel	*E T Matinenga,* for the applicants *R M Fitches,* for the first and second respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure — *parties — locus standi — trustee of a trust — action being brought in name of trust*

Practice and procedure — *parties — trust — how trust may appear as a party*

Headnote

A dispute arose within the applicant trust as to who should constitute the D board of the trust. It was alleged that the terms of office of the first respondent and the other trustees had expired. The second and third respondents were appointed to the board at an extraordinary general meeting, the legitimacy of which was disputed. The second and third applicants had obtained a provisional order in terms of which the trust's bank accounts were frozen until new signatories to the accounts were E appointed. The first and second respondents were ordered to cease withdrawing any money from the accounts held by the trust. This resulted in bills going unpaid and other similar problems. A second order was obtained by the applicants which effectively allowed the first respondent to continue as a signatory. The current hearing was concerned with the F confirmation or discharge of the provisional order. Other questions that fell to be decided included (1) whether proceedings could be instituted in the name of the trust; and (2) the *locus standi* of the second and third applicants.

Held, that both the provisional order and the final order sought a final interdict, a practice which defeats the whole object of interim protection. G The requirements for a final interdict were not met in this case. It was necessary for the applicants to establish a clear right to an interdict. Until the uncertainty about which board was the legitimate one was resolved, the applicants could not show they had a clear right.

Held, further, that although it is correct to say that a trust is not a legal person, in terms of rr 7 and 8 of the High Court Rules 1971 associates (which H

A includes trustees of a trust) may sue and be sued in the name of their association.

Held, further, that as the second applicant was a trustee, she would, in an appropriate case, have *locus standi even* if she were not the chairperson.

Cases referred to

B *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)

de Waal & Ors v van der Horst & Ors 1918 TPD 227

Kuvarega v Registrar-General & Ors 1998 (1) ZLR 188 (H)

C *Mahommedan Mosque, Estcourt, Trustee v Mahommed Sayed* 1937 NPD 241

Mtshali v Mtambo & Anor 1962 (3) SA 469 (GW)

Registrar-General v Combined Harare Residents Assn & A nor 2002 (1) ZLR 83 (S)

Smyth v Ushewokunze & Anor 1997 (2) ZLR 544 (S)

D *van Rensburg & Ors v Afrikaanse Taal- en Kultuurvereniging, Estcourt, Trustee (SAS & H)* 1941 CPD 184

Westerhof v Zimbank & Anor HH-105-03

Women and Law in Southern Africa & Ors v Mandaza & Ors 2003 (1) ZLR 500 (H)

Women and Law in Southern Africa & Ors v Mandaza & Ors HH-98-03

Legislation considered E

High Court Rules 1971 (RGN 1047 of 1971), rr 7 & 8

Case information

E T Matinenga, for the applicants

F *R M Fitches,* for the first and second respondents

Judgment

Chinhengo J: On 30 April 2003, the applicants obtained a provisional order in terms of which bank accounts held by the first applicant ("WLSA") were frozen until new signatories to those accounts were appointed — see G *Women & Law in Southern Africa Research and Education Trust & Ors v Mandaza & Ors 2003* (1) 500 (H). The real parties in this matter are the second and third applicants on the one hand and the first and second respondents on the other. WLSA is but a victim of the antagonistic positions adopted by the two parties. The third to eighth respondents have either not filed any papers in opposition or they have stated that they will abide by whatever decision is H made by this court.

2003 (2) ZLR p454

Chinhengo J

The specific interim relief granted in HH-71-03 was that: A

"1 First and second respondents, be and are hereby ordered to cease forthwith the withdrawal of any money from all Women & Law in Southern Africa Research and Education Trust's accounts in Zimbabwe and abroad;

2 Third, fourth, fifth, sixth, seventh and eighth respondents be and are B hereby ordered to immediately suspend any banking transactions and block any withdrawals of money by first and second respondents for and on behalf of first applicant on the following accounts - (first applicant's 19 banking accounts with the respondent banks are then listed).

3 First and second respondents be and are hereby interdicted from C withdrawing any money transferred out of the Century Bank FCA banking account to the Zimbabwe Banking Corporation Account No 4191317679100 and are hereby interdicted from further transferring any money from the said Zimbank Account to any other account.

4 That costs of this provisional order are reserved".

The bank accounts having thus been frozen, certain difficulties which were or D should have been foreseen arose. Staff salaries and telephone bills could not be paid. The telephone and facsimile lines were disconnected. WLSA's accounts for water, rates and electricity could not be paid. The applicants were constrained to approach this court again for an order which would enable WLSA to meet its obligations.

The provisional order in HH-71-03 was obtained pursuant to an urgent E application. The urgency which prompted this court to grant the provisional order was that the first and second respondents ("Mandaza" and "Harrison" respectively) had withdrawn over US$31 000 out of WLSA's bank accounts between 14 February and 30 March 2003 and that Mandaza had obtained signing powers on a WLSA foreign currency account holding US$60 000 at F Century Bank. The applicants expressed the

apprehension that Mandaza would spend the money on work unrelated to WLSA or transfer the money to another bank. Essentially the applicants were alleging that Mandaza was misusing WLSA funds and should therefore be barred from withdrawing any money from the organization's bank accounts or otherwise deal with those accounts. G

When the difficulties I have mentioned above arose and the applicants made another application to this court they succeeded in obtaining an order that:

"1. The second, third, fourth, fifth and sixth respondents shall accept as signatories to the WLSA account at their respective institutions the third applicant and either the 1st respondent or a person appointed by H

Chinhengo J

A the 1st respondent in writing with any cheque or transaction to be signed or authorised by both signatories.

2. The costs of this application shall be costs in the cause".

See *WLSA & Ors v Mandaza & Ors* HH-98-03.

It is, I think, quite apparent that the order in HH-98-03 somewhat detracted B from the order in HH-71-03 in that whereas Mandaza and Harrison had been barred from withdrawing money from the bank or transacting any monetary business of WLSA by the order in HH-71-03, they were now, *per* necessity, being required to do exactly that which they had been barred from doing. The provisional order was, no doubt, significantly neutralized in its effect by the order in HH-98-03. The only advantage, if such it was, derived by the C applicants from the order in HH-98-03 was that the third applicant ("Moyo") was now to be a signatory to the bank accounts together with Mandaza or Mandaza's nominee. In my view, Mandaza's position was not drastically altered, if at all, in respect of the authority or power to transact the monetary affairs of WLSA, except to the extent that Moyo was now to be involved.

The applicants had not, in lodging the urgent application in HH-71-03, D thought through the problems which that application would create for WLSA. If they had thought through those problems and had decided nonetheless to seek the order which they then obtained, it would beg the question whether the real dispute between the parties was over the withdrawal and use of WILSA funds by Mandaza or whether in fact Mandaza was misusing the funds of the E organization. I will show that the applicants avoided tackling the real issue in dispute between them and Mandaza and that, because they did not tackle the real point of the dispute, that issue remains alive and will dog WLSA for sometime until it is tackled head-on and hopefully resolved.

I am concerned only with the confirmation or discharge of the provisional order granted in HH-71-03. The papers placed before me do not disclose how, F if at all, the order in HH-98-03 has been implemented. If it has been implemented in its terms then one of either Mandaza or Harrison or Mandaza's other nominee is still a signatory to WLSA's bank accounts.

The final relief sought by the applicants which I am required to confirm is similar in its material respects to the interim relief already granted. It is that: G

"1. The first and second respondents be and are hereby ordered to cease forthwith the withdrawal of any money from all Women & law in Southern Africa Research and Education Trust's accounts in Zimbabwe;

2. The third, fourth, fifth, sixth, seventh and eighth respondents be and are hereby ordered to suspend all banking transactions and revoke the H first and second respondents' signing powers against any withdrawals

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Chinhengo J

of money by first and second respondents in respect of the following A accounts (which are listed - all 19 of them);

3. The first applicant represented by the second and third applicants be and are hereby directed to furnish all the respondents within fourteen days of this Order with new signatories for all the 1st applicant's banking accounts and all respondents are hereby ordered to accept the new signatories as directed by the second and third applicants; B

4. The first and second respondents be and are hereby interdicted from visiting the offices of first applicant or transacting any business purportedly on behalf of the 1st applicant.
5. The costs of this application be borne and paid by first and second respondents jointly and severally, the one paying the other to be absolved". C

It will be necessary for me to analyze and determine the nature of the final relief sought by the applicants. Before doing so however, I have, I think, to show what the real dispute between the parties is.

[*The learned judge considered the facts on this issue and conclude:*]

The real dispute between the parties, therefore, is whether the Mandaza or the D Shongwe Board of Trustees is the legitimate board of trustees of WLSA.

To come back to the final relief sought I must observe that the holding of the purse-strings of WLSA is considered by both parties, in particular by the applicants, to be the linchpin of the legitimacy of their respective boards of trustees. The applicants must have calculated that if they obtained an order E barring Mandaza and Harrison from transacting the monetary affairs of WLSA they would have obtained the means by which they would force Mandaza and her Board of Trustees to capitulate. With access to WLSA's funds, following the confirmation of the provisional order Shongwe and her Board would have neutralised Mandaza and her Board. Thus the provisional order was not intended to deal directly with the real dispute between the parties but rather F to remove the carpet, so to speak, from under the feet of Mandaza and her board of trustees and render them ineffective. Paragraphs 3 and 4 of the final order sought would have the effect of constituting Shongwe and her board of trustees into the *de facto,* if not the *de jure,* board of trustees of WLSA because those paragraphs seek to authorise Shongwe and Moyo to furnish the G respondent banks with the names of the new signatories for all the bank accounts. Paragraph 2 of the final draft order requires the banks to revoke Mandaza and Harrison's signing powers. In my view, this cannot be a legitimate function of the banks. Rather the revocation of signing powers is properly the function of the legitimate Board of Trustees of WLSA. The applicants had written to the banks purporting to revoke the signing powers H

Chinhengo J

A of Mandaza and Harrison. They had not succeeded because the banks refused to acknowledge their request or instruction as legitimate for the reason, it would seem, that they had not been given to understand that Shongwe's Board had replaced that of Mandaza. It must be clear also that, by seeking to remove the carpet from under the feet of Mandaza and her Board in the manner I have mentioned above, the applicants would also have dealt a fatal blow to the B claims by the other trustees on Mandaza's Board that they are still trustees of WLSA. Such an outcome is quite obviously inappropriate. The other five trustees on Mandaza's Board were not parties to the present application. Confirming the order and thereby effectively declaring that the Board on which they claim to validly sit as trustees has ceased to exist would detract most inappropriately from the rules of natural justice. These trustees cannot C be adversely affected in their rights or legitimate expectations without having been afforded the right to be heard. It seems to me, therefore, that if the applicants had intended to seek a solution to the real dispute between the parties, they should have cited all the members of Mandaza's Board and challenged its right to remain in office. They did not do that. Rather they D sought final relief which was materially the same as the interim relief. In so doing the applicants brought themselves within the criticism levelled against such an approach by Chatikobo J in *Kuvarega v Registrar-General & Ors* 1998 (1) ZLR 188 (H) at 193A-B where he said:

> "The practice of seeking interim relief which is exactly the same as the substantive relief sued for, and which has the same effect, defeats the E whole object of interim protection. In effect a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of *a prima facie* case. If the interim relief is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is F undesirable where, as here, the applicant will have no interest in the outcome of the case on the return day".

The same criticism was made by Chidyausiku CJ in *Registrar-General of Elections v Combined Harare Residents Association & Anor* 2002 (1) ZLR 83 (S) at 108. He said:

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

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

Chinhengo J

In the present case, however, the applicants maintained their interest in the A matter right up to the return day, not because they had not achieved their purpose but more because a final order, similar in all material respects to the interim relief already granted, would drive the last nail into Mandaza's Board's coffin. This approach has several drawbacks, some of which I have already mentioned. The applicants' real objective was the removal of Mandaza's B Board so that their new Board could operate smoothly. That being so, the applicants should have sought as interim relief the freezing of the bank accounts and, as final relief, a declaration of legitimacy of their new board of trustees.

The final relief sought by the applicants is, to my mind, a final interdict against Mandaza and Harrison from carrying on the financial affairs of WLSA, and, C in particular from operating WLSA's banking accounts and from visiting WLSA offices. Viewed from this perspective, the interdict has nothing directly to do with whether Mandaza is still a trustee and chairperson of WLSA. That this is so is supported by the applicants' averments regarding the alleged misuse of funds by Mandaza which allegations were not pursued by D them in their heads of argument or in their oral submissions at the hearing. In my view, the interim relief granted in HH-71-03 could not have been granted if the court had not been persuaded that Mandaza was abusing WLSA funds. On the other hand, the order in HH-98-03 could not have been issued if it had been seriously contended that Mandaza was abusing WLSA funds. This means that the allegations of misuse of funds were made merely to cloud the E issues and avoid dealing with the real dispute between the parties and to obtain the provisional order much more easily.

The final relief sought in this matter is, as I have said, in the nature of an interdict. I must therefore examine the requirements for the granting of a final interdict and satisfy myself that those requirements have been met by the applicants. Mr Fitches submitted that both the provisional order and the final F order seek a final interdict. I agree that this is the case.

[*His lordship proceeded to do so and concluded:*]

Until a decision is procedurally made as to which of the competing Boards is the legitimate Board of WLSA I cannot see how the applicants can show that they have a clear right entitling them to an interdict. I cannot see how they can G establish the other requirements for the granting of a final interdict. The provisional order must, on this basis alone, be discharged.

The provisional order was granted on an urgent basis largely, in my view, because the applicants appeared to have established a case that Mandaza was abusing WLSA funds. That allegation was denied by Mandaza and refuted H soundly and convincingly in her opposing affidavits. The applicants did not

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Chinhengo J

A pursue it in their heads of argument or their legal practitioners in oral argument. The order issued in HH-98-03 would not have been issued had the court been satisfied that Mandaza was abusing WLSA funds. The bedrock of the application for the provisional order having thus been destroyed, there cannot, in my opinion, be any other sufficient ground upon which the provisional order can be confirmed.

B [*His lordship then considered the provisions of the Trust Deed and concluded:*]

I am therefore satisfied that as things stand the WLSA Board of Trustees must have three Zimbabwean trustees and a chairperson who is resident in Zimbabwe. The Shongwe Board is not so composed. She herself is not a Zimbabwean resident but a resident of Swaziland. The Shongwe Board is on this basis C irregularly composed. Having regard to the Manual it becomes clear that the Shongwe Board cannot be the legitimate Board of Trustees of WLSA. It would therefore be wrong to confirm the provisional order and empower an otherwise irregularly appointed Board to take charge. This is a matter which can only be resolved, not when Mandaza is barred from transacting WLSA business but when a legitimate Board of Trustees has been appointed. For this reason also D I cannot confirm the provisional order.

There are other issues which were canvassed by the parties. I do not think that they would add anything more to justify my conclusion. To do justice to the parties and their legal practitioners who filed copious affidavits and heads of argument I will address them.

E Mr *Matinenga* was correct in his submission that Mandaza's objection to the institution of the proceedings in the name of WLSA was not well founded. It is true, as the learned judge stated in HH-71-03, that a trust is not a corporate body and therefore it cannot appear as a party. He correctly referred, as supportive of this proposition, to the decisions in *Comr for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A) and *Crundall Bros (Pvt) Ltd v* F *Lazarus NO & Anor* 1990 (1) ZLR 290 (H), also reported as an appeal decision in 1991 (2) ZLR 125 (S). But the High Court Rules 1971, as amended by the High Court of Zimbabwe (Amendment) Rules 1997 (No 33), (SI 192 of 1997), introduced a procedure where associates may, in terms of r 8, sue or be sued in the name of their association. In terms of r 7 an association includes G a trust and an associate, a trustee. The Rules therefore permit a trust to be cited by name as a party to any proceedings. In this regard, and as submitted by Mr *Matinenga,* the learned judge should not, in my respectful view, have given credit to Mandaza's objection.

The question of Shongwe and Moyo's *locus standi* was also raised. Shongwe at least is a trustee of WLSA by Mandaza's own admission. She could in an H appropriate case have standing even if she were not the chairperson but just

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a trustee: see *Trustee Mahommedan Mosque, Estcourt v Mahommed Sayed* A 1937 NPD 241; *Mtshali v Mtambo & Anor* 1962 (3) SA 469 (GW); *de Waal & Ors v van de Horst & Ors* 1918 TPD 227; *Van Rensburg & Ors v Afrikaanse Taal - en Kultuurvereniging (SAS & H)* 1941 CPD 184 and *Westerhof v Zimbank HH-105-03.*

Mr *Matinenga* submitted that the dispute in this case, by which I think he B meant the dispute as to which is the legitimate Board of Trustees, can be resolved on the basis of interpreting clause 5 of the Trust Deed. That clause provides that:

> "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; C
>
> 5.2 Retiring trustees shall be eligible for nomination to no more than one additional term of office".

Mr *Matinenga* argued that because Mandaza and her Board had been in office for more than four research phases, taking into account the period before and after the amendment of the Trust Deed in 1999, the intention of the amendment D in 1999 was that they should forthwith cease to be trustees. Whilst I accept that it is desirable to give a generous and purposive interpretation with an eye to the spirit and letter of a provision (*Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S) at 553A-C) the particular facts of this case are such as require this court to reach the conclusion I have reached. I have shown that the national co- ordinators and others who were not happy with the continued tenure of E Mandaza and the other trustees, acknowledged by letter dated 31 January 2003, that Mandaza's Board was in office as at that date with the general membership's consent until at least 5 February 2003 when the authors of the letter demanded that they step down. Having extended the tenure of Mandaza's Board from April 2001, it seems to me that all that remained was for the new trustees appointed in terms of clause 4.1 of the Trust Deed to be notified to the F old Board so that a smooth hand-over procedure could be carried out. Instead of doing this, the applicants sought to hold an irregular General Assembly meeting and instal a new Board of Trustees without following the procedure previously agreed in regard to a smooth hand-over. In any case, a finding that Mandaza and her board should step down or should have stepped down G does not mean that Shongwe's Board was regularly appointed or that it is the legitimate Board of WLSA. Therefore the applicants would still not be entitled to the confirmation of the provisional order even if it were to be found that Mandaza is no longer a trustee and chairperson of WLSA.

WLSA is an important regional organisation. It has been the beneficiary of generous international donor support. It is extremely important that its affairs H

A be handled in a transparent and professional manner. Trustees are personally liable for the conduct of trust affairs and as such any change of trustees must occur against the background of a full account of their performance by the outgoing trustees. It is my hope that WLSA will gather its thoughts and pickup the pieces and that its members will co-operate with each other with a view to progressing the objectives of this worthy organisation. They need a new start B and this judgment may provide an opportunity for such a new beginning. In order to restore harmony in WLSA and in recognition of the fact that each of the parties has the interests of WLSA at heart, I will not order any of them to pay the other's costs. If funds are available the costs in this matter and those reserved in HH-71-03 and HH-98-03 may be paid by WLSA.

C The provisional order is accordingly discharged. There will be no order as to cost in respect of this application or HH-71-03 and HH-98-03. If WLSA has the funds the costs may be paid by it.

Coghlan Welsh & Guest, legal practitioners for applicants

D *Honey & Blanckenberg,* legal practitioners for first and second defendants

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/MUCHENJE v BATA SHOE COMPANY 2003 (2) ZLR 462 (S)

MUCHENJE v BATA SHOE COMPANY 2003 (2) ZLR 462 (S)

Citation	2003 (2) ZLR 462 (S)
Case No	Judgment No. S-39-03
Court	Supreme Court, Harare
Judge	Cheda JA
Heard	18 November 2003
Judgment	26 November 2003
Counsel	The applicant in person *I Chagonda,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Appeal — *leave to appeal against decision of Labour Tribunal — on question of law only* C

Employment — *dismissal — employer's right to dismiss not removed by right to recover shortfall from employee*

Headnote

The applicant was dismissed from employment after a hearing by a labour relations officer found against him. His appeal to the Labour Relations D Tribunal also failed. He then applied for late

condonation of an appeal to the Supreme Court, as he wished to challenge the findings of fact by the Tribunal

Held, that an appeal from the Labour Relations Tribunal to the Supreme Court can be made only on a question of law, not on a question of fact

Held, further, that where an employee is dismissed for a shortfall, and the E shortfall is recovered, the employer's general right to dismiss remains.

Legislation considered

Labour Relations Act [*Chapter 28:01*], s 92(2)

Case information

The applicant in person F

I Chagonda, for the respondent

Judgment

The applicant was dismissed from employment by Bata Shoe Company. His matter went through the labour relations officers, who determined the case in favour of the respondent. G

The applicant then appealed to the Labour Relations Tribunal ("the Tribunal"), but was not successful.

He now wishes to appeal to this court but, because of the delay in noting the appeal, he is now applying for condonation of the late noting of the appeal. The application is opposed by the respondent. H

Cheda JA

A According to the applicant, he received a copy of the order following the hearing of the Tribunal on 25 June 2003. The reasons were not there. He asked for them and was later informed that they had been sent to the wrong address, despite the fact that he had informed the registrar of the Tribunal what his new address was.

The applicant was given a copy of the judgment on 8 September 2003. He B noted the appeal on 23 September 2003.

The applicant says he did not note an appeal after he received the order as there were no reasons. The respondent pointed out, and this is confirmed by the order of 25 June 2003, that the main reason was given in the order. The order reads as follows:

C "It is ordered:

1. That failure by the appellant to explain or justify absence of the calls register or use of the calculator, does not absolve him from his responsibility.
2. That in view of the above, I find no merit in the grounds of appeal. Accordingly the appeal be and is hereby dismissed."

D The applicant accepted that this reason was given but says it was "patchy" and he wanted full and detailed reasons.

In his grounds of appeal, the applicant does not deal with the point raised above. Instead, he raises issues which he accepts were raised before the Tribunal but disagrees with the Tribunal's findings on the facts. He could not E give any proper reasons for the delay other than that he wanted detailed reasons.

It is clear that the applicant could have filed his appeal once he received the order, which told him the reason for the dismissal of his appeal. Even the detailed judgment gives the same reason.

F Even if condonation of the late noting of the appeal were to be granted on the basis that the applicant needed more detailed reasons, the application cannot succeed because of three other reasons that stand in his way.

Firstly, his grounds of appeal simply repeat what he admits to having told the Tribunal and he then says he does not agree with the Tribunal's conclusion. For example, he says he wants to show this

court that the allegations against G him were manufactured by Bata. His contract had been renewed and he wants to tell this court how these things were done. He wants this court to review his case. He also accuses the Tribunal of echoing the sentiments of a labour relations officer.

The applicant's grounds of appeal do not attack the judgment he is appealing H against.

2003 (2) ZLR p464

Cheda JA

Secondly, the Tribunal made findings of fact regarding his case. No point of A law arises at all.

Section 92(2) of the Labour Relations Act [*Chapter 28:01*] provides as follows:

> "(2) An appeal on a question of law from any decision of the Tribunal shall lie to the Supreme Court." B

There is, therefore, no room for appealing on a question of fact, except where it can be shown that there was a misdirection, or the decision arrived at was so grossly unreasonable as to justify interference.

Thirdly, on the merits, it is not disputed, even by the applicant himself, that there was a shortfall for which he was dismissed. He suggested that his C contract of employment provided for recovery of a shortfall by his employer only. I cannot read this to mean that where a shortfall is recovered, the employer's general right to dismiss is removed by the right to recover the shortfall.

Accordingly, there is no merit in the application and it is dismissed with costs. D

Atherstone & Cook, respondent's legal practitioners

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Source:
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TAGARIRA BROS (PVT) LTD v LUNGA NO & ANOR 2003 (2) ZLR 465 (H)

2003 (2) ZLR p465

Citation	2003 (2) ZLR 465 (H)
Case No	Judgment No. HB-126-03
Court	High Court, Bulawayo
Judge	Ndou J
Heard	10 September 2003
Judgment	27 November 2003
Counsel	*V Majoko,* for the applicant *J Tshuma,* for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Insolvency — *liquidation — meeting — validity — provisional liquidator* C *having publicised meeting before confirmation*

Headnote

The applicant was the successful bidder for the shares of the second respondent's company at a liquidation meeting convened by the Assistant Master in compliance with a court order. He then made an application for an order that the provisional liquidator (first respondent) or the D second respondent transfer the shares, as this had not been done. The second respondent argued that the sale was not valid, as the provisional liquidator had not been confirmed when she publicised the meeting at which the bid was accepted by the creditors, thus the meeting was a nullity.

E *Held,* that the meeting was properly convened by the Assistant Master. The fact that the appointment of the provisional liquidator had not yet been confirmed when she caused the meeting to be publicised resulted in no prejudice to the second respondent and should not render the meeting a nullity. The sale, accepted by the creditors, was therefore valid, and the transfer was ordered.

Cases cited F

Esharowitz v Perold 1921 CPD 501

Ex p *Serfontein en 'n ander:* in re *insolvente Bedoel Schoeman* 1978 (1) SA 246 (O)

Legislation considered G

Companies Act [*Chapter24:03*], s 218(2)(b) & (4)(b), 221(2)(h) and 274(1)

Case information

V Majoko, for the applicant

H *J Tshuma,* for the second respondent

Ndou J

Judgment

Ndou J: According to the terms of the final order sought in this matter, A the relief sought by the applicant is that:

> "1. It be and is hereby declared that the applicant is the legitimate purchaser of Sukasihambe Special Express (Pvt) Ltd (in provisional liquidation) as a going concern together with its movable and immovable assets for the total sum of seven million and two hundred thousand dollars ($7 200 000). B
>
> 2. The first respondent be and is hereby ordered to transfer ownership of all assets belonging to Sukasihambe Special Express (Pvt) Ltd (in provisional liquidation) to applicant within seven days of confirmation of this order.
>
> 3. The second respondent be and is hereby ordered to give the written C consent for the transfer of ownership of the aforementioned assets and to that end is ordered to sign all necessary documents to give effect to the transfer of ownership as aforesaid.
>
> 4. In the event of one or other or both the first and second respondents refusing or failing to sign all necessary documents for the transfer of the assets of Sukasihambe Special Express (Pvt) Ltd (in provisional D liquidation) then the Deputy Sheriff of Bulawayo be and is hereby authorised and ordered to sign the documents aforesaid in the stead of one or the other or both first and third respondents.
>
> 5. The second respondent shall pay the costs of the application."

The salient facts of this matter are that Sukasihambe Special Express Service (Pvt) Ltd ("Sukasihambe") was placed under provisional liquidation by order E of this court dated 6 April 2001, pursuant to an application for voluntary liquidation by Sukasihambe, represented by the first respondent who was then the judicial manager.

The first respondent was "appointed" provisional liquidator of Sukasihambe and in that capacity purportedly exercised powers set out in s 221 of the F Companies Act. It should be pointed out that the second respondent disputes that the first respondent was appointed provisional liquidator. I will come back to this issue. On 26 September 2002, Cheda J ordered:

"1. This matter be and hereby is postponed to 7 November 2002 and the rule *nisi* is extended to that day.

2. The Assistant Master be and hereby is directed to convene a meeting G of the creditors and shareholders and the provisional liquidator of the applicant before 24 October 2002 for the express purpose of trying to settle this matter, but it shall also be for the purpose of –

(a) allowing all creditors of the applicant to prove their claims; H

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Ndou J

(b) Allowing A I Nyathi to make proposals to the creditors to discharge the debts owed to them by the applicant; and

(c) Allowing the provisional liquidator to present proposals by any other buyers interested in purchasing the applicant's shares.

3. The provisional liquidator shall cause a notice of the aforesaid meeting to be published in a Friday newspaper at least 7 days before B the proposed meeting."

At all these stages the first respondent had assumed the role of a provisional liquidator. She was at all material times represented by a legal practitioner. At a meeting attended by, *inter alia,* the second respondent, two bids were submitted. One was for $5 million by Lusinga and the other for $7.2 million C by the applicant. The latter bid was accepted by the creditors and the first respondent, acting in her capacity as Sukasihambe's provisional liquidator. It is clear from the papers that although the second respondent initially opposed the application for provisional liquidation he subsequently dealt with the first respondent in her capacity of provisional liquidator. In all his dealings with the first respondent, the second respondent dealt with her as provisional D liquidator.

It later transpired that up to 10 October 2002, the first respondent had not been appointed provisional liquidator of Sukasihambe. This is evident from correspondence and the letters addressed to her and the second respondent by the Assistant Master of this court. One such letter states in part:

E "I refer to our discussion during your visit to this office on 5 September 2002 and advise that no provisional liquidator has been appointed as yet. Although the provisional order issued on 29 March 2001 directs that Barbra Lunga should be appointed as provisional liquidator, such appointment has not been effected as she has not lodged a bond of security in compliance with s 274 of the Companies Act [*Chapter 24:03*].

F By copy of this letter I am reminding Barbra Lunga to urgently lodge the aforesaid bond of security ..."

(By second respondent's legal practitioner to first respondent's legal practitioner dated 11 September 2002)

"The writer attended at the Assistant Master's office. In terms of the records at the Assistant Master's office Mrs Lunga was never confirmed G as the provisional liquidator as she failed to provide the necessary security. As such, she has never had authority to deal with the company in liquidation and to dispose of its assets. She cannot therefore even make application for the confirmation of the provisional order ..."

(By the Assistant Master to the second respondent's legal practitioner and copied to first respondent's legal practitioners and directly to the first H respondent on 10 October 2002)

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Ndou J

"Further to my letter dated 5 September 2002 I advise that Mrs Lunga has A not lodged any bond of security as she has ignored my copy letter sent to her. In view of this development I advise that the proposed meeting for 11 October 2002 cannot proceed as there is no provisional liquidator in place.

As evident from paragraphs 2c and 3 of the order dated 26 September 2002, there is need for a properly appointed provisional liquidator to be B in office before the required meeting can take place. Therefore the meeting cannot proceed as any purported actions from anyone who is not a liquidator will obviously be null and void. For the sake of progress in this matter I suggest that you have the provisional order amended so that we nominate somebody who is willing to timeously lodge the relevant bond of security." C

(By the Assistant Master to the first respondent and copied to the second respondent's legal practitioners dated 14 February 2003)

> "I refer to my lengthy conversation with Mrs B Lunga regarding the Creditors Meeting that had been sanctioned by the court and held before me on 11 October 2002. I wish to point out that at the time of the meeting D Mrs Lunga had furnished a security bond to the Assistant Master and her certificate of appointment as provisional liquidator had been issued.
>
> Therefore all the proceedings at that meeting were proper and binding to all parties. There was nothing amiss."

Even after writing the letter dated 11 September 2002, the second respondent continued to transact Sukasihambe's winding up dealings through the first E respondent. His protestation did not translate to a boycott of the activities of the first respondent. The second respondent, however, raised two issues, namely, the *locus standi* of the first respondent and the validity of the alleged sale. I propose to deal with these issues in turn.

Locus standi of first respondent F

It is not in dispute that the first respondent was confirmed as a provisional liquidator on 11 October 2002, just before the commencement of the meeting. She only furnished the security bond required by the Assistant Master on that day.

It is trite that a provisional liquidator is appointed as a financial overseer, controller and liquidator. The power of appointment vests with the Master and G the court has no inherent power to appoint a provisional liquidator. The Master has an unfettered and sole administrative discretion as to the appointment of a provisional liquidator and it is within his or her statutory powers to give instructions on such appointments. The decision on the sale of the disputed property took place after the first respondent was properly appointed by the H Assistant Master on 11 October. The way I understand the applicant, the first

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Ndou J

A respondent had already exercised some powers of the provisional liquidator before such appointment. All this was obviously done with the full knowledge of the Assistant Master as evinced by his correspondence. The applicant also used the first respondent to exercise certain liquidator's duties even before the appointment. The appointment was delayed until 11 October 2002 on account of the first respondent's failure to furnish security. Provision of security is pre- B requisite to such appointment as rightly observed by the learned authors J C Nkala and T J Nyapadi in *Company Law in Zimbabwe* (1995 ed) at p 436:

> "Each liquidator, co-liquidator or provisional liquidator must furnish security to the satisfaction of the Master for the due performance of his duties as such before he shall be capable of exercising his duties. If he fails C to do so within a fixed time he shall be deemed to have resigned from his office."

I do not think that such acts carried out by the first respondent prior to 11 October 2002 are relevant for the present application, because the decision to sell the company assets was taken at a properly constituted meeting of D creditors convened by the Assistant Master after first respondent's appointment as provisional liquidator.

I agree with the second respondent's contention that the first respondent should not have been cited as party and that this court cannot order her to perform the duties of provisional liquidator at this stage. I say so because the provisional order of liquidation was discharged on 7 November 2002. The first E respondent ceased being a provisional liquidator as of 7 November 2002. This application was only launched on 18 December 2002 so there is no merit in para 2 of the order sought. I do not, however, agree with the second respondent that I should dismiss the entire order sought on the basis of this fact alone.

Alleged invalidity of sale

F The second respondent alleges that the sale is a nullity. He relies on sections 218(2)(b) and 274(1) of the Companies Act [*Chapter 24:03*]. These provisions deal with the question of provision of security by the provisional liquidator which I have already dealt with and concluded that at the time of the meeting of 11 October 2002 the first respondent had received her certificate of appointment as provisional liquidator.

G The applicant then argues that the first respondent was not the appointed provisional liquidator where she caused a notice of the meeting of 11 October 2002 to be published. The first respondent acted as provisional liquidator and as such the resultant meeting was a nullity. The first respondent was obviously causing a notice to be published "in a Friday edition of a local newspaper at H least seven days before the proposed meeting" as ordered by Cheda J *supra.*

Ndou J

The meeting was convened by the Assistant Master pursuant to paragraph 2 A of the same order by Cheda J which required it to be convened before 24 October 2002. The order says the meeting shall be convened by the Assistant Master but advertised by the provisional liquidator. There is no problem with the convening of the meeting but the publicising of the meeting was done by the first respondent prior to her appointment as provisional liquidator. In any B event, the provisional liquidator does not seem to have the power to convene creditors meetings. In light of the fact that the meeting itself was properly convened I do not think a defect in publication in a local newspaper (with no stated prejudice to the second respondent) should render the meeting a nullity. Section 218(4)(b) clearly authorises a provisional liquidator to sell assets. According to section 221(2)(h), powers of alienating assets are exercisable C "subject to the leave of the court". The second respondent contends that the first respondent did not have the requisite leave of the court. The order of Cheda J ordered, *inter alia,* for a meeting to be held for the purpose of "allowing the provisional liquidator to present proposals by any other buyers interested in purchasing the applicant's shares". Clearly a sale was contemplated and a sale did take place, duly authorised by the said court order. The D applicant's offer was accepted by all the creditors in writing. A tender process was followed and the applicant was the highest bidder.

I agree with the second respondent's contention that a provisional liquidator requires authority of the court to sell any property belonging to an insolvent estate. But disposal of property of the insolvent estate is an essential part of E the liquidation process and the liquidator, in consultation with the creditors, is rightfully the person who should administer the process: *Ex p Serfontein en 'n ander:* in re *insolvente Bedoel Schoeman* 1978 (1) SA 246 (O). From the provisions of the Act it is clear that a provisional liquidator cannot alienate assets of any kind, movable or immovable on his or her own initiative. The court or Master should grant leave to sell only in exceptional circumstances. F The best interests of the creditors is a factor that should weigh heavily in deciding whether such special circumstances exist or not: *Esharowitz v Perold* 1921 CPD 501 and *The Law of Insolvency* 3 ed by C Smith at p 179. *In casu,* there is authority of the court as shown above. Further, the overriding factor is that the creditors themselves accepted the applicant's offer as it was in their best interests. Exceptional circumstances were present for the alienation G of the assets.

I accordingly find that the application should succeed in part as follows: It is ordered:

1. That it be and is hereby declared that the applicant is the legitimate purchaser of Sukasihambe Special Express (Pvt) Ltd as a going concern H

Ndou J

A together with its movable and immovable assets for the total sum of seven million and two hundred thousand dollars.

2. That the Assistant Master of this court be and is hereby ordered to give the written consent for the transfer of ownership of the aforementioned assets and to that end is ordered to sign all necessary documents to give effect to the transfer of ownership as aforesaid.

B 3. That the second respondent shall pay the costs of this application.

Majoko and Majoko, applicant's legal practitioners

Webb, Law & Barry, second respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2003/Volume 2/BON ESPOIR (PVT) LTD v CHABATA & ORS 2003 (2) ZLR 472 (S)

BON ESPOIR (PVT) LTD v CHABATA & ORS 2003 (2) ZLR 472 (S)

Citation	2003 (2) ZLR 472 (S)
Case No	Harare Judgement No. S-45-03
Court	Supreme Supreme Court
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	27 November 2003
Judgment	12 December 2003
Counsel	*R Y Phillips,* for the appellant No appearance for the first respondent *N Mutsonziwa,* for the second and third respondents
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Land — *acquisition — land subject to Hippo Valley Agreement Act [Chapter 20:08]* C *— such land not subject to acquisition in terms of Land Acquisition Act [Chapter 20:10]*

Land — *acquisition — notice of — requirement to publish preliminary notice in Gazette on same date as publication in newspaper — effect of failure to publish notice in Gazette — acquisition invalid* D

Headnote

The Minister of Agriculture published a notice in a newspaper of his intention to acquire the appellant's farm for resettlement but did not publish a notice in the *Gazette* at the same time. The Minister then purported to acquire the land and allocated it to the first respondent. The appellant sought an eviction order against the first respondent. It was E argued that the acquisition was invalid because no proper notice had been given in terms of s 5(1)(a) of the Land Acquisition Act [*Chapter 20:10*]. In addition, the land was subject to the Hippo Valley Agreement Act [*Chapter 20:08*], and the Land Acquisition Act did not override the specific provisions of the former Act.

Held, that the first notice of acquisition in the newspaper must be published F on the same day as a similar notice is published in the *Gazette.* Compliance with the provisions of the section is peremptory and failure to comply invalidated the purported acquisition. The date of publication of the preliminary notice in the *Gazette* is of crucial importance. In addition, the consequences which stem from the publication of the notice G in the *Gazette* are so serious that compliance with s 5(1)(a) can only be imperative.

Held, further, that there was nothing in the Land Acquisition Act which manifested the legislature's intention to repeal or amend the Hippo Valley Agreement Act. The Land Acquisition Act did not override the Hippo Valley Agreement Act. Any acquisition should have been in terms H of the latter Act, which required compensation to be paid.

Sandura JA

Cases referred to A

R v Gwantshu 1931 EDL 29

Legislation considered

Land Acquisition Act [*Chapter 20:10*], ss 5 & 8

Case information

B *R Y Phillips,* for the appellant

No appearance for the first respondent

N Mutsonziwa, for the second and third respondents

Judgment

Sandura JA: This is an appeal against a judgment of the High Court which C dismissed with costs the appellant's application for an order declaring that the occupation by the first respondent ("Chabata") of the homestead and property known as Hippo Valley Settlement Holding 37 ("the property") is unlawful, and directing the second respondent to evict Chabata and all those occupying the property under him from the said property.

D The factual background is as follows. The property is part of the Hippo Valley Settlement Scheme and was registered in the appellant's name in 1986. It is governed by the Hippo Valley Agreement Act [*Chapter 20:08*].

On 29 June 2001 the third respondent ("the Minister") published in *The Herald* newspaper a preliminary notice in terms of s 5(1)(a) of the Land Acquisition Act [*Chapter 20:10*] indicating the Government's intention to E acquire the property, and others, on a compulsory basis. A similar notice was supposed to have been published in the *Government Gazette Extraordinary* ("the Gazette") of 29 June 2001, but that *Gazette* was not printed until the weekend of Saturday 30 June and Sunday 1 July 2001 and was not made available to the public before Thursday 5 July 2001.

F In the circumstances, on 10 July 2001, the appellant's legal practitioner wrote to the Minister as follows:

> "The Herald of 29 June 2001 contained some twelve pages of lists of properties in respect of which preliminary notice was being given in terms of s 5 of the Land Acquisition Act of Government's intention to acquire these properties on a compulsory basis.
>
> G The Act requires such notices to appear on the same day as a similar notice in the *Gazette* and to be followed a week later with a second newspaper notice. It is clear from the wording of the Act that the *Gazette* notice is the principal triggering factor and that the *Gazette* notice is required to give thirty days for objections to be lodged.
>
> H We give formal notice that the *Extraordinary Gazette* which was meant

> to be published on 29 June 2001 was not published on that date and that A the lists appearing as Batches A, B and C in The Herald on 29 June must therefore be regarded as invalid.
>
> The *Extraordinary Gazette* of 29 June 2001 was not made available to the public before Thursday 5 July 2001...".

The letter was copied to the Director of the Civil Division of the Attorney B - General's Office ("the Director"), and the Controller of Printing and Stationery. There was no response to it from the Minister, the Director and the Controller of Printing and Stationery.

Subsequently, the Minister, acting in terms of s 8(1) of the Land Acquisition Act, purported to acquire the property on behalf of the President, and thereafter allocated it to Chabata in terms of the Agricultural Land Settlement C *Act* [*Chapter 20:01*].

Aggrieved by the compulsory acquisition of its property, the appellant company filed an urgent chamber application in the High Court seeking an order evicting Chabata from the property. The

application was dismissed with costs. Dissatisfied with that result, the appellant appealed to this Court. D

Mr *Phillips,* who appeared for the appellant, advanced two main arguments. The first was that the Minister's failure to comply with s 5(1)(a) of the Land Acquisition Act was fatal to all subsequent proceedings including the acquisition of the property, and the second was that the general provisions of the Land Acquisition Act do not override the special provisions of the Hippo Valley Agreement Act with which the Minister should have complied. E

Section 5(1)(a)of the Land Acquisition Act, in relevant part, reads as follows:

"(1) Where an acquiring authority intends to acquire any land otherwise than by agreement, he shall —

(a) publish once in the *Gazette* and once a week for two consecutive weeks, commencing with the day on which the notice in the *Gazette* is published, in a newspaper circulating in the area in which the land to be acquired is situated and in such other manner as the acquiring authority thinks will best bring the notice to the attention of the owner, a preliminary notice —

(i) describing the nature and extent of the land which he intends to acquire ...; and

(ii) setting out the purposes for which the land is to be acquired; and

(iii) calling upon the owner or occupier or any other person having an interest or right in the land who —

A. wishes to contest the acquisition of the land, to lodge a written objection with the acquiring authority within

---

A thirty days from the date of publication of the notice in the *Gazette;* or

B. ...".

It is clear from the above provisions that the first notice in the newspaper must be published on the same day as a similar notice is published in the *Gazette.* Quite clearly, that is not what happened in this case. The notice was published B in *The Herald on* 29 June 2001, but the *Gazette* in which the notice appeared and which was meant to be published on 29 June 2001 was not published on that date. Instead, it was published on 5 July 2001. The error and consequent invalidity of the notice were brought to the attention of the Minister and the Director but, surprisingly, no corrective action was taken.

C In view of the fact that s 5(1)(a) was not complied with, Mr *Mutsonziwa,* who appeared for the second and third respondents, conceded that the property was not lawfully acquired by the Minister. That concession was properly made. It is clear from the wording of s 5(1)(a) that compliance with the provisions of the section is peremptory and that that was the intention of the legislature.

In addition, a number of serious consequences stem from the publication of D the preliminary notice in the *Gazette.* Firstly, the publication of the preliminary notice in the newspaper commences on the day on which the notice is published in the *Gazette.*

Secondly, in terms of s 5(1)(a)(iii)(A), all interested parties who wish to contest the compulsory acquisition of the property in question must lodge E written objections with the acquiring authority within thirty days from the date of publication of the notice in the *Gazette.*

Thirdly, in terms of s 5(2), where the acquiring authority has published a preliminary notice in the *Gazette* in respect of any land no subdivision, permanent improvements or disposal of the land may be effected, while the F notice remains in force, without the permission in writing of the acquiring authority.

Fourthly, in terms of s 5(5), after the lodging of a copy of the preliminary notice with the Registrar of Deeds, the Registrar is interdicted from registering any transfer of the property described in the notice to any person other than the acquiring authority unless, *inter alia,* he does so in pursuance of a valid G contract of sale entered into prior to the date on which the preliminary notice was published in the *Gazette.*

Fifthly, in terms of s 5(8), any person who, after a preliminary notice has been published in the *Gazette* and while it is in force, demolishes, damages, alters or in any other manner impairs the land described in the notice without the H permission in writing of the acquiring authority, is guilty of an offence and is liable to a heavy fine.

Sandura JA

Finally, in terms of s 8(1), the acquiring authority may, not less than thirty A days after the date of publication of the preliminary notice in the *Gazette,* acquire the land by serving an order to that effect on the owner of the land concerned.

It is clear from the above provisions that the date of publication of the preliminary notice in the *Gazette* is of crucial importance. In addition, the B consequences which stem from the publication of the notice in the *Gazette* are so serious that compliance with s 5(1)(a) can only be imperative. Quite rightly, counsel for the second and third respondents did not argue to the contrary.

In the circumstances, as s 5(1)(a) was not complied with, *cadit quaestio.* That is the end of the matter and the appeal succeeds. C

Nevertheless, I shall consider the second argument advanced by Mr *Phillips.* That argument was that the general provisions of the Land Acquisition Act do not override the Hippo Valley Agreement Act which governs the appellant's property and with which the Minister should have complied before compulsorily acquiring the property. In my view, this is a valid argument.

The Hippo Valley Agreement Act was promulgated in January 1965 and is an D Act which incorporates an agreement between the Government of Zimbabwe and Hippo Valley Estates Ltd. It relates to two specific blocks of land in Ndanga District. On the other hand, the Land Acquisition Act was promulgated in 1992, and applies to the compulsory acquisition of land in general. In addition, no manifest repeal of the earlier Act is to be found in the Land Acquisition Act. E

In the circumstances, the maxim *generalia specialibus non derogant* applies. The maxim means that general provisions do not derogate from special provisions. In other words, general provisions do not override pre-existing particular provisions. The maxim has been discussed in many cases. However, the often cited case is *R v Gwantshu* 1931 EDL 29. At 31 Gutsche J said the F following:

> "The general maxim is *generalia specialibus non derogant.* 'When the Legislature has given attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect G according to its own subject matter and its own terms'*, per* Lord Hobhouse delivering the judgment of the Privy Council in *Barker v Edger* [1898] AC at p 754... Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language." H

Sandura JA

A I am in complete agreement with the learned judge. I find nothing in the Land Acquisition Act which manifests the legislature's intention to repeal or amend the Hippo Valley Agreement Act. The Land Acquisition Act does not, therefore, override the Hippo Valley Agreement Act.

In the circumstances, the Minister should have acquired the property in terms B of clause 22(a) of the Hippo Valley Agreement Act, which reads as follows:

> "The Government shall have the right at any time to resume possession of any land let or sold in accordance with the provisions of this Agreement, whether to the Company or Planters under the Land Settlement Scheme, if such land be required in the opinion of the Government for public use by the Government or for use by a section of the public, ... and if the Government shall decide to exercise its rights, it shall pay such C compensation for the land as may be mutually agreed upon, or failing such mutual agreement, as may be determined by valuation, the Company and the Government each appointing a valuator and the valuators, if they are unable to agree, appointing an umpire whose decision shall be final."

It is pertinent to note that the Land Acquisition Act does not have a similar D provision because under that Act no compensation is payable for land compulsorily acquired.

In the circumstances, the following order is made —

1. The appeal is allowed with costs to be paid by the third respondent.
2. The order of the court *a quo* is set aside and the following is E substituted —

> "(a) The occupation of the homestead and property known as Hippo Valley Settlement Holding 37 by the first respondent is hereby declared unlawful.

(b) The second respondent shall take all reasonable and necessary steps to evict the first respondent and all those holding occupation under F him from the homestead and premises of the applicant on Hippo Valley Settlement Holding 37.

(c) The costs of this application shall be paid by the first respondent."

Cheda JA and Gwaunza JA concurred.

G *Coghlan, Welsh & Guest,* appellant's legal practitioners

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

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MGWACO FARM (PVT) LTD & ANOR v PASI & ORS 2003 (2) ZLR 478 (H)

Citation	2003 (2) ZLR 478 (H)
Case No	Judgment No. HH-188-03
Court	High Court, Harare
Judge	Chinhengo J
Heard	15 September 2003; 19 September 2003; 29 October 2003
Judgment	17 December 2003
Counsel	*E T Matinenga,* for the applicants *C G Dube,* for the first respondent *D D Chirindo,* for the third respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* C *Rights — s 16 — acquisition of rural land for resettlement — requirement to give notice to person having an "interest" in the land — only a real interest is protected — lessee in terms of unregistered lease — not a real interest*

Land — *acquisition — notice of — requirement for acquiring authority to give notice to person having an "interest" in the land — only a real* D *interest is protected — lessee in terms of unregistered lease — not a real interest*

Land — *agricultural land — allocation of lease over land — requirement that application for lease be referred to Agricultural Land Settlement Board — failure to refer such an application — allocation invalid* E

Property and real rights — *land — interest in — meaning of — need for owner's dominium to be diminished*

Headnote

The amendment of s 5 of the Land Acquisition Act [*Chapter 20:10*] to reduce the categories of persons to whom notice of acquisition of rural land must be given does not contravene s 16 of the

Constitution. Section 16 F requires that notice must be given to persons who have an "interest" in the land, and such an interest must be a "real" one as opposed to a personal one. A right is real if its correlative obligation constitutes a burden on the subject thing. If the obligation is a burden on the land, and a diminution of the owner's *dominium,* the corresponding right is real. G An unregistered lease would not constitute a real interest.

Where the Minister of Lands allocates a lease over land acquired by the State, the provisions of s 9 of the Agricultural Land Settlement Act [*Chapter 20:01*] must be complied with. The section requires that an application for a lease must be referred to the Agricultural Land Settlement Board, which must then make its recommendations to the Minister. Failure to H refer the application to the Board renders the allocation of a lease invalid.

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Cases cited A

Associated Newspapers of Zimbabwe (Pvt) Ltd v Madzingo & Anor 2003 (2) ZLR 225 (H)

Cowley & Anor v Hahn 1987 (1) SA 440 (E)

Ex p *Geldenhuys* 1926 OPD 155

Mead v Min of Lands 2002 (2) ZLR 449 (H)

B *S v Micklethwaite* 2003 (1) ZLR 26 (H)

Legislation considered

Agricultural Land Settlement Act [*Chapter 20:01*], s 9

Constitution of Zimbabwe 1980, s 16(1)(b)

C Land Acquisition Act [*Chapter 20:10*], s 5 (1)(b)

Case information

E T Matinenga, for the applicants

C G Dube, for the first respondent

D D Chirindo, for the third respondent

Judgment

D **Chinhengo J:** This application is about a piece of land known as Mgwaco Farm. Mgwaco Farm is made up of three surveyed units of land, being the Remaining Extent of Subdivision B of Sutton Estate ("Sutton Estate") measuring 641.1161 hectares in extent, Mgwaco of Hartleyton ("Hartleyton") measuring 507.9512 hectares in extent and Mpinge Extension of Hartleyton E ("Mpinga Extension") measuring 559.4663 hectares in extent. These pieces of land are owned by Mgwaco Farm (Pvt) Ltd ("the first applicant") under one title deed. The whole of Mgwaco Farm is leased to A P Richards (Pvt) Ltd, ("the second applicant"). The lease is not registered.

Mgwaco Farm is situated in the Trelawney Area of Lomagundi District, which is a prime agricultural region of Zimbabwe. It is no doubt a much-sought after F area by those inclined to engage in agriculture. The farm is extensively developed. There are on the farm horticultural greenhouses and worksheds, tobacco curing facilities, workshops, workers' houses, boreholes, a dam, underground irrigation, main lines, power lines, cattle handling facilities, fences and other developments. There are three dwellings on the farm, a G principal house and two other houses to accommodate managerial staff. Of these last two, one is referred to as the manager's house and the other as a cottage.

Mgwaco Farm (Pvt) Ltd is a Zimbabwean registered company. It is wholly owned by Chiredzi Nominees (Pvt) Ltd, another Zimbabwean registered company. Chiredzi Nominees (Pvt) Ltd is a holding company for three other H companies which own four pieces of land in the Hippo Valley area in the

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lowveld of Zimbabwe ("the sugar cane properties"). Chiredzi Nominees (Pvt) A Ltd is controlled by a company called La Boite Investments (Pvt) Ltd, which is another Zimbabwean registered company in which some 30 000 shares are divided between three trusts and 24 000 shares are held by members of the Lagesse family, which is of Mauritian origin. The main holding company, La Boite Investments (Pvt) Ltd, is therefore controlled by three trusts. B

On 17 May 2000 the Government of Mauritius and the Government of Zimbabwe signed an Agreement for the Promotion and Reciprocal Protection of Investments ("the bilateral agreement") in terms of which investments in Zimbabwe by Mauritian nationals, either by themselves or through locally incorporated entities, were afforded certain protection. The deponent to the first applicant's affidavit, Mr Lagesse, deposed to the fact that Mgwaco Farm C was protected by the bilateral agreement and that it could not be compulsorily acquired outside the terms of that agreement. The evidence placed before me did not conclusively establish that the first applicant is a Mauritian entity which is entitled to any protection under the bilateral agreements. In the result Mr *Matinenga* did not pursue any argument based on the nationality of the D first respondent and its alleged entitlement to protection in terms of the bilateral agreement. The particular difficulties which he encountered revolved around the nationality of those individuals who have interests, and the nationality of the trust which have a controlling interest, in La Boite Investments (Pvt) Ltd.

Mgwaco Farm was apparently acquired by the first applicant in 1979. In 1997 E the first applicant decided to dispose of the farm. It offered it to the Government of Zimbabwe in compliance with the general legal requirement that the Government should be offered any rural land before such land can be sold to any other person. On 6 June 2000 the Government issued a certificate of "no present interest" by which it signified that it did not wish to purchase the farm for any purpose. The third respondent did not give any reason for its F refusal to acquire the farm when it was offered to it. It is reasonable to assume that the Government did not have the financial resources with which to acquire the farm on a willing-seller, willing-buyer basis. The certificate of "no present interest" was valid for 12 months until June 2001.

In January and again in March 2002, Mgwaco Farm was listed for compulsory G acquisition. The first applicant lodged an objection to the acquisition. From the evidence before me, it appears that the acquisition was shelved for a while whilst the fourth respondent * attempted to acquire the farm for himself by way of purchase as will become apparent hereunder.

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A **Fourth Respondent's involvement with Mgwaco Farm**

The fourth respondent is cited in this application in his personal capacity. He was served with the papers in this application on 8 August 2003 and again on 18 August 2003. This application was initially set down for hearing first on 15 August, 2003. The hearing was postponed to 19 August 2003 and again to 1 October, 2003. The fourth respondent did not appear at the hearing either by B himself or through a legal practitioner. He apparently ignored the application and any notices which were duly served upon him through his private secretaries. The nature of the allegations against the fourth respondent are such that he would have been expected to oppose the application. Ideally he should have done so. There being no opposition by the fourth respondent, C there was therefore no-one to persuade me that the allegations against him were unfounded. The evidence by the applicants concerning the fourth respondent's involvement and interest in Mgwaco Farm must therefore be accepted as true.

The applicants averred that after Mgwaco Farm was listed for acquisition the fourth respondent visited it. On 29 April 2002 he invited Mr Lagesse, the D deponent to first applicant's affidavits and a director of the company, to his offices and advised him that he wanted to buy the farm. Present at this meeting was the Governor and Resident Minister of Masvingo Province where the sugar-cane properties are situated. Mr Lagesse averred that the fourth respondent told him that if he agreed to sell the farm to him, he would be assured of E retaining, through Chiredzi Nominees (Pvt) Ltd, the sugar-cane properties. Mr Lagesse said that he undertook to advise the fourth respondent about the selling price of the farm after a valuation of the farm and the improvements thereon.

On 3 May 2002, Mr Lagasse delivered the valuation of the farm to the Minister. The valuation covered the land, movable equipment and other F improvements but it excluded a herd of cattle on the farm. The asking price was $300 million. Mr Lagesse averred that at this second meeting, the fourth respondent told him that land had no value in Zimbabwe and that if he did not like the price, the Government could always acquire the farm and allocate it to him anyway. The result of this meeting, so said Mr Lagesse, was an agreement that their respective legal practitioners should consult further on G the matter.

A third meeting was held on 25 May 2002. Mr Lagesse averred that at this meeting the fourth respondent said that he could not meet the first applicant's price and proposed that they enter into another arrangement involving Mr Lagesse, the second applicant and himself. The details of such an arrangement H were not revealed on the papers. After this meeting the fourth respondent's

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legal practitioner later gave a deadline by which Mr Lagesse had to accept the A fourth respondent's counter offer of $65 million as the purchase price of Mgwaco Farm. The fourth respondent called another meeting between himself and two of the directors of the second applicant. He told the second applicant's directors that the first applicant's price was unrealistic and that he would take the farm but would want the second applicant to remain on the farm and carry B on with certain farming operations. The directors advised that they would consult with Mr Lagesse.

A fifth meeting regarding Mgwaco Farm was held in Masvingo in the presence of the Minister of Foreign Affairs. Mr Lagesse averred that at this meeting the fourth respondent again asked him to give up Mgwaco Farm if he wanted his companies to retain the sugar-cane properties. Mr Lagesse said that the C Minister of Foreign Affairs advised that the first applicant was entitled to protection in terms of the bilateral agreement but, despite this advice, the meeting ended with the fourth respondent stating that since Mr Lagesse was not co-operating Mgwaco Farm would be taken over by the Government and made available to him. D

The negotiations between Mr Lagesse and the fourth respondent finally broke down on or about 8 August 2002. The fourth respondent had maintained that the first applicant's price was unrealistic. Mr Lagesse, who now considered that with the constantly rising rate of inflation, the value of the farm was about $400 million appears to have rejected the counter-offer of $65 million which, according to the fourth respondent, also covered the price of the herd of cattle E on the farm.

Mr Lagesse averred that after the breakdown of the negotiations an order in terms of s 8(1) of the Land Acquisition Act [*Chapter 20:10*] ("the Act") was then served on the applicants. He averred that although the order was served in August it appeared to have been signed in July 2002. F

Mr Lagesse averred that the fourth respondent has pursued his interest to acquired Mgwaco Farm through the first and second respondents and has used them as "fronts", nominees or agents with a view, in reality, to acquire the farm for himself. In his affidavit, Mr Lagesse made several damaging allegations against the fourth respondent, in particular about his involvement in the violence which he said accompanied the land reform exercise in the Lomagundi G area. He referred to cases No HC 4327/03 and HC 6397/03 in which he said that the fourth respondent is implicated. He also alleged that the fourth respondent owns several farms, contrary to the policy announced by the President that a person should own one farm only. I shall not repeat all that is said against the fourth respondent because it is not necessary to do so for the purposes of this judgment. Suffice it to say that the allegations are of a H

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A damaging nature and that the fourth respondent should have responded to them to set the record straight if those allegations were confirmed.

Mgwaco Farm was listed for compulsory acquisition first on 15 January 2002. The listing was repeated in March 2002. According to the second applicant, various people visited the farm after its listing. Among them were the second respondent and the fourth respondent. In the affidavit deposed to on its behalf, B the second applicant makes similar allegations against the fourth respondent as those made by the first applicant. I shall not dwell on the details of those allegations. They all indicate that for quite a while the fourth respondent endeavoured to acquire the farm for himself. I

may however highlight certain allegations by the deponent to the second applicant's affidavit. He averred that C on 28 July 2002 Mr Shumba from the District Administrator's office visited the farm and said that he wanted to establish what farming operations were being conducted on the farm and what equipment was there because the farm was to be allocated to the fourth respondent. He said that the second respondent also visited the farm from time to time. On 9 June 2002 a *Sunday Mail* newspaper advertisement appeared announcing that the first three D portions of Hartleyton had been allocated to A2 settlers identified therein as "F. Chombo, J Nyatsine and K Mubwandarika". Except for F Chombo, who is the second respondent herein, the said Nyatsine and Mubwandarikwa did not at any time interfere with the applicants' interests in or occupation of the farm.

E On 18 May 2003, the first respondent ** visited the farm and told Mr Richards that the farm had been allocated to him. Mr Richards averred that the first respondent had told him that the farm had been allocated to him by the fourth respondent which averment the first respondent vehemently denied in his opposing affidavit. In mid June the second respondent put pressure on Mr Richards to vacate the principal house on the farm. He produced a letter to Mr F Richards showing that he had been allocated the first portion of Hartleyton. The second respondent is alleged to have broken into the manager's house on 30 June and remained there until 2 July. He made further threats to evict Mr Richards' family during the month of July. It seems that there was a scramble for the farm during the months of June and July, without it being quite clear whether the farm had been allocated to the fourth respondent, the second G respondent or the first respondent. On 28 July the first respondent visited the farm again. This time he was in possession of a letter from the third respondent in terms of which he had been offered two portions of Hartleyton, now

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described as subdivisions 2 and 3 of Mgwaco. He brought some furniture with A him. Mr Richards averred that the first respondent moved into the manager's house without his consent. He averred that he told him that the manager's house did not fall within subdivisions 2 and 3 which had been allocated to him. The first respondent however insisted that he was entitled to take occupation of the manager's house. He indeed took occupation of it against the will of Mr B Richards. As at the date of hearing of this application Mr Richards was saying that the second respondent was still attempting to forcibly take occupation of the cottage.

The second respondent was personally served with the papers in this application. He neither appeared at the hearing or otherwise opposed this application. The allegations made against him have not been contradicted and they must be C accepted as true.

The first respondent opposed the application. At the beginning of the proceedings and as appears from his opposing affidavit, he averred that the two subdivisions were lawfully allocated to him and that he was entitled to take occupation of the manger's house because it was on the land allocated to him. D He very strongly denied any suggestion that he was an agent, nominee or "front" of the fourth respondent.

Outcome of Hearing on 15 August 2003

I must mention that the applicants had sought a provisional order on an *ex parte* basis. I refused to proceed in that manner and I directed that the E application be served on the respondents. When certain submissions were made on 15 August 2003 it became quite clear that there was confusion as to whether or not the manager's house was on the portions allocated to the first respondent. I adjourned the hearing to allow the parties to verify the position. The parties' legal practitioners carried out further consultations and verified that the manager's house and all the improvements which I have already F mentioned are not on the portions allocated to the first respondent or to the second respondent. Mr *Chirindo* filed two affidavits from Stanford Katonhe, a district lands officer, and from Fisher Leonard Kumirai, an agricultural extension officer. Both of them are employees of the third respondent. In these affidavits it is disclosed that the acquisition of Mpinga Extension was invalid because the court application required to be made in terms of s 7 of the Act was G not lodged at the Administrative Court within 30 days of the service of the order in terms of s 7(1) of the Act. The acquisition of Mpinga Extension was therefore flawed for failure to comply with s 7(1) of the Act as read with s. 16(1)(d) of the Constitution. Mr *Chirindo* conceded that this was the position. The affidavits also showed that the fourth portion on Hartleyton, on which the principal house, manager's house, cottage, greenhouses and office sheds, H

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A workshop, tobacco barns, workers' houses and the cattle handling facilities are located, has not been allocated to anyone. These affidavits settled two questions: first that the first respondent had no right whatsoever to take occupation of the manager's house because that house was not on the land allocated to him; second, that the acquisition of Mpinga Extension was flawed and should therefore be set aside.

B After the adjournment on 15 August 2003, the parties also agreed that I should determine this matter finally and not deal only with the grant or refusal of the provisional order as originally sought. They also agreed between themselves on the timetable for the filing of the necessary affidavits and heads of argument. It was then that I set down this application for the final hearing on C 1 October 2003.

The final order now sought by the applicants was for a declaration that the purported acquisition of Mgwaco Farm is invalid as being contrary to the provisions of ss 11 and 16 of the Constitution. The consequential relief sought is that the orders in terms of s 8(1) of the Act are invalid, the allocation of portions of the farm to the first and second respondents be set aside and that D the first, second and fourth respondents be barred from entering upon any part of Mgwaco farm and from interfering with the farming operations thereon and further that the fourth respondent be barred from authorizing, permitting or encouraging any person from entering upon Mgwaco Farm. The applicants also sought an order of costs against all the respondents jointly and severally, E the one paying the others to be absolved.

It is appropriate at this stage to dispose of certain averments and submissions made by the parties in their affidavits and in the heads of argument which were either withdrawn or abandoned. I have already dealt with some of them.

1. The orders issued in respect of Mpinga Extension are invalid because the third respondent failed to comply with s 7(1)(b) of the Act as read with s F 16(1)(d) of the Constitution. This much was conceded by Mr *Chirindo.*
2. The first respondent is not entitled to take occupation of the manager's house. The second respondent is also not entitled to take occupation of the principal house, or the manager's house or the cottage. This is so because that portion of the farm on which these dwellings and other G structures mentioned in this judgment are situated has not been allocated to anybody. This also was conceded by Mr *Chirindo* and declared to be the position by Stanford Katanhe and Fisher Leonard Kumirani.
3. In the draft interim relief, the applicants had sought an order that the respondents should file discovery affidavits on various issues. At the H hearing on 15 August I pointed out that it was inappropriate, if not

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impermissible, for a party to seek discovery in motion proceedings. The A applicants' legal practitioner readily conceded this point and the applicants have not pursued the matter to compel discovery of certain documents.

4. Apart of the final relief sought was that "the third and fourth respondents are hereby prohibited and interdicted from taking any further steps whatsoever to acquire Mgwaco Farm either for the State, in the case of the third respondent, or for himself or any nominees, relative or associate of his, in the case of the B fourth respondent without the express authority of an order of this court". This part of the final order sought was inappropriate for various reasons which I do not have to deal with. Again Mr *Matinenga* agreed that this part of the order be deleted.
5. The nationality of the first applicant could not be readily established C because the holding company is owned by three trusts. The bilateral agreement was intended to cover and protect, in the manner specified therein, investments by Mauritian nationals or Mauritian entities. The failure to establish the nationality of the first applicant meant that it would not be necessary to consider any submission based on the bilateral D agreement. Mr *Matinenga* said that he was not pursuing the matter on the basis of the bilateral agreement.

6. Mr *Chirindo* had raised, *in limine,* the "dirty hands" argument in relation to the applicants. His argument was that the applicants were approaching the courts with dirty hands in that they had refused to comply with s 9 of the Act which required them to vacate *Mgwaco* Farm within 90 days from E the date on which they had been served with the orders in terms of s 8(1) of the Act. For this proposition Mr *Chirindo* had relied on *Associated Newspapers of Zimbabwe (Pvt) Ltd v Madzingo & Anor.* He wisely abandoned any argument based on the "dirty hands" doctrine. The facts in this case and the provisions of s 9 of the Act did not at all support the application of that doctrine. See *S v Micklethwaite* 2003 (1) ZLR 26 (H) F at pp 5 ff. Mr *Chirindo* conceded that the point *in limine* could not be pursued.

The outstanding issues for decision are whether the acquisition of Mgwaco Farm is valid having regard to the provisions of the Act and whether the allocation of portion of the farm to first and second respondent is lawful. G

The applicants' main argument against the validity of the acquisition of Mgwaco Farm was that the third respondent did not serve the notice in terms of s 5(1)(b) of the Act on the lessee, i.e. the second applicant. That the second

* See p 225 of this volume. — Editor H

2003 (2) ZLR p487

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A applicant was not served with the notice was common cause. Mr *Chirindo* submitted that the failure to serve the notice on the second applicant was permissible in terms of s 5(1)(b) of the Act as read with s 16(1)(b) of the Constitution. Mr *Matinenga,* on the other hand, submitted that the amendment of s 5(1)(b) by Act 15 of 2000 rendered that provisions *ultra vires* s 16(1)(3) of the Constitution. He urged me to find that s 5(1)(b) of the Act was *ultravires* B s 16(l)(b) of the Constitution and on that basis the acquisition of Mgwaco Farm should be declared invalid. Mr *Matinenga's* submissions may be summarized thus:

Section 5(1)(b), of the Act before its amendment by Act No 15 of 2000 read:

> "Where an acquiring authority intends to acquire land otherwise than by C agreement, he shall:
>
> (a) publish once in the *Gazette* and once a week for two consecutive weeks, commencing with the day on which the notice in the Gazette is published, in a newspaper circulating in the area in which the land to be acquired is situated and in such manner as the acquiring authority thinks will best bring that notice to the attention of the D owner, a preliminary notice:
>
> (i) describing the nature and extent of the land which he intends to acquire and stating that a plan or map of such land is available for inspection at a specified place and at specified times; and
>
> (ii) setting out the purposes for which the land is to be acquired; and E
>
> (iii) calling upon the owner, or *occupier or any other person having an interest or right in the land who —*
>
> A wishes to contest the acquisition of the land, to lodge a written notice of objection with the acquiring authority within thirty days from the date of publication of the notice in the *Gazette;* or F
>
> B wishes to claim compensation in terms of Part V for the acquisition of the land, to submit a claim in terms of section *twenty-two,* where the land is not designated rural land, and
>
> (b) serve on —
>
> (i) the owner of the land to be acquired and the holder of any other G real right in that land; and
>
> *(ii) any other person who it appears to the acquiring authority may suffer loss or deprivation of rights by such acquisition;*

whose whereabouts are ascertainable, after diligent inquiry, notice in writing providing for matters referred to in subparagraphs (1), (ii) and (iii) H of paragraph (a)" (my emphasis).

2003 (2) ZLR p488

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In addition to amending subpara (b) of subpara (iii) of s 5(1)((a), which is not A relevant to the issue before me, Act No 15 of 2000 also amended s5(1)(b) and substituted it with the following:

"(b) serve on the owner of the land to be acquired and the holder of any other registered real right in that land whose whereabouts are ascertainable after, diligent inquiry at the Deeds Registry and, if B necessary, in the appropriate companies register, notice in writing providing for the matters referred to in subparagraphs (i), (ii) and (iii) of paragraph (a)".

Mr *Matinenga* argued that in so amending the Act, Act No 15 of 2002 left out certain categories of persons who were required to be served with no notice in terms of s 5(1)(b) and s 16(1)(b) of the Constitution. In so doing, Act No 15 C of 2002 reduced the scope of protection provided by s 16(1)(b) of the Constitution and to that extent the amendment was *ultra vires* the Constitution.

I have difficulty in accepting the validity of Mr *Matinenga's* submissions in the regard. Section 16(l)(b) of the Constitution provides:

"No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law which: D

(a) ...

(b) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition." E

This portion no doubt requires that a notice be served on the owner or person having any other interest or right in the land. In my view, the key words in s 16(1)(b) are "any person ... having any other interest or right therein". The word "therein" means "in the land" to be acquired. Section 5(1)(b)(ii) of the amended Act expanded the category of persons to be served with a notice from the owner or other person having any other interest or right in the land to F encompass, in addition to the owner or holder of any other real right in that land as in s 5(l)(b)(i) of the Act, any other person who it appears to the acquiring authority may suffer loss or deprivation of rights by such acquisition. The question is: did Act 15 of 2002, by deleting s 5(1)(b)(ii) and substituting the new provisions requiring service only on the owner or holder of any G registered real right, derogate from s 16(1)(b) of the Constitution?. I do not think so. In *Cowley & Anor v Hahn* 1987 (1) SA 440 (E), the court dealt with the meaning of the words "any interest in land". At 445 I to 446 B Mullin J, in relation to whether a usufruct was an interest in land, said:

"The first question is whether a usufruct over immovable property is an 'interest in land' as envisaged by the definition of land in the Act. What H

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A authority there is suggests it is not. See Aronstan *The Alienation of Land* at 5. The various textbooks there referred to suggest that a restrictive interpretation should be applied, and that only those rights which diminish the rights of ownership, or confer on the holder powers inherent in the right of ownership, should be regarded as 'interests in land'.

A usufruct is a personal right, held by the usufructuary only, to the use of B the property and its fruits. It does not diminish the rights of ownership such as a real or praedial servitude does and which confers on the holder of the servitude a right *in* the property adverse to the *dominium* holder. The existence of a usufruct may well limit or restrict the enjoyment by the owner of certain rights of possession, and of benefits accruing from the property, but it does not diminish in any way any of the rights of C ownership or *dominium."*

This test seems to have been accepted by the courts in the Roman-Dutch Law system. Silberberg & Schoeman in *The Law of Property* 3 ed refer to this test as "the subtraction from the *dominium* test" and state at p 50-51 that:

"Consequently our courts formulated the so-called subtraction from the *dominium* test which is based on the reasoning that a limited real right D diminishes the owner's *dominium* over his thing in the sense that it either (a) confers on its holder certain powers inherent in the universal right of ownership; or (b) to some extent prevents the owner from exercising his right. This means that a limited real right must amount to a 'diminution' of, or a 'subtraction' from the owner's *dominium* over the thing to which the limited real right relates'.

E In order to more clearly understand what the learned authors mean in this passage, I think one has to refer to the statement by De villlers JP in *Ex p Geldenhuys* 1926 OPD 155 where he states that a right is real if its correlative obligation constitutes a burden upon the servant thing. He said:

"One has to look not so much to the right, but to the correlative obligation. F If the obligation is a burden upon the land, a subtraction from the *dominium,* the corresponding right is real".

Now Mr *Matinenga* did not submit that the second applicant's interest in the land was a real right in the land which would be recognized in terms of s 5(1)(b) of the Act as warranting a notice. Rather, he submitted that the second applicant was a person who should have appeared to the acquiring authority G as one who may suffer loss or deprivation of rights and who was recognised as entitled to a notice in terms of s 5(1)(b)(ii) which was repealed by Act No 15 of 2000. It may be assumed that in so submitting Mr *Matinenga* must have been of the view that the second applicant's rights as a lessee did not constitute a real right in the land.

2003 (2) ZLR p490

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The lease of Mgwaco Farm by the second applicant was not registered. I think A that where a lease is not registered, it should generally not be regarded as conferring a real right in the land. In this case I do not think it does. The owner's *dominium* though restricted to some extent, is not diminished. It is the kind of lease which if notified to a prospective buyer of the land, comes to an end upon the purchase and transfer of the land to the purchaser. The definition B of "real right" in the Deeds Registries Act [*Chapter 20:05*] that it means "any right which becomes a real right on registration" is not helpful. But s 14 of that Act is a little more helpful in that it provides that other real rights in land, other than ownership which is conveyed by a deed of transfer executed and attested by the registrar of deeds, may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the C Registrar of Deeds. In the present case it cannot be said that the second applicant's unregistered base amounts to a diminution or subraction from the owner's *dominium.*

If, as Mr *Matinenga* appeared to have accepted, the second applicant's lease was not a real right in the land, then the need to have served a notice in terms of s 5(1)(b) of the Act would have arisen only if the Act had not been amended D by Act 15 of 2002. The second respondent would then have been covered under the category of any person whose interest or right may be adversely affected by the acquisition as provided in the repealed s 5(i)(b)(ii).

The amendment ushered in by Act 15 of 2002 in respect of s 5(1) of the Act did not, in my view, derogate from s 16(1)(b) of the Constitution. Section E 16(1)(b) requires that a notice be served on a person with an interest or right in the land to be acquired. The second respondent did not have an interest or right in the land within the meaning ascribed to the phrase "interest in the land" in *Cowley's* case *supra.* Thus if s 5(1)(b) is *intra vires* s 16(1)(b) of the Constitution because it meets the Constitution's minimum requirement in respect of service of a s 5 notice, which I am satisfied is the case here, then the F failure or omission to serve the notice on the second applicant did not render the acquisition process invalid. To conclude on this aspect of the application, I am satisfied that s 5(1)(b) of the Act, as amended by Act 15 of 2000, is *intra vires* s 16(1)(b) of the Constitution and that the exclusion of persons who may suffer loss or deprivation as a result of an acquisition of land is permissible G having regard to s 16(1)(b)of the Constitution. In my view, the class of persons who "may suffer loss or deprivation" is too wide and includes persons who may have peripheral rights to the land but do not have rights or interests in land as defined in *Cowley supra.* See also *Mead v Minister of Lands & Anor* 2002 (2) ZLR 449 (H). The applicants' case, based as it was on the contention that the Act was *ultra vires* the Constitution, cannot succeed. The acquisition of H

2003 (2) ZLR p491

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A Hartleyton and Sutton Estate of Mgwaco Farm was accordingly valid to that extent.

The remaining question is whether the first and second respondents were allocated the pieces of land lawfully. The second respondent has not opposed the averments that he is a "nominee" or front for the fourth respondent. To this extent, if the fourth respondent was prohibited by law from acquiring land B through nominees or agents or "fronts", I would have had no difficulties setting aside the allocation of land to the second respondent on that ground. There is unfortunately no such law. Admittedly a policy enunciated by the President exists that no person should own more than one farm. I am not aware that that policy has been reduced to law. In this regard, then, if the allocation C of the land to the second respondent was not vitiated by other considerations I would not have found anything to be wrong with it legally.

Mr *Matinenga* submitted, as the applicants averred in their affidavits, that the allocation of portions of Mgwaco Farm to the first and second respondents was not in compliance with the Agricultural

Land Settlement Act [*Chapter 20:01*]. This Act provides in s 9 that:

> D "No lease in respect of a holding of land referred to in section *eight* shall be issued to an applicant therefor until the application has been referred to the Board for its consideration and report:
>
> Provided that nothing in this section contained shall be construed as requiring the Minister to comply with a recommendation or report of the E Board in relation to an applications."

Section 9 of the Agricultural Land Settlement Act quite clearly requires that whilst the Minister may issue leases to applicants, he may not do so without considering the recommendation orreport of the Agricultural Land Settlement Board established by Part II of that Act as amended by Act No 2 of 2000.

The first, second and third respondents were unable to place before me any F evidence that the provisions of the Agricultural Land Settlement Act were complied with in respect of the allocation of portions of Mgwaco Farm to the first and second respondent. Mr *Chirindo* conceded that there was no such evidence. When Parliament enacted the Agricultural Land Settlement Act and amended it in 2000 through Act No 2 of 2000, it had in mind that the Board G should perform its functions as stated in s 6 i.e. consider and report upon all applications for leases and select and recommend applicants for leases.

The offer of land letter to the first respondent dated 25 June 2003 (Annexure "F") to the founding affidavit) seems to me to go a little beyond the provisions of the Act. Although Clause 6 of the offer letter provides that:

> "A lease agreement will only be entered into once the Minister is satisfied H that all conditions have been met"

Chinhengo J

The conditions attached to the letter requires the first respondent to take up A personal and permanent residence on the farm, undertake to initiate development on the farm in terms of the five year development plan submitted by the applicant and refrain from ceding or assigning any right in respect of the farm. It refers to the first applicant as lessee in clauses (c)(ii) and (iii) and in clause 2(b)(i) it reiterates that a formal lease shall be prepared and signed once it is B establish that the applicant has occupied and is developing the land offered. In clause (2)(c) it is provided that:

> "Irrespective of the date of signature of the lease agreement, the commencement date shall be set back to cover the actual period of occupation and you will be responsible for payment of lease rentals and council rates from the date of your acceptance of this offer". C

In my view the first respondent is in effect constituted into a lessee by the offer letter. He is required to settle on the land and to develop it. He is required, upon it being established that he has met all the requirements of the allocation of the land to him and a lease agreement is concluded, to pay rentals and rates with effect from the date of occupation. In my view, the first and second respondents obtained leases of portions of Mgwaco Farm without any evidence that s 9 of D the Agricultural Land Settlement Act were complied with. It was up to the third respondent and the first and second respondents to satisfy me that the provisions of the Act had been complied with. They did not so satisfy me.

The Act in s 8(2)(b) empowers the acquiring authority to exercise any right of ownership, including the right to survey, demarcate and allocate the land E concerned without undue interference with the living quarters of the owner or occupier of the land who can only be evicted in terms of s 9 of the Act. "Allocate" in context must mean "assign" or "devote to" a person and no more. Section 8 (2)(b) must have been deliberately phrased in order to take account the process of lessee identification as provided in the Agricultural Land Settlement Act and in recognition of the fact that the land concerned is not F finally acquired until the acquisition is confirmed by the Administrative Court in terms of s 7 of the Act. I am satisfied that because there is no evidence at all that the third respondent complied with s 9 of the Agricultural Land Settlement Act in respect of the first and second respondents the allocation of the land to them must be set aside. G

There is one last matter arising from para 6 of the applicants' draft final order sought i.e. that the fourth respondent be prohibited from entering upon any part of Mgwaco Farm. The fourth respondent is a Minister. The applicants have sued him in his personal capacity. Is it to be understood that he may enter upon the farm or any portion of it in his official capacity? If this is so I think an order as prayed for will not be effectuated. This means that this part of the H

Chinhengo J

A relief is inappropriate. I do not think that it is proper for this court to prohibit a Minister, albeit sued in his personal capacity, from entering upon any farm for the purpose of performing his official functions. The order against the fourth is an order made in default of affidavits. I am inclined to grant only a part of the relief prayed for in the said para 6.

In the result I make the following order: B

1. The acquisition of the Remaining Extent of Subdivision B of Sutton Estate and Mgwaco of Hartleyton both of Mgwaco Farm situate in the Lomagundi District is declared to be in compliance with s 16(1)(b) of the Constitution and therefore valid and consequently the orders in terms of s 8 of the Land Acquisition Act [*Chapter 20:10*] issued in respect thereof C are valid.
2. The purported acquisition of Mpinga Extension of Hartleyton is invalid for failure to comply with s 7(i)(b) of the Land Acquisition Act [*Chapter 20:10*].
3. The allocation/lease of any portion of Mgwaco Farm to the first and D second respondents is invalid for failure to comply with s 9 of the Agricultural Land Settlement Act [*Chapter 20:05*].
4. The first and second respondents are hereby interdicted and prohibited from interfering with the occupation of Mgwaco Farm by the applicants or other person living and working on the farm on the authority of the applicants or either of them and with the conduct of farming operations E thereon.
5. The fourth respondent is prohibited and interdicted from authorising, permitting or facilitating or encouraging the unlawful entry upon or occupation of Mgwaco Farm.
6. The first, second and fourth respondents shall pay the applicants' costs, F jointly and severally, the one paying the others to be absolved.

* Ignatious Chombo, who was the Minister of Local Government. — *Editor*
** The Commissioner of Taxes. — *Editor*

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INDEPENDENT FINANCIAL SERVICES (PVT) LTD v COLSHOT INVESTMENTS (PVT) LTD & ANOR 2003 (2) ZLR 494 (H)

Citation	2003 (2) ZLR 494 (H)
Case No	Judgment No. HH-211-03
Court	High Court, Harare
Judge	Hungwe J
Heard	21 July 2003
Judgment	17 December 2003

Counsel *A M Gijima,* for the applicant
S J Chihambakwe, for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Practice and procedure — *application — for stay of execution — urgency* C — *matter not urgent merely because property has been attached*

Headnote

An application for stay of execution of judgment will be considered merely a delaying tactic where there is a debt lawfully determined as due and no D meritorious argument for staying. A matter cannot be deemed urgent simply because property has been attached.

Case information

A M Gijima, for the applicant

S J Chihambakwe, for the respondent E

Judgment

Hungwe J: The applicant filed this application for stay of execution under a certificate of urgency on 16 July 2003. I directed the matter to be set down for hearing on 21 July 2003. The respondent filed its notice of opposition and heads of argument prior to the hearing.

At the hearing of this application Mr *Gijima* who appeared for the applicant F submitted that the application for stay of execution was premised on the fact that the judgment upon which the writ of execution was based had been obtained by fraud. There was an application for rescission of that judgment. If execution is not stayed, then the success of that application would be academic. G

Mr *Chihambakwe,* for the respondent vigorously opposed the application. He attacked the application on three points.

The first point taken by Mr *Chihambakwe* was that, as the judgment had been obtained by consent some four months before the date of the application, it is an abuse of process to seek an order of stay of execution on an urgent basis. H

Secondly, the application was being made to stay execution pending the

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Hungwe J

A resolution of another application for rescission to be filed by the applicant. There was no application for rescission filed by the applicant indicating that in fact this present application was *mala fide.*

Thirdly, the applicant has not shown on the present papers that it has a good defence upon which an application for rescission of the matters in HC 1809/ 03 and HC 1810/03 could be granted. The judgment was obtained by consent B and an allegation of fraud could not be sustained on these papers.

The background to this application is that in HC 1809/03 and HC 1810/03 the first respondent sued the applicant for $341 638 705.29 and $439 010 407.09. The first respondent barred the applicant and sought default judgments. Chinhengo J, before whom the application for default judgment was placed, C summoned the parties to address him on an aspect with which he was unhappy. In that appearance counsel for the first respondent, who still appears for it in the present case, moved the court to grant default judgment since in a letter addressed to first the respondent dated 16 May

2003, the applicant's erstwhile legal practitioners had admitted owing the first respondent $337 million.

Counsel for the applicant consented to judgment in that amount and judgment D was granted.

It is on this judgment that a writ of execution was obtained by the first respondent and acted upon by the second respondent. The fact that judgment had been obtained against their client, the applicant, was therefore known the very day it was granted. This was on 18 June 2003.

E Between 18 June 2003 and 16 July 2003 no attempt was made by the applicant either to obtain rescission, if it was so advised, or to liquidate that portion which it still admits it owes, being $130 million. Up to the date of hearing, the first respondent had challenged the applicant to pay $130 million into court and go to trial on the balance but again the applicants did not take up that F challenge.

The first respondent urged me to conclude from this failure to pay that this application is part of the applicant's delaying tactics. It owes the money. Two legal practitioners had admitted as much on its behalf. It has failed to pay even that which it admits it owes. It is simply insolvent. There is no good faith in this application.

G I agree.

The lack *of bonafides* on the applicant's part is demonstrated by its failure to file an affidavit from its then legal practitioner indicating how he was deceived into giving consent to judgment of such a high amount contrary to instructions. It was not suggested that Mr Chimwaradze was unable to depose to such an H affidavit nor was any explanation given why there was no attempt to file such

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an affidavit. This leads me to conclude that indeed the allegation of fraud is A just a red herring. One would have hoped that the applicant could offer to make payment into court of the sum of $130 million that it admits owing. It did not make that offer.

Instead the applicant seeks to blame its own legal practitioner for its failure to discharge its obligation and or to conduct its pleadings properly. B

I have considered the papers filed in opposition and came to the conclusion that the applicant merely seeks to delay the day of reckoning by filing this application. A matter is not urgent merely because property has been attached. That is self-created urgency, born out of the dilatory manner in which a party conducts its affairs. It cannot be a good reason to stay satisfaction of a lawfully due debt as here. C

In the premises the application is dismissed with costs on a legal practitioner and client scale.

Dube, Manikai and Hwacha, applicant's legal practitioners. D

Chihambakwe, Mutizwa & Partners, first respondent's legal practitioners.

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