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TUSO v CITY OF HARARE 2004 (1) ZLR 1 (H)

Citation	2004 (1) ZLR 1 (H)
Case No	Judgment No. HH-1-04
Court	High Court, Harare
Judge	Bhunu J
Heard	23 October 2003
Judgment	7 January 2004
Counsel	*R M Fitches*, for the applicant Miss *SN Njerere*, for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Court — *High Court — jurisdiction — labour matters — limited jurisdiction* C *to hear labour matters*

Employment — *Labour Court — jurisdiction of — limited jurisdiction of High Court to hear labour matters — extent of Labour Court's jurisdiction*

Headnote

D The Labour Relations Amendment Act 2002, which on 7 March 2003 amended the Labour Act [*Chapter 28:01*], transformed the Labour Tribunal into a court, clothed it with equal review

powers to the High Court and expressly excluded the jurisdiction of all other courts in areas where it had jurisdiction. That amendment must have been intended to prohibit duplication of proceedings in the Labour Court and the High E Court. Now that the legislature has conferred review powers on the Labour Court identical to those of the High Court, litigants in labour matters will have very little or no justification for approaching the High Court for review and by-passing the Labour Court, which was specially created to provide the same remedy in labour matters. Apart from review jurisdiction, the Labour Court has appeal jurisdiction which the High F Court does not have, so the Labour Court can combine both appeal and review procedures and determine the matter more expeditiously and conclusively than the High Court. The High Court can only deal with the procedural aspects of the case without dealing with the merits.

Cases referred to G

Dalny Mine v Banda 1999 (1) ZLR 220 (S)

Moyo v Forestry Commission 1996 (1) ZLR 173 (H)

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

H *Zikiti v United Bottlers* 1998 (1) ZLR 389 (H)

Bhunu J

Legislation considered A

Labour Act [*Chapter 28:01*], s 89(1) & (6), s 124

Case information

R M Fitches, for the applicant

Miss *SN Njerere*, for the respondent

Judgment

BHUNU J: The applicant was employed as the respondent's chief clerical B officer in its department of works. He was suspended from employment with effect from 31 January 2001 on allegations of misconduct.

Following disciplinary proceedings, the applicant's contract of employment was subsequently terminated in terms of s 141(6)(b)(ii) of the Urban Councils Act [*Chapter 19:15*] as read with General Conditions of Service Agreement C SI 66 of 1992. The termination of employment was with effect from 7 August 2001.

Dissatisfied with the decision of the Executive Committee, the applicant appealed to the Review Board. His appeal found no favour with the Review Board on the merits. The Review Board however found that there had been no D compliance with s 7 of the Urban Councils Act, which prescribes that an employee may not be suspended without pay for a period in excess of six months. To rectify the anomaly, the Review Board awarded the applicant his full salary and benefits from the date of suspension to the date of dismissal.

Thus, the Review Board confirmed the dismissal, subject to the applicant being paid his salary and benefits for the period he was on suspension. That E decision was adopted by a full Council resolution which confirmed the applicant's dismissal from Council employment on 3 October 2001.

Aggrieved by the above determination, the applicant approached this court for review, complaining of procedural irregularities in procedures which led to his dismissal. The gravamen of his complaint was that there was gross non-compliance F with the Urban Councils Act which sets out procedures for the suspension and dismissal of junior employees.

When counsel for both parties appeared before me they agreed that the matter be determined on the basis of the heads of argument filed of record. At that brief hearing I queried *mero motu* whether the High Court had jurisdiction to hear and determine a labour relations dispute in view of the recent Labour G Relations Amendment Act 17 of 2002, of which s 89 appears to prescribe exclusive jurisdiction to the Labour Court on all labour matters in the first instance.

The Labour Court is a special court established in terms of s 92 of the Constitution. Its functions, powers and jurisdiction are spelt out under s 89 of H

2004 (1) ZLR p3

Bhunu J

A the Labour Act [*Chapter 28:01*], as amended by the Labour Relations Amendment Act 17 of 2002, which provides as follows:

> "(1) The Labour Court shall exercise the following functions:
>
> (a) *hearing and determining applications and appeals in terms of this Act or any other enactment; and* B
>
> (b) hearing and determining maters referred to it by the Minister in terms of this Act;
>
> (c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
>
> (d) appointing an arbitrator from the panel of arbitrators referred to in C subsection (6) of section *ninety-eight* to hear and determine an application;
>
> (e) doing such other things as may be assigned to it in terms of this Act or any other enactment."
>
> (2)(a) In the case of an appeal — D
>
> (i) …
>
> (ii) …
>
> (iii) *exercise the same powers of review as would be exercisable by the High Court in relation to the decision, order or action that is appealed against or any proceedings connected therewith* (my emphasis).

E Having conferred what are admittedly very wide powers on the Labour Court the lawmaker proceeded to restrict or exclude the jurisdiction of other courts in related matters under s 89(6) of the Amendment Act which provides that:

> *"No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)" (my emphasis).*

F It is manifestly clear to me that the intention of the legislature was to expressly exclude the jurisdiction of all other courts in areas where the Labour Court has jurisdiction in the first instance.

In response to my query, whether the High Court has review jurisdiction in this labour dispute, both lawyers agreed. They submitted that the High Court has G jurisdiction because it was not hearing the matter in the first instance.

With respect, I am unable to agree with that submission. I take the view that the High Court was being invited to hear and determine the application for review as the court of first instance. This is for the simple but good reason that no other court or body had reviewed the proceedings prior to the High Court H being invited to exercise its powers of review. There had only been trial

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2004 (1) ZLR p4

Bhunu J

proceedings in the form of an initial hearing and an appeal to the Review A Board, but certainly no review in the ordinary sense.

Matters could have been different had the Labour Court exercised its appeal or review jurisdiction and the High Court was being invited to review the proceedings of the Labour Court under its general powers of review.

It has been previously suggested that the High Court has jurisdiction to B exercise review jurisdiction in labour matters because it will not be hearing the application in terms of the Labour Act.

I am not persuaded by that argument in so far as it relates to employees to whom the Labour Act applies under s 3. That section makes it clear that the Labour Act applies to all employees, save for members of a disciplined force of the C State or foreign State who are in Zimbabwe under any agreement concluded between the Government of Zimbabwe and that of the foreign State.

It is my considered view that it is only in respect of those employees who do not fall under the perview of the Labour Relations Act that the High Court may exercise its general powers of review because its powers in this regard have not been expressly excluded by statute. D

To draw an analogy, a labour dispute is essentially a civil dispute, over which the magistrates court ordinarily has jurisdiction in terms of its limited jurisdiction. A magistrate cannot arrogate to himself jurisdiction which has been expressly excluded by statute over labour matters on the pretext that it is a civil dispute over which he will be exercising jurisdiction under the E Magistrates Court Act and not the Labour Act.

By the same token the High Court cannot exercise review powers which have been expressly excluded under the pretext that it will be exercising its general powers of review under the High Court Act.

Bearing in mind that the lawmaker has seen it fit to create a special court with equal review powers to the High Court in relation to labour matters, could it F have been the intention of the legislature that both the Labour Court and the High Court should have parallel jurisdiction in this regard when s 124 of the Labour Act seeks to protect litigants against multiple proceedings in different courts? The answer should definitely be in the negative.

By creating a special court exclusively dealing with labour matters and G conferring it with review powers equivalent to the High Court and then proceeding to expressly exclude the jurisdiction of all other courts in the first instance, the legislature must have intended to oust the jurisdiction of all other courts in this regard. H

2004 (1) ZLR p5

Bhunu J

A Mindful as I am of the fact that every court guards jealously its jurisdiction, in this case, I am satisfied that this court's review jurisdiction in the first instance in respect of labour matters has been ousted by statute.

In coming to this conclusion, I am aware of a chain of cases emanating from both the High Court and the Supreme Court such as *Zikiti* v *United Bottlers Ltd* 1998 (1) ZLR 389 (H) and *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H) B which consistently held that the High Court has jurisdiction to exercise its general powers of review in cases of this nature. Those cases were however decided before the Labour Relations Amendment Act 17 of 2002 became law on 7 March 2003. That enactment, as I have already demonstrated elsewhere in this judgment, transformed the Labour Tribunal into a court, C clothed it with equal review powers to the High Court and expressly excluded the jurisdiction of all other courts in areas where it had jurisdiction. That amendment must have been intended to prohibit duplication of proceedings in the Labour Court and the High Court.

Looked at differently, the superior courts have consistently held that this court should hesitate to exercise its general powers of review where a litigant has not D exhausted his domestic remedies. In the case of *Musandu* v *Chairperson, Cresta Lodge Disciplinary and Grievance Committee* HH-115-94, Smith J had occasion to remark that:

> "In my view, this court should not be prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to E apply to court rather than to proceed by way of the domestic remedies. A litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for approaching the court earlier."

Thus, assuming that this court has the necessary jurisdiction, it still has the discretion to decide whether or not to hear the matter before the exhaustion of domestic remedies available to the applicant. In exercising that discretion, the F court has to make a value judgment and determine which procedure is more expedient, cheaper and generally best suited to dispense justice between the parties. In this regard, Malaba J (as he then was) observed in *Moyo* v *Forestry Commission supra* at 192 that:

> "A court will not insist on an applicant first exhausting domestic remedies where the appeal system created by the code of conduct does not confer G on the aggrieved party better and cheaper benefits than its remedies or where the decision to be appealed against undermined those domestic remedies themselves, for example, where the Tribunal had no power to make the decision in question."

Now that the lawmaker has conferred review powers on the Labour Court identical to those of the High Court, litigants in labour matters will have very H

2004 (1) ZLR p6

Bhunu J

little or no justification for approaching the High Court for review, by-passing A the Labour Court which was specially created to provide the same remedy in labour matters.

Apart from review jurisdiction, the Labour Court has appeal jurisdiction which the High Court does not have. Thus the Labour Court can combine both appeal and review procedures and determine the matter more expeditiously B and conclusively than the High Court. The High Court can only deal with the procedural aspects of the case without dealing with the merits, yet the Supreme Court has ruled that it is undesirable to determine labour matters on technicalities. In *Dalny Mine* v *Banda* 1999 (1) ZLR 220 at 221 (S), McNally JA remarked that:

> "As a general rule, it seems to me undesirable that labour relations matters C should not be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:
>
> (a) by remitting the mater for hearing *de novo* and in a procedurally correct manner; D
>
> (b) by the Tribunal [Labour Court] hearing evidence *de novo.*"

It is clear that the Labour Court can deal with both the procedural and substantive aspects of the case under one roof, whereas this court can only deal with the procedural aspects of the case which it cannot put right but refer to other *fora* for rectification if need be. This is obviously time-consuming, E cumbersome and expensive.

The applicant has made no attempt to explain why he has approached this court without exhausting his domestic remedies, which are, in my view, better suited than this court to provide the required remedy.

Thus, even if I were to hold that this court has the necessary review jurisdiction, F a finding which I do not agree with, I would still decline to hear the matter and refer it to the Labour Court for determination.

That being the case, it is accordingly ordered:

1. that this court declines jurisdiction;
2. that this matter be and is hereby referred to the Labour Court for determination.
3. that the applicant is to bear the costs of this application.

Manase & Manase, respondent's legal practitioners

Honey & Blanckenberg, applicant's legal practitioners H

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Source:
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VICTORIA FALLS STEAM TRAIN CO (PVT) LTD v WANKIE COLLIERY CO LTD 2004 (1) ZLR 7 (H)

Citation	2004 (1) ZLR 7 (H)
Case No	Judgment No. HH-3-04
Court	High Court, Harare
Judge	Makarau J
Heard	28 October 2003
Judgment	7 January 2004

Counsel *A P de Bourbon SC*, for the applicant
R Fitches, for the respondent

Case Type Civil application

Annotations None

Flynote

C **Company** — *contracts with — validity — contract concluded in violation of company's internal procedures — when valid — mala fides — whether invalidates contract*

Headnote

The rule in *Royal British Bank* v *Turquand* (1856) 6 E & B 327, 119 ER 886, D which prevents a corporation from relying on non-compliance with its internal procedures to avoid contractual liabilities towards a third party, applies only where the third party was a genuine outsider acting in good faith, and where the transaction was carried out in good faith and was a legitimate one within the powers of the corporation though lacking completeness in terms of the corporation's internal arrangements. The E rule does not apply in cases where there has been a forgery, nor should it apply in the analogous case where the transaction has been carried out in deliberate violation of the internal procedures of the corporation.

The applicant sought to enforce a contract of sale concluded with an official of the respondent company. The official had concluded the sale five days F after he went on leave pending retirement, returning to work specially to conclude the contract, and had violated the company's procedures for the disposal of capital assets. The price at which the asset was sold was below its true value. The evidence indicated that the official intended to favour the applicant to the prejudice of the respondent company, and that the applicant should have realised this. G

Held that sale was not a genuine sale and the applicant was not a genuine outsider, and the rule in *Turquand*'s case did not apply to it.

Cases cited

Royal British Bank v Turquand (1856) 6 E & B 327; 119 ER 886

H *Ruben & Anor v Great Fingall Consolidated* [1906] AC 439 (HL)

2004 (1) ZLR p8

Makarau J

Uxbridge Permanent Benefit Building Society v Pickard [1939] 2 KB A 248

Walenn Holdings (Pvt) Ltd v Integrated Contracting Engineers (Pvt) Ltd & Anor 1998 (1) ZLR 333 (H)

Case information

A P de Bourbon SC, for the applicant B

R Fitches, for the respondent

Judgment

MAKARAU J: The issue that falls for determination in this application is whether the Turquand rule applies in the circumstances of this matter to bind the respondent to a contract of sale with the applicant of one 19thclass locomotive. C

The facts of the matter are fully canvassed in the affidavit of the applicant and that of Claudius Wabatagore on behalf of the respondent. These can be summarised as follows. The applicant made an offer for the locomotive to one Murdock-Eaton, then the general manager (operations) for the respondent, by letter dated 18 October 2002. Correspondence was exchanged between the D

applicant and Murdock-Eaton before Murdock-Eaton accepted the offer on 5 February 2003, five days after he had proceeded on leave pending his leaving the employment of the respondent on retirement. Payment for the locomotive was tendered on 13 February and was duly receipted. The cheque was however returned later when the respondent refused to tender delivery of the locomotive, citing the fact that other organisations had made an offer for the same E ocomotive, making it unavailable for sale by private treaty. Aggrieved by this, the applicant approached this court and, on the basis of the above facts, obtained by consent a provisional order restraining the respondent from disposing of the locomotive pending the determination of whether the respondent should be compelled to deliver the locomotive to applicant in terms of the agreement of sale. F

In opposing the confirmation of the provisional order, the respondent has alleged that the purported sale of the locomotive to the applicant by Murdock-Eaton was highly irregular in that the normal procedure for the disposal of excess assets institutionalised by the public company were not followed. The transaction is described in the affidavit of Wabatagore as:

> G "a deliberate, underhand, fraudulent, corrupt, improper, unauthorised transaction concocted and engineered between a now former employee of the respondent ….and the applicant's representative who were in cahoots with each other for either their mutual personal benefit or the benefit of one of them to the prejudice of the respondent, well knowing that the respondent would never have accepted to sell one of its 19th Class H locomotives for the sum of $2 000 000."

Makarau J

A To substantiate the allegation that the entire transaction between the applicant and Murdock-Eaton was irregular, Wabatagore detailed in his affidavit the process through which the respondent could dispose of a capital asset. The procedure starts with the asset being declared redundant in a particular section and a check being carried out by the chief engineer as to whether the asset can be used in some other department. The procedure also involves at one stage the B asset being removed from the asset register of the respondent, a function that is carried out by the respondent's finance manager on the approval of the managing director and on the recommendation of the chairman of the committee on capital assets. Thereafter, the asset is advertised and sold off.

The above procedure was not followed when Murdoch-E aton purportedly C sold the locomotive to the applicant. This is common cause. Further, the applicant is not disputing that this is the procedure that the respondent had set up for the disposal of its capital assets. Its argument is that in terms of the law, a person dealing with a corporation cannot be prevented from enforcing a contract because of incomplete internal arrangements. The argument advanced on behalf of the applicant proceeds to rely on the Turquand rule that seeks to D prevent corporations from relying on their internal procedures to avoid contractual liabilities.

The case from which the rule is coined is *Royal British Bank* v *Turquand* (1856) 6 E & B 327, 119 ER 886. In that case, two directors of the respondent company signed a bond in favour of the plaintiff, binding the respondent. The E signature was under the company seal. In terms of its constitution, the directors of the respondent could borrow on behalf of the company, under a company resolution. No such resolution was passed. When pressed for payment under the bond, the respondent raised the absence of a resolution to pass the bond as a defence. It did not succeed. The principle upon which the case was decided (the Turquand rule) was to the effect that parties dealing with F a corporation are not bound to do more than peruse the statutes of the company and, if the power to transact is given in the statute, then the party so contracting has the right to infer that the authority to so transact on the part of the corporation has been perfected by the necessary resolutions.

The Turquand rule was applied in this court in the case *of Walenn Holdings (Pvt) Ltd* v *Integrated Contracting Engineers (Pvt) Ltd & Anor* 1998 (1) ZLR 333 (H). G In that case, the court applied the rule to bind the respondent to the purchase of certain shares, the transaction of which had been negotiated and settled by two of the directors who later claimed they had not been authorised by the corporation by resolution to negotiate and conclude the purchase of the shares. In very instructive *dicta*, the court also proceeded to discuss some of H the instances in which the Turquand rule does not apply.

Makarau J

It does appear to me from a reading of the cases in which the rule has been A applied and from texts on the subject, that the contracting party must itself be acting in good faith and that the entire transaction must have been carried out in good faith. It must be a genuine transaction in all other respects save the internal formalities necessary to clothe it with the authority laid down in the statutes of the company. The third party must have been a genuine outsider to be afforded protection by the rule.

My understanding of the application of the rule is that the transaction must be within the powers of the corporation and must be legitimate but simply lacking completeness in terms of internal arrangements. The corporation is then stopped or estopped from raising the incomplete internal arrangements to avoid liability on the contract. Where, however, the transaction is tainted by C *mala fides*, the rule does not apply[1] to the prejudice of the corporation, to bind it to a transaction that it would not have authorised in the first place.

It is settled law that the rule does not apply in cases where there has been a forgery (See *Ruben & Anor* v *Great Fingall Consolidated* [1906] AC 439 (HL) and *Uxbridge Permanent Benefit Building Society* v *Pickard* [1939] D 2 KB 248). It would appear to me the correct view to hold that the position where the transaction sought to be enforced has been concluded in deliberate violation of the internal procedures of the corporation is similar or analogous to one where there has been a forgery. I have, however, been unable to find any authority to support this view.

In the application before me, it appears to me that the sale of the locomotive E to the applicant by Murdock-Eaton was not a genuine sale that simply lacked authorisation by way of a resolution. It was a transaction carried out in flagrant disregard of the procedure set out by the respondent to enhance transparency when disposing of capital assets of the company. Murdock-Eaton simply set out to sell the locomotive outside these procedures. In my view, he abused his F position of trust to purport to sell a capital asset in violation of the internal procedures that had been set up to prevent the very conduct that he engaged in, that of not being transparent in the disposal of capital assets by a public company. He was part of senior management. He must have been party to the drawing up of the disposal procedure that was aimed at enhancing transparency and accountability. He further took advantage of his leaving the respondent on G retirement to purportedly bind the respondent to a sale that he had irregularly conducted. The height of the irregularity of the sale lies in the fact that, despite having proceeded on leave pending retirement on 1 February, Murdock-Eaton returned five days later simply for the purposes of accepting the offer by the H

Makarau J

A applicant. He then copied that acceptance to other senior employees of the respondent.

The applicant has further argued that the locomotive was under-priced. This on its own might not have weighed much with me. However, the cumulative consideration of the under-pricing, the fact that the offer to purchase the locomotive was accepted by an officer of the respondent who was supposed B to be on leave, and the manner in which that officer by-passed laid-down procedures, leads me to two conclusions. Firstly, I have no doubt in my mind that Murdock-Eaton was out to prejudice the respondent in the way he conducted himself. Secondly, I conclude that the applicant was not a genuine outsider and ought to have been put on its inquiry by the suspicious conduct C of Murdock-Eaton had it been a genuine outsider. The applicant has not answered to the specific averment that Murdock-Eaton accepted its offer after he had proceeded on leave. There is no denial of this averment in the applicant's papers, suggesting that the applicant was aware of the irregularity.

I have further considered whether to sell an asset belonging to the respondent is a power that would ordinarily have inhered in a person occupying the D position of Murdock-Eaton to establish ostensible authority on the part of Murdock-Eaton. I must confess that this argument was not pressed before me. It must have occurred to counsel for the applicant that it would not succeed as I cannot see the basis for holding that Murdock-Eaton had ostensible authority to sell the locomotive outside the laid down procedure.

E The applicant has referred me to the irregular manner in which some of the respondent's affidavits were filed. In view of the conclusion I come to in this application, it is unnecessary for me to deal with this issue in detail. Suffice it to say that I have not considered these affidavits in dismissing this application. F

In the result, I make the following order:

1. The provisional order issued by this court on 17 March 2003 is hereby discharged.
2. The application is dismissed. G
3. The applicant is to pay the respondent's costs.

Ahmed & Ziyambi, applicant's legal practitioners.

Scanlen & Holderness, respondent's legal practitioners. H

1 See Charlesworth's *Company Law* 13 ed p 137

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Source:
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CHIVISE v DIMBWI 2004 (1) ZLR 12 (H)

Citation	2004 (1) ZLR 12 (H)
Case No	Judgment No. HH-4-04
Court	High Court, Harare
Judge	Omerjee J & Makarau J
Heard	3 June 2003
Judgment	7 January 2004
Counsel	*W Muchengeti,* for the respondent The appellant in person
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Customary law — *marriage — validity — how tested — duration of marriage* C — *not relevant to determine validity*

Family law — *husband and wife — divorce — distribution of property following divorce — customary law marriage — need for legislative intervention to clarify requirements*

Headnote

D The validity or otherwise of a customary marriage is not tested by how long it has endured but by whether certain formalities and rituals at customary law have been performed. The duration of the union is irrelevant for most practical purposes under customary law. It is however relevant when considering the equitable distribution of the matrimonial estate under the provisions of s 7

of the Matrimonial Causes Act [*Chapter 5.13*]. E Decisions by the superior courts on the distribution of the matrimonial property after a customary law marriage has been terminated have caused confusion that can only be resolved by legislative intervention.

Cases cited F

Chapeyama v Matende & Anor 2000 (2) ZLR 356 (S)

Jengwa v Jengwa 1999 (2) ZLR 121 (H)

Mashingaidze v Mugomba HH-3-99

Matibiri v Kumire 2000 (1) ZLR 492 (H)

Mtuda v Ndudzo 2000 (1) ZLR 710 (H) H

Case information

W Muchengeti, for the respondent

The appellant in person

Makarau J

Judgment

A **MAKARAU J:** The parties were in an unregistered customary marriage that failed after eight months of cohabitation. Upon separation, the respondent issued summons out of the magistrates' court, Marondera, claiming the distribution of the property acquired during the marriage and payment of thesumof $16 000, allegedly owed the respondent by the appellant. The property that fell for distribution was a residential stand and a set of sofas. B

After hearing evidence from the parties and their witnesses, the trial magistrate awarded the immovable property to the respondent. He also ordered the respondent to pay the sums of $8 000 and $5 205 to the appellant as a refund of his contribution towards the deposit for the purchase of the stand and for service charges. Regarding the sofas, the appellant was ordered to pay to the C respondent the sum of $5 000 being her contribution towards the purchase of the sofas. The claim for payment of the sum of $16 000 was dismissed.

The appellant was dissatisfied with the judgement and noted an appeal to this court against the entire judgement. In his notice of appeal, the appellant prayed that the respondent's claim in the lower court for the distribution of the matri-estate be dismissed.

D In his grounds of appeal, he attacked the trial court's judgment on the basis that the court erred in accepting the evidence of the respondent as credible and in disregarding his own version of how the property in dispute was acquired.

It is trite that a court of appeal will be very slow to set aside the findings of a trial court on the credibility of witnesses. This is not a rule of law but a E practical recognition in court procedures that the trial court is better placed than an appeal court to assess the credibility of the witnesses that appear before it. The trial court is physically involved in the verbal exchanges between the parties and can more reliably assess the credibility of the witnesses from the manner in which the testimony unfolds, unlike the appeal court, which has to rely on the record of proceedings. F It is only in exceptional instances, where the record of proceedings clearly indicates that the findings of credibility by the trial court were in error, that an appeal court will interfere. There is no such indication in this appeal.

In my view, the findings of the trial court on the credibility of the witnesses cannot be faulted. On this basis alone, the appeal cannot succeed.

G There is, however, one issue that concerned me in the judgment of the trial court and on which I must comment even if the appeal cannot succeed on the grounds raised in the notice of appeal.

The issue of how to distribute the property of parties to an unregistered customary marriage and which law is applicable to such disputes has dogged the courts for quite some time. No settled position has emerged from the H

Makarau J

various decisions that have been passed down by this, and the Supreme Court. A The confusion that characterises the law in this field and that, in my view, can only be cleared by the legislature by reforming the law of marriages in this country, is manifest in the judgment by the trial court.

In its judgment, the trial court had this to say on pages 2-3 of the judgment, which raised my concern: B

> "The law pertaining to sharing of property states that for property to be shared there must have been [a] recognised form of marriage and if it was an unregistered customary law union the court will consider the duration of the marriage before dealing with the issue of distribution of property. The general principle is that in customary marriages the wife has no claim to property, it is said to belong to the wife (husband?) unless she directly C made contributions. This rule has become relaxed of age because nowadays most women are employed and are contributing in marriage.
>
> In this particular case, we cant talk of sharing property at all. This is an unregistered customary union which lasted for only eight months and both parties did not acquire much as husband and wife and each must take what he /she contributed." D

It does appear to me, with respect, that the trial court tied itself up in knots in trying to resolve the dispute before it. Firstly, there is no rule of customary law that provides the estate of such parties can only be distributed after the duration of the marriage has been established. The validity or otherwise of a customary marriage is not tested by how long it has endured but by whether E certain formalities and rituals at customary law have been performed. The duration of the union is irrelevant for most practical purposes under customary law. It is, however, relevant when considering the equitable distribution of the matri-estate under the provisions of s7 of the Matrimonial Causes Act [*Chapter 5:13*].

Secondly, having determined that there was no marriage to talk about, the trial F court resolved to order that each party be entitled to what they brought into the marriage. In doing so, it is not clear which provision of customary law the trial court was applying.

The choice of law applicable to the distribution of such estates is a real issue that has exercised these courts before. Gillespie J, dealt with the issue in some G detail in *Jengwa* v *Jengwa* 1999 (2) ZLR 121 (H) in *dicta* that I find most useful in highlighting the unsatisfactory status of the law in this regard.

There is no known principle of tacit universal partnership under customary law. There is also no known principle of joint ownership between persons in a union akin to a marriage. In my view, the trial court purported to apply either of the principles between the parties by ordering that each party must be H

Makarau J

A awarded what they contributed to the marriage. It simply tried to find an equitable solution to the dispute after declaring that there was no marriage to talk of and after noting that the parties did not acquire much by way of a joint estate.

Thirdly, in establishing what each party had contributed to the marriage, the trial court used the same considerations of equity that it would have used had B the parties been in a registered union, thus compounding the confusion as to how to treat the property of persons in an unregistered union.

The confusion on the part of the trial court is understandable and to some extent excusable. A perusal of some of the cases that have come before this court and the Supreme Court will reveal that the position of how to treat the C estates of persons in positions similar to that of the parties in this appeal will reveal the same unsettled position.

Some of the cases that have tried to grapple with the issue without settling the position are *Jengwa* v *Jengwa* (supra), *Mtuda* v *Ndudzo* 2000 (1) ZLR 710 (H), *Matibiri* v *Kumire* 2000 (1) ZLR 492 (H), *Chapeyama* v *Matende &Anor* 2000 (2) ZLR 356, and *Mashingaidze* v *Mugomba* HH-3-99.

D The general position that emerges from the above cases appears to me to be that customary law *per se* is inapplicable, as it will lead to an injustice between the parties. (See *Jengwa* v *Jengwa (supra) and Matibiri* v *Kumire*). General principles of law including unjust enrichment, universal partnership and joint ownership have been resorted to through judicial innovation aimed at

providing E a just and equitable distribution of such estates. The result in most of the cited cases has been an attempt to find a just remedy for women in such unions. In the cases that have been reviewed, no woman in such a union has gone from the court empty handed. In *Jengwa* v *Jengwa (supra*), after sounding a warning against judicial innovation that may distort existing legal principles, Gillespie J observed that the development of the law towards recognising the property F rights of women in such unions should be encouraged and regarded as conforming to the national will. He had this to say at 131:

> "Zimbabwe has acceded to the United Nations Convention on the Elimination of All Forms of Discrimination against Women. This includes the obligation on member states to
>
> G 'take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular [to] ensure on the basis of equality between men and women:
>
> ….
>
> (h) the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property…..' H

2004 (1) ZLR p16

Makarau J

> In the face of this national desideratum, it would scarcely be appropriate A for the court not to subvert the wife suffering gender discrimination."

It remains my view that the law in this field of family law remains unsatisfactory and an opportunity to call upon the legislature to intervene that is presented by this case ought to be heard.

The issue that, however, remains for determination is whether the trial court B was correct in applying a general law principle to the distribution of a customary law union. In my view, it was as there is no known principle of customary applicable to such disputes.

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

Omerjee J concurred.

Sakala & Co, respondent's legal practitioners. D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/MACMILLAN & ORS v PROVINCIAL MAGISTRATE, HARARE & ORS 2004 (1) ZLR 17 (H)

MACMILLAN & ORS v PROVINCIAL MAGISTRATE, HARARE & ORS 2004 (1) ZLR 17 (H)

2004 (1) ZLR p17

Citation	2004 (1) ZLR 17 (H)
Case No	Judgment No. HH-49-04
Court	High Court, Harare
Judge	Hungwe J
Heard	9 January 2004
Judgment	9 January 2004
Counsel	*G C Chikumbirike*, for the applicants Mrs *V Mabhiza*, with her *Mr V Shava*, for the respondents

Case Type Application for review

Annotations No case annotations to date

Flynote

C **Court** — *judicial officer — recusal — application — correct approach for judicial officer to adopt — grounds for recusal — bias — actual bias not required — reasonable grounds for apprehension of bias sufficient*

Headnote

The applicants were arrested on charges under the Gold Trade Act and other D statutory offences. They appeared before the first respondent four days after their arrest, the High Court having intervened to require that the applicants be brought to court. The first respondent refused them bail but bail was granted by the High Court on appeal. A month later, when the applicants reported to the police as required by their bail conditions, they were arrested and charged with offences similar to those on which they E had already been released on bail. The magistrate before whom they were brought granted bail but the State announced its intention to appeal against that decision. The applicants were therefore not released. The Attorney-General not having filed a notice of appeal within the stipulated time, the applicants applied to the High Court for an order for their F release. That application was granted. In spite of the High Court's order, the police caused the applicants to appear before the first respondent again, on the same charges as before. Counsel for the applicants applied for the first respondent to recuse himself. He refused to do so and also refused to grant the applicants bail.

The applicants sought a review of the magistrate's decision on the grounds G of bias and gross irregularity. It was argued that as the High Court has already granted bail on the same offences, the magistrate had exhibited bias by refusing bail. It was also argued that the bringing of the second proceedings before the first respondent was an abuse of process.

Held, that bias, in the sense of judicial bias, means a departure from the standard of even-handed justice which the law requires from those who H hold judicial office. Not only actual bias, but also the appearance of bias

disqualifies a judicial officer from presiding, or continuing to preside, A over judicial proceedings. Continuing to preside after recusal should have occurred renders any further proceedings a nullity.

Held, further, that the duty of recusal arises when it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias. The matter must B be regarded from the point of view of a reasonable litigant. The reasonable perception of the parties as to the judicial officer's impartiality is what matters. It is not necessary to inquire into the mind of the person challenged to determine whether or not he was not or would be actually biased.

Held, further, that when a litigant seeks the recusal of a judicial officer he C should weight their objection objectively. An application for recusal is not an attack on the professionalism of the judicial officer. Unless the application is clearly vexatious, a failure by the judicial officer to recuse himself would tend to confirm the applicant's fear that he might not receive a fair hearing.

Held, further, that considering the history of the applicants' appearance on D initial remand and how they obtained bail, it could not be objectively said that their fear that they might not receive a fair hearing was unreasonably held.

Held, further, that the conduct of the police should be strongly deprecated. The impression was created of a serious determination to frustrate court orders. This impression only reinforced the view held in certain quarters that there was no respect for the rule of law by the executive branch of government. If the police believed that the grant of bail was wrong, their proper course was to appeal.

Cases cited F

Foya & Matimba v R & Jackson 1963 R & N 318 (FS)

McNabb v US 318 US 332; 87 L Ed 819 (1943)

Muringi v Air Zimbabwe Corporation & Anor 1997 (1) ZLR 357 (H)

S v Roberts 1994 (4) SA 915 (A) G

Case information

G C Chikumbirike*, for the applicants*

Mrs *V Mabhiza*, with her *Mr V Shava*, for the respondents

Judgment

HUNGWE J: This is an application for review of the decision of the magistrate dismissing the application made in that court for the first respondent to recuse H himself when an application to place the applicants on remand was placed

A before him. It was brought under a certificate of urgency on 6 January 2004. I directed that the respondents file their opposing papers, if they were so disposed to oppose, and that both parties file their heads of argument, indicating too that the matter will be set down today for argument

In this application for a review, the applicants sought the following order:

B "IT IS ORDERED THAT:

1. The decision of the first respondent refusing to recuse himself and placing the applicants on remand be and is hereby set aside.
2. The applicants be and are hereby released from prison custody forthwith.
3. The third respondent be and is hereby interdicted from re-arresting C the applicants or similar charges as appear in Annexures 'B', 'C' and 'E'.
4. All charges pertaining to contravening the Mines and Minerals Act, Gold Trade Act, and Customs and Excise Act be consolidated together in one indictment and that the charges be preferred against the applicants at their trial."

D The background to the application is as follows. The applicants were arrested on 3 November 2003. They appeared before the first respondent on 7 November 2003 on CRB 13714/03. That appearance was consequent upon an order which I granted requiring the investigating officer to bring the applicants to court in case number HC 9198/03.

E They therefore had not been brought to court within 48 hours of their arrest as the police were obliged to do in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. If there was some other legal basis for holding them, the papers before me do not state it.

The applicants were refused bail in their initial appearance before first the F respondent on 7 November 2003.

On appealing to this court (Karwi J) they were granted bail in B17607/03. They were released on bail.

On 12 December 2003, when reporting to CID Fraud in fulfillment of their conditions of bail, the first, second and fourth applicants were arrested. The third applicant surrendered himself to police on 16 December 2003. They were E charged with offences similar to those which they were already on bail.

On 19 December 2003 the magistrate granted them bail on the "fresh" charges. Upon the pronouncement of the grant of bail the State immediately invoked the provisions of s 122(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The effect of that provision is to suspend the judgment H granting bail for seven days, during which period the Attorney General is to

decide whether to appeal or not. If the Attorney-General decides to appeal, the A accused will be held in custody untill a judge determines the appeal. If the Attorney-General does not so decide, he is to notify the magistrate within those seven days. The accused will be released forthwith.

The State representatives did not file their notice of appeal within the stipulated time nor was the magistrate advised of the Attorney-General's B decision prompting the applicants to seek an order for release from this court.

This court (Guvava J) duly granted the order of release on 2 January 2004. The basis for such release was that s 122(2)(a) became operative where no notice of appeal was filed within the seven day period.

On the same day that this court issued an order effectively releasing the four, C the second and third respondents caused them to appear before the first respondent again on similar charges, for the second time. It was their third time being placed on remand for similar charges. In fact State Counsel advised Guvava J of this third appearance and that the applicants would not be released!!

Present counsel for the applicants then made the application for recusal which D is subject of this application for review. The first respondent threw out the application for recusal. He then proceeded to refuse the applicants bail.

The applicants cite two grounds for review of the proceedings in the court *a quo, viz* bias and gross irregularity.

On behalf of the applicants, Mr *Chikumbirike* argued that as the magistrate, E the first respondent, had previously denied the applicants bail, the applicants reasonably feared that he may fail to impartially determine their application as a result of prejudicial bias. He pointed to the fact that despite being denied by the first respondent, this court had subsequently granted them bail. This must have stung him as it clearly showed that his decision was wrong. Secondly, the proceedings of the initial remand were founded upon facts similar to those F upon which bail had been granted. Bringing these proceedings and opposing bail on similar facts in which bail was granted is abuse of process amounting to a gross irregularity which this court should set aside on review in the exercise of its wide powers of review.

In opposition to this application the first respondent contended that he G correctly rejected the application for recusal made against him. He does not, however, elucidate the approach he took or the principle he applied or the authorities he relied upon, for his ruling.

In *S* v *Roberts* 1999 (4) SA 915 (SCA) at p 922 *et seq* Howie JA set out the development of the test for bias thus: H

> "Bias in the sense of judicial bias has been said to mean 'a departure from

---

> A the standard of even-handed justice which the law requires from those who occupy judicial office'. See *Franklin & Ors* v *Minister of Town and Country Planning* [1948] AC 87 (HL) at 103; [1947] 2 All ER 289 at 296B-C). What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly but that such conduct must be 'manifest to all those who are concerned in the trial and B its outcome, especially the accused'. See S v *Rail* 1982 (1) SA 828 (A) at 831H-832A.
>
> It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the C further 'proceedings' a nullity: *Council of Review, South African Defence Force & Ors* v *Monning & Ors* 1992 (3) SA 482 (A) at 495B-C*; Moch* v *Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 9G.
>
> For too long, however, the legal test for the appearance of judicial bias was uncertain. This was because it was variously and, with respect, at times D confusingly stated both here and in England. The way in which the test has now come to be formulated in South Africa can be traced in the following recent pronouncements of this court.
>
> In S v *Malindi &Ors* 1990 (1) SA 962 (A) at 969G-I it was said:
>
> 'The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S* v E *Radebe* 1973 (1) SA 796 (A) and *South Africa Motor Acceptance Corporation (Edms)* Bpk v *Oberholzer* 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter F must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.'

Then, *Monning's* case foreshadowed a switch from 'likelihood' to 'reasonable suspicion' but left the choice of formulation open. At 490C- G G it was said:

'It may be that this formulation [likelihood of bias] requires some elucidation, particularly in regard to the meaning of the word "likelihood": whether it postulates a probability or a mere possibility. Conceivably it is more accurate to speak of "a reasonable suspicion of bias". Suspicion, in this context, includes the idea of the mere possibility of the existence, H present or future, of some state of affairs. *(The Oxford English Dictionary sv*

2004 (1) ZLR p22

"suspicion" and "suspect"); but before the suspicion can constitute a A ground for recusal it must be founded on reasonable grounds.

It is not necessary, however, to finally decide these matters for, whatever the correct formulation may be, I am satisfied that the court *a quo* was correct in holding that the court martial did not pose the correct test when deciding the recusal issue (see reported judgment at 875J-876B) and that the circumstances were such that a reasonable person in the position of B second respondent could have thought that … "the risk of an unfair determination on an issue such as this was unacceptably high."

(See reported judgment at 881H-I).'

(The reported judgment mentioned at the end of that extract is the judgment in *Monning's* case of the Full Court of the Cape Provincial Division reported in 1989 (4) SA 866 (C).) C

Later, in *BTR Industries South Africa (Pty) & Ors* v *Metal and Allied Workers' Union & Anor* 1992 (3) SA 673 (A) it was finally laid down (at 6931-J) —

'that in our law the existence of a reasonable suspicion of bias satisfied the test; and that an apprehension of a real likelihood that the decision D maker will be biased is not a prerequisite for disqualifying bias'.

The court went on (at 694A) to approve the statement by the court *a quo* in *Monning's* case that 'provided the suspicion is one which might reasonably be entertained, the possibility of bias where none is to he expected serves to disqualify the decision maker' and at 694J referred to the required suspicion as one which 'might E reasonably be entertained by a lay litigant'.

Adoption of the reasonable suspicion test in preference to the real likelihood test was confirmed in *Moch's* case at 8H-I.

Thus far, therefore, the requirements of the test thus finalised are as follows as applied to judicial proceedings: F

(1) There must be a suspicion that the judicial officer might, not would, be biased.

(2) The suspicion must be that of a reasonable person in the position of the accused or litigant.

(3) The suspicion must be based on reason0able grounds."

The test as applied in our jurisdiction is not different. It is an objective one. G The inquiry is whether a reasonable litigant would fear bias.

As Robinson J pointed out in *Muringi* v *Air Zimbabwe Corporation & Anor* 1997 (1) ZLR 357 (H) at 376:

"In *Leopard Rock Hotel (Pvt) Ltd* v *Wallen Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) the Supreme Court held that the test as to whether the H

2004 (1) ZLR p23

A person concerned was disqualified to act on the ground of bias was an objective one. In this respect Korsah JA stated at 275A:

'a common theme which runs throughout the authorities is, therefore, that the test to be applied is an objective one. One does not inquire into the mind of the person challenged co determine whether or not he was not *or would be actually biased.* Thus the character, professionalism, B experience or ability as to make it unlikely despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration.'

At 275G Korsah JA referred to the conclusion reached by Clayden J (as he then was), after a careful perusal of relevant cases in *Appel* v *Leo &* C *Anor* 1947 (4) SA 766 (W) at 774 that 'the test to be applied is an objective test, the possibility in fact of bias', and not actual bias."

As far back as 1963 when the point arose before him in *Foya & Matimba* v *R & Jackson NO* 1963 R&N 318 (FS) at 322 Clayden CJ stated:

"I consider therefore that what the applicants had to show was not D necessarily personal animosity towards them. If they showed that the position was such that a reasonable man in their position would have thought that he would not have a fair trial in the circumstances and that there was nothing in further facts disclosed to indicate that that was not a real likelihood, that would be enough."

Considering the history of their appearance on initial remand and how they E obtained the grant of bail, could it be said objectively that the applicants' fear that they may not receive a fair hearing is unreasonably held? I think not.

The applicants had been brought to court on three occasions on similar charges arising out of basically one course of conduct i.e. exportation of gold to South Africa. This is alleged to have occurred within a twelve-month period.

F The second and third respondents had indicated that they intended to appeal against the grant of bail but had not pursue that appeal.

They succeeded in obtaining a warrant to hold the applicants in custody for seven days. When this court ordered their release yet another arrest was effected. Section 322 of the Criminal and Procedure Evidence Act provides for the courses open to the police. The respondents have not argued that that G section was inapplicable.

Such conduct by the police has been demonstrated in this particular case must be deprecated in the strongest terms.

An impression is created of a serious determination to frustrate court orders. That impression only reinforces the view held in certain quarters that there is H no respect for the rule of law by the executive branch of Government. The

police force should be the last arm of Government to reinforce such a view. If A it was believed that the applicants are not entitled to bail, an appeal ought to have been the proper course to take, rather than repeatedly arresting suspects who are on bail and who have not shown the slightest inclination to breach their conditions of bail.

The respondents argued that they had uncovered more grounds for possibly B charging the applicant. Whilst this may be so, that does not warrant a persistent assault on the liberty of the individual in the manner displayed here.

These courts would be failing in their duty to uphold the Constitution and the individual liberties that we all cherish should they turn a blind eye on such abject abuse of process. C

As was stated by Justice Frankfurter in *McNabb* v *US* 318 US 332; 87 L Ed 819 (1943) at 825-826

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent D disregard of cherished liberties. Experience has therefore counselled that safeguards must be placed against the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies on its vindication." F

In the exercise of its judicial functions, a magistrates court is the first port of call for all suspects after their arrests. It is at that court that a decision between incarceration and liberty is made. It may be quickly freely and fairly decided or it may take days, if not weeks, for such a decision to come.

An applicant for bail, like any other litigant, trusts that the tenets of fairness, F transparency, impartiality, lack of interest in the cause and liberty will be observed. That is a reasonable litigant. On the other and, some litigants see conspiracy by the whole system against them. They smell a rat in every corner, They cannot accept that their cases would be fairly handled. They hold this belief without any basis. It is a fear spawned by the mere fact of their arrest. G This category of suspects or litigants is an unreasonable lot. They cannot objectively assess their predicament. The beliefs they hold cannot be said to be reasonably held as they are not based on such grounds.

Yet when they seek a recusal of a judicial officer residing in their case he should objectively weigh their objection. H

A An application for recusal seems to be an attack on the professionalism of the judicial officer. Yet it is not. It merely is an expression of the sometimes unreasonably held fear by litigants that they may not receive a fair hearing for stated reasons. Unless it is clearly vexatious a judicial officer

must therefore reluctantly dismiss such application as a failure to do so would tend to confirm their fear, lest it be said. "Why would he in insist in trying my case if he had B no interest?"

In the instant the fear expressed was that on the same facts, the same presiding officer has refused us bail. He is unlikely to do the same, more so as the High Court order had shown him to have been wrong.

I do not think that that fear was urn reasonably held, bearing in mind the history C of this matter. On that ground alone the first respondent ought to have recused himself. He did not. It does not matter that he proceeded to fairly deal with the matter. After he failed to recuse himseIf the proceedings were a nullity, susceptible to being set aside.

In my respectful view, society ought to be assured that the checks and balances enshrined in the Constitution exist for the safeguard of the liberties of the D individuals. These are enshrined as guarantees to citizens, not window-dressing. Whether one is suspected of committing an offence or not, the presumption of innocence remains the only safeguard against overzealous individuals in the policing arm of the State. Once the police have effected an arrest, and instituted due process, it is no longer up to the police to decide E whether or not a suspect should be held in custody. That is the function of the courts. A view to the contrary cannot be allowed to prevail. These proceedings render themselves reviewable as they display a clear example of abuse of the due process by the police.

In the result I find that the trial court misdirected itself in failing to grant the application for recusal. As such I am free to correct the proceedings in that F court. I will therefore issue the following order:

1. The decision of the first respondent refusing to recuse himself and placing the applicants on remand be and is hereby set aside.
2. The decision placing the applicants on remand for the further 27 counts in CRB No. 60-3/04 is hereby set aside. G
3. The applicants be and are hereby released from prison custody forthwith
4. The third respondent be and is hereby. interdicted from re-arresting the applicants on similar charges as appear in annexures B', 'C' and 'E' of the papers and arising out of the same facts. H
5. All charges pertaining to contravening the Mines and Minerals Act, Gold

Trade Act, Customs and Excise Act and any other charges that might arise A from the same facts, be consolidated together in one indictment and that the charges be preferred against the applicants at their trial.

Chikumbirike & Associates, legal practitioners for applicants

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/ICRC v SIBANDA & ANOR 2004 (1) ZLR 27 (H)

ICRC v SIBANDA & ANOR 2004 (1) ZLR 27 (H)

Citation 2004 (1) ZLR 27 (H)

Case No Judgment No. S-48-03

Court Supreme Court, Harare

Judge	Sandura JA, Malaba JA & Gwaunza JA
Heard	30 September 2003
Judgment	13 January 2004
Counsel	*H Zhou,* for the appellant *S V Hwacha,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Employment** — *termination of employment — whether by agreement or not*

International law — *sovereign immunity — international organisation granted immunity under Privileges and Immunities Act [Chapter 3:03] — whether such immunity restrictive or absolute — contract of employment entered into by such organisation an act jure gestionis — not covered by immunity*

Headnote

D The ICRC terminated the employment of two employees and, when sued, claimed: (a) immunity from suit and legal process in respect of civil proceedings; and (b) that the terminations were in any event by consent.

Held, as to (a), that an international organisation, such as the International E Committee of the Red Cross, enjoys immunity from suit and legal process subject to the provisions of international law, and the doctrine of restrictive immunity applies to it. This is to the effect that a foreign sovereign would enjoy immunity from suit and legal process where the relevant act which forms the basis of the claim is an act "*jure imperii*", i.e. a sovereign or public act. On the other hand, he would not enjoy such F immunity if the act which forms the basis of the claim is an act "*jure gestionis*", i.e. an act of a private law character such as a private citizen might have entered into. It cannot have been the intention of the legislature to grant absolute immunity from suit and legal process to such an organisation when a foreign sovereign did not enjoy such immunity. G A contract of employment between such an organization and its employee is an act of a private law character such as a private citizen might have entered into and a dispute over it would be subject to the jurisdiction of the local courts. The Act granted immunity only in respect of acts *jure imperii*. The acts in question were acts *jure gestionis* in respect of which H no immunity existed.

Held, further, as to (b), that on the facts the termination in respect of the first A respondent was by consent, but in respect of the second respondent was not.

Cases cited

Barker McCormac (Pvt) Ltd v Government of Kenya 1983 (2) ZLR 72 (S); 1983 (4) SA 817 (ZS) B

I Congreso del Partido [1981] 2 All ER 1064 (HL)

Rahimtoola v H E H The Nizam of Hyderabad & Ors [1957] 3 All ER 441 (HL)

Shipping Corp of India Ltd v Evdomon Corp & Anor 1994 (1) SA 550 (A)

Trendtex Trading Corp Ltd v Central Bank of Nigeria [1977] 1 All ER C 881 (CA)

Zimbabwe Bonded Fibreglass (Pvt) Ltd *v* Peech 1987 (2) ZLR 338 (S)

Legislation considered

Privileges & Immunities Act [*Chapter 3:03*] D

Case information

H Zhou, for the appellant

S V Hwacha, for the respondents

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which declared that the appellant ("the ICRC") did not have immunity from suit and E legal process in respect of civil proceedings instituted against it by the second respondent ("Ngangura"), directed the ICRC to comply with the Labour Relations (Retrenchment) Regulations, 1990 ("the Retrenchment Regulations") before terminating Ngangura's employment, and referred to trial the issue of whether the first respondent ("Sibanda") had consented to the termination of her employment. F

The background facts are as follows. Ngangura and Sibanda were employed by the ICRC in Zimbabwe. Ngangura's employment was terminated on 31 December 1997, and Sibanda's was terminated on 31 December 1998. However, the circumstances in which their employment was terminated were not common cause. G

Ngangura and Sibanda alleged that they had been unlawfully retrenched, whilst the ICRC contended that the termination of employment had been by agreement and that the Retrenchment Regulations did not, therefore, apply. When legal proceedings were threatened, the ICRC alleged that it could not be sued in Zimbabwe because it enjoyed immunity from suit and legal process in terms of the Privileges and Immunities Act [*Chapter 3:03*] ("the Act"). H

A Undaunted by the stance taken by the ICRC, Ngangura and Sibanda filed a court application in the High Court seeking an order declaring that, in respect of their contracts of employment, the ICRC did not enjoy immunity from suit and legal process, and directing the ICRC to comply with the Retrenchment Regulations. The learned judge who heard the application granted the order sought by Ngangura, but referred to trial the issue of whether Sibanda had B consented to the termination of her employment. Aggrieved by that decision, the ICRC appealed to this court.

Two main issues arise for consideration in this appeal. The first is whether the ICRC enjoys immunity from suit and legal process in respect of contracts of employment. If it does, that is the end of the matter and the appeal must be C allowed. However, if it does not enjoy that immunity, the second issue to consider is whether the termination of employment was by agreement. If it was, the Retrenchment Regulations would not apply and the appeal must be allowed.

Section 7(1) of the Act, which deals with the privileges and immunities of specified international organisations, reads as follows, in relevant part:

> D "The President may, by notice in the *Gazette*, confer upon any international or regional organisation or agency … specified in such notice all or any of the privileges and immunities set out in Part I of the Third Schedule."

The privileges and immunities set out in Part I of the Third Schedule include immunity from suit and legal process.

E In the court *a quo*, it was not in issue whether or not the President had acted in terms of s 7(1) of the Act in respect of the ICRC. Accordingly, the learned judge accepted that the ICRC had been duly accorded the immunity from suit and legal process. But, as the learned judge correctly observed, that does not shed any light on whether or not the immunity covers all suits and legal processes.

F In order to answer that question, it is necessary to examine the nature and extent of the immunity accorded a foreign sovereign in terms of international law, because it could hardly have been the intention of the legislature to grant greater immunity to an international organisation, such as the ICRC, than that granted to a foreign sovereign.

G The issue concerning the immunity from suit and legal process accorded a foreign sovereign has been the subject of judicial pronouncements for many years. Thus, in *Rahimtoola* v *H E H The Nizam of Hyderabad & Ors* [1957] 3 All ER 441 (HL), Lord Denning said the following at 461E-G:

> "It is more in keeping with the dignity of a foreign sovereign to submit H himself to the rule of law than to claim to be above it; and his independence

is better ensured by accepting the decisions of courts of acknowledged A impartiality than by arbitrarily rejecting their jurisdiction. In all civilised countries, there has been a progressive tendency towards making the sovereign liable to be sued in his own courts – notably in England by the Crown Proceedings Act, 1947. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do B not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognisable by them."

As to the nature and extent of sovereign immunity, the learned Law Lord had this to say at 463I-464A:

"Applying this principle, it seems to me that at the present time sovereign C immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether 'conflicting rights have to be decided', but on the nature of the conflict. Is it properly cognisable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the D dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity." E

Similarly, in *I Congreso del Partido* [1981] 2 All ER 1064 (HL) at 1070F-J, Lord Wilberforce said:

"It is necessary to start from first principle. The basis on which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of '*par in parem*' …, which effectively means that F the sovereign or governmental acts of one state are not matters on which the courts of other states will adjudicate.

The relevant exception, or limitation, which has been engrafted on the principle of immunity of states, under the so-called restrictive theory, arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main G foundations:(a) it is necessary in the interests of justice to individuals having such transactions with states to allow them to bring such transactions before the courts; and (b) to require a state to answer a claim based on such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state nor any interference with its sovereign functions. F

A When therefore a claim is brought against a state … and state immunity is claimed, it is necessary to consider what the relevant act is which forms the basis of the claim: is this, under the old terminology, an act '*jure gestionis*' or is it an act '*jure imperii*'; is it (to adopt the translation of these catchwords used in the Tate letter) a 'private act' or is it a 'sovereign or public act', a private act meaning in this context an act of a private law B character such as a private citizen might have entered into?"

See also *Trendtex Trading Corporation Ltd* v *Central Bank of Nigeria* [1977] 1 All ER 881 (CA) at 890F-G.

The above pronouncements by both Lord Denning and Lord Wilberforce received the approval of this court in *Barker McCormac (Pvt) Ltd* v *Government of Kenya* 1983 (2) ZLR 72 (S) at 79G-H; 1983 (4) SA 817 (ZS) at 821F-G, C where Georges JA (as he then was) said:

"I am completely satisfied therefore that the doctrine of sovereign immunity generally applied in international law is that of restrictive immunity. There are no decisions of courts of this country and no legislation inconsistent with that doctrine and it should be incorporated as part of our law."

D It is, therefore, clear that the doctrine of sovereign immunity applicable in this country is that of restrictive immunity as opposed to absolute immunity. In other words, a foreign sovereign would enjoy immunity from suit and legal process where the relevant act which forms the basis of the claim is an act "*jure imperii*", i.e. a sovereign or public act. On the other hand, he would not enjoy E such immunity if the act which forms the basis of the claim is an act "*jure gestionis*", i.e. an act of "a private law character such as a private citizen might have entered into".

The position in South Africa is the same. It was stated by Corbett CJ in *Shipping Corporation of India Ltd* v *Evdomon Corporation & Anor* 1994 (1) SA 550 (A) at 565A-B as follows: F

"The legal position in this country regarding the doctrine of sovereign immunity was carefully and comprehensively surveyed by the Full Bench of the Transvaal Provincial Division in the case of *Inter-Science Research and Development Services (Pty) Ltd* v *Republica Popular de Mocambique* (1980 (2) SA 111 *supra*). As this survey shows, South African courts G initially applied the doctrine of

absolute immunity, but in the *Inter-Science* case the court … decided to follow the world-wide trend and to apply the restrictive doctrine."

In my view, an international organisation, such as the ICRC, enjoys immunity from suit and legal process subject to the provisions of international law, and the doctrine of restrictive immunity applies to it. It could hardly have been the H intention of the legislature to grant absolute immunity from suit and legal

process to such an organisation when a foreign sovereign did not enjoy such A immunity.

I now wish to consider the nature of the act which forms the basis of the claims brought by Ngangura and Sibanda against the ICRC. That act is a contract of employment which, clearly, is "an act of a private law character such as a private citizen might have entered into". B

Having come to that conclusion, it is not necessary for me to consider whether clause 7 of the conditions of employment, which provided that any dispute arising in the application of the conditions would be settled in conformity with the labour legislation in force in the country, constituted a waiver of the ICRC's immunity. C

In the circumstances, as the learned judge correctly decided, the ICRC does not enjoy immunity from suit and legal process, and the point *in limine* raised by it falls away.

I now wish to deal with the merits of the claim by the two employees, i.e. that before terminating their employment contracts the ICRC should have complied with the Retrenchment Regulations. The ICRC's reply to this was that there D was no need to comply with the Retrenchment Regulations because the contracts of employment were terminated by agreement.

In the case of Sibanda, the ICRC relies upon its letter to her which was dated 18 February 1998. It was written by Frank Schmidt ("Schmidt"), the ICRC's regional delegate, and reads as follows: E

"Dear Mrs Sibanda,

This is to confirm the agreement we reached in our meeting on 17 February in my office regarding the termination of your employment with the ICRC's regional delegation in Harare.

We agreed on the following specific points:

1. Your contract of full-time employment will end on 28 February 1998 F . Under a separate, fixed-term contract, you will continue to work for us, at 50 percent of your time, from 1 March to 31 December 1998. The financial and practical conditions pertaining to this arrangement, including severance pay, will be the same as those set out in Mr Givel's letter to you of 1 December 1997. G
2. You have made arrangements with the University of Southern Queensland/Toowoomba to finish your studies in business administration by the end of 1998. This means that the financial support which ICRC is providing you with for these studies will also terminate at the end of 1998. You have assured me that the cost of this support will not vary from that which we accorded you previously. Please confirm directly to Patricia Barber what this will mean in H

A actual figures and due-dates for our payments to the University.

3. Due to the above points having remained pending for some time, you said that you have fallen behind in your studies. I have agreed to compensate you with a reasonable amount of extra time off to allow you to catch up. Please discuss the exact modalities of this with Patricia as well. B
4. You have asked me if ICRC can provide you with a PC for your studies. I said I could not promise you anything, as we are under instruction from HQ not to divest ourselves of any of our EDP equipment at present, but that we are prepared to examine other possibilities. Please also discuss with Patricia.

I would like to emphasise once again that these arrangements exceed by C far any obligations that ICRC might have toward you under Zimbabwe's labour laws, were it bound by them, and that they are far more generous than any I have ever known ICRC to make for any local staff, or indeed for any expat, ending their employment with the institution.

I am pleased that we have thus successfully and definitely concluded a somewhat protracted process of clarification of the terms of your departure. D I would appreciate your confirming your agreement to these terms, as set out above, by returning to me a copy of this letter with your signature.

With my best wishes for your personal and professional future, I remain …"

As requested by Schmidt, Sibanda confirmed her agreement with the terms set out in the letter by returning to him a copy of the letter signed by her. In E addition, the few remaining issues which

were to be finalised in consultation with Patricia Barber were agreed upon and finalised on 19 February 1998.

Subsequently, on 24 February 1998 Sibanda received her terminal benefits, amounting to $118 703.10, in respect of the termination of the main contract of employment, and on 18 December 1998 she received her salary and other benefits, amounting to $23 326.00, in respect of the fixed term contract.

F However, the allegation by Sibanda was that in addition to the terms set out by Schmidt in the letter dated 18 February 1998, it was agreed that the issue of whether or not she would receive a retrenchment package, determined in terms of this country's labour law, would be dealt with later. This allegation was made for the first time in the answering affidavit, and Sibanda does not G explain why it was not made in the founding affidavit.

In any event, I find the allegation incredible, bearing in mind the detailed agreement set out by Schmidt in his letter dated 18 February 1998. The letter set out in great detail what matters had been agreed upon and what matters were still be to finalised. There is no mention of a retrenchment package being H considered later.

Taking a robust and commonsense approach, I am satisfied that there is no A dispute of fact in this matter which cannot be resolved on the papers. See *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S).

In the circumstances, I am satisfied that the termination of Sibanda's employment was by agreement and that the Retrenchment Regulations do not apply. Sibanda's application should, therefore, have been dismissed. B

However, Ngangura's case stands on a different footing. On 1 December 1997, the ICRC's administrator advised him by letter that because of the need to reduce the local staff, his employment would be terminated on 31 December 1997. He objected to the termination of his employment unless it complied with the Retrenchment Regulations, but accepted, under protest, the terminal benefits offered by the ICRC. He made it clear, however, in a letter dated 16 C December 1997, that he looked forward to negotiating a proper retrenchment package.

In the circumstances, I cannot accept that the termination of Ngangura's employment was by agreement.

Finally, I wish to deal very briefly with the allegation by the ICRC that the D application by Ngangura and Sibanda was in fact an application for a review of the ICRC's decision to dismiss them. It was alleged that the relief sought had been described as a declaratory order in order to avoid the consequences of having failed to institute the application for review within the time limit specified in the High Court Rules.

Commenting on this allegation the learned judge in the court *a quo* said: E .

> "I cannot agree that this application is in reality one for review. Review proceedings are concerned with an irregularity of a procedural nature. The mere fact that the applicants allege a failure on the part of the ICRC to comply with the Regulations does not raise a matter of procedural irregularity or impropriety. It raises, rather, the issue of unlawfulness in F the action taken by the ICRC."

I respectfully agree. The ICRC alleged that the Retrenchment Regulations did not apply because the termination of employment had been by agreement. On the other hand, Ngangura and Sibanda alleged that the Regulations applied, and sought a declaration to that effect.

In the circumstances, the following order is made: G

1. The appeal against the order granted in favour of the first respondent is allowed with costs. The order is set aside and in its place is substituted an order dismissing the application with costs.
2. The appeal against the order granted in favour of the second respondent is dismissed with costs. H

A Malaba JA & Gwaunza JA concurred.

Kantor & Immerman, appellant's legal practitioners

Dube, Manikai & Hwacha, respondents' legal practitioners B

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CHITUKU v MIN OF HOME AFFAIRS & ORS 2004 (1) ZLR 36 (H)

Citation	004 (1) ZLR 36 (H)
Case No	Judgment No. HH-6-04
Court	High Court, Harare
Judge	Makarau J
Heard	2 April 2003
Judgment	14 January 2004
Counsel	*M Hogwe,* for the plaintiff *N Mutsonziwa,* for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 —Declaration of Rights — s 15(1) —inhuman or degrading punishment or treatment* C *— meaning of — s 24 — application under— powers of Supreme Court—whether can award damages*

Court — *High Court — jurisdiction — court's jurisdiction to afford relief in event of breach of accused person's constitutional rights — breach founding claim under actio injuriarum — claim properly before court*

Delict — *actio injuriarum — extent of — act violating dignity of plaintiff* D *— includes inhuman or degrading treatment of an arrested or detained person*

Words and phrases — *"inhuman or degrading punishment or treatment"*

Headnote

Treatment of an arrested, detained or convicted person that affronts the E dignity of that person or exceeds the limits of civilised standards of decency and involves the unnecessary infliction of suffering or pain is inhuman and degrading. If the High Court is satisfied that the actions complained of violate the rights of the plaintiff as granted under the Constitution, it could grant suitable relief to redress the injury. This is part of the inherent jurisdiction that the court enjoys. The plaintiff is not F restricted to bringing an application under s 24 of the Constitution. The right to dignity is recognised in the Roman-Dutch law as an independent right that can be protected by the *actio injuriarum,* the *actio injuriarum* being wide enough to encompass any action that violates the *corpus* or *dignitas* of the plaintiff. Inhuman and degrading treatment affronts the G dignity or self-respect of an individual and could found a claim.

Cases cited

Conjwayo v Min of Justice & Anor 1991 (1) ZLR 105 (S)

Fose v Min of Safety and Security 1997 (3) SA 786 (CC)

In re *Mlambo* 1991 (2) ZLR 339 (S) H

A *Muchenje v Chinyanganya & Ors* HH 95/94

Min of Justice v Hofmeyr 1993 (3) SA 131 (A)

Min of Police v Mbilini 1983 (3) 705 (AD)

S v Chakwinya 1997 (1) ZLR 109 (H)

S v Kusangaya 1998 (2) ZLR 10 (H)

S v Ncube 1987 (2) ZLR 246 (S)

B *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92

Legislation considered

Constitution of Zimbabwe, ss 15(1) & 24(1)&(4)

Case information

C *M Hogwe,* for the plaintiff

N Mutsonziwa, for the defendants

Judgment

MAKARAU J: The plaintiff's claim against the defendants is for damages arising out of an allegation that the defendants subjected him to inhuman and D degrading treatment whilst he was in police custody pending appearance in court to answer to a warrant of arrest.

On 22 February 1999, the plaintiff issued summons out of this court claiming the sum of $100 000.00 as damages for being subjected to inhuman and degrading treatment. The claim was defended. The mainstay of the defence E was not to challenge the facts giving rise to the claim but to argue that the plaintiff's claim is unprecedented and unknown under the Zimbabwean law of delict.

At the trial, the plaintiff gave evidence. He did not call any other witness. Evidence on behalf of the defendants came from one Mirirai Madhumira. He is a member of the Zimbabwe Republic Police. At the material time he was F stationed at Marlborough Police Station and was on charge-office duty on the night the plaintiff was detained. The evidence from these two witnesses coincided to a large extent. I found both credible although the plaintiff tended to be dramatic and emotional in his presentation.

The evidence from these two witnesses may be summarized as follows:

G At the time of the trial, the plaintiff resided in Marlborough, Harare. He was in business. He was engaged in the business of repairing tyres from a premise that is situated at Greencroft Shopping Centre. At times, the police at Marlborough Police Station and from nearby Nyabira Police Station would request him to repair the tyres to their vehicles. At times, he would do this for H free as a service to his community.

On 15 October 1998, the third defendant, a policeman stationed at Marlborough A Police Station, acting within the scope of his authority and in the course of his employment as a duly attested member of the Zimbabwe Republic Police, arrested the plaintiff. The arrest was lawful. It was made on the strength of a warrant issued by the Harare Magistrate's Court after the plaintiff had failed to appear at court to answer to a traffic ticket issued him on a prior date. The B arrest was made around 5.00 p.m at the plaintiff's place of business. Thereafter, he was taken to the police station where he was informed that he would be detained overnight and would be taken to court the following morning to answer to the warrant.

Due to the time he arrived at the police station, the plaintiff could not be given supper before he was put into the holding cells. C

The cell that the plaintiff was held in overnight is 4,3 metres long and 3,68 metres wide. Its normal holding capacity is 15 persons. On the day in question, it held 24 persons. The cell was described by the plaintiff as being so full that the policeman who closed the door after the plaintiff could hardly do so and had to push the door together with the inmates closest to the door. D

The defendants explained that the cell was holding way above its normal capacity as a female inmate occupied the other cell. Marlborough Police Station has two holding cells only.

It is necessary for me to be indecorous and refer to issues that one would not ordinarily detail. This relates to the setting of the cell in relation to the toilet facilities offered the inmates and how they were used on the night in question. In one corner of the cell is the toilet for use by the inmates. The toilet is separated from the rest of the cell by a one and a half metre high wall. There is no door to the toilet. The toilet was used throughout the night. The flushing system of the toilet is operated from outside the cell. On this night, it was only flushed once despite the frequent use the inmates subjected it to throughout the night.

There was no room to sleep. The temperatures were high and no drinking water was provided. No police officer checked upon the inmates the entire night. The police have regulations that inmates are to be periodically checked upon whilst held in the cells at night in case of emergent illness or some other eventuality that may require the opening of the cells. G

There was no water to wash one's hands after using the toilet. There was no toilet paper.

The plaintiff and the inmates were released the following morning around 7.00 in preparation for court. A pot of tea (without milk) was given the inmates together with three cups from which all 24 inmates were to share the tea. H

A At court, the plaintiff was asked to pay $100.00 as a fine for the default and another $100.00 being the amount stipulated by the ticket. He was released after making the payments.

On the basis of the above facts, counsel were agreed that the issue arising for my determination is whether the facts of the matter give rise to an action for damages under the law of delict, the defendants having conceded that the B conditions under which the plaintiff was held on that night were inhuman and degrading.

In my view, the concession by counsel for the defendants that the conditions under which the plaintiff was held were inhuman and degrading may find support in precedent from this court and from the Supreme Court.

C In my review of some of the decisions of the Supreme Court on the subject matter, it appears to me that the term "inhuman and degrading treatment" has been construed only in relation to s 15(1) of the Constitution of Zimbabwe.

The section provides:

> "No person shall be subjected to torture or to inhuman or degrading D punishment or such other treatment."

In *S* v *Ncube* 1987 (2) ZLR 246 (S), the Supreme Court construed the meaning of the section. It held in that case that the section makes unconstitutional (i) torture, (ii) inhuman punishment, (iii) degrading punishment; (iv) inhuman treatment and (v) degrading treatment. In instructive *dicta* on the possible differences between treatment and punishment for the purposes of the section, E Gubbay CJ had this to say at 264:

> "Treatment has a different connotation from punishment. It seems to me that what is envisaged is treatment which accompanies the sentence. In other words, the conditions associated with the service of sentences of imprisonment arenow subject to the proscription. The frequency and conditions of searches of convicts and remand prisoners, the denial of F contact with family and friends outside the prison, crowded and unsanitary prison cells and the deliberate refusal of necessary medical care might afford examples. " (The emphasis is mine).

In *Ncube's* case, the Supreme Court was concerned with whether the punishment imposed upon the applicants was inhuman and degrading and was not G concerned with either torture or treatment. Be that as it may, the views expressed in that case on the issue of treatment of prisoners serve two

purposes in my view. They instruct on what the superior court's thinking is on what would constitute inhuman and degrading treatment accompanying imprisonment and secondly, the views lay a basis upon which inhuman and H degrading treatment of persons under lawful custody can be defined further.

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On the facts of the matter before it, the Supreme Court dealt with the A conditions attaching to a sentence as constituting "treatment" for the purposes of the section. From the discussion in the judgment on how wide the term "inhuman treatment" can be construed for the purposes of the section, it is in my view but a small step to include the conditions attaching to any lawful detention of persons at the instance of the State within the meaning of the term. B Thus, "treatment" for the purposes of the section may, in my view, be held to include the conditions under which the police hold persons under investigation or awaiting appearance in court. I however hold no firm view on this point. Further, it is not necessary that I make a definitive finding on this issue due to the conclusion I reach in this matter.

The *raison d'etre* behind the protection against torture, inhuman and degrading C punishment and treatment has been articulated in a number of cases in this jurisdiction.

In *Conjwayo* v *Minister of Justice & Anor* 1991 (1) ZLR 105 (S), the Supreme Court had to determine whether certain conditions under which a prisoner awaiting execution was held were inhuman and degrading. The application D was brought before the Supreme Court as a constitutional matter under s 15(1) of the Constitution. In graphic language, the court detailed the conditions under which the prisoners were held. After referring to authorities from India, South Africa, Canada and the United States of America, the court allowed the application. In allowing the application, the court held that to confine a human being in a small cell over a weekend for over 47 hours (with two daily half- hour E periods out of the cell but within the confined section itself and not in the open air) was plainly offensive to one's notion of humanity and decency. The court was of the further view that such treatment of the applicants by the prison administration transgressed the boundaries of civilised standards and involved the infliction of unnecessary pain. The court concluded by observing that the emphasis must always be on man's basic dignity, on civilised precepts and on F flexibility and improvement of standards of decency as society progresses and matures. I would add a trite observation at this stage that each case will be determined on its own merits and the standards that may be acceptable today may constitute inhuman and degrading treatment a decade away.

In *Muchenje* v *Chinyanganya* HH 95/94, Mubako J as he then was, dealt with G a claim for compensation for wrongful arrest, detention and ill treatment brought by a 50 year old father of six who had been held by the police for investigation purposes. He was held at different police stations from 25 to 26 July 1991. He was made to sit on a bench in his socks without his shoes on. At night, he was made to share a "smelly and cold cell" and a common toilet with two others. He was not allowed anything to eat for 29 hours and was not H

2004 (1) ZLR p41

A allowed contact with his lawyer. The court was of the view that the plaintiff suffered unnecessary humiliation, mental anguish and physical discomfort. On the basis of that finding, the court made an award of damages for the physical discomfort and mental anguish.

In my view, the physical discomfort, and mental anguish in this case would closely equate to inhuman and degrading treatment at the hands of the police B during investigation although that is not the way the claim was brought. In making the award, the court was showing its abhorrence of any treatment that will cause unnecessary physical discomfort and mental anguish to a suspect while in police custody.

It would appear to me from the authorities that treatment of an arrested, C detained or convicted person that affronts the dignity of that person, that exceeds the limits of civilised standards of decency and involves the unnecessary infliction of suffering or pain is inhuman and degrading for the purposes of the supreme law of the land. Measured against that yardstick, I agree with counsel that the treatment of the plaintiff at Marlborough Police Station on 10 and 11 October 1999 was inhuman and degrading in some respects.

D It was argued on behalf of the defendants that the plaintiff ought to have approached the Supreme Court under s 24 of the Constitution for damages. The argument proceeded to hold that the plaintiff is improperly before this court and that his claim should be dismissed.

The issue that is presented to me for determination by this argument is whether E the plaintiff's remedy for damages is to be exclusively found in the Supreme Court under s 24, it being so exclusive that he is non-suited before me.

It is my view that if this court is satisfied that the actions complained of violate the rights of the plaintiff as granted under the constitution, it could grant suitable relief to redress the injury. This is part of the inherent jurisdiction that F this court enjoys. That this court has such inherent jurisdiction was recognised in *S* v *Chakwinya* 1997 (1) ZLR 109 (H) and in *S* v *Kusangaya* 1998 (2) ZLR 10 (H). Both cases, although dealing with the right of an accused to a fair trial, effectively put to rest the notion that the High Court does not have jurisdiction in matters where allegations of constitutional rights infringements are made. Gillespie J in *Chakwinya's* case put the point thus at page 115:

> G " A similar provision to s24 (4) which pertains to the Supreme Court, is not made in respect of the High Court. That does not mean, however, that the High Court is powerless to give a remedy. Indeed this clause pertaining to the Supreme Court appears *ex abundante cautela* and lest otherwise it be thought that the Supreme Court, a court of appellate jurisdiction, has H no original jurisdiction pertaining to the point in issue."

I understand Gillespie J to be saying clause 24(4) was put into the Constitution A to put it beyond doubt that the Supreme Court has original jurisdiction in these issues. The clause therefore adds original jurisdiction on the part of the Supreme Court without taking away the inherent jurisdiction that this court has always had to redress any actionable wrongs that are brought to its attention. B

Section 24(1) of the Constitution provides:

> "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 C person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress."

Section 24(4) provides:

> "The Supreme Court shall have original jurisdiction -
>
> (a) to hear and determine any application made by any person pursuant to subsection D
>
> (1) …

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights: E

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under the provisions of this Constitution or under any other law."

It appears to me that the above law does not make the jurisdiction of the Supreme Court under s 24 exclusive for the purposes of non-suiting litigants F before this court. The position is quite the converse in the sense that where there is another adequate remedy or relief under the Constitution or some other law, the Supreme Court will decline to exercise the original jurisdiction granted to it by the section.

Whether the Supreme Court can grant damages, as a remedy under s 24, is still G a moot point. Indications of how the Supreme Court may deal with the issue may be found in the remarks of Gubbay CJ in In Re *Mlambo* 1991 (2) ZLR 339 (S). In construing s 24 (4) of the Constitution at page 355B he said:

> "Section 24 (4) of the Constitution empowers the Supreme Court 'to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of H

> A the Declaration of Rights'. It is difficult to imagine language which would give this court a wider and less fettered discretion …"

If these sentiments will guide the future decisions of the Supreme Court, one may venture to suggest that the granting of damages in deserving or appropriate cases will be one of the remedies that the Supreme Court will order under the wide powers granted to it by the section.

B In *Fose* v *Minister of Safety and Security* 1997 (3) SA 786 (CC), the South African Constitutional Court, in construing the term "appropriate relief" under s 7 of the South African Constitution, held that in principle, there was no reason why such relief could not include an award of damages. This is persuasive authority that in all probability, our own Supreme Court, in an C appropriate case, will make a similar finding.

It is my view that the fact that the Supreme Court may have jurisdiction in this matter under s 24 and that it may be able to grant damages under s 24(4) is not in itself adequate for me to dismiss the plaintiff's claim as I have been urged to do by the defendants. The plaintiff has clearly indicated that his claim was deliberately brought before this court for damages under the *actio injuriarum*. D Mr *Hogwe*, for the plaintiff submitted that the claim is unprecedented in this jurisdiction and invited the court to develop the common law of delict to encompass the facts of this matter. The issue to determine is whether he is correct in this regard.

The right to dignity is recognised in the Roman-Dutch law as an independent E right that can be protected by the *actio injuriarum*. Inhuman and degrading treatment affronts the dignity or self-respect of an individual. In *Minister of Police* v *Mbilini* 1983 (3) 705 (AD) at 715G, it was stated that:

> "It is trite law that one of the rights which is protected by the *actio injuriarum* is the right to an unimpaired dignity. Dignity was defined by Melius de Villiers in 1899 in his well-known work *The Roman and* F *Roman-Dutch Law of Injuries* at 24 as-'that valued and serene condition in his social or individual life which is violated when he is either, publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.'
>
> These passages have repeatedly been approved by the courts of this G country as an accurate statement of the law in regard to the concept of *injuria.* See e.g. *R* v *Umfaan* 1908 TS 62 at 66 and 67; *Walker* v *Van Wezel* 1940 WLD 66*; S* v *A & Anor* 1971 (2) SA 293 (T) at 297."

In *Minister of Justice* v *Hofmeyr* 1993 (3) SA 131 (A), the court held that the holding of a political detainee in solitary confinement, with certain other H deprivations, was ground for an action for damages under the *actio injuriarum*.

While the court in that case based the infringement on the bodily integrity of A the plaintiff, (*corpus*), the principle to be distilled from the decision is that the *actio injuriarum* is wide enough to encompass any action that violates the *corpus* or *dignitas* of the plaintiff and the law needs no further widening in this regard.

It is therefore my finding that the plaintiff's claim for damages under the *actio* B *injuriarum* is not only good at law but is also properly before this court.

I now turn to assess the quantum of damages due to the plaintiff.

The plaintiff claimed the sum of $100 000.00 in damages. It was submitted on behalf of the defendants in the alternative that should I find for the plaintiff on the issue of liability, the amount of the damages be reduced to $50 000.00. C

In assessing damages in this matter, I take into account that not all the complaints by the plaintiff are actionable in my view. While the position has been settled that an arrestee, detainee or prisoner does not shed all his rights as a person upon entering state custody, some rights are lost as being inconsistent with the state of being in custody. (See *Whittaker* v *Roos and Bateman; Morant* v *Roos and Bateman* 1912 AD 92). Thus I find that the fact D that the plaintiff was not given supper before being placed in the holding cell is not actionable because of the time he was arrested. He could not have supper on call as it were whilst under police custody. I further find that the fact that some of the inmates had to use the toilet throughout the night is not actionable. It is a natural consequence of being arrested that one cannot chose who to share E the holding cells with nor prescribe the personal habits of one's cellmates. Apart from that, I find that the other conditions under which the plaintiff was held were an affront to his dignity and self-esteem as a person.

Considering all the circumstances of this matter, I believe that an award in the sum of $100 000.00 is appropriate in view of the depreciated value of money.

In the result, I make the following order:

1. The defendants are to pay to the plaintiff the sum of $100 000.00 together with interest thereon at the rate of 25 per cent *per annum* from the date of summons to date of payment in full.

2. The defendants are to pay the plaintiff's costs of suit.
3. The liability of the defendants under this judgment is joint and several, the G one paying the others to be absolved.

Mangwana Hogwe & Partners, plaintiff's legal practitioners. H

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

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STANMARKER MINING (PVT) LTD v METALLON CORPORATION LTD 2004 (1) ZLR 45 (S)

Citation	2004 (1) ZLR 45 (S)
Case No	Judgment No. S-51-03
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	25 November 2003
Judgment	15 January 2004
Counsel	*J C Andersen SC*, with him *G Mutha-Valla*, for the appellant *E W W Morris*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Practice and procedure** — *attachment — to found jurisdiction — what property may be attached — property in which defendant has beneficial interest — interest falling short of ownership*

Headnote

The appellant company was registered in Zimbabwe, while the respondent was a South African-company. They had concluded a written agreement D in respect of their intended acquisition of shares in a Zimbabwean mining company which owned five gold mines in Zimbabwe. That company was wholly owned by a British company, which itself was wholly owned by another British company. Part of the agreement between the appellant and the respondent was to the effect that neither E would negotiate with the British holding company in relation to the acquisition of the shares for a period of three months from the date of the agreement. The respondent did negotiate with the British company and the appellant brought an action in the High Court of Zimbabwe for breach of contract. As the respondent was a *peregrinus*, the appellant applied for

an order confirming the court's jurisdiction. The application F was rejected on the grounds that the beneficial interest that the respondent had in the Zimbabwean mining company was not the kind of interest which could be attached to confirm jurisdiction. The appellant appealed.

Held, that an applicant for attachment to found jurisdiction against a *peregrinus* must show that (1) it has a *prima facie* cause of action against the defendant; (2) the defendant is a *peregrinus*; and (3) the defendant G is within the area of jurisdiction of the court or property in which the defendant has a beneficial interest is within that area. Such property includes the defendant's incorporeal rights. The test of whether the property can be attached to found jurisdiction is whether what the defendant owns is capable of being attached and sold in execution. *In* I *casu*, requirements (1) and (2) were admittedly satisfied. In addition, the

respondent had a beneficial interest in the Zimbabwean mining company, A to the extent that it had complete control over the company and its assets. That control was of great commercial value and constituted property which could be attached and sold in execution.

Cases cited B

African Distillers Ltd v Zietkiewicz & Ors 1980 ZLR 135 (G)

Nkwana v Hirsch 1956 (2) SA 219 (T)

Numill Mktg CC & Anor v Sitra Wood Products Pte Ltd & Anor 1994 (3) SA 460 (C)

S v de Jager 1965 (2) SA 612 (A)

S v Kuiper 2000 (1) ZLR 113 (S) C

S v Mutters & Anor 1987 (1) ZLR 202 (S)

S v Osborne 1989 (3) ZLR 326 (S)

Short & Anor v Treasury Commissioners [1948] AC 534 (HL)

Soja (Pty) Ltd v Tuckers Land Developmemt Corp (Pty) Ltd & Anor 1981 (2) SA 407 (W)

Legislation considered

High Court Act [*Chapter 7:06*], s 15

Case information

J C Andersen SC, with him *G Mutha-Valla*, for the appellant

E W W Morris, for the respondent E

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for an order, *inter alia*, confirming the jurisdiction of the High Court in a dispute between the appellant ("Stanmarker") and the respondent ("Metallon"), and granting leave for the service of Stanmarker's summons and declaration F in respect of its claim for damages against Metallon to be effected at Metallon's registered office in Johannesburg, G South Africa.

The factual background is as follows. Stanmarker is a mining company registered in terms of the laws of Zimbabwe, and Metallon is a South African company with its registered office in Johannesburg.

On or about 24 June 2002, Stanmarker and Metallon concluded a written agreement in respect of their intended acquisition of the shares in Independence Mining (Pvt) Ltd ("Independence"), a Zimbabwean company which owns five gold mines in Zimbabwe – How Mine, Shamva Mine, Arcturus Mine, Mazowe Mine and Redwing Mine. The acquisition was to be effected through a company to be incorporated in Zimbabwe ("Newco"). H

Sandura JA

A At the relevant time, Independence was a wholly owned subsidiary of Cableair Ltd ("Cableair"), a private company Ltd by shares and incorporated in the United Kingdom. In turn, Cableair was a wholly owned subsidiary of Lonmin plc ("Lonmin"), incorporated in the United Kingdom. Lonmin was, therefore, the holding company of Cableair, which was the holding company of Independence, which owned the five mines.

B Lonmin intended to dispose of its shares in Cableair and, consequently, divest itself of its interests in Independence. Thus, on 28 October 2002 Lonmin wrote to the Minister of Mines and Mining Development ("the Minister") as follows:

> "May we take the opportunity first of all to explain that the sale of our C Zimbabwe assets is the result of a decision taken, and made public some time ago, to concentrate on our core business only, which is the mining and refining of platinum group metals."

The agreement concluded by Stanmarker and Metallon on 24 June 2002 was in the form of written Heads of Agreement ("the Heads"). Clause 2.2 thereof provided as follows:

> D "These Heads set out the main principles upon which the parties will negotiate the detailed written agreements referred to herein. These Heads (save for 2.3, 9, 10 and 11) accordingly do not constitute legally binding rights and obligations on the parties hereto. These Heads will fall away and be of no force and effect upon the signing of the detailed written agreements and them E becoming unconditional in accordance with their terms."

Thus, the only legally binding rights and obligations were those set out in clauses 2.3, 9, 10 and 11.

Clause 2.3 provided as follows:

> "The parties undertake with effect from the signature date and until the F expiry of three months thereafter that they will negotiate with each other in good faith in respect of the detailed written agreements and that, subject to 3.5, they will not negotiate with Lonmin or any other person in respect of any matter relating to the acquisition of all or part of the share capital, assets or business of Independence or its immediate holding company."

Clause 3.5, referred to in Clause 2.3, provided as follows:

> G "Metallon shall, on behalf of Newco, negotiate with Lonmin and make an offer to acquire Independence or its immediate holding company for the amount of approximately twelve million US Dollars or such other amount agreed upon between the Shareholders."

Finally, Clause 11.1 provided as follows:

> H "From the signature date and for a period of three months thereafter, neither party shall, without the prior written consent of the other

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Sandura JA

> party, engage in A or enter into discussions with any other party with an interest in acquiring the share capital or business of Independence or its immediate holding company and/or engage in or enter into discussions with any other party desirous of achieving similar objectives than, or competing with, Newco."

Subsequently, Metallon pursued negotiations with Lonmin which resulted in B an agreement of the sale of the shares in Cableair to Pemberton International Investments (Pty) Ltd ("Pemberton"), a company incorporated in terms of the laws of the British Virgin Islands, with its registered office in the Virgin Islands. Regrettably, in its opposing affidavit Metallon did not indicate what its relationship was with Pemberton.

However, it is pertinent to note that whilst Metallon alleged that the shares in C Cableair were acquired by Pemberton, on 5 November 2002 Mzilikazi Khumalo ("Khumalo"), the chief executive of Metallon, wrote to the Minister as follows:

> "This serves to confirm that *Metallon Corporation Ltd*, a black-owned South African company controlled by myself, *has acquired 100 percent of Independence Gold Mining Zimbabwe (Pvt) Ltd from Lonmin plc*" D (my emphasis).

It does appear, therefore, that either Pemberton was a wholly owned subsidiary of Metallon, or that it acquired the shares in Cableair for and on behalf of Metallon.

Whilst Metallon admitted that it pursued negotiations with Lonmin which E resulted in the sale of the shares in Cableair being concluded, it denied that the negotiations were embarked upon before the restraint period of three months, specified in clauses 2.3 and 11.1 of the Heads, expired.

In the circumstances, Stanmarker decided to institute a civil action in the High Court against Metallon claiming damages for breach of contract in the sum of F US$27 315 797. However, as Metallon is a *peregrinus*, and the High Court did not, therefore, have the jurisdiction to entertain such an action, which sounded in money, unless the defendant was within Zimbabwe, or property belonging to the defendant was within Zimbabwe and could be attached in order to confirm the jurisdiction of the High Court, Stanmarker applied in the court *a quo* for an order confirming the jurisdiction of that court in the G proposed action.

That application was subsequently dismissed with costs on the ground that the beneficial interest which Metallon had in Independence was not the kind of interest which could be attached to confirm the jurisdiction of the court. Aggrieved by that decision, Stanmarker appealed to this court. H

2004 (1) ZLR p49

Sandura JA

A The common law position on the attachment of property in order to confirm jurisdiction was set out by Beck J (as he then was) in *African Distillers Ltd* v *Zietkiewicz & Ors* 1980 ZLR 135 (G) at 136F-H as follows:

> "The well settled common law, for which there is no dearth of judicial authority, is that for claims that sound in money brought by an *incola* or a *peregrinus* against a *peregrinus*, there must be an arrest of the person B of the defendant *peregrinus* or an attachment of his property within the territorial jurisdiction of the court in order to found jurisdiction, or to confirm jurisdiction in those cases where some other jurisdictional ground exists in relation to the claim – such as, for example, that it arises from a contract concluded or a delict committed within the court's territorial limits of jurisdiction. Such arrests or attachments are necessary C in order to satisfy, albeit only partially and imperfectly in some cases, the doctrine of effectiveness, for the court will not concern itself with suits in which the resulting judgment will be no more than a *brutum fulmen (Foord* v *Foord* 1924 WLD 81 at 87; *Thermo Radiant Oven Sales (Pty) Ltd* v *Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 300D and 307A-311E)."

D The common law position was altered by s 15 of the High Court of Zimbabwe Act [*Chapter 7:06*] which reads as follows:

> "In any case in which the High Court may exercise jurisdiction founded on or confirmed by the arrest of any person or the attachment of any property, the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe E without ordering such arrest or attachment, if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, as the case may be, by the issue of such process."

Thus, whereas under the common law "there must be an arrest of the person of the defendant *peregrinus* or an attachment of his property within the territorial jurisdiction of the court in order to found jurisdiction, or to confirm jurisdiction in those cases where some other jurisdictional ground exists in relation to the claim", the court now has a discretion as to whether the arrest of the defendant *peregrinus* or the attachment of his property should be G ordered. However, the plaintiff still has to show that the defendant *peregrinus* is within Zimbabwe or that property belonging to the defendant *peregrinus* is within Zimbabwe and is capable of being attached.

In the present case, as the contract in question was concluded in Zimbabwe, a *causa jurisdictionis*, apart from attachment of Metallon's property, exists. Nevertheless, Stanmarker had to establish that Metallon had property in H Zimbabwe which could be attached.

2004 (1) ZLR p50

Sandura JA

Having said that, I now wish to deal with Stanmarker's application to adduce A further evidence on appeal. The application was made at the hearing of the appeal and was opposed by Metallon. After hearing both counsel, we reserved our decision on the matter and indicated that the decision would form part of the main judgment in this appeal.

The basic requirements which must be satisfied by the applicant in an B application for leave to adduce further evidence on appeal were set out by Holmes JA in *S* v *de Jager* 1965 (2) SA 612 (A). At 613B-E, the learned Judge of Appeal said:

> "Accordingly, this court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the court's C reluctance to re-open a trial. They may be summarised as follows:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence. D

(c) The evidence should be materially relevant to the outcome of the trial.

See *R* v *de Beer* 1949 (3) SA 740 (A) at p 748; *R* v *Wiemers & Ors* 1960 (3) SA 508 (A) at pp 514-5; *R* v *Madikane* 1960 (4) SA 776 (A) at p 780; *R* v *Nkala* 1964 (1) SA 493 (A); …"

The above requirements were subsequently quoted with approval by this court in *S* v *Mutters & Anor* 1987 (1) ZLR 202 (S) at 204G-205A; *S* v *Osborne* 1989 (3) ZLR 326 (S) at 336D-G; E and *S* v *Kuiper* 2000 (1) ZLR 113 (S) at 116A-C.

I now wish to examine Stanmarker's application in order to determine whether the requirements set out above have been met.

In the founding affidavit, a director of Stanmarker averred as follows: E

"… at the time of the preparation, argument and determination of the case in the court *a quo*, the appellant did not have the additional information relating to the acquisition by the respondent of Independence Gold Mining Zimbabwe (Pvt) Ltd that it seeks leave to produce. However, subsequent to the handing down of the judgment of the court *a quo* on 25 March 2003, and as a result of the conduct of the respondent in respect G of the operations of Independence Gold Mining Zimbabwe (Pvt) H Ltd and its own corporate activity in Zimbabwe, the appellant has become aware of or has received from various sources, documentation which clarifies the relationship between the respondent and Independence Gold Mining Zimbabwe (Pvt) Ltd and sets out in more detail the exact nature of the respondent's interest in Independence Gold Mining Zimbabwe (Pvt) Ltd."

Sandura JA

A In determining the validity of these averments, the date when the proceedings in the court *a quo* were instituted is of crucial importance. The proceedings were instituted as an urgent *ex parte* chamber application on 30 January 2003. When it was subsequently placed before the learned judge in chambers, he directed that it be served on Metallon, and agreed to hear it later on an urgent basis. The application was later heard on 8 March 2003 and the judgment was B handed down on 25 March 2003.

Some of the documents sought to be produced as additional evidence on appeal are not dated, for example, those prepared for the occasion marking the launching of Metallon in Zimbabwe. These documents show, *inter alia*, Metallon's "Family Tree", and describe Independence as a division of C Metallon. The documents would not have been available to Stanmarker when the urgent chamber application was filed in January 2003 because Metallon was only launched in Zimbabwe on 3 April 2003.

However, the most important documents sought to be produced are dated, and shed a lot of light on Metallon's control over Independence and its assets.

The first of these documents is a letter bearing Metallon's letterhead and D which was written to the Minister by Nonkqubela Maliza ("Maliza"), Metallon's head of corporate affairs. It is dated 12 March 2003, long after the urgent chamber application had been filed, and reads as follows:

"Dear Minister …

RE: INVITATION TO THE LAUNCH OF METALLON GOLD IN E ZIMBABWE AND A TOUR OF SHAMVA MINE

The Chairman of Metallon Corporation, Mr Mzi Khumalo, would be honoured if the Minister could join him and his colleagues *as they launch Metallon Gold in Zimbabwe*. We would appreciate it greatly if the Minister would avail himself to deliver the keynote address at this event.

This event will be held on 03 April 2003 at 18h00 at Amanzi Restaurant, F Harare, and will be followed by a visit to Shamva Mine on Friday, 4 April at 10h00" (my emphasis).

The second document is another letter to the Minister, dated 28 March 2003. It was written by Maliza and, in relevant part, reads as follows:

"Honourable Minister

G Further to the telephone discussion between the undersigned and Honourable Minister … we are pleased to forward:

A letter detailing *our partnership with the Manyame Consortium in Independence Gold and an outline of our production and expansion plans for Independence Gold* …" (my emphasis).

The third document is a letter written by Greg Hunter, a director of Metallon. H It is dated 28 March 2003 and, in relevant part, reads as follows:

2004 (1) ZLR p52

Sandura JA

"Honourable Minister A

CURRENT STATUS OF INDEPENDENCE GOLD MINES (PVT) LTD

1. SALE OF SHARES IN THE COMPANY

As mentioned in my letter dated 27 March 2003, I indicated that we had now signed Heads of Agreement with a grouping of local B Zimbabweans that would allow them to purchase up to 30 percent of the company. The grouping have elected to call themselves the Manyame Consortium …

The structure of the deal will result in the formation of a private company, Newco, which will hold the 30 percent.

We have also agreed that Cableair and Newco will procure the C formation of the staff incentive trust (SIT), which will acquire up to 5 percent of Newco's shareholding …

2. OPERATIONAL ISSUES

… An initiative we have instituted *to support our operations and to ensure that they are able to produce without disruption* is the D procurement of maize meal, rock drill spares, cement, steel balls, pump spares and even cyanide outside of Zimbabwe. To date, we have outstanding orders for the above amounting to some R18.3m over the next 3-6 months.

We are also actively looking at the sponsorship of the School of Mines in Bulawayo, a bursary scheme for the University and we have E already injected more than Z$1m into our local school bursary fund. In addition, we continue to look at the best option for *upgrading the buses at our mines, a programme for the upgrading of housing … and the upgrading of clinics.*

All the above issues are continually examined, planned and where possible executed … F

We are committed to building a substantial and profitable gold producer in Zimbabwe and we have the assets and the people to do this" (my emphasis).

The fourth and last document of relevance in the application for leave to adduce further evidence is a letter to the Minister. It is dated 2 September 2003 and was written by Collen Gura, a director of Independence. The significance G of this letter is that it shows that Independence's letterhead had been altered so as to indicate that the company had become a division of Metallon. In addition, the letter shows that Independence has three directors – A J Reve ("Reve"), G Hunter ("Hunter") and C Gura ("Gura").

It is pertinent to note that Reve and Hunter, both of whom are South African, H

are also members of Metallon's Board of Directors in Johannesburg.

2004 (1) ZLR p53

Sandura JA

A Applying the test set out in *S* v *de Jager supra*, I am satisfied that Stanmarker has proffered a reasonably sufficient explanation as to why the evidence sought to be adduced on appeal was not led in the court *a quo*. In addition, I am satisfied that the evidence is cogent and materially relevant to the outcome of this appeal. The application for leave to adduce further evidence is, therefore, granted. However, I make no order as to costs as neither party was B at fault.

Having said that, I now revert to the main issue in this appeal.

The legal requirements for an order such as the one sought by Stanmarker in the court *a quo* were set out by Olivier J in *Numill Marketing CC & Anor* v *Sitra Wood Products Pte Ltd & Anor* 1994 (3) SA 460 (C). At 463F-I, the C learned judge said:

"It is common cause that an applicant for attachment must show that:

(1) it has a *prima facie* cause of action against the defendant;

(2) the defendant is a *peregrinus* of the Republic; and

(3) the defendant is within the area of jurisdiction of the court or that the D property in which the defendant has a beneficial interest is within that area.

… The requirement to establish a *prima facie* cause of action means, in this context, that the applicant must tender evidence which, if accepted, will establish a cause of action. The fact that such evidence is in dispute does not preclude an order for attachment being granted. (See *Longman* E *Distillers Ltd* v *Drop Inn*

> *Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 914E-F; *Inter-Science Research and Development Services (Pty) Ltd* v *Republica Popular de Mocambique* 1980 (2) SA 111 (T) at 118H-119A)."

In my view, those are the requirements which Stanmarker had to meet in the court *a quo*. The learned judge correctly fond that the first two requirements F had been met.

However, with regard to the third requirement, he concluded that although Metallon had a beneficial interest in Independence, that was not the kind of interest which could be attached to confirm jurisdiction. In my view, the learned judge erred in this regard.

G An interest in property short of ownership nevertheless constitutes a right capable of being attached and sold in execution. Thus in *Nkwana* v *Hirsch* 1956 (2) SA 219 (T), a decision of the Full Bench of the Transvaal Provincial Division, de Wet J said the following at 221H:

> "It seems to me that any vested right or interest which a debtor is himself able to sell or dispose of for value is capable of attachment and capable H of being sold in execution for the benefit of a judgment creditor."

Sandura JA

Similarly, in *Soja (Pty)* A *Ltd* v *Tuckers Land Development Corporation (Pty) Ltd & Anor* 1981 (2) SA 407 (W) at 409F-H, Nestadt J said:

> "The question that arises is whether what was purportedly attached was capable of attachment. A creditor, having been granted a judgment sounding in money against its debtor and not obtaining satisfaction thereof, is entitled to have issued a writ of execution which serves as a B warrant to the Deputy Sheriff … to take possession, by attachment, of so much property of the debtor as will realise by public sale the amount of the judgment and costs. Such property includes the judgment debtor's incorporeal rights (Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at 615, 635). The learned authors give a number of examples of incorporeal rights which may be attached in C execution. One of them is the right, title and interest of a litigant in an action (*Marais* v *Aldridge & Ors* 1976 (1) SA 746 (T) at 750).
>
> The test or criterion would seem to be that laid down by the Transvaal Full Bench in *Nkwana* v *Hirsch* 1956 (2) SA 219 (T) which was approved in *Nkwana* v *Hirsch* 1956 (4) SA 450 (A)."

Thus, various types of interests and incorporeal rights in property are capable D of being attached and sold in execution. In our jurisdiction, the procedure to be followed in attaching incorporeal property or incorporeal rights in property is set out in r 343 of the High Court Rules 1971. Once the right or interest is identified, there should be no difficulty in attaching it.

In the present case, it was common cause that Metallon had a beneficial interest in Independence. In addition, and more importantly, it is clear from the E additional evidence admitted on appeal that Metallon has complete control over Independence and its assets.

In the first place, the documents produced by Stanmarker show that two of the three directors of Independence are also directors of Metallon. That means that Metallon is in effectual and constant control of Independence. F

Secondly, the documents indicate that all the production and expansion plans are prepared for Independence by Metallon.

And, thirdly, Metallon is directly involved in all operational issues affecting Independence, which include the procurement, outside Zimbabwe, of maize meal, cement, rock drill spares, steel balls, pump spares and even cyanide. In G addition, Metallon takes decisions on matters such as the upgrading of buses, houses and clinics at the five mines, matters which in fact should be handled by Independence. Undoubtedly, it is Metallon which would decide whether the mines should be sold or not.

In my view, the control which Metallon has over Independence and its assets is of great commercial value. It is property which can be attached and sold in H

Sandura JA

A execution. I find support for that view in the House of Lords' decision in *Short & Anor* v *Treasury Commissioners* [1948] AC 534 (HL).

In that case, all the shares of a company called Short Brothers (Rochester and Bedford) Ltd ("Short Brothers") were being acquired by the Treasury under a Defence Regulation which provided for payment of their value as between a willing buyer and a willing seller. Each share was valued on the basis of the B quoted market price.

However, the shareholders argued that as all the shares were being acquired, stock exchange prices were not a true criterion, and that there were two ways of determining the real value of the shares. The first was that the whole undertaking should be valued and the global price thus determined apportioned C among the shareholders; and the second was that the value of the shares should be the price which one buyer would pay for all the shares, which price should then be similarly apportioned.

Although the alternative ways of determining the value of the shares were rejected, it was conceded by the Court of Appeal and the House of Lords that had any individual shareholder held a sufficient block of shares to give him D control of the company, then he might have been entitled to a higher price than the total stock exchange value of all his shares, since he would then have been selling an item of property – control – additional to his shares.

At 546, Lord Uthwatt said:

> "I desire only to add that if some one shareholder held a number of shares E sufficient to carry control of the company, it might well be that the value proper to be attributed to his holding under the regulation was greater than the sum of the values that would be attributed to the shares comprised in that holding if they were split between various persons. The reason is that he has something to sell – control – which the others considered separately have not."

F I respectfully agree with the learned Law Lord.

Accordingly, the learned judge in the court *a quo* ought to have granted the order sought by Stanmarker to enable it to litigate at home.

In the circumstances, the following order is made:

1. The appeal is allowed with costs. G
2. The order of the court *a quo* is set aside and the following is substituted –

"(a) The jurisdiction of this court in the dispute between the applicant and the first respondent is hereby confirmed.

(b) The applicant is granted leave to serve the summons and declaration H in respect of its claim for damages against the first respondent,

together with a copy of this order, upon the first respondent's legal A practitioners, Messrs Gill, Godlonton & Gerrans.

(c) Service of the summons and declaration, together with a copy of this order, may be made on the first respondent, or any responsible person, at 161 Rivonia Road, Sandton, Johannesburg, South Africa, by the Sheriff of Johannesburg, Gauteng Province, South Africa, or his lawful Deputy or Assistant. B The said Sheriff, Deputy or Assistant shall certify service of the said documents by affidavit sworn to before a notary public in South Africa and filed of record with this court.

(d) The costs of this application shall be paid by the first respondent."

Cheda JA & Gwaunza JA concurred. C

Kantor & Immerman, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/CHIYANGWA v ATTORNEY-GENERAL & ORS 2004 (1) ZLR 57 (S)

CHIYANGWA v ATTORNEY-GENERAL & ORS 2004 (1) ZLR 57 (S)

Citation	2004 (1) ZLR 57 (S)
Case No	Judgment No. S-1-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Gwaunza JA
Heard	19 January 2004
Judgment	20 January 2004
Counsel	*H Zhou*, with him *L M Mhishi*, for the applicant *A M Wamambo*, with him *C Mandimiiri*, for the respondents
Case Type	Criminal application
Annotations	Link to case annotations

Flynote

Criminal procedure — *bail — Criminal Procedure and Evidence Act* C *[Chapter 9:07] — appeal against decision in bail application — whether Attorney-General may appeal against judge's decision given on appeal*

Headnote

In terms of s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], when a magistrate or judge determines a bail application at first instance, both the Attorney-General and the accused person have a right of appeal, D which lies to the High Court where a magistrate decided the application, or to the Supreme Court where a judge decided it. Where however a judge of the High Court hears an appeal against a magistrate's decision in a bail application, the judge's decision is not appealable by either the Attorney-General or the accused person.

Cases cited E

Chunguete v Min of Home Affairs & Ors 1990 (2) SA 836 (W)

S v Dzawo 1998 (1) ZLR 536 (S)

Legislation considered F

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 121

Case information

H Zhou, with him *L M Mhishi*, for the applicant

A M Wamambo, with him *C Mandimiiri*, for the respondents

Judgment

G **Chidyausiku CJ:** The applicant in this case filed an urgent chamber application seeking the relief set out in the draft order, which reads as follows:

"IT IS ORDERED THAT:

1. The order granted by His Lordship Mr Justice Karwi on 16 January 2004, admitting the applicant to bail on certain conditions, be and is H hereby declared enforceable notwithstanding notification by the

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2004 (1) ZLR p58

Chidyausiku CJ

second respondent of its intention to appeal and notwithstanding any A subsequent appeal by the second respondent against (the) same.

2. The fourth respondent or any of his officers be and is hereby ordered to accept payment of bail from the applicant and to issue a warrant of his liberation in terms of the law.
3. (The) second respondent be ordered to pay the applicant's costs on B an attorney and client scale."

After hearing submissions by counsel in chambers (the actual hearing was in a courtroom because of the number of people wishing to attend the hearing), I directed that the matter be argued before the court made up of three judges. The matter was thereafter argued in court.

The facts of this case are common cause. The only issue to be determined by C this court is the correct meaning to the ascribed to s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act"). The facts are these. The applicant was arrested by the police on 10 January 2004. He applied to the High Court challenging his arrest. The matter was heard on 11 January 2004 by Mr Justice Bhunu who granted an order for the release of the applicant D forthwith. The applicant was not released for reasons that are not apparent on the record. He was instead placed on remand on 12 January 2004. He was placed on remand facing three charges, namely (a) defeating or obstructing the course of justice; (b) contempt of court; and (c) perjury.

The applicant applied to the magistrates court for bail pending his trial. The application was refused and the applicant was remanded in custody E.

The applicant then appealed against the refusal to grant him bail to the High Court. The appeal was heard by Karwi J who allowed the appeal and made the following order:

"IT IS ORDERED:

1. That the applicant be admitted to bail in the sum of $5 000 000 (five F million dollars).
2. That the applicant should not interfere with witnesses.
3. That the applicant surrender all his travel documents.
4. That the applicant report to the police at Harare Central Police Station three times a week, on Monday, Wednesday and Friday, G between the hours of 6.00 am and 6.00 pm."

Upon the making of the above order by Karwi J the Attorney-General, purporting to act in terms of s 121(3) of the Act, advised the learned judge that he intended to appeal. This, it was argued, activated the requirement that the applicant remains in custody for seven days or until such time as the Attorney-General would have indicated that he did not wish to proceed with the appeal. H

2004 (1) ZLR p59

CHIDYAUSIKU CJ

A This prompted the applicant to approach this court on the basis that the Attorney-General has no right of appeal against the order of Karwi J.

I initially had reservations on whether this matter was properly before this court. In this regard Mr *Zhou* made the following submissions. He submitted that the Supreme Court was a superior court which has the power, jurisdiction and authority to review the proceedings and decisions of inferior courts of B justice, tribunals and administrative authorities. For this proposition he relied on s 52(2) of the Supreme Court Act [*Chapter 7:13*]. He further argued that the Supreme Court is endowed with inherent jurisdiction or, in the words of Fleming J, an "undefined power which was intended when the court was created in order to attend to basically any unlawful interference with rights" C — see *Chunguete* v *Minister of Home Affairs & Ors* 1990 (2) SA 836 (W) at 844F.

Mr *Wamambo*, for the respondents, did not dispute the above proposition. Therefore, jurisdiction is not an issue.

The issue is this: does the Attorney-General have, in terms of s 121 of the Act, the right of appeal against the order of Karwi J as he contends? Or does he not D have such a right, as Mr *Zhou* contends?

Section 121 of the Act provides as follows:

"121 (1) Subject to this section and to subsection (5) of section forty-four of the High Court Act [*Chapter 7:06*], where a judge or magistrate has admitted or refused to admit a person to bail — E

(a) the Attorney-General or his representative, within seven days of the decision; or

(b) the person concerned, at any time;

may appeal against the admission or refusal or the amount fixed as bail or any conditions imposed in connection therewith.

F (2) An appeal in terms of subsection (1) against a decision of —

(a) a judge of the High Court, shall be made to a judge of the Supreme Court;

(b) a magistrate, shall be made to a judge of the High Court.

(3) A decision by a judge or magistrate to admit a person to bail shall be suspended if, immediately after the decision, the judge or magistrate is G notified that the Attorney-General or his representative wishes to appeal against the decision, and the decision shall thereupon be suspended and the person shall remain in custody until —

(a) if the Attorney-General or his representative does not appeal in terms of subsection (1) — H

(i) he notifies the judge or magistrate that he has decided not

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Chidyausiku CJ

to pursue the appeal; or A

(ii) the expiry of seven days;

whichever is the sooner; or

(b) if the Attorney-General or his representative appeals in terms of subsection (1), the appeal is determined.

(4) An appeal in terms of subsection (1) by the person admitted to bail B or refused admission to bail shall not suspend the decision appealed against.

(5) A judge who hears an appeal in terms of this section may make such order relating to bail or any condition in connection therewith as he considers should have been made by the judge or magistrate whose decision is the subject of the appeal. C

(6) Subsections (2) to (6) to section one *hundred and sixteen* shall apply, *mutatis mutandis*, in relation to any appeal in terms of this section.

(7) Any order made by a judge in terms of subsection (5) shall be deemed to be the order made in terms of the appropriate section of this Part by the judge or magistrate whose decision was the subject of the appeal. D

(8) There shall be no appeal from a decision or order of a judge in terms of this section.

(9) This section shall apply in regard to a private prosecution as if references to the Attorney-General were references to the private party instituting the prosecution."

On a proper reading of the above section, there is no doubt that when a E magistrate or a judge hears a bail application in the first instance, there is a right of appeal by an accused person and the Attorney-General to the High Court from the magistrate's decision and to the Supreme Court from a High Court judge's decision. That much is common cause. It is also common cause that, in such a case, if it is the Attorney-General who notes the appeal in terms of s 121(3) of the Act the accused person is liable to remain in custody for F seven days.

Subsection (5) of s 121 of the Act empowers a judge hearing an appeal to make such order relating to bail or any conditions in connection therewith as he considers should have been made by the judge or magistrate whose decision is the subject of the appeal. G

Subsection (6) of s 121 of the Act merely incorporates the provisions of s 116 of the Act; while subs (7) provides that any order made by a judge in terms of subs (5) shall be deemed to be the order made in terms of the appropriate section of this Part by the judge or magistrate whose decision was the subject of the appeal. H

CHIDYAUSIKU CJ

A Subsection (8) provides that: "*There shall be no appeal from a decision ororder of a judge in terms of this section"* (my emphasis).

I have no doubt in my mind that subs (8) of s 121 deprives any party — both the accused person and the Attorney-General — of any right of appeal against any order made by a judge in terms of subs (5) of s 121 of the Act. Thus, when a judge of the High Court hears a bail application in the first instance he is B exercising his power in terms of s 121(1) and whatever decision he makes is appealable. However, when he hears a bail application as an appeal judge he does so in terms of s 121(5) of the Act and any order he makes when sitting as such is not appealable because of the provisions of subs (8) of s 121.

This, in essence, was the contention of Mr *Zhou* and I find myself in agreement C with him.

Mr *Wamambo*, for the respondents, has argued that a party to bail proceedings is allowed only one appeal. Thus, if bail proceedings start in the magistrates court, as was the case here, and an accused who is refused bail appeals to the High Court he has exhausted his one chance of appeal and therefore cannot appeal to the Supreme Court. However, if it is the Attorney-General who loses D in the High Court he is entitled to appeal to the Supreme Court because he has not as yet utilised his one chance to appeal.

I am not persuaded by this argument for a number of reasons.

That interpretation, in my view, would confer the right of appeal to one party, the Attorney-General, and deny the similar right to the other party, the accused, in the same proceedings. This would be grossly unfair and the legislature could not have intended such an unjust situation.

I also find nothing in the express and explicit language of subs (8) of s 121 of the Act that confers the right of appeal on the Attorney-General against an order made by a judge in terms of subs (5), while denying the same right to an F accused person.

Mr *Wamambo* cited the case of *S* v *Dzawo* 1998 (1) ZLR 536 (S) as authority for his proposition. I do not accept that submission. *Dzawo's* case *supra* is authority for the proposition that an accused person has the option of commencing bail proceedings in the magistrates court or the High Court. If he chooses to start in the magistrates court, then his right of appeal is exhausted G by the one appeal to the High Court. He cannot, in the event of the decision going against him in the High Court, appeal to the Supreme Court because of subs (8) of s 121 of the Act. In *Dzawo's* case *supra* the court did not in any way address the right of appeal of the Attorney-General, as that was not an H issue in that case.

CHIDYAUSIKU CJ

In my view, the conclusion that the Attorney-General has no right of appeal A against an order of the High Court made in terms of subs (5) of s 121 of the Act is consistent with the conclusion reached by this Court in D*zawo's* case *supra*.

In conclusion, I am satisfied that the Attorney-General cannot appeal against the order of Karwi J because of s 121(8) of the Act. His intention to appeal, B communicated to the judge, is devoid of any legal force or effect and certainly does not activate the consequence envisaged in s 121(3) as contended for by the respondents.

In the result, the application succeeds and the following order is made –

> "1. The order of Karwi J granted on 16 January 2004 is not appealable by either party and should therefore be complied with. C
>
> 2. The second respondent shall pay the applicant's costs on the ordinary scale."

Cheda JA and Gwaunza JA concurred D

Dube, Manikai & Hwacha, applicant's legal practitioners

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

[*Editor's note*: E

Following this judgment, s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] was amended by Act 14 of 2004. Subsection (8) of the section now reads as follows:

> "(8) There shall be no appeal to a judge of the Supreme Court from a decision or order of a judge of the High Court in terms of paragraph (b) of subsection (2), unless the decision or order relates to the admission or F refusal of admission to bail of a person charged with any offence referred to in —
>
> (a) paragraph 10 of the Third Schedule; or

(b) the Ninth Schedule in respect of which the Attorney-General has issued a certificate referred to in subsection (3b) of section G *thirty-two*;

in which event subsections (3) to (7) shall apply to such appeal."] H

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MAPONGA v MAPONGA & ORS 2004 (1) ZLR 63 (H)

Citation	2004 (1) ZLR 63 (H)
Case No	Judgment No. HH-21-04
Court	High Court, Harare
Judge	Makarau J
Heard	20 January 2004
Judgment	20 January 2004
Counsel	Mr *G Mhlanga,* for the applicant First respondent in default Second respondent in person
Case Type	Civil Application
Annotations	Link to case annotations

Flynote

Family law — *husband and wife — property rights — matrimonial home —* C *rights of wife to the matrimonial home — limits on — what matrimonial home is — right of husband to dispose of matrimonial home*

Family law — *matrimonial home — how determined — not by property ownership — determined by place where home established*

Headnote

D The applicant was married to the first respondent in terms of the Marriages Act [*Chapter 5:11*]. The second respondent was her stepson, the son of her husband by a previous marriage. The husband owned a house in Mabvuku but the couple established a home in Ruwa. Without the applicant's knowledge, the husband ceded his rights in the Mabvuku property to his son, the second respondent. When the couple became E estranged and abandoned the Ruwa home, the wife then applied for a court order declaring the Mabvuku property the matrimonial home, declaring her right to reside in it, and setting aside the cession of rights in it to her stepson.

Held, that the determination of what is a matrimonial home depends not on property ownership, but on the place where a couple establishes residence. F They lived together in Ruwa, not Mabvuku, hence the Mabvuku property could not be a matrimonial home simply because the husband owned it.

Held, further, that the rights of a wife to the property of her husband are governed by the common law, the principles in this regard being largely borrowed from English common law. The rights are personal against the G husband and cannot hold against a genuine claim by a third party. The wife's status as such does not grant her any right to property that the husband has that is not the matrimonial home. She only has limited rights to the matrimonial home that she and the husband set up. These rights are personal against the husband and can be defeated by the husband providing her with alternative suitable accommodation or the means to H acquire one. The husband can sell the roof from above her head if he does

so to a third party who has no notice of the wife's claims, thus completely A alienating the matrimonial home without making any reference to the wife.

Held, further, that only where the third party associates with the husband to defraud the wife of her right on the matrimonial home is the wife's right, derived from her status, is upheld. However, the wife must prove collusion between her husband and the third party to render her homeless. Such collusion was not shown in this case.

Held, further, that the legislature has developed the law to protect the wife in divorce matters and on the death of the husband. In other circumstances, precedent rules, and the law still awaits updating. C

Cases cited

Cattle Breeders Farm (Pvt) Ltd v Veldman (2) 1973 (2) RLR 261 (A)

Ferris v Weaven [1952] 2 All ER 233 (QB)

Muganga v Sakupwanya 1996 (1) ZLR 217 (S)

Muzanenhamo & Anor v Katanga & Anor 1991 (1) ZLR 182 (S)

Nanda v Nanda [1967] 3 All ER 401 (P) D

National Provincial Bank Ltd v Ainsworth [1965] 2 All ER 472 (HL)

Case information

Mr *G Mhlanga,* for the applicant

First respondent in default

Second respondent in person E

Judgment

MAKARAU J: The applicant married the first respondent on 11 February 1997, in terms of the Marriages Act [*Chapter 5:11*]. The marriage still subsists. Prior to his marriage to the applicant, the first respondent was married to one Naome Maponga, who passed on in 1978. The second respondent was borne to the first respondent out of that marriage. He is a F stepson to the applicant. During the subsistence of his marriage to the late Naome Maponga, the first respondent was allocated a residential stand in Mabvuku by the local authority. This was on a rental basis. In 1981, the first respondent was offered an opportunity to purchase the property under a suspensive agreement of sale. He took up the offer.

In November 1997, the first respondent and the applicant moved from the G Mabvuku property and set up home in one room that they rented in Ruwa. She alleges that this move was a deliberate one on their part to enable them to qualify for a residential stand in Ruwa. In their absence, the second respondent took occupation of the property in Mabvuku. She alleges that he did so as a caretaker. Later in 1999, she discovered that the second respondent actually H

Makarau J

A occupied the property in his own right as cedant of the first respondent's rights in the property. The first respondent had donated his rights title and interests in the property to the second respondent on 14 October 1997 without the knowledge of the applicant.

The relationship between the applicant and the first respondent became strained to such an extent that the first respondent left the matrimonial home B and set up home with his mother at her rural home. The applicant soon followed the first respondent but their differences resurfaced and she had to leave. At the time of the hearing of the application, the first respondent had abandoned the applicant. She alleges in her application that she is now homeless as the second respondent bars her from occupying the Mabvuku C property.

In her application, the applicant prays for an order declaring the Mabvuku property to be the matrimonial home. She further prays for an order permitting her to reside at the property without interference from the second respondent and for an order setting aside the cession of rights in the property between the first and second respondents.

D The first and second respondents opposed the application. In his opposing affidavit, the first respondent denies that the property in Mabvuku ever constituted his matrimonial home with the applicant and that the applicant never had any claim over the property.

The applicant's claim to the property is not one of ownership. It is for an order E declaring the Mabvuku property F the matrimonial home between her and the first respondent and consequent to that order, an order directing that she be allowed to occupy the matrimonial home without let or hindrance from the second respondent.

The issue before me is not whether or not the applicant has the right to occupy the matrimonial home *per se.* It is whether the Mabvuku property constitutes the matrimonial home or failing that, whether there is any other basis in law upon which I can order that she be accommodated at the Mabvuku property.

The applicant argues that upon the solemnisation of her marriage to the first respondent, they both proceeded to the third respondent's offices for her status to be recorded against title to the property. She further argues that the G recording of her status against the title to the property transformed the property into the matrimonial home.

In my view, whether a particular abode constitutes the matrimonial home is a fact to be determined by where the parties set up home, and ordinarily reside. It does not have any direct relation to the property owned by either or both of H the parties. It usually coincides with the property owned by one of the parties

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but this is not necessarily the qualifying factor. This appears to me to have been A the manner in which McNally JA determined the matter in *Muzanenhamo & Anor* v *Katanga & Ors* 1991 (1) ZLR 182 (S), when he held that the parties' matrimonial home moved to Mutare when Mr Katanga purchased a property there after being transferred to that city by his employers. Since Mr Katanga was going to work in Mutare, he was going to be ordinarily resident in that city B and it is in that city that the matrimonial home was to be found.

In the application before me, it is common cause that the applicant and the first respondent stayed in the Mabvuku property up to November 1997 when they relocated to Ruwa. At Ruwa, they set up home in rented accommodation. That became the matrimonial abode. From Ruwa, they never returned to set up home at the Mabvuku property. The first respondent returned to his mother's C home and there the applicant followed him. It thus appears to me that the parties never established a matrimonial home at the Mabvuku property.

The mainstay of the applicant's case in this matter is her status as the first respondent's wife. The rights of a wife to property belonging to her husband is a problem area and is, in my view, far from being satisfactory. As observed D by McNally JA in *Muzanenhamo*'s case, claims resting on the wife's status as such have always posed difficulties for the courts. This is what he had to say at p 187F:

> "I turn secondly to consider whether she may have a right of occupation arising from her status as a wife. This is always a difficult problem for the courts to solve. See for example, *Jackson* v *Jackson* [1971] 3 All ER 774 E (CA); *Cattle Breeders Farm (Pvt) Ltd* v *Veldman (2)* 1973 (2) RLR 261 (A) and *Owen* v *Owen* 1968 (1) SA 480 (E).
>
> It is essentially a matter of equity. The courts will intervene where, for instance, the husband sells the house as part of a policy of harassment arising out of divorce proceedings."

In this jurisdiction, the rights of a wife to the property of her husband are F governed by common law. These common law principles, largely borrowed from English common law, were developed in an era that was not sensitive to the role of the wife in a marriage, and are heavily tipped in favour of the husband. The principles were developed in an era when the medieval authorities looked to the husband for dues rather than to the wife. Thus, all property, even G that of his wife, fell under his control for the due payment of dues. Thus, the principles place the wife in a position subservient to that of the husband in contrast to the thrust in modern law towards equality between spouses.

What are these principles and do they still have a place in modern society?

The rights of the wife to the property of her husband have been described as personal against the husband and as arising from her right to consortium and H

A the right to be maintained by her husband.

In *Cattle Breeders*'s case, the following pronouncement by Lord Upjohn in *National Provincial Bank Ltd* v *Ainsworth* [1965] 2 All ER 472 (HL) was approved:

> "A wife does not remain lawfully in the matrimonial home by leave of her husband as the owner of the property. She remains there because, as a B result of the status of marriage, it is her right and duty so to do and, if her husband fails in his duty to remain there, that cannot affect her right to do so. She is not a trespasser, she is not a licensee of her husband, she is lawfully there as a wife, the situation is *sui generis*."

This appears to be the only recognition afforded the status of a wife, for C immediately after citing the above with approval, the then Beadle CJwent on to say at p 266C:

> "To what extent the rights of the wife which are of a personal character are binding against third parties must depend on the particular circumstances of each case, and in particular, on the relationship of the third party to the spouses."

D As against her husband, the right of the wife to remain in the matrimonial home is not absolute. At p 267E in *Cattle Breeders*'s case, the position was accepted as settled that the husband could eject his wife, even if he is in the wrong by deserting the family. This is what was said:

> "A long line of cases seems to have laid down the proposition that, even if the husband may be the defaulting party, he may eject the wife from the E matrimonial home, provided he offers her suitable alternative accommodation or offers her the means of acquiring such suitable accommodation."

As against third parties, the position of the wife is equally precarious. A long line of cases seems to indicate that where there has been a genuine transaction F between the third party and the husband, the wife's personal rights against her husband do not enter the field of property law to defeat the third party's claim – see *National Provincial Bank Ltd* v *Ainsworth supra*, *Cattle Breeders Farm (Pvt) Ltd* v *Veldman (2) supra*.

From the decisions in *Ferris* v *Weaven* [1952] 2 All ER 233 (QB) and in *Muganga* v *Sakupwanya* 1996 (1) ZLR 217 (S), among others, emerges the G principle that where the third party associates with the husband to defraud the wife of her right in the matrimonial home, the wife's right, derived from her status, is upheld. The wife must prove collusion between her husband and the third party to render her homeless.

In *Nanda* v *Nanda* [1967] 3 All ER 401 (P), the court issued an injunction H against a wife who visited her husband's new home with another woman on

the strength of a decree of restitution of conjugal rights. "She seemed to think A that she had a right to arrive at the husband's home, where he was living with Miss Atkinson and demand accommodation; perhaps even to exclude Miss Atkinson and take her place in the home." The court held that the wife had no right to trespass in a new home established by the husband with another woman. B

It would then appear to me in summary that the status of a wife does not grant her much in terms of rights to the immovable property that belongs to her husband. Firstly, she has no right to any property that the husband has that is not the matrimonial home. She only has limited rights to the matrimonial home that she and the husband set up. These rights are personal against the husband

and can be defeated by the husband providing her with alternative suitable C accommodation or the means to acquire one. The husband can literally sell the roof from above her head if he does so to a third party who has no notice of the wife's claims, thus completely alienating the matrimonial home without making any reference to the wife. Even the wife's right to consortium with her husband is not absolute as evidenced by the decision in *Nanda* v *Nanda supra*. D Finally, the matrimonial home is determined by where the parties jointly intend to set up home.

Applying the above principles to the application before me, it would appear to me that the applicant's status as wife will not do her much good. She does not have a matrimonial home to claim the right of occupation in respect of. The property that once belonged to her husband has since been alienated in E circumstances where she cannot show that the second respondent acted in collusion with the first respondent to defeat her just claims. She and the first respondent voluntarily left the property not only to set up a new home but to acquire a property of their own in Ruwa. That they failed to do so does not make the Mabvuku property the matrimonial home instead of the failed acquisition. F

In divorce matters and upon the death of the husband, the legislature has intervened to ease the iniquitous position that the wife finds herself in towards the matrimonial home.

Lord Hodson in *National Provincial Bank Ltd* v *Ainsworth supra* saw no reason why the wife's personal rights against her husband, which are derived G from her status, should enter the field of real property so as to clog the title of an owner. One could suggest many reasons. At the time of the decision, these may not have manifested themselves. The thrust of modern law is to continually recognise the gender role of wives and to raise this role to an equal one to that of men within a marriage. Just as Lord Upjohn recognised that the position of the wife, derived from her status, is *sui generis*, so should her rights have been H

Makarau J

A viewed on their own rather than as a trespasser or licencee of her husband's, a suggestion that his position is superior to hers.

It is hoped that a future court will venture to suggest that the bedrock upon which the principles that govern the rights of wives to the matrimonial property is outdated and that the principles have long outlived their mediaeval purposes.

B I am shackled to the mediaeval chains by precedent.

In the result, the application is dismissed. There shall be no order as to costs.

Chihambakwe Mutizwa & Partners, applicant's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/S v MUENDAWOGA 2004 (1) ZLR 70 (H)

S v MUENDAWOGA 2004 (1) ZLR 70 (H)

Citation	2002 (1) ZLR 70 (SC)
Case No	Judgment No. HH-10-04
Court	High Court, Harare
Judge	Bhunu J

Heard	28 January 2004
Judgment	28 January 2004
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure — *record — status of — exclusive memorial of* C *proceedings — amendment of record — limited circumstances in which record may be amended*

Criminal procedure — *sentencing — sentence imposed in the absence of the accused — propriety of*

Headnote

The record of proceedings in a criminal trial was endorsed by the magistrate D "sent(enced) *in absentia*". Upon enquiry, the magistrate sought to suggest that this was a mistake.

Held, that once a judicial officer has made a written record of court proceedings, that record constitutes the exclusive memorial of the proceedings. Judicial officers, save in exceptional circumstances, are E strictly bound by the written record made during the course of proceedings. They may not subsequently supplement, amend or vary the record. Once the proceedings are recorded the record speaks for itself. No one can speak on its behalf, including the author. The record should be left to speak for itself at all material times without interference or adulteration, although patent errors may be corrected or rectified. F

Held, further, that but for the fact that the sentence imposed was a wholly suspended one, the sentence would have been quashed and the matter remitted for reconsideration in the presence of the accused as required by law. In the circumstances the court would merely withhold its certificate that the proceedings were in accordance with real and substantial justice. G

Cases cited

S v Ndhlovu & Anor HH-219-03

Union Govt v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43

Legislation considered H

Magistrates Court Act [*Chapter 7:10*], s 5(1)

2004 (1) ZLR p71

Bhunu J

Judgment

A **BHUNU J**: The accused was charged and convicted of theft on 4 September 2003. Nothing much turns on conviction.

It is the sentencing procedure adopted by the trial magistrate which the scrutinising regional magistrate has brought to question.

The record shows that on 4 September 2003, the accused was remanded to 8 B September for sentence. On 8 September, the accused was further remanded to 10 September for sentence.

He was eventually sentenced on 10 September 2003. Against that date, the trial magistrate endorsed:

> "Sent(enced) *in absentia*."

Upon a query being raised by the regional magistrate whether it was appropriate C to sentence a convict *in absentia,* the trial magistrate made an about turn and denied that he sentenced the accused *in absentia*.

He explained that the endorsement related to September because on that date the accused was not brought to court from prison necessitating a further remand to 10 September. He was adamant that the accused appeared before D him on 10 September when he sentenced him.

That might very well be so, but the trial magistrate is bound by the four corners of the written record of proceedings. He cannot supplement or correct it by written or oral evidence.

In the recent case of *S* v *Ndlovu & Anor* HH-219-03, Uchena J, after surveying E a number of authorities, was at pains to emphasise the need for magistrates to keep a comprehensive and accurate record of proceedings made at the time of the proceedings.

It is not necessary to reiterate what the learned judge said in that judgment as it is sufficiently lucid, self-explanatory and instructive.

F The long and short of it all is that judicial officers, save in exceptional circumstances, are strictly bound by the four corners of the written record of proceedings made during the course of proceedings. They cannot subsequently supplement, amend or vary the record of proceedings. Once the proceedings are recorded, the record becomes *res ipsa loquitor*, that is, it speaks for itself. No one can speak on its behalf including the author. The record should be left to speak for itself at all material times without interference or adulteration.

A record of proceedings is evidence of the proceedings presided over by the magistrate. That being the case the rules of evidence come into play. The rule forbidding the supplementing of the record of proceedings is akin to the parole H evidence rule.

Bhunu J

This rule is a rule of contract which stipulates that A once a contract is reduced to writing the written document is deemed to be the exclusive memorial of the parties' agreement. No evidence to prove its terms may be given: see *Union Government* v *Vianini Ferro Concrete Pipes (Pty) Ltd* 1941 AD 43. In the context of court proceedings, the general rule becomes:

> "Once a judicial officer has made a written record of court proceedings the B written record shall constitute the exclusive memorial of the proceedings."

It is a legal requirement that the court proceedings be recorded in writing. Section 5(1) of the Magistrates Court Act [*Chapter* 7:10] provides that every magistrates court shall be a court of record.

Thus, the trial magistrate is required to keep a comprehensive and accurate C record of proceedings. It is also trite that the proceedings are as recorded by the magistrate. That being so no-one can alter, vary, amend or rectify the record of proceedings without the consent of all the parties concerned without offending against the record as contemporaneously recorded by the magistrate.

To allow the record to be amended willy-nilly after the proceedings, is to open the door to errors, distortions and inaccuracies arising from faulty memory or D down right dishonesty.

In so saying, I am by no means suggesting that patent errors many not be corrected or rectified. This may be done with the concurrence of all the parties concerned. The trial court may seek rectification of the record from the reviewing court after providing sufficient basis for the amendment or variation E sought.

For instance, if the trial magistrate apart from his mere say-so had produced prison records showing that the accused was not brought to court on the 8th but on the 10th when he was sentenced, the reviewing court could accept that the endorsement on the record was a patent error and allow rectification of the record. This he did not do. F

His explanation defies logic and as such cannot possibly be correct. If the endorsement was prompted by the accused's non appearance at court on the 8th then the magistrate would undoubtedly have recorded "remanded *in absentia*" against that date instead of recording "Sent(enced) *in absentia*" against the 10th. G

The accused was sentenced to a wholly suspended sentence. In the normal run of things, I would have quashed the proceedings and remitted the matter to the trial court to reconsider sentence in the presence of the accused as is required by law. I however, consider it unduly vexatious to recall the accused when he now considers the mater to be over and done with. There will be no serious prejudice because from the record it appears that the accused had addressed H

Bhunu J

A the court in mitigation of sentence at the time of his conviction on 4 September 2003. The fact, however, still remains that there was no strict adherence to the legal requirements in that according to the record sentence was pronounced in his absence without him being appraised of the reasons thereof. That being the case, I am unable to certify these proceedings as being in accordance with real and substantial justice.

B I accordingly withhold my certificate.

Uchena J concurred.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/KUFANDIRORI v CHIPURIRO & ORS 2004 (1) ZLR 74 (H)

KUFANDIRORI v CHIPURIRO & ORS 2004 (1) ZLR 74 (H)

Citation	2004 (1) ZLR 74 (H)
Case No	Judgment No. HH-12-04
Court	High Court, Harare
Judge	Bhunu J
Heard	23 October 2003
Judgment	28 January 2004
Counsel	*R Fitches,* for the applicant *T Sakutukwa,* for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Contract — *pledge — rights of pledgor — retains ownership of property — pledgee must seek redress for default through legal process*

Contract — *pactum commissorium — unlawful and unenforceable*

Statutes — *Contractual Penalties Act [Chapter 8:04] — s 4 — when penalty clause invalid — relief granted when disproportionate prejudice to* D *creditor*

Headnote

The plaintiff had pledged a motor vehicle as security for a loan and signed an agreement that, in case of default, the pledgee could transfer ownership of the vehicle to himself. When the debt was not paid, the creditor E transferred ownership. The pledgor then sought to recover the vehicle on the basis that the agreement was a *pactum commissorium* and hence unlawful.

Held, that the default or penalty clause constituted a *pactum commissorium* which is unlawful and unenforceable.

Held, further, that a creditor cannot simply transfer pledged property when F the pledgor defaults on the debt; the pledgor retains ownership of the pledged property until the creditor takes court action for redress.

Held, further, that s 4 of the Contractual Penalties Act[*Chapter 8:04*] allows a court to grant relief to a debtor who falls victim to a disproportionate penalty in a contract. The court ordered ownership of the vehicle transferred back to the pledgor and the vehicle itself returned to the G pledgor on payment of the debt.

Cases cited

Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor 1994 (1) ZLR 310 (H) H

Bhunu J

Legislation considered A

Contractual Penalties Act [*Chapter 8:04*], s 4

Case information

R Fitches, for the applicant

T Sakutukwa, for the respondents

Judgment

B **BHUNU J**: In this opposed application there is no material dispute of facts on most issues relevant to the determination of the dispute at hand. The undisputed facts are that the respondent lent the applicant one million dollars in consequence whereof the applicant pledged his motor vehicle registration number 780-583J, keys and registration book as security for the debt to the C respondent.

The terms of the agreement are contained in the applicant's affidavit dated 18 June 2002 which reads in part:

> "The vehicle has been surrendered on term(s) that I pay back money by 31 July 2002 failure (of) which I give Mr H Chipuriro the express right to effect change of ownership and further changes will be made to the D agreement thereafter."

It is common cause that the applicant did not repay the loan by the due date whereupon the respondent proceeded to effect change of ownership into his own name in terms of the agreement.

There is a material dispute of fact as to whether or not the respondent frustrated E the applicant's bid to repay the loan by the due date. There is however no need to resolve that factual dispute because the application can be determined on the basis of the legality or otherwise of the terms of the pledge. That being the case it is not necessary to determine whether or not the doctrine of fictional fulfillment is applicable to this case.

F There is also a factual dispute as to whether or not the respondent used and damaged the pledged motor vehicle without the applicant's consent prior to 31 July 2002. The nature of the relief sought makes it unnecessary to resolve that factual dispute at this stage.

The applicant seeks to recover the motor vehicle from the respondent on the basis that the agreement to forfeit the pledged motor vehicle was unlawful and G unenforceable in so far as the agreement constitutes a *pactum commissorium.*

Chimutanda Motor Spares (Pvt) Ltd v *Musare & Anor* 1994 (1) ZLR 310 (H) defines a *pactum commissorium* as:

> "a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt , after the H lapse of the time fixed, the full property in the thing will irrevocably pass

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Bhunu J

> to the creditor in payment of the debt. See *van Rensberg* v *Weiblen* 1916 A OPD 247 at 252."

An examination of Roman Dutch Law authorities, particularly *Wille's Principles of South African Law* 8 ed p p 345 establishes that a valid pledge merely confers the right to retain possession of the thing pledged as security by the pledgee as long as the debt remains unpaid; it does not confer the right B of ownership. The pledgor retains ownership of the pledged property. C

The law places a duty of care on the pledgee over the pledged property. In the event of loss or damage while the property is under his custody or possession, there is a presumption of negligence against the pledgee. Thus the pledgee is accountable to the pledgor for such loss or damage to the pledged property.

In addition, the pledgee is obliged to render an account to the pledgor of all fruits and profits actually derived from the pledged property. These he must pay over to the pledgee or set off in reduction of the debt.

In the event of default to pay by the date, the pledgee has no recourse to self help. He has no right to sell the pledged property without recourse to law. The procedure which the pledgee must follow for redress is outlined in *Wille's* D *Principles of South African Law (supra*) at p 349 where it is stated:

> "A judgment for the debt secured may be obtained by the mortgagee if the mortgagor fails to repay the debt at the due date or if he commits a breach of any express clause of the mortgage contract which entitles the mortgagee to foreclose. The judgment of the court declares that the specifically mortgaged property may be executed upon, and the property is subsequently E sold in execution of the judgment by the officer of the court, who pays the mortgagee the amount of his judgment from the proceeds of the sale.
>
> A mortgagee is not entitled to sell the mortgaged property without recourse to law …"

That is the legal position save for very limited exceptions which need not F detain us here as none have been relied upon.

It is clear that the penalty clause in the agreement at hand amounts to a *pactum commissiorium*. I have already demonstrated above that such an agreement is unlawful and unenforceable due to illegality.

The reasons why our law renders a *pactum commissorium* illegal are many and G varied. The chief reason however has to do with public policy considerations. Our courts will certainly not give effect to agreements which are contrary to public policy, exploitative and oppressive.

The unfortunate part of life is that due to the unequal distribution of wealth, grinding poverty and greed, the world will always have its fair share of "Shylocks" who are prepared to pounce and make capital out of other people's H

Bhunu J

A misfortunes. They will demand their pound of flesh regardless of the cost to and effect upon the victim.

Both common and statutory law have developed safeguards which endeavour to protect gullible members of the public from oppressive and exploitative agreements which they may enter into.

B Section 4 of the Contractual Penalties Act [*Chapter 8:04*] is relevant. It provides that:

> "(1) Subject to this Act a penalty stipulation shall be enforceable in any competent court.
>
> (2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of an act, omission or C withdrawal giving rise to liability under a penalty stipulation the court may:
>
> (a) reduce the penalty to such extent as the court considers equitable under the circumstances; and
>
> (b) grant such other relief as the court considers fair and just to the parties.

D (3) without derogation from its powers in terms of subsection (2) a court may —

(a) order the creditor to refund to the debtor the whole or any part of any instalment, deposit or other moneys that the debtor has paid; or

(b) order the creditor to reimburse the debtor for the whole or part of any E expenditure incurred by the debtor in connection with the contract concerned.

(4) In determining the extent of any prejudice for the purpose of subsection (2), a court shall take into consideration not only the creditor's proprietary interest but every other rightful interest which may be affected by the act, omission or withdrawal in question."

F It is pertinent to note that what is being brought to question here is the penalty clause of the agreement and not the contract itself. The contract itself is perfectly valid. As can be seen from the provisions of the above section the court has very wide powers in granting equitable relief where it deems the penalty clause is out of proportion to the prejudice suffered by the creditor.

G In this case the respondent lent the applicant one million dollars. Upon breach he exacted a penalty by appropriating the applicant's motor vehicle to himself. He openly admitted that he used the applicant's pledged motor vehicle prior to the due date. He has however not accounted to the applicant for the value of such use. The value of the motor vehicle he appropriated to himself has not been ascertained but the probabilities are that it is much more than the money H lent plus interest. This is the only reasonable explanation as to why he rushed

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to activate the penalty clause without notice or demand. Thus the respondent A has been unjustly enriched to the extent of the difference between the money borrowed plus interest and the actual value of the pledged motor vehicle to the loss and prejudice of the applicant.

Such unwarranted prejudice entitles the court to intervene and provide equitable relief in terms of s 4 of the Contractual Penalties Act [*Chapter 8:04*]. B

At the commencement of argument counsel for the applicant submitted that the respondent was barred for failure to file heads of argument timeously. Counsel for the respondent gave what appeared to be a plausible explanation and made a verbal application for condonation. I granted the application, preferring to determine the application on the merits rather than on a technicality. Despite C that initial success, the respondent has no leg to stand on, on the merits.

The applicant has asked for costs on an attorney-client scale. There is no justification for punitive costs because the respondent had an arguable case based on an agreement which is apparently valid on the face of it but could not bear close scrutiny.

In the result it is ordered — D

(1) that the application be and is hereby granted with costs to be borne by the second respondent on the ordinary scale;

(2) (a) that first and second respondents shall forthwith release to the applicant the Toyota motor vehicle registration number 780-582 J together with the keys and registration book for the motor vehicle upon repayment E of the loan of $1 000 000 together with interest at the prescribed rate;

(b) that the first and second respondents shall upon, payment of the debt due together with interest, sign all the necessary papers to register the motor vehicle in the name of the applicant, failing which the Deputy Sheriff shall sign any such papers necessary to give effect to this order;

(3) (a) Alternatively; F

That in the event that for any reason the motor vehicle cannot be returned to the applicant within three weeks from the date of this order, the first respondent is ordered to pay the applicant the agreed value of the motor vehicle as at March 2003 as determined by any registered valuer on the Master of the High Court's panel of evaluators;

(b) that in the event that the applicant fails to repay the loan together with interest the motor vehicle shall be sold in execution, the proceeds used to repay the loan together with interest and the residue paid to the applicant; H

Bhunu J A

(4) That this order shall remain in operation notwithstanding the noting of an appeal against it.

Wickwar and Chitiyo, applicant's legal practitioners

Mantsebo and Partners, the first respondent's legal practitioners.

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Source:
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S v CHAYISVA 2004 (1) ZLR 80 (H)

Citation	2004 (1) ZLR 80 (H)
Case No	Judgment No. HH-17-04
Court	High Court, Harare
Judge	Chinhengo J
Heard	28 January 2004
Judgment	28 January 2004
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *general principles — globular sentence* C *for multiple offences — limited circumstances in which globular sentence appropriate*

Headnote

The accused was convicted by a magistrate on one count of housebreaking with intent to steal and theft and on another count of stock theft. The two offences were committed a month apart and at different places. The D magistrate treated both counts as one for sentence and imposed a sentence of four years' imprisonment. On automatic review:

Held, that there is no provision in the Criminal Procedure and Evidence Act [*Chapter 9:07*] for the imposition of globular sentences. Section 343 of the Act provides only for cumulative or concurrent sentences. This does not mean that globular sentences may not be imposed. There has been E judicial approval of this approach and it is routinely resorted to. It would, for example, be appropriate, if a juvenile is convicted of a number of offences and it is proposed to sentence him to corporal punishment, to treat all counts as one for sentence. In the normal course, though, if a judicial officer decides to pass a globular sentence on a person convicted of more

than one offence, he must be guided by the following factors F (which are not exhaustively stated):

(a) the offences should be the same or of a similar nature; and

(b) the offences should be closely linked in time; or

(c) they arise out of the same transaction (such as forgery and uttering).

In casu, none of these criteria were met. Although the overall sentence was G appropriate, it would have to be replaced with separate sentences for each of the two counts.

Cases cited

R v Chikwara 1951 SR 259; 1952 (1) SA 368 (SR) H

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

Chinhengo J

A *S v Maphosa* 1985 (1) ZLR 184 (H)

S v Nkosi 1965 (2) SA 414 (C)

R v Phillips 1955 SR 210; 1956 (1) SA 80 (SR)

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

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 343

Judgment

CHINHENGO J: The accused appeared before the magistrates court at Chivhu facing one count of housebreaking with intent to steal and theft and another of stock theft. He pleaded guilty to the charge of stock theft. He C admitted to having stolen a cow and a heifer and to have slaughtered the cow and sold the heifer. The heifer was recovered. He pleaded not guilty to the charge of housebreaking with intent to steal and theft. He was tried but was convicted nonetheless. He was found to have broken into the complainant's home and stolen a jersey valued at $2 500.

The magistrate treated both offences as one for the purpose of sentence. He D imposed a globular sentence of four years' imprisonment. The accused had three previous convictions for theft, housebreaking with intent to steal and theft and stock theft.

I asked the magistrate to justify his approach to sentence i.e. treating the offences of housebreaking with intent to steal and theft and stock theft as one E for the purpose of sentence. He failed to do so.

What prompted me to ask the magistrate to justify the approach he had taken in respect of sentence was the fact that the two offences were not at all connected. The housebreaking with intent to steal and theft had been committed on 11 December 2002. The accused had stolen the jersey from a house in Chivhu Township, an urban settlement, where he had visited his brother. The F cow and heifer were stolen on 18 January 2003 from a complainant who resided at Dzova Village, Chief Mutiti, Chivhu District – a rural area.

John Reid Rowland in *Criminal Procedure in Zimbabwe* states the following at pp 25-25(b):

> "Where the accused is convicted of two or more offences, it is preferable G that he should be sentenced separately for each offence, especially where the offences are entirely different. In most cases there is no practical advantage in imposing a globular sentence, where all counts are treated as one for sentence. An exception might arise where it is decided, in dealing with a juvenile, to place him in a training institute or impose a sentence of whipping. The imposition of a globular sentence often causes difficulties H on appeal or review. Consequently, one globular sentence for two or more

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Chinhengo J

> offences should only be considered where the offences are the same or of A a similar nature and are closely linked in time. A common example would be charges of forgery and uttering."

There is no statutory provision authorizing the imposition of a globular sentence. The Criminal Procedure and Evidence Act [*Chapter 9:07*] provides in s 343 only for cumulative or concurrent sentences. That section provides B that:

> "(1) Where a person is convicted at one trial of two or more different offences or where a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to several punishments for such offences, or for such last offence, as the case may be, as the court is competent to impose. C
>
> (2) When sentencing any person to punishments in terms of subsection (1), the court may direct the order in which the sentences shall be served or that such sentences shall run concurrently."

It is clear therefore that the B Criminal Procedure and Evidence Act does not make provision for the imposition of globular sentences. The exception may be the one stated by John Reid Rowland above and also referred to in *S* v *Nkosi* D 1965 (2) SA 414 (C) at 415E. This, however, is not to say that globular sentences may not be imposed. There has been judicial approval of this approach and it is now routinely resorted to by our courts. See *R* v *Chikwara* 1951 SR 259; 1952 (1) SA 368 (SR) which involved a conviction of forgery and uttering and *R* v *Phillips* 1955 SR 210; 1956 (1) SA 80 (SR) where Beadle E J (as he then was), finding that the cumulative sentences of four days' imprisonment on each of seventeen counts was too severe, proposed that treating all offences as one may be an option open to a judicial officer in an appropriate case. At 82G-83C, he said:

> "In any event, I do not think the rule that separate sentences should be imposed on different counts should be stretched any further than necessary, F or applied too slavishly, because there are instances when it is desirable that all counts should be treated together for the purpose of sentence. See *R* v *Visser* 1930 TPD 170; *R* v *Minnaar* 1945 (2) PH 227. For example, in the case of the conviction of a juvenile on large number of counts of equal gravity, if the court wishes to impose a sentence of corporal punishment the only possible thing to do is to treat all counts together as G one for the purpose of sentence.
>
> Again, it may be argued that s 351(2) [(now s 343] of the Code, which deals with concurrent sentences, seems to indicate that the sentences should be treated count by count. I do not think, however, that this was the intention of the legislature in framing this particular subsection. The intention appears to be merely to indicate that, in the absence of anything H

> A said to the contrary, sentences of imprisonment for different offences should run consecutively, and not concurrently, with each other."

Beadle J carried through with this reasoning when he became Chief Justice. In *R* v *Makaza & Ors* 1969 (1) RLR 97 (G), he specifically recommended to magistrates to treat many counts as one for the purpose of sentence in cases in which the several counts arise out of the same transaction. Judicial approval B was also given to this approach in *S* v *Zacharia* 2002 (1) ZLR 48 (H).

In deciding to pass a globular sentence, therefore, a judicial officer must be guided by the following factors, which are not exhaustively stated:

(a) the offences are the same or of a similar nature; and

(b) the offences are closely linked in time; or C

(c) the offences arise out of the same transaction.

The offences of which the accused was convicted in the present case do not meet any of the criteria I have outlined. The first was committed in an urban area about one month before the second offence of stock theft was committed. The latter was committed quite some distance from where the former was D committed and in a rural area. Although both offences are of a similar nature, the one is a less serious offence of housebreaking with intent to steal and theft and involved the theft of a clothing item whilst the other is a serious offence of stock theft. The legislature had, in respect of stock theft, to enact a law to deal specifically with it to emphasise its seriousness – see the remarks of Ebrahim J in *S* v *Maphosa* 1985 (1) ZLR 184 (H). The two offences did not E arise out of the same criminal transaction. In my view, this was not a proper case in which the magistrate should have coupled the two offences for the purposes of sentence. The conviction and overall sentence is appropriate for an accused with previous convictions for similar offences. But for the reasons I have given the sentence must be set aside and substituted with the following:

> F "Count 1: (Housebreaking with intent to steal and theft)
>
> 12 months' imprisonment.

Count 2: (Theft of stock)

36 months' imprisonment."

G Omerjee J concurred.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/ECONET WIRELESS (PVT) LTD v POSTAL AND TELECOMMUNICATIONS REGULATORY AUTHORITY OF ZIMBABWE & ORS 2004 (1) ZLR 84 (H)

ECONET WIRELESS (PVT) LTD v POSTAL AND TELECOMMUNICATIONS REGULATORY AUTHORITY OF ZIMBABWE & ORS 2004 (1) ZLR 84 (H)

Citation	2004 (1) ZLR 84
Case No	Judgment No. HH-25-04
Court	High Court, Harare
Judge	Omerjee J
Heard	3 February 2004
Judgment	3 February 2004
Counsel	*E Matinenga*, for the applicant *J Muzangaza*, for the first respondent Mrs *F Maxwell*, for the second respondent *L M Mhishi*, for the third respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Posts and telecommunications — *Postal and Telecommunications Act [Chapter 12:05] — s 99 — regulatory power of Minister — amendment of licences — whether Minister may make regulations which amend* D *existing licences.*

Headnote

The applicant was a telecommunications operator whose licence under the Postal and Telecommunications Act [*Chapter 12:05*] authorised it to operate a limited facility for the transmission and receipt of international cellular traffic. Section 42 of the Act empowered the first respondent to amend licences such as the applicant's, but stated that before doing so E it had to notify the licence-holder and give the licence-holder an opportunity to make representations. Subsequently the Minister responsible for administering the Act issued a set of regulations under s 99 of the Act which vested exclusive control over international telecommunication services in the third respondent, a telephone company. The effect of the regulations was to amend the applicant's licence, but the F applicant had not been consulted before the regulations were issued.

Held, that since there had been no consultation with the applicant before the regulations were issued, they were invalid to the extent that they amended the applicant's licence. G

Legislation considered

Postal and Telecommunications Act [*Chapter 12:05*], s 42

Postal and Telecommunications (International Telecommunications Services) Regulations, 2004 (SI 18 of 2004), s 4 H

2004 (1) ZLR p85

Omerjee J

Case information

A *E Matinenga*, for the applicant

J Muzangaza, for the first respondent

Mrs F Maxwell, for the second respondent

L M Mhishi, for the third respondent

Judgment

B **OMERJEE J:** The applicant is a duly registered telecommunications operator who obtained a licence in or about September 2002 issued in terms of the provisions of the Postal and Telecommunications Act [*Chapter 12:05*] as read with the Postal and Telecommunications (Licensing, Registration and Certification) Regulations, 2001, published in Statutory Instrument 11A of 2001 ("the Regulations"). This licence is valid for a period of fifteen years.

C On Friday 30 January 2004, the second respondent1 published in the Government Gazette, the Postal & Telecommunications D (International Telecommunications Services) Regulations, 2004, in Statutory Instrument 18 of 2004 ("the latter regulations"). Broadly speaking, the effect of the latter regulations is to put in place a mechanism for the control and monitoring of international telecommunications traffic in the hands of the third respondent2.

The applicant lodged the present application on an urgent basis as it was of the view that the rights it enjoys in terms of its licence were being controlled or restricted by virtue of the latter regulations

Specifically, clause 5.1.1. of the licence issued to the applicant gives it the E right to control and operate a limited facility for the transmission and receipt of international cellular traffic, originating and terminating in the applicant's network. A closer scrutiny of the latter regulations reveals that the effect thereof, amongst other things, is to amend the terms of the licence currently held by the applicant. Section 4 of the latter regulations vests exclusive authority and control of international communication services in the third F respondent. It reads as follows —

> "*Access to international telecommunications services*
>
> 4, TelOne (Private) Limited shall —
>
> (a) provide access to all international telecommunications services;
>
> (b) provide international interconnection capacity for all other public G licensed telecommunications operators including Voice Over Internet Protocol".

2004 (1) ZLR p86

Omerjee J

Counsel for all three respondents were agreed and conceded that the latter A regulations have the effect of amending the terms of the licence currently held by the applicant.

The procedures to be complied with in regard to an amendment of an existing licence are governed by s 42 of the principal Act as read with s 11 of the regulations. Section 42(2) makes it mandatory for the authority to give prior B notice in writing of its notice to amend the licence including the nature of the proposed amendment. Furthermore, this section obliges the authority to afford the affected party — the applicant — the opportunity to make representations. The lawmaker in enacting this provision expressly incorporated the *audi alteram partem* rule i.e. the right to be heard. The regulations in s 11 are similarly consistent with the provisions of 42 of the principal Act. The C regulations expressly require the authority, the first respondent, to allow the affected party a

period of thirty days within which to make representations regarding any proposed amendment to its licence.

In the light of the legal position, it was hardly surprising that counsel representing the first respondent submitted that to the extent that the licence D of the applicant would in effect be amended by the latter regulations, the procedure outlined in the Act regarding the amendment of an existing licence, had not been complied with. Counsel was not in a position to offer any evidence of any consultation having taken place as between the first respondent and the applicant in this instance. Counsel further submitted that the first respondent is the authority in terms of the Act and the regulations to amend E an operator's licence. He revealed in the course of the hearing that the first respondent is not the party that had sought to amend the applicant's licence. Counsel representing the first respondent conceded that the applicant had accordingly established its case in this matter.

Counsel representing the second respondent also conceded during the hearing F that the amendment of the applicant's licence, the result of the latter regulations, must be done in accordance with the law governing such amendments. She submitted that the second respondent had acted in good faith in enacting the latter regulations. Counsel conceded, however, that in doing so there had been no compliance with the provisions of s 42 of the Act. Counsel further conceded that the applicants had established their case. G

Counsel for the third respondent largely confined his submissions to the issue of technical capacity to absorb additional international telecommunications traffic. Counsel was of the view that in regard to the specific issue before the court — namely the amendment of the licence of the applicant — compliance with the law was mandatory. H

Omerjee J

A The concessions by counsel are in my view proper. It is clear that there was no compliance with the provisions of the Act to the extent that the latter regulations purport, amongst other things, to amend the licence currently held by the applicant. Counsel for all the respondents were of the view that given this background, the order to be given should be final in nature and not an interim or provisional order. In the circumstances the order as consented to by B all parties and in final form is as follows:

> "That the provisions of the Postal and Telecommunications (International Telecommunications Services) Regulations SI 18 of 2004 be and are hereby declared null, void and of no effect to the Applicant in so far and to the extent that they purport to amend the Applicant's licence".

In regard to costs, it was submitted by counsel representing the first respondent C that his clients were simply before the court to explain their position. Counsel freely conceded that the applicants had established their case and were entitled to relief. Counsel for the third respondent restricted their submissions to the issue of their technical capacity, as the latter regulations impose upon them certain responsibilities. They were not strictly a party to the issue for D determination raised by the applicant. This leaves the second respondent who, on the concession by counsel, caused the promulgation of the statutory instrument.

In view of the determination made it follows that costs in this matter should be payable by the second respondent. It is so ordered.

E *Kantor & Immerman*, legal practitioners for the applicant

Muzangaza, Tomana and Mandaza, legal practitioners for the first respondent

Office of the Attorney-General, legal practitioners for the second respondent

Dube, Manikai & Hwacha, legal practitioners for the third respondent

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Source:
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MAHATA v CHIGUMIRA & ANOR 2004 (1) ZLR 88 (H)

Citation	2004 (1) ZLR 88 (H)
Case No	Judgment No. HH-24-04
Court	High Court, Harare
Judge	Omerjee J
Heard	28 January 2004
Judgment	4 February 2004
Counsel	*G Chikumbirike*, for the applicant Mrs *E Mwatse* & Mrs *Mabeza,* for the second respondent
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Court — *judicial officer — recusal — grounds for — reasonable apprehension* C *of bias — magistrate being interviewed by police after granting bail — should not preside over subsequent application by State to revoke bail*

Criminal procedure — *bail — alteration of — when bail may be altered or rescinded — need for new facts to be shown*

Criminal procedure — *bail — application — factors to consider — attitude of police or prosecutor — not decisive — merely a relevant factor to* D *consider*

Headnote

The applicant had been granted bail by a magistrate. A few days later, the police called on the magistrate to express their disquiet at the grant of bail, and subsequently the magistrate presided over a bail hearing at E which the bail was rescinded. The hearing was purportedly held in terms of s 126 of the Criminal Procedure Criminal Procedure and Evidence Act [*Chapter 9:07*].

Held, that the magistrate should have recused herself from hearing the matter. The fact that she had been interviewed by the police would cause in the mind of the applicant the reasonable apprehension that she would not act F fairly.

Held, further, that the second bail hearing was irregular. There must be new facts in existence before a magistrate can act in terms of s 126(1). Where no new facts exist, an order purportedly made in terms of the section would constitute a gross irregularity. The disquiet felt by the police was not a new fact. In any event, the attitude of the police or prosecutor is not G decisive of whether bail should be granted; the attitude of the State is merely a relevant factor to be considered. Ultimately the court has to exercise its discretion to arrive at its own decision.

Omerjee J

Cases cited A

Bridges & Hulme (Pvt) Ltd v Magistrate, Bulawayo & Anor 1996 (1) ZLR 542 (H)

Bull v Min of Home Affairs 1986 (1) ZLR 202 (S); 1986 (3) SA 870 (ZS)

Masedza & Ors v Magistrate, Rusape & Anor 1998 (1) ZLR 36 (H)

Legislation considered B

Criminal Procedure & Evidence Act [*Chapter9:07*], s 126 (1)

Case information

G Chikumbirike, for the applicant

Mrs *E Mwatse* & Mrs *Mabeza,* for the second respondent

Judgment

C **OMERJEE J**: The applicant has brought this matter by way of review and is asking the High Court to exercise its review powers under ss 26 & 27 of the High Court Act [*Chapter 7:06*]. The relief sought is as appears in the draft order filed together with this application. The circumstances leading to this application are well set out in the applicant's grounds for review and appear D to be common cause. They will, therefore, not be repeated save in so far as they are relevant and have a bearing on the determination of this matter. The first respondent did not file any response despite service having been effected at her office. The second respondent and the investigating officer attached to CID Frauds filed papers by way of opposition.

It is settled that the High Court has wide powers conferred upon it to review E decisions made by inferior courts and in particular, can review a decision on the grounds of gross irregularity, interest in the matter and/or bias.

The present application is premised on the following grounds:

A. INTEREST ON THE MATTER AND/OR BIAS

The first respondent presided over the bail application involving the applicant F on 31 December 2003 when the applicant was admitted to bail. It is apparent that the police felt aggrieved by what they perceived to be irregularity in the proceedings of 31 December 2003. The true nature of the police complaint is easily inferred from events that were to unfold shortly thereafter. The first respondent and other participants were questioned by the police on 6 January G 2004. On Friday 9 January 2004, the first respondent presided over a bail application brought in terms of s 126 of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. Following a hearing, the first respondent decided to rescind her earlier decision admitting the applicant to bail and ordered that he be placed in custody.

Omerjee J

It was submitted on behalf of the applicant that the fact of the questioning of A the first respondent by the police regarding her handling of this case followed by her presiding over the same matter a few days later was not proper. It was submitted on behalf of the applicant that this scenario would cause in the mind of the applicant, the reasonable apprehension that the first respondent would not act fairly. The test applicable in such matters is not proof of actual bias, B but a reasonable apprehension of bias – see *Masedza & Ors* v *Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H) at 44H-45B where the learned judge stated as follows:

> "At the heart of the test for recusal lies the principle that justice should not only be done but be seen to be done. See *Appel* v *Leo & Anor* 1947 (4) SA 766 (W); *S* v *Radebe* 1973 (1) SA 796 (A). Lord Denning MR in C *Metropolitan Properties Co (FGC) Ltd* v *Lannon & Ors* [1969] 1 QB 577 at 599 puts in succinctly –
>
> 'In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or to the mind of the chairman of the Tribunal, or whoever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, D in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as unbiased as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit …'."

Significantly, counsel for the second respondent in their submissions conceded E that, given the particular background of this matter, the impression of bias or interest in the case, was unavoidable

when the first respondent presided over proceedings on 9 January 2004. It is of course common cause that the presiding magistrate was subsequently arrested and placed on remand on allegations of corruption arising from her handling of this matter. F

The issue is therefore, would a fair minded person, having knowledge that being unhappy with the decision, the police had formally questioned the first respondent, not apprehend that the first respondent would be tainted by bias in her decision? I am constrained to respond in the affirmative. In my view, the first respondent ought to have recused herself from this matter on 9 January 2004. G

B. GROSS IRREGULARITY IN THE PROCEEDINGS

The applicant contends that the proceedings, the subject matter of this application, were not done in accordance with the provisions of s 126 of the Act and this therefore constitutes a gross irregularity, and that this court should exercise its review powers and declare as a nullity, the decision H

Omerjee J

A purportedly made in terms of that section by the first respondent. In particular he urges that s 126 can only be invoked in "a situation where the court on facts discovered *by it*" exercises its power to revoke bail already granted. That *in casu*, because it was not the court's own discovery, but that of some other person, which triggered the invocation of s 126, a situation which is not contemplated by the section, the magistrate was wrong to proceed by way of B that section so the argument goes.

This argument does not persuade me. Clearly, on a proper construction of s 126 it is implicit that either party to a criminal proceeding, upon discovering facts not originally placed before the court, is entitled to bring an application pursuant to s 126 for an order to alter or add to the conditions of the C recognizance or revoke bail all together, as the case may be. In fact, it is hard to contemplate a situation where the court on its own, will discover such facts, without some outside agency having to bring them to its attention, the reason simply being that the court is not in the business of finding and/or gathering of facts. The court is in the business of taking into consideration facts placed before it in order to arrive at a judicial decision.

D However, the above observation does not end the matter of gross irregularity *viz.,* the invocation of s 126. Put differently, can it be said that the first respondent acted correctly in invoking s 126?

As already stated it is permissible for a magistrate to alter, add to, or revoke bail by virtue of s 126(1). However, an order can ONLY be made in terms of E this subsection if based on new facts or in the language of proviso (ii) to s 126(1):

> "a … magistrate shall not act in terms of this subsection unless facts which were not before the … magistrate who granted bail are brought to his attention."

It is clear that it is a prior requisite that there must be new facts in existence F before a magistrate can act in terms of s 126(1). Where no new facts exist, an order purportedly made in terms of this section will constitute a gross irregularity.

In the present case, it appears that the matter was placed before the magistrate because there was some disquiet on the part of the police as to how bail G originally denied was subsequently granted. Can this be considered a new fact, as contemplated by s 126? The police attitude as to whether bail should be granted or not, in the circumstance of this case, was not a new fact. No doubt this fact was present at the first appearance of the applicant on 24 December 2003 when the bail application was deferred. This is implied by the assertion H by the prosecutor that in all probability police investigations would be

Omerjee J

completed in mid January 2004. The factor of police attitude was investigated A at the subsequent hearing on the 31 December. In any event, it is a normal factor, which is inevitably considered by a court when exercising its discretion on the question of bail. In short, it existed at the time when the court considered the granting of bail.

To reinforce this point, it is perhaps important to restate the well established B legal position pertaining to the decision of bail. This position was summarised in *Bull* v *Minister of Home*

Affairs 1986 (1) ZLR 202 (S); 1986 (3) SA 870 (ZS) at 871E as follows:

> "It is a fundamental and long tradition of the criminal procedure of Zimbabwe that the courts, and not the Executive, should decide whether a person brought before the court to face criminal charges should be C allowed bail or be kept in custody (*viz*., whether he should be deprived of his liberty) pending his trial or the withdrawal of the charges. It is right and proper that it should be so, for the courts are well equipped to deal with the balancing act involved in the need to preserve the liberty of the individual whom our law presumes innocent until proven guilty, on the one hand, and the interest of the due administration of justice, on the other D hand."

From the above statement, it cannot be gainsaid that the decision on bail is within the domain of the court and therefore the attitude of the State i.e. the prosecution or the police through the prosecution, is merely a relevant factor to be considered. Ultimately, the court has to exercise its discretion to arrive at its own decision. E

It is again, significant that counsel for the second respondent submitted that notwithstanding the complaint from the police, the attitude of the prosecution was to distance themselves from the proceedings. Indeed, from a reading of the record it is apparent that the prosecution team, then consisting of two prosecutors who had not dealt with the previous application, adopted the F position that they had not called for the enquiry of 9 January. Secondly, the record reveals that the prosecution was not itself dissatisfied at the earlier grant of bail to the applicant. Counsel for the respondents in the present hearing conceded that in the circumstances of this case, it could not properly be submitted that new facts had been placed before the court. I am constrained to agree. Given this background, I have doubts if such is what was contemplated G by s 126 as constituting new facts.

Having regard to the circumstances of this case as appear in the papers filed, it is my considered view that no new facts were placed before the first respondent and therefore she could not act in terms of s 126(1). H

Omerjee J

A In short, the order revoking bail, purportedly made in terms of s 126(1), was based on an error of law and therefore a nullity. It is pertinent to point out here that the High Court has power to review decisions of inferior courts on grounds of error of law, if the error amounts to a gross irregularity, that is, if it is substantial, material or manifest in that it causes a miscarriage of justice – see *Bridges & Hulme (Pvt) Ltd* v *Magistrate, Bulawayo & Anor* 1996 (1) ZLR 542 (H). B

C. CONCLUSION

On the basis of the aforegoing, this court has no option but to conclude that the application has merit. As alluded to above, the concern of the police relates to the perceived irregularities in the manner bail was granted. The proper C course was for the Attorney-General to request the High Court to review the proceedings relating to the grant of bail by the magistrate in order for the High Court to review the irregularity. It must be remembered that a review is not an appeal from a decision, but a review of the manner in which the decision was made. It was an error on the part of the State to purport to bring an application in terms of s 126(1) as already explained above. The State is at liberty, if it so desires, to lodge review proceedings against the grant of bail on 31 December 2003.

In the result, the application for review succeeds. The order of the first respondent of 10 January 2004 rescinding bail be and is hereby set aside. The order of the first respondent of 31 December 2003 still stands.

E *Chikumbirike & Associates*, legal practitioners for the applicant

Office of the Attorney-General, legal practitioners for the second respondent

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ASSOCIATION OF INDEPENDENT JOURNALISTS & ORS v MINISTER OF STATE FOR INFORMATION & ORS 2004 (1) ZLR 94 (S)

Citation	2004 (1) ZLR 94 (S)
Case No	Judgment No. S-136-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	21 November 2002
Judgment	5 February 2004
Counsel	*S Moyo & M K Chikuni,* for the applicants *J Tomana,* for the first respondent No appearance for the second respondent *N Mutsonziwa,* for the third respondent
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 18 — right to protection of the law — law creating offence of strict liability for publishing false information — too broad in effect*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* D *Rights — s 20 — right to receive and impart information without* E *interference — requirement for journalists to be accredited — not a contravention of section if criteria and qualifications for accreditation not too onerous — entitlement of person to be accredited if criteria met*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 20 — right to receive and impart information without* F *interference — entitlement of Media and Information Commission to be party to drawing up of code of conduct for journalists and to enforce such code — not a restriction on rights protected by s 20*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 20 — right to receive and impart information without interference — law making it an offence for journalist to collect or disseminate information without the permission of his employer — too vague in objective – not constitutional*

Statutes — *Access to Information and Protection of Privacy Act [Chapter 10:27] — ss 79, 80, 83 and 85 — constitutionality of sections* G

Headnote

The applicants, an association of journalists and two individual journalists, brought an application under s 24 of the Constitution, seeking an order declaring that ss 79, 80, 83 and 85 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] violated their rights under s 20 of the Constitution (the right to receive and impart information without interference) and s 18(9), in that it deprived them of the right to H

Chidyausiku CJ

A be heard before a decision affecting their rights is made. Section 79 of the Act provided for the accreditation of journalists; s 80 criminalised certain abuses of journalistic privileges; s 83 outlawed the practice of journalism without accreditation; and s 85 provided for the development of a code of conduct by the Media and Information Commission in consultation with interested parties. Section 85 also conferred on the B Commission disciplinary powers and provided guidelines on sanctions for misconduct.

Held, (Sandura JA dissenting in part) that s 20(1) of the Constitution of Zimbabwe guarantees an individual's right to freedom of expression, but does not expressly guarantee the exercise of that right through any means of one's choice. There is nothing in the language of s 20(1) that suggests C that the legislature intended to confer on an individual a constitutional entitlement to work as a journalist. However, any law that seeks to regulate the practice of journalism has to conform with the stringent requirements for a law abridging the right conferred by s 20 of the Constitution to be valid. It is vital to the proper functioning of the press D that the legal framework should ensure and enhance the independence of the press from both governmental and commercial control. A law providing for the licensing of the media falls under the exception of a law providing for public order. A person who complies with the requirements of s 79 is entitled to accreditation; the Commission does not have a discretion. If the requirements for accreditation were too onerous, the E regulations setting out the requirements could be held to be unconstitutional, but the existing regulations could not be so held. It followed that s 83, which penalised practising as a journalist without accreditation, was also constitutional.

Held, further, that s 80(1)(a), which provides that a journalist who falsifies or fabricates information and publishes falsehoods is guilty of a criminal F offence, created strict criminal liability and was so broad in its sweep that its provisions were unconstitutional, being *ultra vires* s 18 of the Constitution.

Held, further, that s 80(1)(c), which criminalises the conduct of a journalist who is not a freelance journalist who collects or disseminates information G without the permission of his employer, was too vague in its objective to justify the limiting of the freedom of expression. Such a matter belonged in the realm of labour law.

Held, further (Sandura JA dissenting in part), that it was not unconstitutional for the Commission to be party to the drawing up of a code of conduct and for its enforcement. The Act provided adequate safeguards in terms H of a fair hearing and the appeal procedures.

Chidyausiku CJ

Cases cited A

Athukorale & Ors v A-G of Sri Lanka (1997) 2 BHRC 610

Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors 2003 (2) ZLR 236 (S)

Chavunduka & Anor v Min of Home Affairs & Anor 2000 (1) ZLR 552 (S) B

Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism Inter-American Court of Human Rights Advisory Opinion OC-5/85 Series A, No 5

Groppera Radio AG v Switzerland 12 EHRR 321

Hewlett v Minister of Finance and Another 1981 ZLR 571 (S); 1982 (1) SA 490 (ZS) C

In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)

S v Chogugudza 1996 (1) ZLR 28 (S)

S v Tsvangirai 2001 (2) ZLR 426 (S)

Thorgeir Thorgeirson v Iceland (1992) 14 EHRR 843

Woods & Ors v Min of Justice & Ors 1994 (2) ZLR 195 (S) D

Legislation considered

International Instruments

Inter-American Convention on Human Rights, Arts 13(1) & (2) and 29 E

Zimbabwean Legislation

Access to Information and Protection of Privacy Act [*Chapter 10:27*], ss 79, 80(1)(a), (b), (c) and (d), 83, 85(1), (2), (3), (4), (5), (6) and (7)

Access to Information and Protection of Privacy (Registration, Accreditation and Levy) Regulations, 2002 (SI 169C of 2002)

Constitution of Zimbabwe 1980, ss 18(9) and s 20(1) & (2) F

Case information

S Moyo & M K Chikuni, for the applicants

J Tomana, for the first respondent

No appearance for the second respondent

N Mutsonziwa, for the third respondent G

Judgment

CHIDYAUSIKU CJ: The first applicant in this case is the Association of Independent Journalists of Zimbabwe, a body corporate with a capacity to sue and be sued in its own name with a current membership of sixty journalists. The second applicant is a news editor employed by Financial Gazette (Pvt) Ltd. The third applicant is a news editor employed as such by Zimind Publishers (Pvt) Ltd. H

Chidyausiku CJ

A The first respondent is the Minister of State for Information and Publicity in the President's Office who is responsible for the administration of the Access to Information and Protection of Privacy Act [*Chapter 10:27*], hereinafter referred to as "the Act". The second respondent is the Media and Information Commission, a body corporate established in terms of s 38 of the Act, hereinafter referred to as "the Commission." The third respondent is the B Attorney-General of Zimbabwe who is cited in terms of s 24 of the Constitution of Zimbabwe.

The applicants made this application in terms of s 24 of the Constitution which entitles an applicant to approach this court, sitting as a Constitutional Court, on an allegation that the Declaration of Rights in the Constitution of C Zimbabwe has been, is being, or is likely to be contravened in relation to him or it.

In particular, the applicants alleged that sections 79, 80, 83 and 85 of the Act violate the rights of the first applicant's members and those of the second and third applicants under s 20(1) of the Constitution of Zimbabwe, that is to say, the right to receive and impart information and ideas without hindrance or D interference. The applicants further alleged that s 79 is unconstitutional as it contravenes s 18(9) of the Constitution in that it deprives them of the right to be heard before a decision affecting their rights is made. The relief sought is that s 79, 80, 83 and 85 be declared unconstitutional, therefore, null and void and of no effect.

E The respondents contend otherwise and argue that the above provisions are *intra vires* the Constitution and, therefore, valid and of full force and effect.

Section 79 of the Act provides for the accreditation of journalists while s 80 criminalises certain abuses of journalistic privileges. Section 83 outlaws the practice of journalism without accreditation. Section 85 provides for the development of a Code of Conduct by the Commission in consultation with F interested parties. That section also confers on the Commission disciplinary powers and provides guidelines on sanctions for misconduct. The above four sections are the only sections of the Act that the applicants seek to have set aside as unconstitutional.

A number of issues raised in this case were also raised in the case of *Capital* G *Radio* v *The Broadcasting Authority of Zimbabwe & Ors*.[1] Judgment in that matter was recently handed down and some of the issues herein were determined therein. There is no need for me to deal in any detail with the issues raised in this case that were determined in that judgment. Thus, the court concluded in the *Capital Radio* case, *supra*, that freedom of expression as

Chidyausiku CJ

enshrined in s 20 of the Constitution includes freedom of the press. The A respondent raises the same issue in this case. I am satisfied that s 20 of the Constitution subsumes freedom of the press. I come to that conclusion on the same reasoning that is set out in the *Capital Radio* case *supra*.

This court also concluded in the *Capital Radio* case *supra*, that it was constitutionally permissible to enact laws that regulate the licensing and the B functioning of the media or press but such enactments had to be within the limits that are constitutionally permissible. In arriving at that conclusion the court relied on a number of authorities.[2] The authorities relied on in arriving at the above conclusion specifically relate to the electronic media as opposed to the print media. While I accept that the constitutionality of a particular impugned enactment differs from case to case it has to pass the laid down test.[3] C I see no basis in principle for holding that it is constitutionally permissible to regulate by statute the electronic media but not the print media. The constitutionality of each statutory enactment depends on the wording and effect of the particular enactment. No doubt the question of whether the impugned provision regulates the electronic media or the print media is a very D relevant factor in the determination of the constitutionality or otherwise of the particular impugned enactment. In this regard, I do not accept Mr *Moyo*'s submission that the practice of journalism is special and admits no statutory regulation and that only self regulation is constitutional.

In arguing that the regulation of journalism by statute is unconstitutional and that the only regulation of journalism that is constitutional is self regulation, E Mr *Moyo* relied on the Advisory Opinion of the Inter-American Court of Human Rights.[4] Sandura JA in his judgment has placed reliance on that case for certain of his conclusions. I wish to comment in some detail on the Opinion.

The facts of that case are briefly as follows. In terms of Law No. 4420 of Costa F Rica, an individual could not practise journalism in Costa Rica unless he was a member of the Coligio. In other words, it was unlawful to practise journalism without being first a member of the Coligio. The holding of a Licenciate Bachelor Degree in Journalism, or graduation from the University of Costa Rica, was a requirement, among others, for membership of the Coligio.[5] A Mr G

Chidyausiku CJ

A Schmidt was charged with and convicted of practising journalism without being a member of the Coligio in contravention of Law No. 4420. He was convicted and sentenced to three months' imprisonment. The conviction was challenged on the basis that Law No. 4420 was unconstitutional. In particular, it was contended that Law No. 4420 of Costa Rica contravened Articles 13 and 29 of the Inter-American Convention on Human Rights "the Convention". It B was common cause that if Law No. 4420 contravened the Convention it was unconstitutional, because Costa Rican law was required to conform with the Convention.

The Costa Rican Supreme Court concluded that Law No. 4420 was constitutional and the Inter-American Commission for Human Rights came to the same conclusion. However, the Inter-American Court of Human Rights C came to a different conclusion. That court concluded that:

1. the compulsory licensing of journalists was incompatible with Article 13 of the Inter-American Convention on Human Rights if it denied any person access to the full use of the news media *as a means* of expressing opinions or imparting information; and D
2. Law No. 4420 of 22 September 22 1969, Organic Law of the Association of Journalists of Costa Rica, the subject of the instant Advisory Opinion requested, was incompatible with Article 13 of the Inter-American Convention on Human Rights, in that it prevented certain persons from joining the Association of Journalists and, consequently, denied them the E full use of the mass media *as a means* of expressing themselves or imparting information (my emphasis).

I agree with the interpretation ascribed to Article 13 of the Convention by the Inter-American Court of Human Rights. I do not, however, agree with Mr *Moyo*'s contention that the same interpretation be ascribed to s 20 of the Constitution of Zimbabwe.

F The wording of Article 13 of the Convention differs from the wording of s 20 of the Constitution in certain material respects. Article 13(1) and (2) of the Convention provides as follows:

"1. Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive and impart information G and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art or *through any other medium of one's choice*.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to *prior censorship but shall be subject to subsequent imposition of liability*, which shall be expressly established by law H to the extent necessary to ensure –

Chidyausiku CJ

(a) respect for the rights or reputations of others; or A

(b) the protection of national security, public order or public health or morals" (my emphasis).

Section 20 of the Constitution provides, in relevant part, as follows:

" 20 Protection of freedom of expression

(1) Except with his own consent or by way of parental discipline, no B 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 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 C 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;

(b) for the purpose of –

(i) protecting the reputations, rights and freedoms of other persons D 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;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless E 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. F

or

(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."

A proper reading of the above sections reveals that the underlined words in G Article 13 of the Convention do not appear in their equivalent of s 20 of the Zimbabwean Constitution. The difference in wording leads, in my view, to two significant differences in meaning between the two provisions. The right guaranteed in Article 13(1) of the Convention is broader than the right guaranteed by s 20(1) of the Constitution. The former includes the means of exercising the guaranteed right, while the latter does not. Similarly, the H

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A derogation permissible in terms of Article 13(2) is narrower than that permissible in terms of s 20(2) of the Constitution.

Firstly, Article 13(1) of the Convention guarantees the *means of exercising* the guaranteed freedom of B expression. The Convention not only guarantees the individual's freedom of expression but it also guarantees the individual's entitlement to all means of exercising that right, the right of freedom of expression. The Convention in effect guarantees an individual's right to practise journalism or exercise freedom of expression through the medium of journalism if he so chooses. Section 20(1) of the Constitution of Zimbabwe guarantees an individual's right to freedom of expression. It does not expressly guarantee the exercise of that right through any means of one's choice. I see C nothing in the language of s 20(1) that suggests that the legislature intended to confer on an individual a constitutional entitlement to work as a journalist. It is quite clear that the Advisory Opinion is predicated on the individual's guaranteed right to "any means", in exercising the freedom of expression. "Any means" includes the practice of journalism, guaranteed by the

Convention. In terms of Article 13(1) of the Convention, an individual's entitlement to D practise as a journalist is a constitutionally protected and guaranteed right.

Secondly, Article 13 of the Convention outlaws preventive restriction of any description. The requirement for the licensing of journalists, and indeed the need for accreditation, is a preventive restriction, expressly prohibited by Article 13(2) of the Convention. Section 20(2) of the Zimbabwean Constitution, does not expressly or implicitly, prohibit, preventive restriction.

E Thus, the President of the Court, Buergenthal J, had this to say in para 38 of the main opinion in this regard:

> "38.Article 13(2) of the Convention defines the means by which permissible limitations to freedom of expression may be established. It stipulates, in the first place, that *prior censorship is always incompatible* with the full F enjoyment of the rights listed in Article 13, but for the exception provided for in subpara (4) dealing with public entertainment even if the alleged purpose of such prior censorship is to prevent abuses of freedom of expression. *In this area preventive measure inevitably amounts to an infringement of the freedom guaranteed by the Convention*" (my emphasis).

The same point is made by Piza J at para 17 of his concurring opinion:

> G "17. Therefore: I am in agreement with the two conclusions of the Advisory Opinion but would add the following –
>
> Third: That, furthermore, the very licensing of journalists in general, and that established by Law No. 4420 in particular, are also incompatible with Article 13 of the Convention, insofar as they impose a licence or a H prior authorisation for the practice of that profession, which is the same

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> as preventive restriction not authorised by Article 13(2) of the Convention A to the freedom of expression."

In short, Article 13(2) of the Convention totally prohibits legislation that provides for preventive restrictions on freedom of expression but allows, subject to certain conditions, legislation that provides for subsequent imposition of liability. Article 13(2) of the Convention makes a distinction between B legislation that provides for preventive restrictions, which it totally prohibits, and legislation that is restrictive in providing for subsequent imposition of liability. It prohibits the former and allows the latter subject to certain further criteria. This distinction is very important as it formed the basis of the *ratio decidendi* for holding Law No. 4420 to be incompatible with Article 13 of the Convention. C

Subsection (2) of s 20 of the Constitution, which provides for the derogations to the freedom of expression, makes no distinction between legislation imposing preventive restrictions and legislation imposing subsequent liabilities D . Subsection (2) of s 20 permits both legislation imposing preventive restrictions and legislation imposing restrictions in the form of subsequent liabilities provided such legislation falls within the permitted derogation.

On this basis, it is erroneous to ascribe to s 20 of the Constitution of Zimbabwe the interpretation ascribed to Article 13 of the Convention by the Inter-American Court of Human Rights. The texts are materially different and to do so would in effect amend s 20 of the Constitution.

I, however, wish to make the following observation. If Law No. 4420 were a E Zimbabwean statute and was challenged it would most probably be struck down as unconstitutional because it places too onerous a burden, namely, possession of a University degree, on anyone wishing to be a journalist.

In brief, I would restate my conclusion as follows. I accept as correct the interpretation of the Inter-American Court of Human Rights of Article 13 of F the Convention. I do not agree that the same interpretation can be ascribed to s 20 of the Zimbabwean Constitution because the texts are different.

I agree with Mr *Moyo*'s submission that the practice of journalism is different from the practice of other liberal professions such as law and medicine. It is correct that the practice of journalism involves the exercise of the freedom of G expression, the receiving and imparting of information. This distinction, in my view, does not place the practice of journalism beyond the control of statutory regulation. This distinction is reflected in the fact that any law that seeks to regulate the practice of journalism has to conform with the stringent requirements for a law abridging the right conferred by s 20 of the Constitution to be valid. The statutory provisions regulating the other professions are not H

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A required to conform with the stringent requirements of s 20 of the Constitution to be valid.

The press has been colloquially referred to as the fourth arm of the State. Mr *Moyo* made several submissions in which he very ably set out the significance and importance of the press to the proper functioning of a democracy. In support of the above submissions he referred the court to a very B wide range of authorities. The court accepts these submissions and acknowledges, as it did in the *Capital Radio* case, *supra*, the significance and importance of the press.

The acknowledged importance of the press does not mean that the press is above the law and cannot be required to operate within a legal framework. C Indeed, the applicants, by challenging some sections of the Act and not challenging others, tacitly concede the constitutionality of the unchallenged sections. Inherent in this tacit concession is the proposition that it is constitutionally permissible to regulate the press. What emerges from the authorities we have been referred to is that it is vital and indeed critical to the proper functioning of the press that the legal framework should ensure and D enhance the independence of the press from both governmental and commercial control.[6] It is with the above objective in mind that the constitutionality of enactments regulating the press will be tested. Enactments that unduly undermine the independence of the press will not pass the laid down test for the constitutionality of such enactments.

E In challenging s 79, Mr *Moyo* advanced a number of grounds for the challenge. He submitted that s 79 and the other impugned sections do not fall within the ambit of any of the exceptions to s 20(1) of the Constitution and, are therefore invalid, null and void.

In paragraph 15.30 of his heads of argument, Mr *Moyo* makes the following submission in regard to s 79 as read with s 91(2)(p):

> F " his provision is central to the entire licensing system and yet it is impossibly vague. No indication is given of what should constitute either 'prescribed formalities' or 'prescribed standards', nor are any limitations imposed on the content of two conditions for obtaining a licence. As a result, these provisions vest too much discretionary power [to restrict] freedom of expression in a government body and fail to provide for any G control mechanisms or consultation process. They thus fail to meet the standards required under the provided by law part of the test restrictions on freedom of expression. … We submit, therefore, that subsections 79(5)(a) and (b) in tandem with section 91(2)(p) grant excessive measure of discretion to politically linked individuals and bodies and thus do not

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> satisfy the requirement that restrictions on freedom of expression be A provided by law."

In the above submission, I understand Mr *Moyo* to be making the following points –

(a) section 79 provides for the licensing of the media;

(b) the section is impossibly vague and, B

(c) it confers directly or indirectly too much discretion or power on a political functionary.

On that basis, he argued that s 79 should be declared unconstitutional.

There is no doubt that s 79, as Mr *Moyo* has submitted, is at the centre of the licensing system. The authorities clearly establish that the licensing of the C media fall under the exception of public order.7 I find myself in agreement with the proposition that a law providing for the licensing of the media falls under the exception of a law providing for public order. On that basis, Mr *Moyo*'s contention that s 79 does not fall under any one of the exceptions to s 20(1) cannot succeed. D

Having concluded that s 79 falls under the exception of public order, the next issue that falls for determination is Mr *Moyo*'s contention that s 79 is too vague to be law and in the event that the court concludes that s 79 is not vague, the next issue will be, is it reasonably justifiable in a democratic society? As I said Mr *Moyo* has argued that s 79 as a whole and, in particular, subs (5) is too vague to be categorised as provided by law. I am unable to agree with that E submission. Subsection (1) is very clear in its language. It clearly states that in order to exercise the privileges accorded in s 78, which has not been impugned and is therefore for the purposes of this case constitutional, a journalist has to be accredited by the Commission. I see nothing vague about this subsection. The subsection is as clear as it can be. It states in very clear terms that in order to enjoy the benefits conferred by s 78 a journalist requires F accreditation.

Subsections 79(2), (3) and (4) are very explicit. Subsection (2) expressly provides that non-citizens and non-permanent residents cannot be accredited as journalists except for a limited period of time as provided in subs (4). There is nothing vague or ambiguous about these subsections. Subsection (3) is G equally explicit in that it provides that a journalist wishing to be accredited is required to apply to the Commission in the form and manner prescribed. It is patently clear that the form and manner will be prescribed in the relevant

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A statutory instrument. In my view the intention of the legislature is very clear. What is required of an applicant is equally clear. Look at the relevant statutory instrument and it will tell you how to make an application for accreditation and the fee that is required.

The applicants' *locus standi* to challenge the constitutionality of s 79 (2), (3) and (4) is doubtful. There is no averment on the papers that the applicants or B any of the members of the first applicant are not citizens or permanent residents of Zimbabwe. In the absence of such an averment, the inference is that the applicants are citizens and/or permanent residents of Zimbabwe in which case it is difficult to see how they are adversely affected by the above subsections.

C I also find s 79(5) fairly clear. In terms of subs (5), the Commission "may" accredit an applicant as a journalist if it is satisfied that the applicant comes within the parameters set out therein. It is quite clear from the context that the word "may" means "shall" in this subsection.

> "In ordinary usage, 'may' is a permissive and 'must' is imperative, and, in accordance with the usage, the word 'may' in a statute will not generally D be held to be mandatory. In some cases, however, it has been held that expressions such as 'may' or 'shall have power' or 'shall be lawful' have – to say the least – a compulsory force and so their meaning has been modified by judicial exposition."

See Maxwell on *The Interpretation of Statutes* 12 ed by P St. J Langan at pp 234-235 and the cases there mentioned.

E The use of the word "may" here does not, as it would in the ordinary sense of the word, confer a discretion on the Commission. If it did, one could be faced with a situation where an applicant, having complied with the requirements of subs 79(5) could be denied accreditation at the whim of the Commission. This cannot have been the intention of Parliament. The requirements for accreditation F were set out in subs (5) and the intention must be that, upon satisfaction of those requirements, an applicant is entitled to be accredited. This provision does not allow for an abuse of its powers of accreditation by the Commission. Indeed, it lends protection to an applicant who has complied with the prescribed formalities that he will not be deprived of accreditation for reasons other than those stated in the subsection. It certainly does not inhibit the G journalist in expressing himself freely.

The courts interpret statutes so as to give effect to the intention of Parliament, as expressed in the words of the statute.

> "It is hardly necessary to stress that the intention of the Legislature is to be H gleaned from the language used; we must be very careful to avoid the

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> assumption that the Legislature intended what we think it ought to have A intended."

Per Baron JA in *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS) at 509E.

On this basis, I am satisfied that once an applicant has satisfied the legal requirements he will as a matter of law be entitled to accreditation. B

It is patently clear from this section that the formalities in question will be provided for in the relevant statutory instrument or regulations. Paragraph 79(5)(b) also provides that the Commission has to be satisfied that the applicant has the prescribed qualification. The qualification no doubt has to be provided for in the relevant regulations. If the regulations lack clarity as to C what constitutes qualification, it is the regulations that may fall foul of the Constitution and may be challenged. It would appear to me that the substance of the matter will be in the regulations prescribing the "formalities" and the "qualifications". Thus, if the regulations provide too onerous "formalities" and "qualifications" they may fall foul of the Constitution. Whereas if the regulations provide for mere

formalities and qualifications that are hardly D onerous it is difficult to see how they can fall foul of the Constitution. Thus, for instance, if the regulations prescribing the qualification provide that a journalist has to have a university degree in order for him to be accredited as a journalist then such a law will most probably be held to be unconstitutional.8 On the other hand, if the regulations prescribing the qualification for accreditation is that the applicant be literate it is unlikely to be held E unconstitutional.

In any event, the qualifications and the formalities required are not a matter of conjecture. They are set out in SI 169C of 2002, which provides for the registration and accreditation of journalists. A perusal of the Regulations reveals nothing patently unconstitutional, except for Form AP3 in the Second F Schedule to the Regulations. The requirement in that Form, that accreditation be approved by the Permanent Secretary and the Minister, bears the hallmarks of unconstitutionality. The applicants are entitled to challenge the constitutionality of any of the provisions of SI 169C. They have not done so and the only reasonable inference to be drawn is that the applicants do not believe they have a basis for such a challenge. G

The applicants' contention that when s 79 is read with s 91 the effect is unconstitutional is without substance. Section 91 merely enables the Minister to make regulations and specifically mentions areas in respect of which the Minister may make such regulations. The first observation I would make is that H

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A s 91 is not impugned in the applicants' affidavits. It is impugned in the heads of argument. An applicant's case, as a general rule, stands or falls on his or its founding affidavit. Be that as it may, s 91 is an enabling provision found virtually in every other Act that provides for the making of regulations. The Minister responsible for the administration of the Act is conferred with the authority to make regulations under the Act. This is not to say he is given a B blank cheque to make such regulations. The regulations made in terms of the Act are equally subject to constitutional scrutiny like any other law.

Mr *Moyo* has also argued that s 79 confers on a political authority, the Minister, too much power in the licensing system for journalists. I am unable to accept this submission for a number of reasons. A proper reading of the C section reveals that that section confers on the Commission and not the Minister certain powers. If the suggestion is that the Commission is not sufficiently independent of the Minister or is controlled by the government, the argument is misconceived. Indeed, Mr *Moyo* argued strenuously the point that the Commission was not independent. Section 40 of the Act is the section that provides for the appointment and composition of the Commission. D Section 40 is not impugned, therefore this court is not seized with the issue of the constitutionality or otherwise of s 40 of the Act. If it is the applicants' contention, as it seems to be, that the Commission is not sufficiently independent of governmental control, then the applicant should have impugned s 40 which constitutes the Commission. This court considered s 4 of the Broadcasting Act [*Chapter 12:01*] in the *Capital Radio* case, *supra.* That E section similarly constitutes the Broadcasting Authority under that Broadcasting Act. This court unanimously concluded, in that case, that s 4 of the Broadcasting Act was constitutional because the regulating authority was, from a legal point of view, independent of governmental control.

In *Nyambirai*'s case *supra*, this court set out three criteria that legislation has F to satisfy to be adjudged reasonably justifiable in a democratic society. These are:

(1) whether the objective of the legislation is sufficiently important to justify limiting a fundamental right;

(2) whether the measure designed to meet the legislative objectives rationally connected to it; and G

(3) whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

It is common cause that s 79 is at the centre of the licensing system. Licensing H of the media, as I have already stated, is sufficiently important to have been

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recognised as a constitutional exception.9 Accordingly, I am satisfied that the A object of s 79 is sufficiently important for the purpose set in (1) above.

Section 79 is rationally connected to the above objective because, as was submitted by the applicants' counsel, it is at the centre of the licensing process. On this basis s 79 is, therefore, rationally connected to the objective of the legislation. The second requirement is therefore met. B

The third requirement cannot be conveniently applied to s 79. Section 79 is essentially an enabling provision. The requirement that the means used be no more than is necessary to accomplish the objective can only be applied to the regulations that prescribe formalities and qualifications for accreditation. As I have said, none of the provisions of SI 169C have been challenged. Section 79 merely confers the powers to make regulations that prescribe the formalities C and qualifications for accreditation. The test will have to be applied to the regulation that prescribes the formalities and the qualifications and not s 79 which only confers the powers to make such regulations.

In the result, I come to the conclusion that the challenge to s 79 cannot succeed.

I now turn to deal with s 80. This section criminalises the abuse of journalistic D privilege. In my view, the philosophy of this section as encapsulated in the wording is a cause for concern.

Generally speaking, when one abuses a privilege the remedy is withdrawal of the privilege. Criminalising the abuse of a privilege is patently oppressive. In any event, this court has concluded that freedom of the press is subsumed E under s 20 of the Constitution and to perceive the exercise of a constitutionally protected right as a privilege cannot be correct. Freedom of the press is a constitutionally guaranteed right and not a privilege.

Subsections 80(1)(a) and (b) provide that a journalist who falsifies or fabricates information and publishes falsehoods is guilty of a criminal offence. These provisions create strict criminal liability and are so broad in F their sweep that I have no hesitation in agreeing with Mr *Moyo*'s submission that on the authority of *S* v *Chogugudza*10 and *S* v *Tsvangirai*11 these provisions are unconstitutional in that they are *ultra vires* s 18 of the Constitution.

I, however, do not agree with Mr *Moyo*'s submission that s 80(1)(a) and (b) G are *ultra vires* s 20 of the Constitution. In my view, the constitutional right

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A protected under s 20 relates to the freedom to impart and receive information without hindrance. In my view, falsehood is not information. Falsehood is the antithesis of the truth or information. The Constitution confers no right on an individual to falsify or fabricate information or to publish falsehoods. Section 20 of the Constitution protects the right to impart and receive information, not falsehoods. Information is the truth. Falsehoods are not information. There is C no intrinsic value in the falsification or fabrication of information or the publication of falsehoods as to warrant constitutional protection of such an activity.

Section 80(c) criminalises the conduct of a journalist who is not a freelance journalist who collects or disseminates information without the permission of his employer. I have serious doubts that this provision can be said to fall under the exception of public order in terms of s 20(1) of the Constitution. Even if I were to accept that it does, that section does not, in my view, pass any of the three tests set out in *Nyambirai*'s case *supra*. The objective of s 80(1)(c) is obscure. An obscure objective can never be sufficiently important to justify the limiting of the freedom of expression.

D The matters raised in s 80(1)(c) are matters that are best left in the domain of contractual relationship, that is, between employer and employee. Criminalising such conduct has a chilling and intimidating effect on journalists. I accordingly hold the view that s 80(1)(c) is unconstitutional.

Section 80(1)(d) is a standard clause found in most Acts of Parliament. It E criminalises the contravention of a provision of the Act. Once a provision of the Act is constitutional I see nothing wrong in criminalising the contravention of a provision that complies with the Constitution. To the extent that s 80(2) has been of necessity amended by the striking down of paras (a), (b) and (c) of the section, I see nothing unconstitutional in the amended s 80(2).

In brief, and for the foregoing reasons, sections 80(1)(a), (b) and (c) are F unconstitutional and should be struck down.

Section 83 prohibits an individual from practising as a journalist unless he or she is accredited as a journalist. The issues raised here are identical to those raised in respect of the challenge to s 79. What I said in regard to s 79 applies with equal force to s 83. In my view, s 83 is constitutional.

G I now turn to deal with s 85. The grounds of the applicants' challenge to s 85 are set out in paragraph 13 and 26 of the founding affidavit of Mr Mutsakani. In effect, the applicants seem to be making the following points:

1. Section 85 confers on the second respondent too much power to interfere with the right of freedom of expression of journalists and reduces that H right to a privilege to be enjoyed at the discretion of the second respondent.

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2. Section 85 as well as the other impugned sections go beyond the purpose A for which the derogations from s 20(1) are permissible.

I must confess that I find Mr *Moyo*'s submissions in regard to s 85 equivocal. From para 15.33 to 15.34 of the heads of argument, Mr *Moyo* seems to contend that while it may be proper to regulate other professions it is unconstitutional to regulate journalism. Only self regulation is constitutional when it comes to B journalism. However, in para 15.35 of the heads of argument Mr *Moyo* seems to be making the concession that legislative regulation of the media is permissible but such regulation must be minimal otherwise it becomes unconstitutional and that s 85 exceeds what is constitutionally permissible. I have already concluded that legislative regulation of the media is permissible within constitutionally permissible limits. I will now proceed to determine C whether s 85 is constitutionally permissible.

Section 85(1) confers on the Commission powers to develop a Code of Conduct. It enjoins the Commission to consult with stakeholders such as journalists when developing the Code of Conduct. The only argument advanced on behalf of the applicants, is that the development of the Code of D Conduct should be done by the journalists themselves, without the involvement of the Commission. While this may be preferable I am unable to accept that the involvement of the Commission in such an activity is unconstitutional.

Section 85(2) confers on the Commission the power to enforce the Code of Conduct. The section also provides for maximum sanctions that the Commission *can* and not *shall* impose for the breach of the Code of Conduct. This again, E is essentially an enabling provision. It sets out what the Commission can do as opposed to shall do. The section confers on the Commission absolute discretion on what sanctions should be imposed for violations of the Code of Conduct within the prescribed limit. I have some difficulty in understanding the basis of the challenge to this section. The suggestion seems to be that F journalists should not be sanctioned for violating the Code of Conduct as such sanction would be unconstitutional. I do not find this submission persuasive.

Subsections 85(3), (4), (5), (6) and (7) provide for the mechanisms to be followed in misconduct proceedings. They provide for a fair hearing and the appeal procedures. There simply is no substance in the submission that these subsections are unconstitutional. G

In the result, and for the foregoing reasons, I hold that s 80(1)(a), (b) and (c) are unconstitutional and are hereby struck down. Section 79, subss (1)(d) and (2) of section 80, s 83 and s 85 are hereby declared constitutional.

There will be no order as to costs because both parties have partially succeeded.

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A Cheda JA, Ziyambi JA & Malaba JA concurred.

SANDURA JA: I have read the judgment prepared by Chidyausiku CJ and agree that paras (a), (b) and (c) of s 80(1) of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] ("the Act") are inconsistent with s 20(1) of the Constitution of Zimbabwe ("the Constitution"). In addition, I B agree that subsections (1), (3), (4), (5), (6) and (7) of s 85 do not contravene s 20(1) of the Constitution. However, I respectfully disagree with the conclusion that ss 79, 80(1)(d), 80(2), 83 and 85(2) do not contravene s 20(1) of the Constitution. The section reads as follows:

"Except with his own consent or by way of parental discipline, no person C 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 correspondence."

However, the right to freedom of expression is not absolute because subs (2) of s 20 of the Constitution authorises a restriction of this right in certain D circumstances. The subsection, in relevant part, reads as follows:

"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; E

(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;

(iii) maintaining the authority and independence of the courts or F tribunals or Parliament;

…;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

G The provisions in subsections (1) and (2) of s 20 of the Constitution are very similar to the provisions in paragraphs 1 and 2 of Article 13 of the American Convention on Human Rights, which read as follows:

"1. Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart H information and ideas of all kinds, regardless of frontiers, either

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orally, in writing, in print, in the form of art, or through any other A medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

(a) respect for the rights or reputations of others; or B

(b) the protection of national security, public order, or public health or morals."

I have set out these provisions *in extenso* because I shall refer to them in the course of this judgment.

In broad terms, two issues arise for determination in this application. The first C is whether the provisions of the Act being challenged constitute restrictions of the right to freedom of expression guaranteed by s 20(1) of the Constitution. If they do, the second issue to consider is whether they are saved by s 20(2) of the Constitution, on the basis that the restrictions are reasonably justifiable in a democratic society.

Although s 78 of the Act has not been challenged, I would like to set out its D provisions to facilitate a better understanding of s 79(1) of the Act. The section, in relevant part, reads as follows:

"Subject to this Act and any other law, a journalist shall have the right –

(a) to enquire, gather, receive and disseminate information; E

(b) -(f) …;

(g) to circulate reports and materials he prepared under his signature, under a pseudonym or without any signature."

I now wish to consider whether the provisions of the Act being challenged contravene s 20(1) of the Constitution. F

I. SECTION 79

This section deals with the accreditation of journalists and, in relevant part, reads as follows:

"(1) No journalist shall exercise the rights provided in section *seventy-eight* in Zimbabwe without being accredited by the Commission.

(2) … G

(3) Any person who wishes to be accredited as a journalist shall make an application to the Commission in the form and manner and accompanied by the fee, if any, prescribed …

(4) …

(5).The Commission may accredit an applicant as a journalist and H

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A issue a press card to the applicant if it is satisfied that the applicant –

(a) has complied with the prescribed formalities; and

(b) possesses the prescribed qualifications; and

(c) …"

The word "journalist" is defined in s 62 of the Act as follows:

B "'journalist' means a person who gathers, collects, edits or prepares news, stories and materials for the office of a mass media and is connected with it by reason of his employment and includes freelance journalist."

In order to make provisions for, *inter alia*, the manner in which a person wishing to be accredited as a journalist would apply for accreditation, the Access to Information and Protection of Privacy (Registration, Accreditation C and Levy) Regulations, 2002, published in SI 169C of 2002 ("the Regulations") were promulgated on 15 June 2002. Section 6 of the Regulations reads as follows:

"An application for the accreditation of a journalist in terms of section 79 of the Act shall be made in Form AP3 and shall be accompanied by the appropriate application fee and accreditation fee."

D The application and accreditation fees are set out in the First Schedule to the Regulations. In the case of an application by a local journalist working for a local media, the application fee is $1 000 and the accreditation fee is $5 000. In the case of a local journalist working for a foreign media, the application fee in US$50 and the accreditation fee is US$1 000.

E However, it is clear from Form AP3, the application for the accreditation of a journalist, that the accreditation of a journalist by the Commission is subject to approval by the Permanent Secretary and by the first respondent, with the first respondent having the final say in the matter. The accreditation is not, therefore, a mere formality. If it were, why would it need the Minister's F approval?

I now wish to consider whether s 79 imposes a restriction on freedom of expression. I have no doubt in my mind that it does. The journalist has to apply for accreditation and pay application and accreditation fees. In addition, the accreditation is not a mere formality.

G It is pertinent to note that there is no rational basis for distinguishing the practice of journalism from the exercise of the right to freedom of expression, because the two are intertwined. This was made clear by the Inter-American Court of Human Rights in its Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. The H Opinion had been sought by the Government of Costa Rica on the interpretation

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of the provisions of Article 13 of the American Convention on Human Rights, A which I have already set out in this judgment.

In the Advisory Opinion, OC-5/85 of 13 November 1985, Series A, No. 5, the court had this to say at para 74:

"It has been argued that what the compulsory licensing of journalists seeks to achieve is to protect a paid occupation and that it is not directed against B the exercise of freedom of expression as long as it does not involve remuneration and that, in that sense, it deals with a subject other than that dealt with by Article 13 of the Convention. This argument is based on a distinction between professional journalism and the exercise of freedom of expression that the court cannot accept. This argument assumes that it is possible to distinguish freedom of expression from the professional C practice of journalism, which is not possible. Moreover, it implies serious dangers if carried to its logical conclusion. *The practice of professional journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner*. It D should also be noted that the

argument that the differentiation is possible could lead to the conclusion (that) the guarantees contained in Article 13 of the Convention do not apply to professional journalists" (my emphasis).

Additionally, at para 72, the court said:

"The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not E take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom 'to seek, receive and impart information and ideas of all kinds … either orally, in writing, in print …' The profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information. F The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees."

The only issue for consideration, therefore, is whether the restriction imposed on freedom of expression by s 79 is reasonably justifiable in a democratic society. G

However, as this court stated in *Woods & Ors* v *Minister of Justice & Ors* 1994 (2) ZLR 195 (S) at 199B-C:

"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 H under attack is to be adjudged on whether it arbitrarily or excessively

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A 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 individual – see In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 64; and generally, *CoT* v *CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C; 1990 (2) SA 260 (ZS) at 265B-266D."

Nevertheless, in *Nyambirai* v *NSSA & Anor* 1995 (2) ZLR 1 (S), this court set B out the criteria which should be considered in determining whether or not a restriction is permissible. At 13C-E, Gubbay CJ, with whom I and three other judges of this court concurred, said:

"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:

C (i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(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 D necessary to accomplish the objective.

See *R* v *Oakes* (1986) 19 CRR 308 at 336-337 (a decision of the Supreme Court of Canada)."

Due to the overriding importance of freedom of expression in a democratic society, the above test is to be applied strictly. This point was made by the European Court of Human Rights in *Thorgeir Thorgeirson* v *Iceland* (1992) E 14 EHRR 843, at para 63, as follows:

"The court recalls that freedom of expression constitutes one of the essential foundations of a democratic society; subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also F to those that offend, shock or disturb. *Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established*" (my emphasis).

I now wish to apply the test set out in *Nyambirai*'s case *supra*, to the facts of the present case in order to determine whether the restrictive provisions of G s 79 are reasonably justifiable in a democratic society.

ARE THE LEGISLATIVE OBJECTIVES SUFFICIENTLY IMPORTANT TO JUSTIFY LIMITING A FUNDAMENTAL RIGHT?

The legislative objectives in respect of s 79 are set out by the first respondent in his opposing affidavit as follows:

H "Accreditation is a worldwide practice which is primarily meant to ensure

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two main objectives i.e. accountability of the journalist to society and A ensuring easy access to events by the journalist."

However, as the applicant avers in its answering affidavit, the second objective given by the first respondent, i.e. ensuring easy access to events by the journalist, only applies to voluntary accreditation, which is not in issue in this application. What is in issue is the compulsory accreditation of journalists. In B the circumstances, the first respondent has advanced only one objective for the enactment of s 79, i.e. the accountability of the journalist to society.

Regrettably, the first respondent does not say how the requirement that a journalist be accredited, before exercising his rights as a journalist, would achieve the intended objective. Nevertheless, I am satisfied that the legislative objective given is not sufficiently important to justify limiting freedom of C expression.

In a number of cases, this court has stressed the importance of freedom of expression in a democratic society. One of them is *In re Munhumeso & Ors supra*. At 56G-57B, the court said:

> "The importance attaching to the exercise of the right to freedom of B expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man', *per* European Court of Human Rights in *Handyside* v *United Kingdom* (1976) 1 EHRR 737 at para 49 …
>
> Freedom of expression, one of the most precious of all the guaranteed E freedoms, has four broad special purposes to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making; and (iv), it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change … *In sum, what is at stake is the basic principle of the 'people's right to* F *know'* – see *Indian Express Newspapers (Bombay)* v *Union of India* (1985) 2 SCR 287" (my emphasis).

Similarly, in *Rights of Access to the Media,* Andras Sajo says the following at p 3:

> "Knowledge is interwoven with the concept of man. Every person must have the possibility of knowing the elements of his environment, the G intellectual and scientific achievements of his fellow men, the facts and the developments that affect or may affect his life and generally all those elements and facts which enable him not only to survive but also freely to develop his personality. Knowledge cannot and should not be the monopoly of the few. It is a wealth which must be accessible to everybody. Those who lack knowledge are doomed to be always victims of those who know; H

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> A victims of deceit and distortion of facts; victims of irrationality because undoubtedly every person who is ill informed cannot think correctly."

In the circumstances, it is clear beyond doubt that the legislative objective given for the enactment of s 79 is not sufficiently important to justify limiting the fundamental right to freedom of expression, which has been described by the Inter-American Court of Human Rights, in the Advisory Opinion already B cited, as "a cornerstone upon which the very existence of a democratic society rests."

ARE THE MEASURES DESIGNED TO MEET THE LEGISLATIVE OBJECTIVE RATIONALLY CONNECTED TO IT?

In my view, they are not. I cannot see any rational connection between the C requirement that a journalist should be accredited before practising as a journalist and the objective of making him accountable to society. In his opposing affidavit, the first respondent does not say how the two are connected.

ARE THE MEANS USED TO IMPAIR THE RIGHT OR FREEDOM NO D MORE THAN IS NECESSARY TO ACCOMPLISH THE OBJECTIVE?

Put differently, the question is whether the restrictive provisions in s 79 are the least drastic means by which the stated objective of the section may be accomplished. There can be no doubt that the answer to that question is a negative one because the provisions of the common law and criminal law adequately make the journalist accountable for his actions.

E In the circumstances, it is clear beyond doubt that the provisions of s 79 are not reasonably justifiable in a democratic society. They, therefore, contravene s 20(1) of the Constitution.

This conclusion is supported by the Advisory Opinion of the Inter-American Court of Human Rights already cited in this judgment. At para 85, the court F unanimously concluded:

> "That the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies *any person* access to the full use of the news media as a means of expressing opinions or imparting information" (my emphasis).

G As already stated, the compulsory accreditation of journalists in terms of s 79 is not a mere formality. It was obviously intended to exclude some persons from practising as journalists. For example, those persons who cannot pay the application and accreditation fees are excluded from practising journalism.

I now wish to deal very briefly with the argument that s 79 does not contravene H s 20(1) of the Constitution because it is a restriction of freedom of expression

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permitted by s 20(2) of the Constitution as it makes provision in the interest **A** of public order. I understand the argument to be that the compulsory accreditation of journalists was introduced as a way of organising the profession in general.

This argument was considered and rejected by the Inter-American Court of Human Rights in the Advisory Opinion already cited. At para 76, the court B said:

> "The court concludes, therefore, that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each C individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based."

I entirely agree.

II. SECTION 80

This section reads as follows — D

> "(1) A journalist shall be deemed to have abused his journalistic privilege and committed an offence if he does the following:
>
> (a) falsifies or fabricates information;
>
> (b) publishes falsehoods;
>
> (c) except where he is a freelance journalist, collects and disseminates E information on behalf of a person other than the mass media service that employs him without the permission of his employer;
>
> (d) contravenes any of the provisions of this Act;
>
> (2) A person who contravenes subparagraphs (a) to (d) of subsection (1) shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or to imprisonment for a period not exceeding F two years."

As stated at the beginning of this judgment, I agree with Chidyausiku CJ that paras (a), (b) and (c) of s 80(1) contravene s 20(1) of the Constitution. However, with regard to paras (a) and (b), my view is that the two paragraphs contravene s 20(1) of the Constitution simply because the publication of false G statements is protected by s 20(1) of the Constitution. The issue concerning the publication of false statements was considered by this court in *Chavunduka & Anor* v *Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S). At 558E-559D, Gubbay CJ, with whom I and three other judges of this court concurred, said:

> "Plainly, embraced and underscoring the essential nature of freedom of H

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> A expression, are statements, opinions and beliefs regarded by the majority as being wrong or false …
>
> In *R* v *Zundel* (1992) 10 CRR (2d) 193 (Can SC) Madam Justice McLachlin (now Chief Justice) …, writing for the majority, in a valuable and forward-looking judgment, stated at 206:
>
> '(The) guarantee of freedom of expression serves to protect the right of the B minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of "truth" or "public interest" from smothering the minority's perception. The view of the majority has no

need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or "false" view on pain of criminal prosecution and imprisonment, on its B face, offends the purpose of the guarantee of free expression.'

And continued at 209:

'Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The D criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity. Applying the broad purposive interpretation of the freedom of expression guaranteed by s 2(b) hitherto adhered to by this court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the E benefit of the constitutional guarantees of free speech'."

I now wish to deal with s 80(1)(d). This provides that a journalist shall be deemed to have abused his journalistic privilege and committed an offence if he contravenes any of the provisions of the Act. In other words, if a journalist who has not been accredited in terms of s 79 practises journalism, as he is constitutionally entitled to do, he is deemed to have committed an offence. As F I have concluded that s 79 contravenes s 20(1) of the Constitution, the same applies to s 80(1)(d) because it prohibits conduct permitted by the Constitution.

Similarly, s 80(2) which provides that, a person who contravenes paras (a) to (d) of subsection (1), shall be guilty of an offence, contravenes s 20(1) of the Constitution because it prohibits conduct permitted by the Constitution.

G III SECTION 83

This section reads as follows:

"(1) No person other than an accredited journalist shall practise as a journalist nor be employed as such or in any manner hold himself out as H or pretend to be a journalist.

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(2) No person who has ceased to be an accredited journalist as a A result of the deletion of his name from the roll, or who has been suspended from practising as a journalist, shall, while his name is so deleted, or is so suspended, continue to practise directly or indirectly as a journalist, whether by himself or in partnership or association with any other person, nor shall he, except with the written consent of the Commission, be employed in any capacity whatsoever connected with the journalistic B profession."

In my view, it is clear beyond doubt that this section contravenes s 20(1) of the Constitution. That is so because the compulsory accreditation of journalists in terms of s 79 contravenes s 20(1) of the Constitution.

IV SECTION 85 C

This section, in relevant part, reads as follows:

"(1) The Commission shall, in consultation with such organisations it considers to be representative of journalists, develop a code of conduct governing the rules of conduct to be observed by journalists.

(2) The Commission shall be responsible for enforcing the code of D conduct referred to in subsection (1) and shall, for that purpose, have the following powers in relation to any journalist who contravenes the code or any provision of this Act –

(a) deleting his name from the roll of journalists; or

(b) ordering his suspension for a specified period; or

(c) imposing such conditions as it deems fit subject to which he shall be E allowed to practise; or

(d) ordering him to pay a penalty not exceeding fifty thousand dollars; or

(e) cautioning him; or

(f) referring the matter for prosecution. F

(3) to (7) …"

In my view, subsections (1), (3), (4), (5), (6) and (7) do not contravene s 20(1) of the Constitution, although the code itself, if not carefully drafted, might contravene s 20(1) of the Constitution. This

view is supported by the Advisory Opinion of the Inter-American Court of Human Rights already cited in this judgment. At para 80, the court said: G

> "The court also recognises the need for the establishment of a code that would assure the professional responsibility and ethics of journalists and impose penalties for infringements of such a code. The court also believes that it may be entirely proper for a State to delegate, by law, authority to impose sanctions for infringements of the code of professional responsibility and ethics. But, when dealing with journalists, the H

A restrictions contained in Article 13(2) and the character of the profession … must be taken into account."

However, subsection (2) stands on a different footing. This is so because it empowers the Commission to penalise journalists, not only for contravening the code, which would be constitutional, but also for contravening "any provision of this Act", which includes the provisions of the Act which are B unconstitutional.

What that means is that in certain circumstances a journalist would be penalised for doing what he is entitled to do in terms C of s 20(1) of the Constitution; for example, practising journalism when he has not been accredited in terms of s 79. For that reason, subsection (2) is in contravention of s 20(1) of the Constitution.

In the circumstances, I would order as follows:

1. Sections 79, 80, 83 and 85(2) of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] contravene s 20(1) of the Constitution of Zimbabwe and are hereby struck down. D
2. The costs of this application shall be borne by the first respondent.

Scanlen & Holderness, applicant's legal practitioners

Muzangaza, Mandaza & Tomana, first respondent's legal practitioners

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

1 2003 (2) ZLR 236 (S)
2 Athukorale & Ors v Attorney-General of Sri Lanka (1997) 2 BHRC 610; Groppera Radio AG v Switzerland 12 EHRR 321
3 Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)
4 Advisory Opinion, OC-5/85, Series A No. 5
5 Paragraph 81 of the *Opinion supra*
6 *Athukorale's* case *supra*

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GONCALVES v RODRIGUES 2004 (1) ZLR 122 (H)

Citation 2004 (1) ZLR 122 (H)

Case No Judgment No. HH-197-03

Court High Court, Harare

Judge Ndou J

Heard 7 January 2002

Judgment 11 February 2004

Counsel Mrs *J B Wood,* for the plaintiff
R Fitches, for the defendant

Case Type Civil trial

Annotations No case annotations to date

Flynote

Property and real rights — *immovable property — rights in and to —* C *personal rights — not capable of registration — contract providing for personal right in land — invalidity of*

Unjust enrichment — *action for — requirements — defendant's immovable property being improved at plaintiff's expense when parties lived as husband and wife — action based on unjust enrichment justified* D

Headnote

The parties, who were not married to each other, lived as husband and wife in a house registered in the name of the woman. The man provided the money for the deposit on the purchase price and paid for several improvements which improved the value of the house. They drew up a notarial deed, which provided that in the event of the relationship E becoming difficult and the parties separating, the property would be sold to the best advantage and the proceeds divided. The deed was not registered. The relationship ended and the man brought an action to have the property sold. The woman argued that it should be treated as being of no effect, as it gave a personal right in immovable property.

Held, that the notarial deed did not comply with the formalities required by F the Deeds Registries Act [*Chapter 20:05*] and was thus not validly contracted. The Act provides that registration is required for the derivative acquisition of ownership or limited real rights to land. Here there was no registration of joint ownership of the land in line with the contents of the notarial deed, so according to the Deeds Registry the property was in the sole and absolute ownership of the defendant. G

Held, further, that the court will assist parties to an "invalid" contract where considerations of equity and justice justify the prevention or avoidance of enrichment by one party at the expense of the other. The requisites for liability under the general action for unjust enrichment are: (a) the defendant must be enriched; (b) the plaintiff must have been impoverished H

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A by the enrichment of the defendant; (c) the enrichment must be unjustified; (d) the enrichment should not come within the scope of one of the classical enrichment actions; (e) there must be no positive rule of law which refused an action to the impoverished person. All the requirements were satisfied in this case: the defendant was enriched by the improvements to the disputed property, with the plaintiff being correspondingly B impoverished. There was no justification for the enrichment. Consequently, the plaintiff's prayer would be granted.

Cases cited

AM Bennett (Pvt) Ltd v H O Wilsenach & Co (Pvt) Ltd 1972 (2) RLR 175 (G) C

Amalgamated Society of Woodworkers of SA and Another v Die 1963 Ambagsaalvereniging 1967 (1) SA 586 (T)

BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A)

Breytenbach v Frankel & Anor 1913 AD 390

D *Crispette & Candy Co Ltd v Michaelis NO & Anor* 1948 (1) SA 404 (W)

Frye's (Pty) Ltd v Ries 1957 (3) SA 575 (A)

Industrial Equity v Walker 1996 (1) ZLR 269 (H)

Jengwa v Jengwa 1999 (2) ZLR 121 (H)

Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere 1994 (3) SA 283 (A)

E *Lodge v Modern Motors* Ltd 1957 R&N 462 (SR); 1957 (4) SA 103 (SR)

Milne NO v Singh NO & Ors 1960 (3) SA 441 (D)

Muringaniza v Munyikwa HB-102-03

Nortje en 'n Ander v Pool NO 1966 (3) SA 96 (A)

Ntini v Masuku HB-69-03

F *Standard Bank van SA Bpk v Breitenbach en Andere* 1977 (1) SA 151 (T)

Takafuma v Takafuma 1994 (2) ZLR 103 (S)

Wakefield v ASA Seeds (Pvt) Ltd 1976 (2) RLR 63 (G)

Legislation considered

Deeds Registries Act [*Chapter 20:05*] s 56

Case information

G Mrs *J B Wood,* for the plaintiff

H *R Fitches,* for the defendant

Ndou J

Judgment

NDOU J: The plaintiff issued summons against the defendant in the A following terms:

"The plaintiff's claim against defendant:

(a) an order directing that the property known as Stand 91 of Kensington Estate measuring 351 square metres be sold to the best advantage and net proceeds divided equally; and B

(b) costs of suit."

The defendant entered appearance to defend the claim. She also filed a claim in reconvention seeking:

"a) an order declaring her to be the sole owner of the immovable property situate in the District of Salisbury, called Stand 91 of Kensington C Estate measuring 351 square metres, also known as Number 19 McLoughlin Road, Avondale, Harare, as reflected in the Deed of Transfer;

b) an order that the Notarial Deed signed by the parties on 10 January, 1995 be declared *pro scripto* and of no effect.

c) costs of suit." D

The salient facts of the case are that the parties started living together in about 1990 and moved into the disputed property in 1994. The house was purchased through the defendant and is registered in her name. The deposit for the house was $50 000. The plaintiff made payments to the defendant including a payment of $50 000. The plaintiff made material improvements to the house and these enhanced the value of the property. It is the defendant's case that E these luxurious alterations and extensions to the already existing house, costing approximately $540 000, were made without her consent or authority.

By way of a notarial deed dated 17 January 1995, signed by the parties, it was "agreed" as follows:

"(a) That the property was jointly owned and had been jointly acquired; F

(b) That the property was registered in the name of defendant purely for the purposes of convenience.

(c) That in the event of occupation by both parties being rendered difficult then the property would be sold to the best advantage through the agency of an estate (agent) nominated by both parties." G

It is beyond dispute that at the commencement of these proceedings the occupation by both parties had been rendered difficult and the relationship between the parties had irretrievably broken down and the plaintiff had vacated the property. It is common cause that the defendant took no steps to have the above-mentioned notarial deed set aside until her claim in reconvention was filed over six years later. By 29 August 2000 the relationship between the H

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A parties had reached breaking point and the defendant tried to enforce the terms of the said notarial deed relating to her right to residence at the house. Thereafter the plaintiff was insisting on having the house sold unless the defendant opted to buy his share or was willing to have him buy hers. The defendant obtained a provisional order with an interim interdict against the plaintiff, on an *ex parte* basis, while the plaintiff was out of the country. The B defendant, after opposing papers were filed, filed an answering affidavit to set down the matter for confirmation (or discharge) of the provisional order.

The defence to the plaintiff's claim is dependent on the counterclaim, which as alluded to above, seeks an order declaring the notarial deed to be *pro non scripto*. In other words it has always been assumed that the basis of this C defence/counterclaim was that the notarial deed was allegedly signed by the defendant as a result of some impaired volition. However, from the pleadings, it was never clear whether the impaired volition was supposed to have arisen from duress or from undue influence.

It has also been belatedly averred by the defendant that the notarial deed was *non scripto* because it purports to confer a personal right in immovable D property. It purports to secure rights in immovable property without registration in the Deeds Registry. It is argued by the defendant that this is in contravention of s 56 of the Deeds Registries Act [*Chapter 20:05*] which states:

> "No deed or condition in a deed, purporting to create or embodying any personal right in respect of immovable property shall be capable of registration."

E This latter assertion was not specifically pleaded. The defendant submits that the notarial deed is voidable on account of impairment of volition. The defendant's case was heard first and I propose to deal with evidence in that fashion.

DEFENDANT'S CASE

F *Maria Delia de Souza Rodrigues*

She testified as follows.

She is employed by a firm of legal practitioners in Harare as Office Manager. Prior to that she had been employed at Barclays Bank for 29 years since January 1971. She rose through the ranks at Barclays Bank from a clerk to a G Property Administrative Manager at Head Office in Harare. She is the registered owner of the disputed property, 19 McLoughlin Road, Avondale, Harare. She says that contrary to the plaintiff's assertion, she is the legal owner of this property, having acquired and paid for it using her own resources. She says that the property was neither jointly acquired nor jointly owned. She testified that the property was registered in her name by virtue of the fact that

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she purchased it and paid for it using her own financial resources. She, A therefore, denies and refutes that the property was registered in her name only for the purpose of convenience as reflected in the notarial deed. She further denies that the plaintiff has any entitlement in law either to have the property sold or to share the proceeds of the sale. She says the parties had been co-habiting since June 1990 at a different address and commenced cohabitation B at the disputed property from 1993, prior to her purchase thereof, until she obtained an order of this court on 29 November 2000. She obtained the latter interdict arising out of the plaintiff's violent behaviour towards her and her family. According to her, the nub of the dispute arises from the fact that between 1994 and 1995, the plaintiff, without her consent or authority, unilaterally effected certain alterations and extensions to her already existing C house. She says that she did not acquire the disputed property jointly with the plaintiff. The Bank which financed the purchase of the property did not allow joint ownership. She says that she previously had a flat in Bulawayo which she sold and

the proceeds thereof went to the purchase of the disputed property with the balance of the purchase price coming from her erstwhile employers, Barclays Bank. She produced documents in support of her testimony in this D regard. From these records it is clear that she bought the Bulawayo flat on 14 April 1987. She only met the plaintiff in August 1989 i.e. over two years after she acquired the Bulawayo flat. She produced the agreement of sale in respect of the disputed property. The purchase price is reflected as $300 000.00 financed through a loan obtained from Barclays Bank, her then employer. The E loan was secured through a mortgage bond. She serviced the bond through direct deductions from her salary. The property was registered in her name. Barclays Bank lent her the purchase price of $300 000.00 plus transfer costs less deposit which they took from the proceeds of the sale of the Bulawayo flat. Her salary at the time was between $18 000 and $20 000 and her package included payment of school fees for her children, medical aid for her and her F children, parking and petrol allowances and payment of annual subscriptions at Chapman Golf Club and Health Studio. She also received bonds and shares. She had 5000 Barclays Bank shares. She produced documents to show the deductions in her salary towards the servicing of the mortgage bond. When she left Barclays Bank to join CABS this necessitated the transfer of the mortgage bond to the latter. She paid around $20 000.00 plus allied charges for CABS G to take over the bond. She says that the plaintiff was aware of all these transactions as he was living with her. Their relationship was okay. As the plaintiff is a wealthy man he could have purchased the disputed property for cash if he had wanted to be involved. He did not, and she felt that the servicing of the bond was within her means and did not involve him. The plaintiff, however, later made alterations and extensions to the property. At the time she H

A asked him whether it was worth it but he nevertheless went ahead. He constructed a luxury area with a thatched structure. This area was out of bounds for her and her children as the plaintiff kept it locked. He constructed a snooker room which he used with his friends. He added two outside toilets. He extended the lounge and dining-room. She did the curtaining. The plaintiff also made extensions in the kitchen by adding kitchen fittings. He also built B two carports. He added a new bedroom to the main house. The extensions were made between 1994 and 1995. The plaintiff did not consult her on the necessity and the nature of these extensions and alterations. As soon as he completed these alterations his attitude changed. He stopped her and her children from bringing friends to the property. He started referring to the property as his house and informed his family that the property was his. C Tension crept into their relationship. Things went from bad to worse. The plaintiff controlled access to parts of the house, especially those affected by the extensions and alterations. The plaintiff started assaulting her daughter. The situation deteriorated to such an extent that she wanted to move out of the house but she had children at school. She felt that she had to take action when D her children were old enough to look after themselves. She has no family support in the country. The plaintiff made the rules and told her that she and her children had to abide by them. The plaintiff shouted at her daughter in front of her friends. Eventually no one visited them.

She states that they were "actually living in prison". The plaintiff himself brought his friends and his family from South Africa. The situation was very E stressful for her and her 23 year old daughter. After a big scene at the house she arranged for her daughter to emigrate to the United Kingdom. The situation was so stressful that she and her daughter (before her emigration) were continuously on anti-depressant medication. His eldest daughter from a previous relationship came and the plaintiff started breaking fittings and said they were his. He became so violent that she had to seek police intervention. F The situation got out of control. After her third visit to the police they advised her to seek a court order to deal with her domestic problems. She obtained an order as she felt threatened and feared that the situation would explode. She obtained a restraining order on 29 November 2001.

She explained the circumstances under which she signed the notarial deed in G the following terms

> "There was no peace of mind. I was just about to collapse. Basically I just went and signed. I didn't question it. It was done by his lawyer…I got a draft from the plaintiff. I just read through it. I didn't argue... I had my life to think about, I felt that if I signed that I would stop this continued H bothering about the plaintiff not having title to the property... He did not

explain the document to me it was like something to sign and perhaps A make peace. The bank would never transfer the title anyway."

She says when she signed the notarial deed before a legal practitioner she did not express her reservations and lack of volition to him. She said that after the signing of the notarial deed the situation did not get better. She had signed in the hope that things would become better. She accepted that she received B moneys from the plaintiff by way of living expenses and also for bookkeeping services that she offered to his business. The situation did not improve after the signing of the notarial deed and the plaintiff continued to subject her to "mental and physical blackmail". She stated that there was, however, no argument about the signing of the notarial deed. She did not take the deed seriously so she never bothered to give thought to the terms thereof. She, C however, conceded that she understood the contents. Although she did not agree with the contents, she just signed without protest because she wanted peace for her children and herself. She was in a state of stress when she signed. She states that she could not move out of the disputed property because she D was the one who was servicing the mortgage bond. She did not ask the plaintiff to move out. She did not consider selling the disputed property because she did not want to jeopardize her life because of their relationship, which had turned sour.

In a nutshell, she signed the notarial deed to keep peace, without having regard to the consequences of her signature. She states that she did not, in any event, anticipate any serious consequences arising from signing the notarial deed as E the title deeds were still under her sole name. She did not bother to have the notarial deed nullified because she considered it to be incomplete and did not take it seriously. She conceded that at some stage, through her erstwhile legal practitioner, she tried to enforce her rights arising from the notarial deed. A letter by her legal practitioner was produced and she confirmed that the letter was written by her legal practitioners to the plaintiff at her behest. In this letter F she did not seek to resile from the notarial deed. She said that she only launched legal proceedings against the plaintiff after the latter wrote letters seeking to enforce his rights arising from the notarial deed. She says after obtaining the provisional order she did nothing to have it confirmed as things returned to normal. She disputes ever threatening to sell the property. She G concedes that the improvements were in excess of $500 000 – thus enhancing the value of the disputed property. She, however, still claims sole ownership of the property and does not want to share it with the plaintiff. She is unable to give reasons why she should be enriched at the expense of the plaintiff save to allege that the property is registered in her name. She stated that she was, at the time of her testimony, using a Mazda M3 vehicle that the plaintiff bought H

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A for her for $300 000. She accepted that the plaintiff took her on expensive holidays, drove her children to school and helped her ex-husband. She is adamant that this has nothing to do with the issue before the court.

PLAINTIFF'S CASE

Vitorino Goncalves

B He testified that he is a transport operator and a man of straw. He says he first met the defendant in 1989. After his divorce he went to live at a place called Maria Estate Boarding House. The defendant and her brother were also living there. She moved out but kept on visiting her brother and their relationship developed during such visits. Eventually he moved in with her but her flat did not have much by way of furniture. Her salary was at the time very meagre and C he paid for the rent for the flat, bought the food and also paid for the defendant's clothes. They shared this flat for over two years. They were living together as "husband and wife". He concedes that the defendant did bookkeeping for his transport business. He, however, states that she was doing so on account of their relationship and not for financial reward. He also bought tyres for her vehicle. In 1991 he bought her the vehicle that she referred to in D her testimony. It was brand new when he bought it. He negotiated with the seller of the disputed property. He wanted to pay the purchase price of $350 000.00 cash. The defendant persuaded him not to pay cash as she was able to finance the purchase through a low interest loan from her employers and the cash would then be used to buy a vehicle. The defendant approached E her employers and a loan was granted but the defendant said the loan would be in her name. He says a deposit of $50 000.00 was required. He paid the deposit. He actually deposited the $50 000.00 into the defendant's account. He also gave her an additional $35 000.00 for insurance for the property and transfer charges. He also paid $12 000.00 capital gains

tax for her Bulawayo property that she had just sold. Throughout the cohabitation he regarded the F defendant to be in a position akin to a wife. She did not ask for money but he gave her lots of money. He paid for almost everything for a period of approximately 14 years. His generosity extended to her ex-husband.

On the improvements, he says that when he realised that a lot of money was going to be involved he felt that he needed some form of protection. He felt that G he needed to safeguard his interest in the property. He discussed this with the defendant and she shared his concern. He consequently approached his legal practitioner who drew up the notarial deed in question. Although the notarial deed was drafted in 1994 it took a long time before it was signed. The deed was finally signed before a notary public in the presence of witnesses. The defendant signed freely and voluntarily. They employed the services of an H architect and the defendant and her children worked with him on the nature of the improvements required. She made the suggestions on

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the improvements. A For services rendered the architect charged $35 000.00 which he paid. The improvement plans were in the defendant's name. She signed the plans before they went for approval. He says the improvements were, *inter alia*, extensions of the lounge, bedroom, add-on of three doors, he took up carpets and replaced them with tiles. He replaced the bathroom carpets with tiles. He did 150 metres B of plumbing. He replaced roof tiles in the lounge area. He built a new kitchen. He built a new entertainment area outside the main house with bathrooms, bars and office. He built a snooker game room. He built a small exercise room. He engaged Costain Construction Company to level the ground at the back. He spent over a million dollars on materials for these improvements and produced an invoice/receipt in support of this averment. He states that most of these C improvements were done after they signed the notarial deed. It took between one and a half to two years for the improvements to be completed. He states that problems between the parties were caused by, as he termed it, "the defendant's compulsive jealousy". Some quarrels started in 1998 and afterwards in 1999. In 1998 the situation got unpleasant between them to such an extent that he approached his legal practitioner for the purpose of selling the disputed D property and sharing the proceeds thereof equally.

The defendant pleaded with him not to sell the property. She suggested that they try to make up and remain good friends. Thereafter the situation did not improve. It instead got worse as the defendant had become very rude to his children. In October 2000 he went to the house and found the defendant's E friend Mr Linnel there and things came to a head. As the value of the property at the time was about six million dollars he suggested to the defendant that he was offering her two million dollars for her share and interest in the property. The defendant declined. He moved some of his property to a friend's house. He then went and told the police as he intended to go overseas for a while. He went to the house and saw a man in her bedroom. He called the police and they F came and took away the man to the Police Station. Two days later he got to the house and found the same man in the defendant's bedroom. The defendant said she allowed him to come and she and her son attempted to beat him up. He once more called the police but by the time they arrived he had run away. He went overseas and when he returned he discovered that the gate's remote control had G been changed and his gate lock could not open the gate. The defendant later came to the property with the police and served him with a court order but he initially refused but later accepted it when he was served by the police. The order was granted when he was out of the country. He opposed the order and nothing has happened since then.

Under D cross-examination he admits that he is a rich man but said he is not H

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A wealthy. He admits owning a Mercedes Benz 260E, a Mitsubishi Pajero, Nissan Sunny, Toyota Hilux, four trucks with trailers, owning premises where he operates a factory from another house with title deeds in his name. The house is paid up and has no encumbrances. He stated that since the interdict he stopped his contributions towards the bond repayments. He felt that as the defendant was staying in the property she should pay the bond. He stated that B he did not know whether the notarial deed was registered against the title deeds of the disputed property. In the event that the property is sold he is willing to pay the half share of the capital gains tax. He stated that the current value of the property is 35 million dollars.

Jonathan Mpandanyama

He is an employee of the City of Harare who is an architect. He drew the plans for the improvements. He first C met the plaintiff who later introduced him to the defendant. Both parties showed him around and told him what they had in mind. He went to the property several times. On some occasions he was attended to by the plaintiff. On other occasions he was attended to by the defendant. There were also instances where he found both parties. Under cross-examination he concedes that he is not a registered architect but that he is an architectural technician. He did the work for the parties in his spare time as he was employed by the City of Harare at the time. He however stated that he was contracted by the plaintiff to carry out the work of drawing the improvement plan.

E *Assessment of evidence*

In my view the credible evidence is that the defendant signed the notarial deed in order to achieve peace in the parties' relationships. She did not tell the plaintiff about her objective in signing the deed. On the other hand, the plaintiff wanted the notarial deed as a form of security as the parties were not legally married and he was injecting quite a fortune into the improvement of F the property.

The defendant's evidence is that she signed the deed under circumstances of duress because the plaintiff was badgering and embarrasing her. She knew at the time that performance on the deed was not possible on account of the fact that the deed was not executed or attested by the Registrar of Deeds. This is G a requirement in terms of the Deeds Registries Act [*Chapter 20:05*]. In terms of this Act, registration is normally required for the derivative acquisition of ownership of or limited real rights to land. The Act also imposes, *inter alia,* a duty on the registrar to keep such registers containing such particulars as are necessary for the purpose of maintaining an efficient system of registration. There is no question of passivity of the registrar. In principle a registered H owner can only transfer his right of ownership to another person by means of

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registration. Land is a scarce and important resource. Acquisition of its A ownership requires stringent regulation. In the circumstances, I support the unqualified application of the registration principle despite apparently contrary views evinced from common law authorities – Grotius Inleiding 2.32. 2 and Van der Keessel *Praelectiones ad Grotii* 2.32.3 – see also *The Law of Property* by H Silberberg and J Schoeman 2 ed p 206. B

I agree that our law does not have any explicit or active form of guarantee of title. Our law does not seem to provide an implied warranty of indefensibility either. The requirement of registration in the Deeds Registries serves to reduce the likelihood of fraud or error and as a result enhances the operating efficacy of the system and the security of registration: *The Acquisition and Protection of Ownership* by Carey Miller pages 173/4 and *Standard Bank van SA Bpk* v C *Breitenbach en Andere* 1977 (1) SA 151 (T) and *Breytenbach* v *Frankel & Anor* 1913 AD at 390. The Supreme Court has stated that the registration of rights in immovable property in terms of the Deeds Registries Act is not a mere matter of form. It is a matter of substance — it conveys real rights upon those in whose name the property is registered: *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S). D

A *dictum* of Hoexter JA in *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 582A, is instructive –

> "As far as the effect of registration is concerned, there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds Office. Indeed the system of land registration was evolved for the E very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Theoretically no doubt the act of registration is regarded as notice to all the world of the ownership of the real right which is registered. That merely means that the person in whose name a real right is registered can prove his ownership by producing the registered deed. Generally speaking, F no person can successfully attack the right of ownership duly and properly registered in the Deeds Office. If the registered owner asserts his right of ownership against a particular person he is entitled to do so, not because that person is deemed to know that he is the owner, but because he is in fact the owner by virtue of the registration of his right of ownership." G

Further in *Milne NO* v *Singh NO & Ors* 1960 (3) SA 441 (D) at 449F Caney J stated:

> "...our system of registration is, in general, a guarantee to a transferee that all is well".

From the foregoing it is clear that the notarial deed did not comply with formalities required by the Deeds Registries Act. The notarial deed was not H

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A validly contracted on account of non-compliance with the Deeds Registries Act. It is trite that for creation or formation of a valid contract certain absolute requirements must be complied with: there must be agreement or consensus between the parties, the parties must have the capacity to contract, *the performance on which they agree must be possible and lawful and prescribed formalities, if any, must be complied with.*

B The Deeds Registries Act lays down that registration is required for the derivative acquisition of ownership of a limited real right to land. In casu, there is no registration of joint ownership of the land in line with the contents of the notarial deed. In the final analysis the inescapable conclusion is that according to the Deeds Registries Act the property is in the sole and absolute ownership C of the defendant. No extrinsic evidence may be adduced by the plaintiff to contradict, vary or add to terms of the registration in the circumstances of this case. Even without making a finding whether there was undue influence by the plaintiff on the defendant I therefore find that the notarial deed was not validly contracted.

There is no marriage between the parties and as such this finding alone impacts C greatly against the plaintiff's claim. His claim is not sustainable ex contractu, based either on a marriage relationship or the notarial deed. It does not seem that his claim is ex delicto. Damages are usually associated with contractual and delictual liability. Delictual liability may also be interpreted to include liability without fault or liability based on risk. It is, however, trite that liability for unjust enrichment is allowed in compensation of patrimonial loss E if certain requirements are met: BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) at 436 and Law of Damages by P J Visser and J M Potgieter at page 5.

Unjust enrichment at the expense of another is a generic conception of the composite event which gives rise to a claim for restitution. There is a Roman F root for the claim of undue enrichment. The Digest preserves two versions in fragments excerpted from Pomponius. In one he says:

> G "*cum alterius detrimento* – i.e. this is indeed by nature fair, that nobody should be made richer through loss to another".

In another, he says:

"*cum alterius detrimento et injuria* i.e. it is fair by the law of nature that nobody should be made richer through loss and wrong to another".

There are three mechanisms against unjust enrichment, *viz*, deterrence, anticipation and reversal. Reversal is the only one relevant to the facts *in casu*.

The doctrine of unjustified enrichment applies when a person is enriched H through the acquisition (in a legal rather than factual sense) of an asset without

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adequate justification, for example the existence of a valid contact. In certain A strictly delineated circumstances the law requires the person so enriched to disgorge the benefit. The doctrine of unjust enrichment, like *negotiorum gestio*, reveals that the courts are disinclined to intervene where liability has neither been voluntarily assumed nor incurred by the commission of a wrongful act. In limiting liability and, in particular, in discouraging unsolicited B assistance to others, the individualistic values of the classical law of contract which purports to emphasize freedom and equality are asserted – Farlam and Hathaway: *Contract Cases, Materials and Comment* 3 ed by G F Lubbe and C M Murray at pages 1 - 2.

In *A M Bennett (Pvt) Limited* v *HO Wilsenach & Co (Pvt) Ltd* 1972 (2) RLR 175 (G) at 177 E-G Macaulay J aptly stated the operation of the doctrine as C follows:

> "...There is no general action based on enrichment. *Nortje & Anor* v *Pool NO* 1966 (3) SA 96. To succeed, the plaintiff must bring its claim within one or other of the recognized *condictiones*. This, in my view, it is unable to do. In *Govins* v *Jester Pools (Pty) Ltd* 1968 (3) SA 563 at 573 Jansen J, considered various authorities on unjust enrichment and referred with D approval at F to H to a passage in Professor Lee's

'Introduction to Roman-Dutch Law' (5 ed) pp 347 to 348. It is clear from that passage that enrichment is not without just cause if it is permitted by law. Nor is it unjust if it is the consequence of a contract".

The court will, however, assist parties to an "invalid" contract where justified E by considerations of equity and justice: *Wakefield* v *A S A Seeds (Pvt) Ltd* 1976 (2) RLR 63 (G) *Ntini* v *Masuba*, HB 69-03 and *Muringaniza* v *Munyikwa* HB 102-03. In *Wakefield* v *A.S.A. Seeds (Pvt) Ltd* Goldin J aptly captured the doctrine at page 70 D-H as follows:

"...Moreover, members can become entitled to claim payment on the basis of the doctrine of unjust enrichment. The Court will come to the aid of a F party to an invalid contract where considerations of justice and equity justify the prevention or avoidance of enrichment by one party at the expense of the other. In *Huvman* v *Nortje* 1914 AD 293, Innes, JA, said at 301-2:

'Turning now to our own law, we find the doctrine well established that no man may enrich himself at the expense or to the detriment of another' G .

Its general operation lies outside the realm of contract, and its most frequent application relates to cases where improvements have been made by a possessor of land. But it was used in *Rubin* v *Botha* (1911 AD 568) to prevent enrichment which had its origin not in possession but in an agreement which the parties believed to be binding, but which turned out to be invalid. And there is no reason in principle why it should not be H

A similarly employed where the enrichment would follow in consequence of a contract but would not be covered or contemplated by it."

It has been held that money lent by a company in terms of a void transaction could be recovered from the borrower to the extent of the unjustified enrichment (*Crispette &Candy Co Ltd* v *Michaelis N O & Anor* 1948 (1) SA 404 (W) at 408). Young J analysed the authority in great detail and concluded B in the case *of Lodge* v *Modern Motors* Ltd 1957 (4) SA 103 (SR); 1957 R&N 462 (SR) that the enrichment principle applied where a provision in the Hire Purchase Act rendered the contract between the parties a nullity. (See also *Amalgamated Society of Woodworkers of SA and Another v Die 1963 Ambagsaalvereniging* 1967 (1) SA 587 (T) at 596; *Nortje en 'n Ander* v *Pool NO* 1966 (3) SA 96 A.

C In *Industrial Equity* v *Walker* 1996 (1) ZLR 269 (H) Bartlett J admirably dealt with the issue of unjust enrichment and stated at pages 296G-297D:

"I am satisfied that, echoing the words of Van Zyl J in *Blesbok Eliendomsagentskap* v *Cantamessa supra* (1991 (2) SA 712 (T)), the time has indeed arrived for recognising the general enrichment action as it existed in our common law. I am of the view that the detailed research D and analysis of the Roman Dutch writers, particularly as encapsulated by Scholtens in 'The General Enrichment Action That Was' (1966) SALJ *supra*, and Van Zyl 'The General Enrichment Action is Alive and Well'. *Acta Juridice* 1992 *supra*, establishes that the general enrichment action had developed in the Roman-Dutch Law by the 18th Century. (See also *Lotz Law SA* Vol 5 p 46; Weeramantry '*The Law of Contract* Vol 2 1025 E and van Zyl '*Negotiorum Gestio in the SA Law* 85)

It is accordingly my most respectful view that the majority decision in *Nortje* v *Pool supra* was incorrect in stating that our law does not regard the rule against unjust enrichment as creating a legal obligation independently of one or other recognized enrichment action and regardless of particular circumstances. I am of the view that if the full research as F particularised in the articles to which I have referred had been before the court in *Nortje's* case that a contrary decision would have been reached... I am satisfied that the correct view of the law is as stated by Rumpff JA in the minority decision in *Nortje's* case.

I am also accordingly with the utmost deference respectfully of the view that the upholding of the majority decision to *Nortje* v *Pool* by this court G in *Polwarth & Company (Pvt) Ltd* v *Zanombairi & Ors* 1972 (1) RLR 112 (G); *Skywork (Pvt) Ltd* v *Peter Scales (Pvt) Ltd* 1978 RLR 416 (G) and *Guthrie Overseas Investment* v *GMHL Holdings (Pvt) Ltd* HH 554-87, was incorrect".

The learned judge held that the recognition of the existence of a general action H of unjust enrichment in our law will not open floodgates for judicial intervention

whenever the distribution of property does not seem to be consonant with A equity. The requirements for liability for this action would have to be present and the courts can further control the ambit of this action by exercising a discretion to circumscribe liability according to the general

sense of justice of the community and the legal convictions of society. The requisites for liability for this general action are: B

(a) the defendant must be enriched;

(b) the plaintiff must have been impoverished by the enrichment of the defendant;

(c) the enrichment must be unjustified;

(d) the enrichment should not come within the scope of one of the classical C enrichment actions; and

(e) there must be no positive rule of law which refused an action to the impoverished person. See also *Kommissaris van Binnelandse Inkomste en 'n Ander* v *Willers 'en Andere* 1994 (3) SA 283 (A).

I agree with Bartlett J with an addition that this principle can be traced even D in Roman Law as shown in the excerpts from Pomponius *supra*. This view received further support in *Jengwa* v *Jengwa* 1999 (2) ZLR 121 (H). At page 130F-G Gillespie J stated:

> "Bartlett J in *Industrial Equity* v *Walker* 1996 (1) ZLR 269 (H) has given the law precisely that general action for which jurists in Southern Africa have been pressing ... The elements of that action, as the learned judge E defined them, seem to be apposite to the case of the wife at customary law, to whose property rights the general law applies. Where she has made a contribution that impoverishes her and will leave the husband enriched at her expense under the existing law, then I would suggest that there be extended to her an action based upon that unjust enrichment."

From the credible evidence in this case I am satisfied that all the requirements F for an action of unjust enrichment are satisfied. The defendant was enriched by the vast improvements on the disputed property with the plaintiff being correspondingly impoverished. There is no justification for the enrichment. The other two requisites are also satisfied.

The plaintiff seeks an order that the property be sold and the net proceeds be G shared equally between the parties. Is there any justification for this type of prayer? I think so. Authority is found in *Rubin* v *Bellina supra* where the action was used in an agreement which the parties believed to be binding, but which turned out to be invalid. Consideration of justice and equity justify the prevention or avoidance of enrichment of the defendant by the plaintiff. There is no justification for such enrichment from the evidence before me. The H

Ndou J

A plaintiff's claim must therefore succeed and the defendant's claim in reconvention fail.

It is accordingly ordered:

1. That the defendant shall pay to the plaintiff an amount equivalent to 50 per cent of the present nature of the immovable property known as Stand 91 of Kensington Estate , Salisbury District, also known as Number 19 B McLoughlin Road, Avondale, Harare within three months of this order;
2. That should the defendant fail to comply with the provisions of paragraph 1 *supra*, it is ordered that the same property be sold to the best advantage and the net proceeds divided equally between the parties;
3. That defendant's claim in reconvention be and is hereby dismissed; C
4. The the defendant shall pay the plaintiff's costs of suit.

Byron Venturas & Partners, legal practitioners for plaintiff

Lofty & Fraser, legal practitioners for defendant

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Source:

S v REZA & ANOR 2004 (1) ZLR 138 (H)

Citation	2004 (1) ZLR 138 (H)
Case No	Judgment No. HH-2-04
Court	High Court, Harare
Judge	Chinhengo J & Makarau J
Heard	31 July 2003
Judgment	11 February 2004
Counsel	Mr *B Chikowero*, for the appellants *R Tokwe*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law — *common law offences — assault with intent to do grievous bodily harm — how intent to be inferred — not necessary that grievous* C *bodily harm should actually occur — acts amounting to torture, intended to induce a confession — intent to do grievous bodily harm proved*

Criminal procedure (sentence) — *common law offences — assault with intent to do grievous bodily harm — police officers torturing suspect by beating him on soles of feet — custodial sentence warranted* D

Evidence — *medical evidence — criminal case — need for doctor to be called when affidavit unclear or inconsistent with oral testimony*

Headnote

The appellants, who were police constables, had been convicted of assault with intent to do grievous bodily harm. It was alleged that they had beaten E the complainant on the soles of his feet in an unsuccessful attempt to make him confess to stock theft. The complainant's evidence was not consistent with the medical affidavit. The appellants were sentenced to short terms of imprisonment, with further terms suspended on conditions. They appealed against sentence only.

Held, that the doctor should be called to give *viva voce* evidence where the F affidavits tendered by the prosecution are not clear or appear inconsistent with the oral evidence of the complainant.

Held, further, that assault with intent to cause grievous bodily harm is a specific intent crime. While it is not necessary that grievous bodily harm should have resulted from the assault, the actual injuries sustained, the nature of the weapon used, the point of the body to which the attack was G aimed and the degree of force used are some of the factors that a court can properly take into account in inferring an intention on the part of the accused. An intent to do grievous bodily harm is established if it is shown that the accused assaulted his victim with the knowledge that really serious harm may occur (not *will* occur) and he is reckless as to whether or not it occurs. H

Chinhengo J

A *Held*, further, that the appellants' actions amounted to torture, as defined in international instruments. The existence of an objective such as obtaining a confession is a necessary ingredient of torture. The appellants' conduct showed an intent to do grievous bodily harm.

Held, further, that while ordinarily the use of torture should result in a custodial sentence, as this was the first time a court had classified an B assault of this nature as torture, a heavy fine would be imposed.

Cases cited

S v Dube 1991 (1) ZLR 218 (S)

R v Edwards 1957 R & N 107 (SR)

S v Mbelu 1966 (1) PH H176

C *S v Melrose* 1984 (2) ZLR 217 (S)

S v Tachiona & Anor 1994 (2) ZLR 402 (H)

S v Todzvo 1997 (2) ZLR 162 (S)

Case information

Mr *B Chikowero*, for the appellants

D *R Tokwe*, for the respondent

Judgment

CHINHENGO and MAKARAU JJ: The appellants are members of the Zimbabwe Republic Police. They are aged 24 and 62 years respectively. On 5 September 2002, they appeared before the magistrates court at Chivhu, facing one count of assault with intent to cause grievous bodily harm. They E both denied the charge. After trial, they were convicted and sentenced to six months' imprisonment, three of which were suspended on condition of good behaviour. They have appealed to this court against the sentence only.

The facts giving rise to the charge are as follows:

On 28 March 2001, the complainant went to the local veterinary offices to F obtain a permit to allow him to move certain livestock from one point to another. At the veterinary offices, he was accosted by the second appellant and taken to the police post at Masasa, near Chivhu. The first and second appellants were investigating a stock theft case and suspected the complainant of being the thief. At the police post, the two appellants jointly assaulted the complainant by beating him under the feet with a sjambok. This was in a bid G to make him admit to the stock theft charges. The bid failed and the complainant was released.

After his release, the complainant sought medical attention and was attended to by a Dr Regis Kabanda. A medical report was subsequently compiled and H was adduced into evidence during the trial.

Chinhengo J

As indicated above, the appellants appealed against sentence only. However, A after perusing the record, the conviction of the appellants on a charge of assault with intent to cause grievous bodily harm concerned us. During the hearing of the appeal, the issue of the propriety of the conviction of the appellants on the charge was brought to the attention of counsel. Both were of the view that the conviction was proper. B

The essential elements of the offence of assault with intent to cause grievous bodily harm have been set out in a number of cases. See *R* v *Edwards* 1957 R&N 107 SR*, S* v *Melrose* 1984 (2) ZLR 217 (S), *S* v *Tachiona & Anor* 1994 (2) ZLR 402 (H) and *S* v *Dube* 1991 (1) ZLR 218 (S).

The medical evidence adduced during the trial should have been supplemented C by *viva voce* evidence of the doctor. Firstly, while the complainant was assaulted on 28 March 2001, the medical affidavit was deposed to in July 2002 and indicates that the complainant was examined, for the purposes of the affidavit, on 24 April 2001. This was some considerable time after the assault.

Secondly, the complainant testified that he sought medical attention immediately after the assault. He further testified that the medical report that D was compiled immediately after that attendance

went missing at the police station. In view of this development, it was necessary for the doctor to be called to testify as to his findings on the first examination. This, unfortunately, was not done.

Thirdly, the complainant testified that the appellants only stopped assaulting E him when he started bleeding profusely. It is not made clear from where the blood was coming from. He testified that the skin on the soles of his feet turned black tending to suggest that the blood was from some other part of his body. The medical report does not help the situation.

Time and again, this court and the Supreme Court have called upon magistrates to call the doctor to give *viva voce* evidence where the affidavits tendered by F the prosecution are not clear or appear inconsistent with the oral evidence of the complainant. (See S v *Todzvo* 1997 (2) ZLR 162 (S)). In this matter, it was imperative that the doctor be called to give oral evidence before a conviction on the charge could be returned.

Due to the inadequacy of the medical evidence, the issue of the propriety of G the conviction was put to counsel for the appellants and the respondent at the hearing. As already stated, they both expressed the view that the conviction was proper. Although we were initially of the view that the conviction was not proper we now agree with the view of both counsel that the conviction for assault with intent to cause grievous bodily harm was proper. H

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Chinhengo J

A It is trite that the offence of assault with intent to cause grievous bodily harm is a specific intent crime. While it is not necessary that the grievous harm should have resulted from the assault, the actual injuries sustained, the nature of the weapon used, the point of the body to which the attack was aimed and the degree of force used are some of the factors that a court can properly take into account in inferring an intention on the part of the accused: see *S* v *Mbelu* B 1966 (1) PH H176. The evidence in this appeal shows that the complainant was beaten under the feet.

The appellants are members of the Zimbabwe Republic Police. They arrested the complainant and assaulted him under his feet with a sjambok. The complainant's evidence about the assault reads as follows:

> C " Yes accused two approached me and handcuffed me. I was taken to the police post and I was handed over to accused one. Accused one said I was the stock thief and he wanted me. I was ordered to remove my pair of shoes and (it was) said I had stolen Mupepereki's bovines. My hands were handcuffed so accused one removed my shoes. I was taken into the yard. He started assaulting me with a sjambok under my feet whilst he was D stepping on my legs and accused two was holding my head. He only stopped when I started bleeding profusely. Accused two also assaulted me. I was assaulted on the soles of my feet and the skin turned black. I also bled profusely. I was assaulted whilst outside people were watching. I later went to hospital and was examined by a doctor."

This evidence was not seriously challenged by the appellants. Under cross- E examination, the complainant was asked about the apparent delay in being examined by the doctor. He had been assaulted on 28 March 2001 but the medical report was dated 24 April 2001. The complainant explained that the first report which had been prepared by the doctor on 30 March was given to a police officer, a Cst Hove, but it disappeared at the police station. He had to ask the doctor to re-examine him and prepare another report.

F The offence of assault with intent to do grievous bodily harm has been considered in so far as its elements are concerned in the cases already mentioned, namely, *R* v *Edwards*, *S* v *Melrose*, *S* v *Tachiona & Anor* and *S* v *Dube*.

In *R* v *Edwards supra* at 112E, Beadle J (as he then was) said:

> G "I therefore, come to the conclusion that as far as assault with intent to cause grievous bodily harm is concerned, it is sufficient to prove that the accused committed the crime knowing that his act was likely to cause grievous bodily harm and that he committed it in circumstances which show that he was reckless and careless as to whether or not such harm resulted. If that was his state of mind, then I think the Crown has proved H all the intent required to establish this crime."

2004 (1) ZLR p142

Chinhengo J

In *S* v *Melrose supra*, the court refrained from choosing between the tests for A holding what the nature of the harm should be – whether it be such as "seriously interferes with health" or such as is

"no more nor less than 'really serious'." The court found that on the facts of the case before it the injuries were not very serious and the appellant should have been convicted of common assault. B

In *S* v *Tachiona & Anor supra*, Chatikobo J said that to prove intent in a charge of assault with intent to cause grievous bodily harm it was sufficient to show that the accused did the act knowing that it was likely to cause grievous bodily harm and that he did it in circumstances which showed that he was reckless and careless as to whether or not harm resulted. Commenting on the passage from Beadle J's decision in *R* v *Edwards* which we have quoted above, C Chatikobo J, at 406F-407A, said:

> "The learned judge used the conjunction 'and' to make it clear that the element of foreseeability should be coupled with recklessness. Foreseeability and recklessness are two limbs of the same test. They are not two separate and distinct tests of legal intention. Indeed, Hunt *South African Criminal Law and Procedure* Vol I 1ed (the second edition is not D immediately available to me) at p 119 defines legal intention as consisting of 'foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not'. Recklessness on its own, cannot constitute legal intention. A person can only be reckless about something which he foresees as a possibility. Unless he can foresee something as likely to occur he cannot be reckless about whether E or not it occurs. Recklessness has been defined as 'persistence in such conduct, despite such foresight': *per* Holmes JA in *S* v *de Bruyn & Anor* 1968 (4) SA 498 (A) at 511G-H. It connotes a deliberate omission to take heed when one is aware of the likelihood of something occurring."

In *S* v *Dube supra*, it was held that the crime of assault with intent to do grievous bodily harm may be committed even though the physical injuries are F slight because the question as to whether grievous bodily harm is in fact inflicted on the victim is immaterial in determining liability as it is simply the intention to do harm that is in question.

From all the cases, it seems to be the common thread that the intention for the crime of assault with intent to do grievous bodily harm is established if it is G shown that the accused assaulted his victim with the knowledge that really serious harm may occur (not will occur) and he is reckless as to whether or not it occurs.

The appellants in the present case assaulted the complainant in order to extract a confession from him that he was the thief in the case of stock theft which they were investigating. This brings the appellants' act in the realm of torture. The H

Chinhengo J

A United Nations General Assembly has defined torture as:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing for an act he has committed or intimidating him or other person. It does not include pain or suffering B arising only from, inherent in or incidental to lawful sanction to the extent consistent with the Standard Minimum Rules for Treatment of Prisoners."

Among the physical brutalities which have been found to amount to torture in other jurisdictions are "*falanga*" or "*bastinado*" (beating of the feet with wooden or metal stick or bar which makes no skin lesions and leaves no permanent and recognizable marks, but cause intense pain and swelling of the C feet): see Paul Sieghart *The International Law of Human Rights* at p 163 (para 14.3.5). There is differing judicial opinion on whether the motive with which the conduct is carried out has any relevance to the question whether it constitutes torture. One school of thought is that the existence of an objective such as obtaining information or a confession is a necessary ingredient, whilst the other school of thought is that torture is torture, whatever its purpose, if D inflicted compulsorily. We incline to the view that the existence of an objective such as obtaining a confession is a necessary ingredient of torture. Torture is a degrading and inhuman treatment. In the present case, two police officers subjected the complainant to torture. They beat him under the feet with a sjambok in order to extract a confession from him. Their intention, in E our view, was to cause him such severe pain as would result in him confessing to the offence alleged against him. In order to oblige an adult to make a confession which is self-incriminatory, one must desire that the assault will serious interfere with the victim's health to an extent that he will be forced to make a confession. The torturer must so act with recklessness as to whether such interference occurs or not. We have said that in other jurisdictions the F beating of the feet with a wooden or metal stick or bar which makes no lesions and leaves no permanent and recognizable marks is regarded as torture. We think it is or should be so regarded in this jurisdiction as well. In our view it is torture. The medical report prepared by Dr Kabanda details the injuries sustained by the appellant as "haematomas under the feet. Swollen

upper arm and headache". He found that the wounds observed were consistent with the g use of the sjambok – a "blunt instrument" and that the force applied to inflict the injuries was "severe". He also found that there was no possibility of permanent disability occurring. This last observation is consistent with the nature of an assault under the feet. It is designed to cause severe pain to induce a confession without leaving any visible mark. The intention of the appellants, H in our view, was properly established as required by the definition of the

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offence charged. If their conduct was in fact torture of the complainant, which A we have determined it to be, there should no doubt that the conviction was proper.

We initially questioned the complainant's evidence that he bled profusely. His evidence as to the assault generally and the report by the doctor regarding the "swelling upper arm and headache" would suggest that he bled as a result of B the assault. The appellants did not dispute this assertion or the findings in the medical report.

The offence of which the appellants were convicted is a serious offence involving the torture of a suspect. It is an offence that calls for a severe censure in terms of punishment. C

In their grounds of appeal against sentence, the appellants allege that the trial court erred in –

"1. giving excessive weight to the seriousness of the offence *per se* and failed to individualise the particular case before it.
2. Not taking into account the fact that the medical report discounted likelihood of disfigurement and permanent disability. D
3. Not taking into account the fact that the complainant did not suffer serious injury.
4. Not taking into account the fact that the assault was not directed at any vulnerable part of complainant's body.
5. Not taking into account the fact that no lethal weapon was used. E
6. Not taking into account or giving insufficient weight to the fact that any effective prison term would automatically terminate the appellants' employ.
7. Giving insufficient weight to the appellants' status as first offenders.
8. Giving insufficient weight to the second appellant's age of 62 years. F
9. Giving excessive devotion to the course of deterrence as to obscure the numerous and weighty factors of mitigation.
10. In law in regarding imprisonment as the only punishment which is appropriate for deterrent purposes. G
11. Not appreciating that the appellants' wrong lay in being overzealous in the course of duty rather than wickedness *per se.* Their motive was therefore noble and good.
12. Not treating imprisonment as a rigorous and severe form of punishment which should only be imposed as a last resort." H

A The respondent's counsel found himself in some difficulty to support the sentence imposed on the appellant. He conceded that the sentence is harsh and induces a sense of shock. In the circumstances of this matter, we are of the view that his concession was properly made. We accordingly set aside the sentence and proceed to assess an appropriate sentence .

In assessing sentence in this matter, we have taken into account that the B appellants are first offenders and have family responsibilities. Further, as members of the police force, they are likely to lose their jobs as a result of the conviction. Against these mitigatory features, are the aggravating features that the trial magistrate referred to and what we have said regarding torture. The full wrath of the law should be brought to bear upon police officers who assault C suspects during investigations. There is need on the part of the courts to protect suspects from police officers that use violence as a tool of investigating crimes.

We have however considered that this is the first time that this court has classified the beating of a person under feet, as in this case, as torture. Those who engage in the torture of suspects should

ordinarily receive a substantial D custodial sentence. *The Herald* newspaper in its issue of 28 January 2003 contained the strongest condemnation of torture in the following words:

> "Torture is banned in Zimbabwe but there is, most unfortunately, a small minority in the country who think they can get away with using torture as a short-cut to the professional techniques used by the police.
>
> E There are four strong objections to torture. First and most important, it breaches a fundamental right guaranteed in our constitution and in international treaties to which Zimbabwe is a signatory.
>
> Secondly, it does not produce much practical information. Most people, faced with torture, will admit to anything, whether they did it or not, and will try to figure out what sort of lies that the torturer wants to hear and F then tell them. The information obtained if very dubious.
>
> Thirdly, it degrades the torturer. The victim is not degraded. The victim is hurt by the torturer but will receive the sympathy of all right-thinking people later and will even become some sort of a hero. The torturer will be regarded as some monster fit for the gutter.
>
> G Finally, even if any remotely valuable evidence is obtained, it will be thrown out in any trial. Thus we might have the wrong person brought to court, because they have admitted something they did not do, or the right person going free because the evidence is tainted. Neither is desirable.
>
> Thus, there are legal, moral and practical objections to torture. It is wrong and it does not work.
>
> There is one argument in favour of torture that, at first sight, looks as H though it may be valid. It is an argument presented by the intelligence

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> community in several parts of the world including countries such as Israel A and America. These intelligence officers usually give the example that a terror gang is about to detonate a bomb, overthrow a government or some other terrorist attack.
>
> A member of the gang is found. Surely, they argue, it is better for this person to be violently persuaded to give the vital information of where the bomb is to be placed than for many innocents to die. Unfortunately, such B an arrested person is likely to lie. The information is likely to be worse than useless.
>
> We would assume that those belonging to groups prepared to kill civilians would be given plausible stories to tell should they be arrested.
>
> The fake information would have the additional advantage of diverting C intelligence efforts down the wrong track and boosting the chances of a successful terror attack.
>
> Thus, even this superficially valid argument fails the practical test.
>
> The ban on torture does not mean that intelligence officers and the police have to treat a suspect as though such a suspect was a guest in their homes. There is a general acceptance that robust interrogation can be used D .
>
> But this robust interrogation consists of lengthy periods of questioning, sometimes by teams of skilled officers operating in relays. Every inconsistency in the answers is rigorously probed and pursued. A liar will be worn down.
>
> Eventually, a skilled and experienced senior officer, and such a drastic interrogation should always be led by this sort of person, will be able to E make a professional assessment over whether the suspect is involved. If not a handsome apology should be made and the tired and hungry, but unharmed, suspect be released.
>
> Even in these cases the general principle is that there should be some real and substantial evidence of involvement in a serious crime before any one can be subjected to this procedure. F
>
> The cases of torture documented in the courts, both ours and others, show that this abuse of legal and moral rights is committed by those who are unwilling to follow the professional standards of their calling.
>
> First class intelligence officers and first class police detectives do not resort to torture. They obtain their information or their evidence with their G brains, not their hands. And that information is more reliable, and the evidence more solid, than anything obtained under torture.
>
> We hope the heads of our intelligence and police services make it abundantly clear to all their officers that they will not tolerate torture in any circumstance. This also applies to opposition leaders who have been arrested for kidnapping and torturing members of other political parties. H

> A We don't expect them to cry foul when the tables are turned against them. Torture is wrong and useless."

We wholly subscribe to these sentiments.

On the basis of the foregoing, the conviction is confirmed but the sentence is set aside. The appellants are sentenced as follows:

B "Each: a fine of $150 000 or in default of payment, three months' imprisonment."

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/PIONEER PROPERTIES (PVT) LTD v NCUBE 2004 (1) ZLR 148 (H)

PIONEER PROPERTIES (PVT) LTD v NCUBE 2004 (1) ZLR 148 (H)

Citation	2004 (1) ZLR 148 (H)
Case No	Judgment No. HH-23-04
Court	High Court, Harare
Judge	Chinhengo J
Heard	11 February 2004
Judgment	11 February 2004
Counsel	*P Kawonde*, for the plaintiff Defendant in default
Case Type	Application for default judgment
Annotations	No case annotations to date

Flynote

Practice and procedure — *default judgment — liquidated demand — what* C *is — claim by lessor for cost of repairs for which lessee was responsible under lease — whether liquidated demand*

Words and phrases — *liquidated demand — what is — claim by lessor for cost of repairs for which lessee was responsible under lease*

Headnote

The plaintiff issued summons against the defendant, claiming the cost of D repairs to locks and fittings in premises that were leased under a contract which made the defendant responsible for the repairs. After the defendant had been barred for failing to file a plea the plaintiff applied for judgment in default in terms of O 9 R 57 of the High Court Rules, 1971, which allows default judgment to be granted where the plaintiff's claim is for E a debt or liquidated demand only.

Held, that although the defendant's liability for the repairs was acknowledged in the lease, that liability depended on the happening of a future event, i.e. the locks and fittings becoming damaged. That contingency rendered both the defendant's liability and the lease agreement illiquid because it had to be established that the event had happened and that the plaintiff B had in fact incurred the expenditure, and there was no agreement on the method of calculating the cost of repairs or the value of the damaged fittings.

Held, further, that if the plaintiff had assessed the damage to the fittings and received an estimated cost of repair and the defendant had refused to G honour its bill, the plaintiff's claim could probably have qualified as a liquidated claim.

Held, further, that the plaintiff's claim was one for damages, and evidence was necessary in terms of O 9 r 60 of the High Court Rules, 1971, to establish the nature of the damage to the locks and fittings and the reasonableness of the charges for repairing them. H

Chinhengo J

Cases cited A

Belingwe Stores (Pvt) Ltd v Munyembe 1972 (1) RLR 244 (G)

C S D Enterprises (Pvt) Ltd v S & T Import & Export (Pvt) Ltd & Ors 1980 ZLR 238 (G)

Chequers Outfitters (Bloemfontein) (Pty) Ltd v Sussman 1959 (3) SA 55 (O)

Inglestone v Pereira 1939 WLD 55

Standwin Investments (Pvt) Ltd v Helfer 1961 R & N 679 (SR)

Union Share Agency & Investment Ltd v Spain 1928 AD 74

Western Bank Ltd v Pretorius 1976 (2) SA 481 (T)

Legislation considered C

High Court Rules, 1971, O 9 rr 57, 58, 59 & 60

Case information

P Kawonde, for the plaintiff

Defendant in default

Judgment

D **CHINHENGO J**: The plaintiff (lessor) sued the defendant (lessee) for $486 539.21 arising out of a lease agreement between the parties. Clause 8 of the relevant lease agreement provides that:

> "(i) The lessee hereby acknowledges, subject to the provisions of clause 6 above, that the interior of the leased premises and outbuildings E including all keys, locks, glass windows, electrical and plumbing fittings and fixtures, taps and other appurtenances of the said premises are in good order and in a clean and sanitary condition. He undertakes to make good and repair and replace at his own cost and charge any or all of the items mentioned immediately above during the currency of this Agreement and at the termination of this lease to F return and redeliver the same to the lessor in good order and condition, fair wear and tear alone excepted.
>
> (ii) The lessee hereby acknowledges that he will be responsible for repairs to the electrical and plumbing fittings, plugs, elements, washers and valves within the leased premises or facilities that he is using."

G Clause 6 referred to in para 1 above is not relevant to the purpose of this judgment. It is clear from clause 8 that the lessee assumed liability for repairing damaged utilities specified in that clause during the time that he remained in occupation of the leased premises and/or at the time that the lease agreement is terminated.

Chinhengo J

The lessor's claim is for the cost of repairing door locks and electrical fittings. A The lessor alleged in its declaration that on 29 January 2003 it cancelled the lease agreement but the lessee refused to vacate. From the written submission made on behalf of the lessor in support of this application, it is mentioned in response to one of my queries that eviction proceedings were instituted in the magistrates court prior to the institution of the action in this court and those B proceedings are pending. The lessor's action is therefore founded on clause 8 of the lease agreement. It alleged that on 7 April 2003, it carried out repairs of electrical fittings and locks at a cost of $486 539,21. As it

was the lessee's responsibility to carry out these repairs at his cost the lessor claimed the cost from the lessee.

After summons was served on the lessee and an appearance to defend was C entered, the lessee failed to file its plea despite being served with a notice to plead and intention to bar. The lessor then applied for default judgment by way of a chamber application since the lessee was barred for failure to file his plea.

When the application for judgment in default was placed before me on 18 November 2003, I was of the *prima facie* view that the lessor's claim was D not a liquidated demand and I raised some queries with the lessor's legal practitioner. One of them was:

> "Is this claim not in the nature of damages giving rise to the need for the plaintiff to prove his damages. Claim is not liquidated."

The lessor's legal practitioner responded by letter addressed to the Registrar of this court and dated 20 January 2004. He said: E

> "3. The claim is not one in the nature of damages. It is a liquidated claim. Authority for this proposition is found in Jones and Buckle *The Civil Practice in the Magistrates Court in South Africa* Sixth Edition p 500-501 where it is said 'a liquidated amount in money is an amount which is either agreed upon or which can be ascertained promptly and summarily'. F
>
> The learned author goes on to demonstrate instances where courts have held to be liquidated amounts in money an ordinary shop account, definite sums expended for clothes and medicines, the purchase price and cost of erection of a fence which should have been erected by plaintiff on defendant's failure to do so. G
>
> The last example is on all fours with the case at hand."

The issue is whether the amount expended by the lessor in this case in respect of the repair of door locks and electrical fittings is a liquidated amount in respect of which judgment in default may be entered for the lessor in terms of Order 9 of the High Court Rules, 1971. Order 9 r 57 permits the granting of a default judgment if the plaintiff's claim is for a debt or liquidated demand H

Chinhengo J

A only and the defendant has failed to enter appearance or, having entered appearance, has been barred for default of a plea. Order 9 rr 58 and 59 respectively provide for the procedure to be adopted by the plaintiff where his claim is not for a debt or liquidated demand only or where his claim is for a debt or liquidated demand only but argument in relation to any aspect of the suit is considered necessary. In terms of these rules the plaintiff is required, B without notice to the defendant, to set down the case for judgment on an appropriate day specified in sub (1) of r 223 which we commonly refer to as the "unopposed roll" or "motion court". There are, therefore, two instances when a plaintiff who asks for judgment in default is required to make an application in terms of r 223(1) – where the claim is not for a debt or liquidated demand only or where it is for a debt or liquidated demand only but argument C is considered necessary in respect of any aspect of the suit. Order 9 r 60 provides for a third instance where such an application should be made, i.e. where the claim is for damages and evidence as to *quantum* should be adduced.

A liquidated demand is based on a liquid document. It is trite that a document cannot itself be liquid or illiquid but it is the liability evidenced by that D document which can be liquid or illiquid. See *Chequers Outfitters (Bloemfontein) (Pty) Ltd v Sussman* 1959 (3) SA 55 (O) at 57. The question which ordinarily arises, as it did in this application, is whether in a particular case the plaintiff's claim is a liquidated demand. A liquid document (and so also a liquidated demand) has been described as one which on a proper construction evidences by its terms and without resort to extrinsic evidence (a) E an acknowledgment of indebtedness; (b) in an ascertained amount of money; (c) the payment of which is due to the creditor. See *Western Bank Ltd* v *Pretorius* 1976 (2) SA 481 (T) at 483. In *Union Share Agency & Investment Ltd* v *Spain* 1928 AD 74 it was held that it is necessary to prove indebtedness where the indebtedness arises upon the fulfilment of some condition or the happening of some event. The important point is to appreciate the difference F between the indebtedness being subject to the happening of an event and the payment being subject to the happening of an event. To understand this distinction the words of Ramsbottom J in *Inglestone* v *Pereira* 1939 WLD 55 at 62-3 are pertinent. He said:

> "The principle is readily understood. Where the existence of the obligation G to pay, i.e. the debt, is dependent upon the fulfillment of a condition, there is no obligation until the condition has been fulfilled; and where the document shows that the obligation is conditional, in this sense, then it does not appear

from the document itself that any obligation has ever come into existence, the document is not a liquid document and provisional judgment cannot be given. Where, however, the document shows the H existence of an obligation by the debtor but payment is claimable upon the

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2004 (1) ZLR p152

Chinhengo J

happening of some simple event, e.g. that notice demanding payment has A been given or that the debtor has made default, the happening of that event can be proved by extrinsic evidence, if put in issue, but unless put in issue, is proved by simple allegation in the summons – see *Spain's* case at page 78. The distinction is between a document which shows an existing debt and one which shows that the debt is subject to the happening of an event, and if this distinction is borne in mind. … the various cases … become B clear."

See also *CSD Enterprises (Pvt) Ltd* v *S & T Import and Export (Pvt) Ltd & Ors* 1980 ZLR 238 (G) at 242C where Waddington J said that a document will be illiquid if extrinsic evidence is needed to C prove a contingency giving rise to the indebtedness, the position being different where evidence is needed to prove a contingency upon which payment only is dependent. The present case is based on a clause in a lease agreement in terms of which the lessee's liability is acknowledged. That liability, to my mind depends on the happening of an event in the future, i.e. that the locks and electrical fittings have been damaged and they are no longer in good order. This contingency would seem to me to render both the liability of the lessee and the lease agreement illiquid because D it must be established that the event has happened and that the lessor has in fact incurred the expenditure. In *Belingwe Stores (Pvt) Ltd)* v *Munyembe* 1972 (1) RLR 244 (G), the defendant had been the manager of the plaintiff's store and as such in control of its stock in trade. He had undertaken in writing liability to the plaintiff in respect of the value of any stock found to have gone missing or otherwise unaccounted for. On stock-taking in October 1971, the E plaintiff found that stock to the value of $1 047 was missing. He subsequently applied for default judgment, and the question arose as to whether the plaintiff's claim was for a debt or a liquidated demand only. Greenfield J held that an admission of liability by a defendant is a factor which may enable a court to regard such a claim as liquidated. Similarly, in the present case, clause F 8 of the lease agreement is an admission of liability by the defendant. But in my view there is a point of distinction between the present case and *Munyembe*'s case *supra.* To illustrate this distinction I will quote from Greenfield J's judgment at 246A-B where he said:

"It will be noted that Annexure 'B' is in the form of an undertaking unlimited as to time "to make good any losses in my stock", apparently by G monetary payments. The document does not directly say how losses are to be ascertained, nor does it refer in terms of the 'value' of the stock. Moreover, Annexure 'A', which claims that stock to the value of $1 047 is missing, does not say whether this represents the cost of the stock or the price it was expected to realize on sale to customers. *It is, however, implicit, I think, that the taking of stock on 1st May, 1971, and on 3rd* H *October, 1971, was conducted by the same method as used prior to the*

2004 (1) ZLR p153

Chinhengo J

A *signing of Annexure "B" and that the defendant would be conversant with this method. I think it can also be assumed that the stock values would be estimated on the same basis at each stock-taking*." (emphasis is mine)

I have underscored what I think distinguishes *Munyembe's* case from the present. Greenfield J found as a basis upon which the extent of the defendant's B liability was to be assessed the established method of taking stock and the means by which the value of the stock was estimated. The present case does not have these features. Although the defendant accepted liability in advance in terms of clause 8 of the agreement, the method by which the value or cost of damage to the locks and electrical fittings should be ascertained was not provided for. So even though liability was admitted, the plaintiff's claim C remained illiquid in view of the absence of agreement on the method of calculating the cost of repairs or the value of the damaged fittings. Had the plaintiff assessed the damage and received an estimated cost of repair and the defendant had refused to honour its bill, the present claim could probably have qualified as a liquidated claim.

D This brings me to the second issue. Is the plaintiff's claim one for damages? In my view it clearly is. In *Standwin Investments (Pvt) Ltd v Helfer* 1961 R & N 679 Beadle CJ had to decide whether a claim for the value of goods as an alternative to a main claim for the return of the goods themselves is a liquidated claim. He came to the conclusion, based on the practice in the Cape

Provincial Division, that the alternative claim was a liquidated claim. He also reached this E conclusion on the basis that it was in essence a vindicatory claim. At 680E-G Beadle CJ said:

> "There appears to be a considerable amount of authority, particularly in the Cape, on this question: *Warmsley* v *James,* 15 SC 120; *Hunkin* v *King* 1908 C.T.L.R. 421; *Union Government* v *Simon* 1914 CPD 612; *Du Toit* v *Grobler,* 1947 (3) SA 213 (SWA); and *Beringer* v *Beringer,* 1953 (1) SA 38 (E.D.L.). F All these cases deal with this question, and in all these cases it was held that it was competent to give judgment for an alternative claim such as this, under a Rule which is almost identical in its terms to Rule 5 Order 3. In none of these decisions, however, do the judgments point out how this particular claim can be regarded as a claim other than one of damages. Mr *Pudney,* however, has suggested that, as the main G claim is a vindicatory one, the claim for the value of the goods instead of the goods themselves also takes on the character of a vindicatory claim, and thus it is not regarded as a claim for damages. This is a plausible argument, and the only one that I can think of which justifies these H decisions; but I would prefer to express no firm opinion on its soundness."

Chinhengo J

He then went on to show what the practice of the courts in the Cape was and A to accept that practice.

The plaintiff's claim in the present case cannot be regarded as a vindicatory action in any sense. There is a need in this case to show by more than just an allegation in the summons or declaration that the event happened, i.e. that the defendant damaged the locks and electrical fittings. There is a need to B establish the nature of the damage to the locks and the electrical fittings and the reasonableness of the charges for labour and materials. Additionally, the plaintiff's claim is one for damages. I am, therefore, unable to grant default judgment. This is a case covered by r 59 or by r 60 of the rules of this court and in respect of which the plaintiff is required to set down the case for judgment on an appropriate day specified in subr (1) of r 223. G

It is therefore ordered that the plaintiff (applicant) may apply in terms of r 59 or r 60 of the High Court Rules, 1971, for judgment to be entered in its favour. This is to say, the matter should be referred to the unopposed roll to enable the plaintiff to prove his entitlement to judgment and the *quantum* thereof. D

Kawonde & Company, the plaintiff's legal practitioners.

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Source:
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MERCHANT BANK OF CENTRAL AFRICA v DUBE 2004 (1) ZLR 155 (S)

Citation	2004 (1) ZLR 155 (S)
Case No	Judgment No. S-6-04
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	29 January 2004
Judgment	12 February 2004
Counsel	*J B Colegrave,* for the appellant

S V Hwacha, for the respondent

Case Type Civil Appeal

Annotations No case annotations to date

Flynote

Employment — *appeal — against determination of disciplinary committee under disciplinary code — Labour Relations Tribunal — powers on appeal — where able to determine matter on merits, should do so — when should remit matter for hearing de novo*

Employment — *contract — termination — grounds for — gross negligence in performance of duties — meaning of*

Employment — *disciplinary proceedings — code of conduct — consultant or observer present and participating in proceedings — no provision for such in code of conduct — presence impliedly forbidden and irregular — proceedings voidable at instance of employee unless irregularity shown not to have caused prejudice*

Headnote

The respondent was charged with gross negligence in the performance of his duties at the bank he worked for. At the disciplinary hearing at which he was found guilty, a consultant was present who gave his opinion as to whether the acts charged constituted negligence. The Labour Relations Tribunal, on appeal, held that the consultant's presence constituted an irregularity voiding the proceedings and set them aside, stating that the bank could institute fresh proceedings.

Held, that the consultant's presence vitiated the disciplinary proceedings, it not being provided for in the code of conduct and the bank not having shown that the irregularity did not prejudice the respondent.

Held, further, that the Labour Relations Tribunal should not have determined the matter on the basis of the procedural irregularity. It should have either determined the matter on the merits or, if it was unable to do that, remitted it for hearing *de novo*. In the present case, the Tribunal could, and did in fact, come to a conclusion on the merits.

Held, further, that an entire failure to give consideration to the consequences of one's actions or omissions, or a total disregard of one's duty, would

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constitute gross negligence. On the facts, the respondent was guilty of gross negligence and his dismissal was justified.

Cases cited

Bickle v Ministers of Law and Order 1980 ZLR 36 (G)

Dalny Mine v Banda 1999 (1) ZLR 220 (S)

Minerals Marketing Corp of Zimbabwe v Mazvimai 1995 (2) ZLR 353 (S)

Case information

J B Colegrave, for the appellant

S V Hwacha, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the Labour Relations Tribunal (now the Labour Court) which ordered the appellant ("the bank") to reinstate the respondent ("Dube") in his position as a clerk without loss of salary and benefits from the date of his dismissal.

The factual background is as follows. Dube was employed by the bank as a clerk in the customer services department. On 9 December 1998, he commenced temporary relief duties at the travellers'

cheques and foreign currency desk ("the desk"). He had been employed by the bank for about seven years and, during that time, had manned the desk in 1995, 1996, 1997 and in July and October 1998 for various periods.

On 21 December 1998, Dube received a telephone call from a person who E informed him that he was calling from the International Bureau de Change ("the bureau"), and that the bureau intended purchasing from the bank US$10 000 in notes. Having said that, he asked Dube to outline the procedure to be followed in buying the foreign currency. In reply, Dube informed him that the bureau was to deposit into the bank's account at Stanbic Bank F Zimbabwe Limited ("Stanbic") the local currency equivalent in cash amounting to $375 797.50, and that upon the production of the cash deposit slip he (i.e. Dube) would release the foreign currency to the bureau. To facilitate the transaction, Dube gave the caller the bank's account number at Stanbic.

Thereafter, Dube completed a "Request For Issue of Travellers Cheques/Notes" ("the requisition") which indicated that the bureau was purchasing G US$10 000 from the bank. He was supposed to pass the requisition on to the checking clerk who would have checked the figures and the identity of the bureau, but he did not do so because the checking clerk was not at his desk. In the absence of the checking clerk, Dube took the requisition to an official referred to as the custodian, but did not inform him that it had not been checked by the checking clerk. The custodian then released the US$10 000 to Dube, H

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A who later gave it to a man who had presented to him a cash deposit slip indicating that the sum of $375 797.50 had been deposited into the bank's account at Stanbic.

Before handing over the foreign currency, Dube did not check with Stanbic to confirm that the money had been deposited into the bank's account. He did not contact the bureau to confirm that the man collecting the foreign currency was B doing so on its behalf. And he did not ask the man to identify himself. The man was a complete stranger to him.

It subsequently turned out that the deposit slip presented to Dube was not a genuine one and that no money had been deposited into the bank's account at Stanbic. In the circumstances, the bank was defrauded of the sum of US$10 000.

C As a result, on 20 January 1999, Dube was charged with two acts of misconduct in terms of the bank's Code of Conduct ("the Code"), which is set out in SI 201 of 1995. The first was failure to comply with standing instructions or follow established procedures resulting in substantial loss to the bank, and the second was gross negligence causing serious loss to the bank. On the same day, he was suspended from duty on full pay until further D notice.

About a week later, a third act of misconduct was added and Dube was informed. The third act of misconduct was a serious act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract. In terms of the Code, the penalty for each of the three acts of E misconduct was dismissal.

On 29 January 1999, a disciplinary hearing was conducted and Dube was subsequently found guilty of all the three charges and was dismissed with effect from 12 March 1999. He appealed to a body referred to as the grievance and disciplinary committee, but that committee was evenly divided. The two employer's representatives were of the view that Dube was guilty of all the F charges, whilst the two employee's representatives concluded that he was not guilty of the charges.

The matter later went to the appeals board ("the board"), which concluded that Dube had been improperly charged with the three acts of misconduct. The board was of the view that he should only have been charged with failure to G comply with standing instructions. It found him guilty of that charge and imposed the penalty of a first written warning.

The bank then appealed to the Labour Relations Tribunal (now the Labour Court) which set aside the disciplinary proceedings on the ground that the presence at the initial disciplinary hearing of a Mr Brunette ("Brunette"),

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described in the minutes as a consultant, vitiated the proceedings. Aggrieved A by that decision, the bank appealed to this court.

The first issue I wish to deal with is the effect of Brunette's presence at the initial disciplinary hearing. The Code makes no provision for the presence of a consultant at such a hearing. In addition, it is clear from the minutes of the hearing that Brunette was not a silent observer. The relevant part of the minutes B reads as follows:

> "*Mr Brunette highlighted and verified the specific areas in the Bank's Disciplinary Code that Mr Dube had breached* as being Category 'D' offences … as follows:
>
> – Failure to comply with standing instructions or follow established procedures resulting in substantial loss to the Bank – Paragraph C 11.17;
> – Gross negligence causing serious loss to the Bank – Paragraph 11.15; …
> – Mr Dube committed a serious act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his D contract of employment; …
>
> Mr Chikuhwa queried the third allegation of misconduct, to which *Mr Brunette explained that Mr Dube's breach of an implied condition of his contract of employment (was) due to his negligent failure to follow written down procedures*" (my emphasis).

The minutes indicate that it was subsequently suggested by the bank's E representative that Brunette had been at the hearing in order to explain the charges and clarify legal procedures. I find that explanation unacceptable. That is so because what Brunette said went beyond explaining the charges. He was in fact saying that Dube had committed the three acts of misconduct. The extent to which such a statement may have influenced the hearing officer is not F known.

In any event, the Code makes no provision for the presence of a consultant at the hearing. Mr Brunette's presence at the hearing was, therefore, impliedly forbidden and irregular.

In *Minerals Marketing Corp of Zimbabwe* v *Mazvimavi* 1995 (2) ZLR 353 (S), this court dealt with a situation similar to the one in the present case. A G Mr Sibanda, the human resources manager, had attended the disciplinary hearing when, in terms of the company's Code of Conduct, he was not supposed to attend. At 362C-E, Gubbay CJ said:

> "Nonetheless, it is certain that Mr Sibanda was not present merely as an observer. The minutes reflect that he was permitted to put questions to and make statements concerning the respondent, although the occasions on H

Sandura JA

> A which he did so were few … What is plain is that in allowing Mr Sibanda to be present, in a capacity other than a silent observer, the disciplinary committee went beyond the parameters of the code. It was an act impliedly forbidden. Thus a procedural irregularity occurred which, if not vitiating the proceedings, rendered them voidable at the instance of the respondent … The irregularity was calculated to prejudice the respondent and was not shown by the Corporation not to have caused any prejudice."

B Although it appears that Sibanda played a more active part at the disciplinary hearing than Brunette, I think that the comments made by Gubbay CJ in the *Minerals Marketing* case *supra* apply to the present case with equal force. Brunette was not a mere observer. On the contrary, he made statements indicating that Dube had committed the alleged acts of misconduct. Such C statements were calculated to prejudice Dube and were not shown not to have done that. In the circumstances, Brunette's presence and participation at the hearing vitiated the proceedings.

However, that is not the end of the matter. In my view, the Tribunal should not have determined the matter on the basis of the procedural irregularity. It should have either determined the matter on the merits or remitted it for D hearing *de novo*. As McNally JA said in *Dalny Mine* v *Banda* 1999 (1) ZLR 220 (S) at 221B-D:

> "As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of E procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways –
>
> (a) by remitting the matter for hearing *de novo* and in a procedurally correct manner;
>
> (b) by the Tribunal hearing the evidence *de novo*.
>
> In regard to the first of these alternatives, this court has previously said that:
>
> 'The Tribunal is not given a discretion whether to remit or not. Once it decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on the merits, it has no choice but to remit.'

See *Air Zimbabwe Corp.* v *Mlambo* 1997 (1) ZLR 220 (S) at 223F, and s 101(8) of the Act."

G In the present case, the Tribunal could, and did in fact, come to a conclusion on the merits. It found that Dube's negligence was ordinary and not gross, and set aside the proceedings on the ground that they were vitiated by Brunette's presence and participation at the hearing. It then dismissed the bank's appeal, which it should not have done, and indicated that the bank was at liberty to

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institute fresh disciplinary proceedings against Dube. That was unnecessary A because the Tribunal had already made a determination on the merits.

Having said that, I now proceed to deal with the second and main issue in this matter, which is whether Dube was guilty of gross negligence. I have no doubt in my mind that he was.

Although gross negligence is incapable of precise definition, an entire failure B to give consideration to the consequences of one's actions or omissions, or a total disregard of one's duty would constitute gross negligence – see *Bickle* v *Ministers of Law and Order* 1980 ZLR 36 (G) at 41A-C.

As already stated, Dube commenced temporary relief duties at the travellers' cheques and foreign currency desk on 9 December 1998. That was not the first C time for him to man that desk. He had been employed by the bank for seven years and had manned the desk in 1995, 1996, 1997 and in July and October 1998 for various periods. He must, therefore, have been familiar with the procedures to be followed in the execution of his duties.

In addition, on 15 May 1998 and 24 August 1998, the bank circulated memoranda to all the clerical staff in the customer services department, the D department where Dube worked, reminding them to guard against fraud. It was common cause that Dube saw both memoranda and that his initials appear on both documents. A paragraph in the memorandum issued on 24 August 1998 reads as follows:

> "Please note that in a volatile exchange market the tendency is for clients E to avoid their obligations depending on circumstances, and this could result in the bank losing money which is a situation which all of us must try to avoid."

However, notwithstanding such reminders, on 21 December 1998 Dube completely failed to give consideration to the consequences of his actions and omissions. In the first place, after preparing the requisition he did not pass it F on to the checking clerk, who would have checked the identity of the bureau and discovered that the bureau was not one of the four which the bank dealt with. His explanation for not passing the requisition on to the checking clerk was that the clerk was not at his desk. However, as the caller had not requested him to attend to the transaction as a matter of urgency, there was no reason for not waiting for the clerk to return to his desk. Instead, he took the requisition G to the custodian but did not inform him that it had not been checked by the checking clerk.

Secondly, when the cash deposit slip was presented to him he did not check it in order to satisfy himself that it was genuine. Had he done so, he would have discovered that it did not bear a teller's stamp and the initials of the teller who H

A had received the cash. He would have discovered that the stamp on the deposit slip was that of the waste department, a department which does not deal with cash deposits. And he would have noticed that the cash deposit slip did not indicate that the various amounts, totalling $375 797.50, had been checked, found correct and ticked off in accordance with the usual bank practice.

Thirdly, Dube handed over the US$10 000 to a complete stranger without B requiring him to identify himself and taking down his identification particulars. He did not ask the stranger to produce proof of his authority to collect the money on behalf of the bureau, and he did not contact Stanbic to confirm that the sum of $375 797.50 had been deposited into the bank's account. In addition, he did not contact the bureau to confirm that the stranger had been C sent by the bureau to collect the foreign currency.

In my view, the cumulative effect of all these factors leads to the inescapable conclusion that Dube was guilty of a complete dereliction of duty and was grossly negligent. His negligence caused a serious loss to the bank.

In the circumstances, the following order is made –

1. The appeal is allowed with costs.
2. The order of the Labour Relations Tribunal is set aside and the following is substituted –
   "It is declared that the respondent was lawfully dismissed."

Cheda JA & Gwaunza JA concurred.

Atherstone & Cook, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners

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S v SYLOW 2004 (1) ZLR 162 (S)

Citation	2004 (1) ZLR 162 (S)
Case No	Judgment No. S-7-04
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	26 January 2004
Judgment	12 February 2004
Counsel	*E W W Morris,* for the appellant *V Shava,* for the respondent
Case Type	Criminal Appeal
Annotations	No case annotations to date

Flynote

Appeal — *criminal appeal — appellant absenting himself in breach of bail conditions — whether fugitive from justice — medical considerations and fears for personal security — relevance of*

Headnote

The appellant was convicted on fourteen counts of theft by conversion and sentenced to a term of imprisonment. While on bail pending appeal after his conviction, the appellant was allowed by the court to leave the country for a limited period. He did not return in the time stipulated, and an unauthenticated medical certificate was produced as the reason for his failure to return. He also

claimed that he feared for his security if he returned. His bail was estreated and a warrant was issued for his arrest. The High Court declined to hear an application to allow the appeal to be heard in his absence on medical grounds; it found that he must be E regarded as a fugitive from justice. On appeal to the Supreme Court:

Held, that the state of the appellant's health was not a valid reason for his failure to return to the country by the stipulated date.

Held, further, that the fears for his personal security had been grossly exaggerated. He could easily return to this country without being noticed by any of the people he allegedly feared. Even if he harboured the fears F alleged by him, that would not assist him. It would simply show that he had intentionally placed himself beyond the reach of the law. The inescapable inference must, therefore, be that he did not return because he intended placing himself beyond the reach of the law so that if his appeal did not succeed he would not return to the country to serve the G prison sentence. He was, therefore, a fugitive from justice, and the court *a quo* correctly declined to hear his appeal. H

2004 (1) ZLR p163

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Cases cited A

Chetty v Law Society, Transvaal 1983 (1) SA 777 (T)

S v Moshesh & Ors 1973 (3) SA 962 (A)

S v Neill 1982 (1) ZLR 142 (H)

Case information

E W W Morris, for the appellant

B *V Shava,* for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which declined to hear the appellant's appeal to that court on the ground that the appellant was a fugitive from justice and did not, therefore, have the requisite *locus standi in judicio*.

C The factual background is as follows. On 19 April 2000, the appellant, a dentist and an Australian national, was convicted by the regional magistrates court on fourteen counts of theft by conversion. All the counts were treated as one for the purpose of sentence and he was sentenced to five years' imprisonment with labour, of which three years' imprisonment with labour was conditionally D suspended. He noted an appeal against the conviction and sentence, and was released on bail by the High Court pending the outcome of the appeal.

In terms of the conditions of his release on bail, he was required, *inter alia*, to surrender his travel documents to the registrar of the High Court ("the registrar"), and report at the Harare Central Police Station once per week on a fixed day and within a stipulated period.

E Subsequently, on 2 November 2000, the appellant's bail conditions were varied by the High Court to enable him to travel out of the country between 2 November and 30 November 2000, and between 15 December 2000 and 10 January 2001. As a result, his passport was returned to him on the understanding that he would return it to the registrar on or before 10 January 2001.

F When the appellant failed to return to the country by that date, the Attorney-General filed an application in the High Court on 27 February 2001 seeking: (a) the estreatment of the appellant's cash bail; (b) the calling in of the appellant's surety; and (c) the issue of a warrant of arrest against the appellant. The order sought was granted on 16 March 2001.

G However, before that date the appellant's legal practitioner wrote to the Attorney-General on 2 March 2001, informing him that the appellant had fallen ill in Switzerland, but did not furnish the Attorney-General with any medical certificate confirming the allegation of the appellant's illness. Thereafter, on 10 April 2001 the appellant's legal practitioner again wrote to H the Attorney-General, indicating that although the appellant intended to

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return to Zimbabwe he was still ill. In reply, the Attorney-General informed A the appellant's legal practitioner on 12 April 2001 that if the appellant intended prosecuting his appeal he had to return to Zimbabwe.

Subsequently, on 11 July 2001, the appellant's legal practitioner filed a court application in the High Court on behalf of the appellant, with the founding affidavit having been sworn to by the appellant in Switzerland on 22 June B 2001. Annexed to the founding affidavit was a copy of an undated medical certificate in which it was stated, *inter alia*, that the appellant was in "a severe anxiety depressant state", was under treatment, and was unfit to travel.

In the court application, the appellant sought the following order:

> "1. The respondent shall ensure that the court record required to enable C the applicant to prosecute his appeal under case reference No. B655/2000 is completed by no later than one month after the date of this order.
>
> 2. On completion of the said record, the appeal shall proceed in accordance with the Rules of this Honourable Court, save that should the applicant be absent from Zimbabwe on the date fixed for the D hearing of the said appeal he shall produce evidence of his current medical condition to the court hearing the appeal so as to enable it to determine whether or not the appeal should proceed in his absence.
>
> 3. The warrant of arrest issued by this Honourable Court on 16 March 2001 shall not be enforced pending the determination of the said appeal and shall be deemed to have been cancelled at the conclusion E of the said appeal if the applicant's conviction or the sentence of imprisonment is set aside."

That order was later granted on 17 January 2002 after the Attorney-General's representative defaulted in filing his heads of argument and the State was barred.

Subsequently, the appeal was set down for hearing by the High Court on F 14 May 2002, but was postponed and later heard on 25 July 2002, when the court determined that the appeal could not be heard in the absence of the appellant from the country as he was a fugitive from justice. Aggrieved by that decision, the appellant appealed to this court.

The issue in this appeal is whether the appellant is a fugitive from justice. If G he is, the appeal cannot succeed because a court will not entertain actions by persons who put themselves beyond its reach by going into hiding or fleeing the country.

Thus, in *S* v *Neill* 1982 (1) ZLR 142 (H) at 145E-F, Squires J said the following:

> "But the appellant is a fugitive from justice in the sense that, having been H

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> A convicted by a court of this country, he has fled its jurisdiction and, by doing so, has effectively set its laws at naught. Whatever his motive was for so acting, he has shown by so doing that he is not prepared to accept or abide by decisions of our system of courts and the effect of those decisions if they should be to his serious disadvantage. And, by fleeing the country and still prosecuting his appeal, he is wanting to seek the relief which is available from these courts, but without being prepared to submit B himself to them if he is unsuccessful."

See also *S* v *Moshesh & Ors* 1973 (3) SA 962 (AD) at 964B.

In order to determine whether the appellant is a fugitive from justice, it is necessary to examine the reasons given by him for his failure to return to the country. He advanced two main reasons. The first was the state of his health, C which allegedly made him unfit to travel; and the second was the fear associated with his personal security if he returned to the country. I shall deal with the two reasons in turn.

As far as the state of his health is concerned, the following averments appear in a statement annexed to the founding affidavit:

> D "In July and September 2000, the bail conditions were relaxed to allow Dr Sylow to travel overseas. … In October 2000, the Attorney-General for unknown reasons opposed further travel. The matter had to be brought before the High Court. After five hearings, where the State opposed Dr Sylow leaving the country, the High Court judge finally allowed further travel in November and December/January 2001.

E At this stage, nine months after the trial, the transcript was still not prepared. This deadlock, combined with the ever-deteriorating political and legal climate in Zimbabwe and the fear of political bias in his case, put Dr Sylow and his family in Geneva under considerable stress. Doctor Sylow found his health severely affected.

In January 2001, fearing that a mental breakdown was imminent, F Dr Sylow therefore travelled to Geneva to be with his family. He was already under the care of a clinical psychologist and his doctor, and taking medicines for acute depression. …"

It is clear from the above averments that the appellant left Zimbabwe in January 2001. This must have been before 10 January 2001, the date by which he was supposed to have returned to Zimbabwe and surrendered his passport to the G registrar. I say so because in his founding affidavit he avers as follows:

"11. … my condition worsened to such an point that on January 10, when I was supposed to return to Zimbabwe, as required by my bail conditions, I could not do so.

12. My state of health was at this stage very poor and I communicated this H to my legal practitioners in January 2001, after my arrival in Geneva,

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Sandura JA

to advise them about the situation and my incapacity to return to A Zimbabwe …"

Although the appellant does not indicate the date on which he left for Geneva, it must have been only a few days before 10 January 2001. In my view, before he departed he must have been aware that he was not going to return to Zimbabwe before 10 January 2001. He should, therefore, have discussed the B matter with his legal practitioner and instructed him to seek from the High Court an extension of the period of his absence from the country. The fact that he did not do so is significant.

Secondly, bearing in mind the appellant's allegation that before he left for Geneva he was under the care of his doctor and that of a clinical psychologist, and was taking medicines for acute depression, it is surprising that no medical C affidavits were annexed to the founding affidavit confirming those allegations. Instead, a copy of an undated medical certificate, issued by a doctor in Geneva, was annexed. The same doctor issued another certificate in May 2002, stating that the appellant's condition had not changed. The certificate was produced in the court *a quo* and was before this court. D

Thirdly, if it is true that shortly after his arrival in Geneva the appellant informed his legal practitioner in Zimbabwe, in January 2001, about the state of his health and his inability to return to Zimbabwe, it is difficult to understand why his legal practitioner did not file an affidavit confirming that. In addition, it is difficult to understand why the appellant's legal practitioner did not write to the Attorney-General in January 2001 informing him about the E appellant's inability to return. Instead, he first wrote to the Attorney-General about the appellant's ill health in March 2001, about two months after the date by which the appellant should have returned to the country.

In the circumstances, I am satisfied that the state of the appellant's health is not a valid reason for his failure to return to the country by 10 January 2001. F

I now wish to deal with the second reason advanced by the appellant for his failure to return to the country, which was fear for his personal security.

In a statement dated 30 April 2001, the appellant avers as follows:

"Doctor Sylow is now finding himself in a situation where a warrant of arrest is issued against him. He receives hate mail threatening him and his G family. His company has been robbed of all its funds and closed down. Friends and colleagues have been physically threatened and attacked and told not to assist him. His main accusers … appear to openly ally themselves with lawless elements, so far condoned by the political establishment and police, to extort money from Dr Sylow and further damage him and the Dental Clinic. In this climate and against the background of increasing lawlessness and the lack of police protection, H

2004 (1) ZLR p167

Sandura JA

A he fears that his return to Zimbabwe would place him in direct danger and be most prejudicial both to his safety and health."

In my view, the fear has been grossly exaggerated. The appellant could easily return to this country without being noticed B by any of the people he allegedly fears. In addition, he could stay in a hotel in Harare or elsewhere and wait for the determination of his appeal by the High Court, again without being noticed by any of the people he allegedly fears.

However, even if the appellant harboured the fear alleged by him, in my view, that would not assist him. It would simply show that the appellant had intentionally placed himself beyond the reach of the law.

Thus, in *Chetty* v *Law Society, Transvaal* 1983 (1) SA 777 (T), Chetty's fear C of harassment by the security police did not prevent the court from finding that he was a fugitive from justice. The facts in that case are set out in the headnote as follows:

> "The applicant was at the instance of the respondent Society struck off the roll of attorneys when he had failed to appear before the Council of the Society to answer certain complaints which had been levelled against D him. The Society learnt that the applicant had fled the country and was in the neighbouring State of Botswana en route to London. From the papers filed, it was apparent that he did not intend to return to the Republic. The applicant applied for the rescission of the judgment and order, and condonation of his failure to answer timeously the complaints levelled against him.
>
> E *Held*, that the applicant had become a fugitive from justice by putting himself beyond the reach of the law and therefore could not claim the protection of the court."

At 780A-C, O'Donovan J considered Chetty's fear of harassment by the police and said:

> F "The applicant denies having left the country to avoid the consequences of any misconduct on his part as an attorney. He has given a detailed account in the affidavit filed by him in support of the present application, of the harassment to which he says he was subjected at the hands of the Security Police and which he claims led to his decision to leave the country. It must, however, have been clear to the applicant that, through flight out of the G Republic, on the eve of a meeting that he had undertaken to attend, he would avoid the processes of investigation in which the Law Society was engaged, and any proceedings arising thereout, and the inference is in my view inescapable that this result was intended by him, whatever other factors may have motivated him."

I am, therefore, satisfied that the appellant did not advance any valid reason H for his failure to return to this country. The inescapable inference must,

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Sandura JA

therefore, be that he did not return because he intended placing himself A beyond the reach of the law so that if his appeal did not succeed he would not return to the country to serve the prison sentence. He is, therefore, a fugitive from justice, and the court *a quo* correctly declined to hear his appeal.

In the circumstances, the appeal is dismissed. B

Cheda JA & Gwaunza JA concurred.

Coghlan, Welsh & Guest, appellant's legal practitioners C

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S v MAKAMBA (1) 2004 (1) ZLR 169 (H)

Citation 2004 (1) ZLR 169 (H)

Case No Judgment No. HH-38-04

Court	High Court, Harare
Judge	Guvava J
Heard	15 February 2004
Judgment	15 February 2004
Counsel	*G V Mamvura,* for the applicant *R Gwatidzo,* for the respondent
Case Type	Urgent Chamber Application
Annotations	No case annotations to date

Flynote

Criminal procedure — *bail — accused appearing in court after High Court* C *order issued — accused must then be dealt with in terms of s 32 of Criminal Procedure and Evidence Act [Chapter 9:07]*

Statutes — *Presidential Powers (Temporary Measures) Act [Chapter 10:20] — regulations made under s 2 of Act — regulations amending Act of Parliament – validity of such regulations*

Headnote

D The applicant was arrested on currency charges. He was held by the police for longer than the maximum period allowed, and a court order was obtained that he should be taken to court for an initial court appearance, failing which he should be released. The magistrate before whom he appeared refused bail, on the grounds that an amendment to s 32 of the Criminal E Procedure and Evidence Act, effected by regulations made under the Presidential Powers (Temporary Measures) Act, precluded her from doing so. It was argued that as the applicant's appearance before the magistrate was as a result of a court order, s 32 did not apply. It was further argued that the regulations amending s 32 were invalid, as regulations cannot amend an Act.

F *Held,* that when the magistrate made her ruling, she clearly accepted that she was dealing with the applicant in terms of s 32. If the applicant disputed that, he should have appealed.

Held, further, that s 5 of the Presidential Powers(Temporary Measures) Act provides that regulations made under it prevail over any other law to the G contrary, except those made in terms of the Emergency Powers Act, hence the amendment to s 32 of the Criminal Procedure and Evidence Act is valid.

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Cases cited A

Forum Party of Zimbabwe & Ors v Min of Local Government & Ors 1997 (2) ZLR 194 (S)

S v Gatsi; S v Rufaro Hotel (Pvt) Ltd 1994 (1) ZLR 7 (H)

Sutter v Scheepers 1932 AD 165 B

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 32

Presidential Powers (Temporary Measures) Act [*Chapter 10:20*], ss 2(1), (2) & 5

Presidential Powers (Temporary Measures) (Amendment of Criminal C Procedure and Evidence Act) Regulations 2004 (SI 37 of 2004)

Case information

G V Mamvura, for the applicant

R Gwatidzo, for the respondent

Judgment

GUVAVA J: This is an application for bail which was brought on a certificate D of urgency. The certificate stated that the applicant had already been in custody for a period in excess of 96 hours, the period stipulated in the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act") and that therefore it warranted being dealt with on an urgent basis.

The facts which gave rise to this matter may be summarised as follows: E

The applicant is a businessman, a farmer, and a politician. He operates a chain of supermarkets, is non-executive chairman and non-executive director of Telecel Zimbabwe (Pvt) Ltd, a telecommunications company. He is also an ex-member of Parliament for the Mount Darwin Constituency and an ex-chairman for the ruling party for the Mashonaland West Province. The applicant is charged with contravening s 5(1)(a)(i) of the Exchange Control F Act [*Chapter 22:05*]. He has been charged both in his representative and personal capacity. The applicant, in his representative capacity, is alleged to have on 45 separate occasions issued cheques in respect of foreign currency purchased from persons who are not registered dealers. The Company is not a registered dealer. On 11 separate occasions the applicant is alleged to have G sold foreign currency to Telecel Zimbabwe (Pvt) Ltd. The applicant was not a registered foreign currency dealer. The applicant is also alleged to have opened a foreign currency account with NedBank in Sandton Johannesburg without the requisite exchange control authority. Further allegations against him are that he illegally exported maize to South Africa. He would then cause the proceeds of the sale to be banked in a Telecel Zimbabwe (Pvt) Ltd foreign H

A currency account in Luxembourg. The applicant was arrested on 8 February 2004. He was thereafter held in police custody until 14 February 2004 when this court granted an order that the applicant be taken "for initial court appearance by 12:00 noon on 14 February 2004". The court also ordered that in the event that the applicant was not taken to court he should be released. The applicant was thus taken to court and placed on remand. At the hearing the B learned magistrate who was seized with the matter indicated that she had no jurisdiction to grant the applicant bail because of a statutory instrument which had just been promulgated by way of an extraordinary government *Gazette.*

At the beginning of the hearing Mr *Gwatidzo* for the respondent conceded that the application was urgent. I was satisfied that this concession was properly C made in view of the lengthy period of incarceration of the applicant before he was placed on remand. In my view this distinguished this case from the usual bail applications which are dealt with by this court and thus warranted the urgent intervention of this court.

On the merits Mr *Mamvura* submitted three grounds in support of his argument that the applicant should be released on bail. He submitted firstly, D that the State had not alleged in its response nor in the form 242 that the applicant may abscond or interfere with witnesses .He thus submitted that there was no ground for denying the applicant bail. Secondly, he submitted that the applicant was not placed on remand in terms of s 32 of the Act but pursuant to a court order. He thus argued that since the application was not made in terms of that section, the provisions of the Presidential Powers E (Temporary Measures) (Amendment of Criminal Procedure and Evidence Act) Regulations, 2004 (SI 37 of 2004) ("the Regulations") which sought to amend subs (2) of s 32 of the Act did not apply. Finally he submitted that in any event the Regulations, being subsidiary legislation, could not amend a provision in an Act of Parliament.

F I propose to deal with each of the issues raised. I will however begin with the issue of whether or not the applicant was placed on remand in terms of a court order or in terms of s 32 of the Act as amended, as this will determine whether this court has jurisdiction to deal with the application for bail.

The order granted by Chitakunye J stated as follows:

G "The respondent shall take the applicant for initial court appearance today 14 February 2004 by 12:00 noon. Failing which the applicant shall be released by 12:30 pm today 14 February 2004."

The application before Chitakunye J was for the release of the applicant from police custody. A perusal of the record shows that the complaint related to the fact that the applicant had been kept in custody for a period in excess of that H prescribed by law. In fact the applicant had been unlawfully held for a period

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Guvava J

in excess of 96 hours. In his ruling he found that the warrant for further A detention obtained on 14 February 2004 was unlawful and that the respondents were not entitled to continue holding the applicant without bringing him to court. From the reasons given in his ruling this order was made in accordance with section 32 of the Act.

The court in its ruling clearly did not order that the applicant be placed on B remand. Indeed it could not do so as that application was not before it.

It is not in dispute that when the applicant was taken to the magistrates court later in the day the magistrate seized with the matter ruled that she had no jurisdiction to deal with an application for bail because of the provisions of the new Regulations. In my view this was a clear acceptance by the court that C the applicant was being placed on remand in terms of s 32 of the Act as amended by the new Regulations. It appears to me that the applicant did not take issue with this finding by the B learned magistrate as he would have sought to appeal against that ruling. The applicant has not done so but has sought to challenge this in his submissions before me. In my view, in this application, I cannot revisit the basis upon which the applicant was placed on remand. That D would be the subject of an appeal which is not what has been brought before me. Clearly in my view the applicant was detained in terms of s 32(2) of the Act as amended by the Regulations.

I turn now to the provisions of the Regulations and the relevant provision provides as follows: E

> "2. Section 32 ("Procedure after arrest without warrant") of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is amended in subsection (2) by the repeal of the proviso thereto and the substitution of –
>
> "Provided that if the person arrested without warrant is charged with any offence referred to in paragraph 10 or 11 of the Third Schedule –
>
> (a) the judge or magistrate before whom he is brought in terms of this F section shall not decline to order his further detention or to issue a warrant for his further detention solely on the basis that there are no *prima facie* grounds for the charge, and no court shall admit such person to bail for a period of seven days from the date when an order or warrant for his further detention was issued in terms of this paragraph; or G
>
> (b) and the judge or magistrate before whom he is brought in terms of this section is satisfied that there are *prima facie* grounds for the charge, the judge or magistrate shall order his further detention or issue a warrant for his further detention for a period of twenty-one days (unless the charge is earlier withdrawn), and no court shall admit such person to bail for a period of fourteen days from the date when an H

Guvava J

> A order or warrant for his his further detention was issued in terms of this paragraph."

My understanding of the provision is that para (a) of subs (2) of s 32 takes away the discretion of the magistrate or judge before whom a person is brought on initial remand to refuse to detain that person solely on the basis that a *prima facie* case has not been established. It also prohibits that court from granting B such a person bail for a period of seven days. In terms of paragraph (b) of the provision, where the court finds that a *prima facie* case has been established for the charge, it shall order his further detention or issue a warrant for his further detention for a period of 21 days. The provision also provides that no court shall admit such person to bail for a period of 14 days. Thus a court dealing with an initial remand would proceed in terms of either paragraph (a) B or (b). In this case the record of proceedings has not been made available to me and I am thus unable to determine whether the trial magistrate proceeded in terms of paragraph (a) or (b).

Mr *Mamvura* submitted that in the event that this court finds that the remand was in terms of the Regulations, the provisions of the Regulations were D unlawful as they sought to amend an Act of

Parliament. It was also submitted that they were invalid as they contradicted the provisions of s 116 of the Act which grants this court the right to admit any person to bail in respect of any offence.

I however do not find any merit in this argument. The Regulations were made E in terms of the Presidential Powers (Temporary Measures) Act [*Chapter 10: 20*] ("The Presidential Powers Act"). This is a unique Act as it gives to the President the authority to make law, a power which is ordinarily exercised by Parliament.

Section 2 of this Act provides as follows:

> "2.Making of urgent regulations
>
> F (1) When it appears to the President that –
>
> (a) a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and G
>
> (b) the situation cannot adequately be dealt with in terms of any other law; and
>
> (c) because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation;
>
> then, subject to the Constitution and this Act, the President may make H such regulations as he considers will deal with the situation.

Guvava J

> (2) Regulations made in terms of subsection (1) may provide for any matter A or thing for which Parliament can make provision in an Act:

Provided that such regulations shall not provide for any of the following matters or things –

(a) authorizing the withdrawal or issue of moneys from the Consolidated Revenue Fund or prescribing the manner in which withdrawals may be B made therefrom; or

(b) condoning unauthorized expenditure from the Consolidated Revenue Fund; or

(c) providing for any other matter or thing which the Constitution requires to be provided for by, rather than in terms of, an Act; or C

(d) amending, adding to or repealing any of the provisions of the Constitution.

In my view these Regulations are different from subsidiary legislation which may be made, for instance, by the Minister for Justice, Legal and Parliamentary Affairs in term of s 389 of the Act. In terms of s 2(2) of the Presidential Powers Act regulations made in terms of this Act may provide for any matter or thing D for which Parliament can make provision in an Act of Parliament. There are, however, a few exceptions which are outlined in the proviso but these are not relevant to the case before me. It is clear to me therefore that the Regulations which were published in Statutory Instrument 37 of 2004 may amend an existing Act of Parliament. (See *S* v *Gatsi; S* v *Rufaro Hotel (Pvt) Ltd* 1994 (1) ZLR 7 (H) and *Forum Party of Zimbabwe & Ors* v *Minister of Local* E *Government, Rural and Urban Development & Ors 1*997 (2) ZLR 194 (S).

The submission, too, that the Regulations are invalid because they are contrary to the provisions of s 116(1)(a) of the Criminal Procedure and Evidence Act does not have merit. Section 5 of the Presidential Powers Act provides that regulations made in terms of that Act shall "to the extent of any inconsistency prevail over any other law to the contrary, apart from regulations made in terms F of the Emergency Powers Act [*Chapter 11:04*]." Thus the provisions of the Regulations would prevail in this case.

It is clear therefore that having found that the applicant was placed in detention in terms of s 32 of the Act as amended by the Regulations this court does not have jurisdiction to determine an application for bail in respect of this matter. G The provisions in the Regulations clearly state that no court shall admit a person to bail who has been placed in detention in terms of the provision and whose offence is an offence in terms of paras 10 and 11 of the Third Schedule. These provisions are clearly peremptory provisions, particularly if one has regard to the wording and the test which was laid out in the case of *Sutter* v *Scheepers* 1932 AD 165. Indeed no submission was made that the provision H

Guvava J

A was not peremptory. The applicant is facing the charges referred to and thus falls within the ambit of these provisions.

Accordingly the application is hereby dismissed.

Scanlen & Holderness, applicant's legal practitioners.

B *Attorney-General's Office,* respondent's legal practitioners.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/S v KELLY 2004 (1) ZLR 176 (H)

S v KELLY 2004 (1) ZLR 176 (H)

Citation	2004 (1) ZLR 176 (H)
Case No	Judgment No. HH-33-04
Court	High Court, Harare
Judge	Mungwira J & Uchena J
Heard	18 February 2004
Judgment	18 February 2004
Counsel	*L Mazonde*, for the appellant *R Tokwe*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *general principles — factors to be taken into account — views expressed by complainant as to what sentence* C *should or should not be imposed — such views to be given proper weight*

Headnote

The appellant was convicted of theft from his employer, who produced various foodstuffs. The appellant was a despatch clerk/operations manager. Over a period he stole some 3.5 tonnes of foods, some, at least, of which D was classed as not fit for human consumption. The precise value of the goods was not established accurately. At some stage during the trial the complainant intimated that it was not his desire that the appellant should be imprisoned. The appellant was nonetheless sentenced to five years' imprisonment, of which three years were suspended on condition the appellant paid a specified sum of money as restitution and a further year E was suspended on conditions of good behaviour.

Held, that the sentence was not justifiable and was out of line with sentences imposed in similar cases. The value stolen could by no stretch of the imagination be said to warrant a suspended

sentence of three years on condition of restitution.

Held, further, that the attitude of the complainant in a criminal case is relevant F to sentence. Where the complainant indicates that it is not his desire to have the accused incarcerated, a sentencing authority ought to attach weight to the expressions of the complainant, as such a factor has an impact on the form of sentence imposed. The trial magistrate's failure to take the complainant's attitude into account was a misdirection. G

Cases cited

S v Chamunorwa 1993 (2) ZLR 49 (H)

S v Chikopa 1984 (1) ZLR 209 (S)

S v Chiwoko & Anor 1989 (2) ZLR 364 (H)

*S v Mademb*o *& Anor* 2003 (1) ZLR 137 (H) H

S v Mapuka HH-232-98

Mungwira J

A *S v Tami & Ors* 1983 (1) ZLR 246 (H)

S v Tivafire 1999 (1) ZLR 358 (H)

Case information

L Mazonde, for the appellant

R Tokwe, for the respondent

Judgment

B **MUNGWIRA J:** The appellant was convicted by the magistrate, Harare of theft from his employer of chicken and fish valued at $219 000.

Upon convicted he was sentenced to a prison term of five years of which three years' imprisonment was suspended on condition the appellant effected restitution to the complainant in the sum of $219 000. Another year was C suspended on the usual conditions of good behaviour. The result was that the appellant if he complied with the conditions of suspension, would serve an effective sentenced of one year's imprisonment.

The appellant initially lodged an appeal against both conviction and sentence but at the hearing abandoned his appeal against conviction.

The grounds of appeal against sentence are that the sentence imposed is so D manifestly excessive as to induce a sense of shock.

It was submitted on behalf of the appellant that the theft was not pre-meditated and that at most the appellant, motivated by greed, acted on the spur of the moment. He, it is said, stole from his employer after realising that he could make money out of the portion of goods which was classified as being unfit E for human consumption and realised a profit of only $11 000.

This court was urged to take into account the fact that about half, if not most, of the goods stolen was destined for destruction and further that the appellant gave away about l½ tonnes of the goods. It is the appellant's argument that the court *a quo* disregarded the complainant's evidence to the effect that had the approximately 3½ tonnes of goods stolen been considered unfit for human F consumption the residual value thereof would be in the region of $20 000. That being the case, the appellant submitted that a heavy fine coupled with an order of restitution of about $11 000 would have met the justice of the case.

The State in its submissions argued that, while the issue of sentence is essentially one for the discretion of the trial court, there are, in the instant case, G several factors which militate against the imposition of a custodial penalty.

The first factor advanced is the spiraling rate of inflation which has eroded the value of money. According to the respondent, the amount involved is such that the decision to impose an effective

custodial penalty was not warranted.

The respondent further highlighted that the trial magistrate failed to accord H due weight to the fact that the complainant had indicated that in reporting the

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Mungwira J

matter it was never his intention or desire that the appellant be incarcerated. A That factor, had it received due consideration, would have, it was submitted, had an impact on the form of or nature of sentence meted out.

In addition, the State indicated that account should have been had of the fact that one of the consequences of the commission of the offence was that the appellant lost his employment: see *S* v *Ndlovu* HH-32-82. The respondent B further urged this court to take note of the fact that after conviction and sentence and before the grant of bail pending appeal, the accused served a portion of the sentence imposed. The position adopted by the respondent in this regard is that it is undesirable to send back to prison a man who has already served a portion of his sentence, particularly in circumstances where he or she has subsequently obtained steady employment. C

The interests of society can, the respondent contends, be served by imposing an alternative form of punishment in the form of a heavy fine, a portion of which can be suspended on appropriate conditions of good behaviour or, alternatively, community service.

The first issue I shall deal with, and which emerges from perusal of the record D of proceedings, is that of the quantum of restitution. The evidence adduced in respect of quantum, from our observation, appears to have been inconclusive.

In *S* v *Tivafire* 1999 (1) ZLR 358 (H), Chinhengo J indicated that unless a judicial officer is in a position to ascertain the liability of the convicted person to pay compensation and, unless the quantum of compensation is readily E ascertainable, it would not be proper to proceed under s 358(3)(b) or s 358(3)(h) in any case in which compensation must, if properly quantified, be payable: see *S* v *Chiwoko* 1989 (2) ZLR 364 (H); *S* v *Mapuka* HH-232-98.

It is in the *Tivafire* case further stated that the court must always make an order in the correct amount (*see S* v *Tami & Ors* 1983 (1) ZLR 246 (H) at 247H) and that where the correct amount cannot be ascertained or assessed, as would be F the case if the court acted in terms of s 358 (3)(b) of the Criminal Procedure and Evidence Act, where personal injuries are involved prejudice is likely to be caused to both the convicted person and to the victim of his offence. In respect of the convicted person, prejudice may arise, for instance, from ordering him or her to pay a high amount as compensation which may not be G justified. In respect of the victim, prejudice which may arise in that the order may stipulate a lesser amount than that which is justified, that is the correct amount in the circumstances.

Both counsel for the appellant and the respondent conceded that although the loss in this matter is purely pecuniary the amount awarded as compensation was on the available evidence speculative. H

Mungwira J

A Whilst it is common cause that the appellant effected an unlawful removal of goods from his employer's premises the evidence reveals that the matter proceeded on the basis of approximations. Whilst in the normal course this state of affairs might have compelled us to set aside the order, in the circumstances of the present case, the complainant does not appear to have taken issue with the award and, acting on the basis of the calculations B advanced on behalf of the appellant, there is no evidence and neither has any compelling argument been advanced that prejudice has been occasioned to either the complainant or the respondent.

It has been drawn to our attention by counsel for the appellant, and confirmed by counsel for the respondent, that restitution has since been effected in the amount ordered.

G I must confess that I found this to be a rather strange case in that, whilst the arguments advanced on behalf of the appellant were, for the most part, lacklustre and not compelling, it is the respondent which saw fit to robustly take up the cudgels on behalf of the appellant. I say so, however, in full appreciation of the role of counsel for the State in cases of this nature.

D I would dismiss on the turn the submission that the offence was not premeditated and was committed on the spur of the moment. The circumstances of the commission of the offence belie that fact. The appellant was employed as a dispatch clerk/operations manager by the complainant. He thus held a fairly senior position. He was responsible for maintaining controls and checks on E goods leaving his employer's premises and was familiar with, amongst other things, the relevant dispatch procedures. In order to commit the offence, he needed to mobilise several junior members of staff to remove the goods from various freezers and he needed a sizeable vehicle for transport given the quantity involved. In addition, there were certain hurdles which he had to overcome, such as the independent security check. It is also, in my respectful F opinion, hardly likely that he would have taken the chance of moving that quantity of perishable items without being assured of a market, his intention being to profit from the sale thereof. The whole scenario smacks of pre-planning. In light of the aforegoing, it is, in my view, inconceivable that the appellant acted on the spur of the moment.

There is no substance in the argument that a substantial portion of the goods G taken was due for destruction and as such that the stolen goods were virtually worthless. As a matter of fact, the evidence adduced revealed that the bulk of goods taken could be classified as fit for human consumption, with only a very small proportion – in the region of 300 to 350 kg – being classifiable as "bad". H Even if it were the case that the bulk was unfit for human consumption, the fact

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Mungwira J

remains that the appellant did not have the right to determine for the A complainant the mode of disposal.

The appellant's argument that most of the goods were not fit for human consumption falls flat on its face when confronted with the incontrovertible evidence that, although that may well have been the case, the goods were of an ascertainable commercial value. It was up to the complainant to elect to sell B to certain customers, return the goods for conversion to pet food or to order destruction. The appellant at no stage pleaded or expressed ignorance of the procedures pertaining to destruction. The bottom line is that the complainant sustained a significant loss. Not much weight can be attached to the appellant's assertion that his sole profit was an insignificant sum of $11 000. That was a risk that he took and it does not minimise his high level of moral C blameworthiness.

His loss of employment would undoubtedly occasion hardship to the appellant and his kin, but again I do not believe that given the circumstances of the commission of the offence undue weight should be placed on that as a mitigatory factor. D

The period of barely a week spent in custody, pending the grant of bail after conviction and sentence, is negligible and there is no merit to the unsolicited concession made by the respondent in this regard.

There can be no doubt that the appellant's conduct falls within the category of what would be classified a serious offence. In *S* v *Chamunorwa* 1993 (2) ZLR 49 (H), it was stated that, with the alarming increase in thefts of property E and money involving higher and higher values or amounts, society obviously looks to the courts to impose severe sentences to deter persons from committing such offences, but that the question of sentence remains a difficult one for the court. The need to balance the interests of society, which require severe sentences for those who breach the trust placed in them, and the interests of the offender, which are opposed to those of the society, and which two F interests appear irreconcilable is brought to the fore in *S* v *Chitoka* 1984 (1) ZLR 209 (S).

In the *Chamunorwa* case *supra*, it was pointed out that the courts cannot be expected to apply some sort of yardstick whereby they simply increase the effective sentence of imprisonment in proportion to the increasing value of the G property or money stolen lest the courts fall into the danger of coming up with sentences which will be solely destructive of and soul-destroying for the convicted person.

Whereas there is very little that one might find in favour of the appellant —and we were not impressed with most of the arguments advanced on his behalf by both sides — there is, however, clearly a glaring misdirection in the H

Mungwira J

A sentence imposed by the trial court. Given the quantum involved and the nature of the offence, a sentence of five years' imprisonment, albeit with portions suspended on certain conditions, is not justifiable and is way out of line with sentences imposed in similar cases. The amount involved can by no stretch of the imagination be said to warrant a suspension of three years' imprisonment on condition of restitution. The period of imprisonment is glaringly B disproportionate to the prejudice suffered. Sight should also not be lost of the fact that the court in this case was dealing with a first offender.

The judgment of Chinhengo J in *S* v *Madembo & Anor* 2003 (1) ZLR 137 (H) provides useful guidelines on the approach to sentence in matters such as the present. Unlike in previous cases in which the issue of the value of money has been addressed, the learned judge in this particular matter reviewed past B sentences based on concrete data in the form of cost of living indexes.

Another shortcoming which I observed is the dismissive attitude of the trial magistrate to the submission in mitigation, to the effect that the complainant had indicated that it was not his desire to have the appellant incarcerated. Although I was not able to trace anywhere in the record of proceedings where D this is stated by the complainant, judging from the remarks of the magistrate and the prosecutor in response to the submission, it would appear that this was common cause. I have here no hesitation in agreeing with the respondent's submission that in as much as one appreciates that crimes are generally committed against the State, a sentencing authority ought to attach weight to the expressions of a complainant as such a factor has an impact on the form E of sentence imposed.

Had this submission received proper consideration I have no doubt that the trial court might have reached a different conclusion. The failure to do so is a patent misdirection.

Bearing in mind the foregoing, that the appellant has since obtained stable F employment and compensation having been effected I am satisfied that interference is warranted.

In the result, the appeal against conviction is dismissed. The appeal against sentence succeeds in that the sentence imposed by the trial court is set aside and the following is substituted:

> "The appellant is to pay a fine of $250 000 or in default of payment G eighteen months' imprisonment. In addition, ten months' imprisonment is suspended for four years on condition that the appellant does not within that period commit any offence involving dishonesty and for which he is sentenced to imprisonment without the option of a fine."

H Uchena J concurred**.**

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/WOMEN AND LAW IN SOUTHERN AFRICA RESEARCH AND EDUCATION TRUST & ORS v MANDAZA 2004 (1) ZLR 182 (H)

WOMEN AND LAW IN SOUTHERN AFRICA RESEARCH AND EDUCATION TRUST & ORS v MANDAZA 2004 (1) ZLR 182 (H)

Citation	2004 (1) ZLR 182 (H)
Case No	Judgment No. HH-35-04
Court	High Court, Harare
Judge	Hungwe J

Heard 17 December 2003

Judgment 18 February 2004

Counsel *Coghlan, Welsh & Guest*, applicant's legal practitioners
Honey & Blanckenberg, respondent's legal practitioners

Case Type Chamber application

Annotations No case annotations to date

Flynote

Appeal — *noting of — effect — suspension of judgment appealed against — discharge of provisional order — appeal against discharge — whether noting of appeal revives interim relief granted with provisional order*

Spoliation — *what is — manager of premises locking out persons employed* D *on premises — whether amounts to spoliation*

Headnote

Where an interim interdict has been granted pending confirmation of a provisional order, and the order is subsequently discharged, the interdict comes to an end. If an appeal is noted against the discharge of the provisional order, the appeal does not revive the provisional order or the E interim interdict. A party who wishes the interdict to continue pending appeal must make a fresh application for it.

In the course of a dispute over control of the applicant trust, one of the contending parties (the respondent) physically prevented the staff of the trust from entering the trust's premises and working there. She justified her action by relying on a judgment given in her favour on the merits of F the dispute; that judgment, however, was subject to an appeal. The applicants sought an order restoring the *status quo ante* pending final settlement of the dispute, contending that the respondent's action amounted to spoliation.

Held, that the applicants did not have to address the merits of the dispute since spoliation is predicated on the need to discourage people from G taking the law into their own hands. The respondents were entitled to the order they sought.

2004 (1) ZLR p183

Hungwe J

Cases cited A

Ismail v Keshavjee 1957 (1) SA 684 (T)

S A B Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd 1968 (2) SA 535 (C)

Sirioupoulos v Tzerefos 1979 (3) SA 1197 (O)

Judgment

B **HUNGWE J**: This matter came under a certificate of urgency.

The urgency arose out of the following events. The first and second applicants filed for 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 *Women & Law in Southern Africa Research and Education Trust & Ors* v *Mandaza & Ors* HH-71-03. On the return day, the matter was C argued before Chinhengo J who, on 26 November 2003, rendered judgment, which judgment was only available on 6 December 2003. He discharged the provisional order in *WLSA & Ors* v *Mandaza & Ors* HH-202-03 on the basis that had the allegations set out in HH-71-03 been true, then there would have been no basis for the applicants seeking an order which they obtained in D HH-98-03. The point made there is this. In HH-71-03, the first and second applicants had obtained an order

effectively barring the respondent from transacting any business on the accounts held by WLSA. Having obtained such an order, the same parties approached this court seeking another order whose effect was to join another signatory to the WLSA bank accounts to the existing panel which comprised the respondent and her appointee Laura H Harrison. There has been no explanation as to the allegation that the respondent was abusing WLSA funds, which was the basis upon which the earlier order had been obtained. The learned judged gave other reasons for his order discharging the provisional order.

In the present application, the following is important to note: F

1. Elizabeth Shongwe, who claimed to be chairperson and Trustee in HH-202-03, is not part of this new application.
2. One Theresa Moyo and virtually all the staff in the employ of WLSA filed this application.
3. They all claim to have been despoiled by the respondent and seek an order G confirming the *status quo ante*.

The issue before me is in my view whether the respondent is entitled to lock out everyone from the premises of WLSA.

Theresa Moyo, the trustee, sets out the position thus. On 10 December 2003, the respondent caused guards from Beecon Security to physically bar all staff H and her from entering the premises at 16 Lawson Avenue, Milton Park, Harare.

Hungwe J

Up to that date, they had enjoyed peaceful and undisturbed occupation and A possession of the said premises. She says the respondent had no right to act in this way unless she was armed with a lawful order of court to that effect.

The respondent raised various reasons for her action in her opposing affidavit. She challenged the *locus standi* of Theresa Moyo and the rest of the applicants who, she says, only enjoyed a right of entry to the premises at the absolute B discretion of WLSA, their employer.

As against the third applicant, the respondent points to a letter she addressed to her suspending her from employment with WLSA way back in February 2003. Her status is pending determination in the Labour Court. As such, she has no cause of complaint and is not entitled to the relief she seeks against the respondent. Similarly, the fifth respondent's *locus standi* is challenged on the C further basis that the respondent had addressed to her a letter of suspension on 9 December 2003. As the matter of suspension is pending in the appropriate forum, she has no *locus standi* to mount this application. At the hearing, the applicants applied to file a supplementary affidavit as well as an amended draft interim order. D

The reasons for this new position was that as the respondent contended that an appeal against the order of Chinhengo J did not suspend that order, it was therefore necessary to seek a new order interdicting the respondent from transacting on WLSA accounts.

The matter before me is twofold. The original papers were confined to an order E restoring the *status quo ante*. That order was being sought by the *spoliatae* as against the spoliator. It was confined to maintaining the respective parties' previous positions. It did not address the respective rights on the merits. It did not need to. Spoliation is predicated on the need to discourage people taking the law into their own hands. Thus, it is said, theoretically a thief ought to succeed should the owner resort to self-help and vindicate his stolen property F without recourse to due process. A *Mandament van spolie* protects possession. In order to succeed, an applicant for an order *mandament van spolie* only needs to show, firstly, that he was in possession of the thing and, secondly, that he was unlawfully deprived of such possession.

The amended papers brought into focus the interests of WLSA as a legal G *persona* in the sense that it can sue and be sued in its own right. As a trust it acts through the medium of its trustees. Theresa Moyo on behalf of the Trust expresses the fear of financial ruin that might befall the Trust should an interim interdict not be granted. The nature of the relief sought in the amended draft order is such as would preserve the *status quo* until such time each party's rights are defined and pronounced. H

Hungwe J

A I am aware that the status of each of the applicants except WLSA is challenged and that there has been no answering affidavit to the opposing affidavit. I am also aware that the decision relied upon by the respondent for her action at Lawson Avenue is under appeal.

At this point I have to decide whether the effect of that appeal is to suspend the judgment appealed against and thereby revive the provisional order of B Smith J in HC-71-03.

It appears settled now that the granting of an interim relief as an adjunct to a rule *nisi* calling upon a party to show cause why an interdict should not be granted is well known. The purpose of such an order is to ensure that, pending a full investigation of the matter by the court, the wrong complained of should C not be committed and continued. Such a provision of an interim interdict is always intended to operate pending the decision of the application on the return day of the rule *nisi.* When therefore the rule *nisi* is discharged the interim relief granted comes to an end: see *S A B Lines (Pty) Ltd* v *Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C); *Ismail* v *Keshavjee* 1957 (1) SA 684 (T) at 688; *Sirioupoulos* v *Tzerefos* 1979 (3) SA 1197 (O).

D In terms of common law, the noting of an appeal suspends the judgment appealed against. But what effect does it have where, as here, the order appealed was one discharging a provisional order? It seems to me that the proper approach for this court to take is that adopted by the South African courts (Uniform Rules of Court, r 49). An interpretation given to that rule in E the case law indicates that unless a fresh application for an interim interdict is made, the appeal does not revive a discharged provisional order or interim interdict.

The applicants have urged the court to issue a fresh interim interdict whose affect would be the same as that which has been discharged, on the basis that the respondent's actions amount to spoliation. To my mind, the applicants are F entitled to the order they seek. No matter how justified at law the respondent believes she is, she certainly is not entitled to take the law into her own hands. This is what she did.

Pending the determination of the appeal, the applicants are granted the interim relief as appears in the amended draft.

G Costs to be costs in the cause.

Coghlan, Welsh & Guest, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/TM SUPERMARKET v MANGWIRO 2004 (1) ZLR 186 (H)

TM SUPERMARKET v MANGWIRO 2004 (1) ZLR 186 (H)

Citation	2004 (1) ZLR 186 (H)
Case No	Judgment No. S-57-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Gwaunza JA
Heard	3 November 2003
Judgment	23 February 2004

Counsel *L T Biti*, for the appellant
S Mushonga, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Employment — *appeal — under Labour Act — against decision of Labour Court — appeal only on question of law — what is a question of law —* C *misinterpretation of facts or basing conclusion on non-existent facts a question of law*

Headnote

An appeal to the Supreme Court against a decision of the Labour Court may only be made on a question of law, which means, among other things, any D question which is within the province of a judge instead of the jury. The determination of whether or not a function that was delegated to an employee was one that could be delegated is a question of law. A misinterpretation of the facts can also amount to a question of law, as can the basing of a conclusion on non-existent facts. E

Cases cited

Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A)

Muzuwa v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (S)

National Foods Ltd v Magadza S-105-95 F

Reserve Bank of Zimbabwe v Granger & Anor S-34-01

Case information

L T Biti, for the appellant

S Mushonga, for the respondent

Judgment

GWAUNZA JA: The appellant appeals against an order of the Labour Court, G which gave it the option to either reinstate the respondent without any loss of benefits, or pay him damages in lieu of reinstatement.

The facts of the matter are as follows: The respondent was employed as a branch manager by the appellant, which operates a chain of supermarkets throughout the country. In December 1998, the appellant was charged with and found guilty of conduct, acts or omissions inconsistent with the fulfilment H

Gwaunza JA

A of the expressed or implied terms of his contract. He was subsequently dismissed from his employment.

The details of the conduct of which he was found guilty are contained in his letter of dismissal and are cited as follows in the judgment of the court *a quo*:

> "1. He failed to discover and investigate three missing reset numbers. (one that occurred between 20 and 31 October 1998 and two on B consecutive weeks between 10 and 25 November 1998). The total cash lost by the company from one till operator was $24 896.67.

2. He did not timeously take disciplinary action against eight till operators with huge cash shortages in one week totalling $6 721.14 (see the attached auditor's report for the breakdown). C
3. He failed to adhere to basic administrative systems and procedures stipulated for controlling and managing cash generated at the branch. His failure to adhere to stipulated systems resulted in the loss to the company of a total of $69 975.11.
4. He failed to ensure proper filing and storage of till audit rolls and DBS printouts. Some audit rolls and DBS printouts were missing on 15 December 1998 when I was carrying out investigations and are D still missing to date."

The letter from the appellant, in which these charges were laid out, had the following conclusion:

> "Cash management is critical to the success of our business. Mr Mangwiro had abdicated critical controls notwithstanding the fact that he was E instructed to handle such very important aspects of control himself. The degree and extent of his ineptitude coupled with the consequential loss suffered by the company were found to be acts, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract of employment. Therefore, his blatant abdication and negligence of critical controls of our business could not be condoned."

F Mr *Biti* for the appellant contends the decision of the court *a quo* on the various counts with which the respondent was charged were wholly questions of law and that therefore the appeal is properly before this court.

Mr *Mushonga*, for the respondent, argues on the other hand that there were no issues of law arising in the grounds of appeal cited by the appellant. Further, G that even were this court to arrive at a different conclusion on the facts placed before the court *a quo,* it would still have to determine whether the decision of the court *a quo* was so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided, would have arrived at it.

This court must therefore first determine whether the appeal is properly H before it.

2004 (1) ZLR p188

Gwaunza JA

It is trite that an appeal from the labour court to this court can only be on a point A of law. (See the numerous authorities on the determination of what constitutes a point of law, that include *Muzuwa* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S), *National Foods Ltd* v *Magadza* S-105-95 and *Reserve Bank of Zimbabwe* v *Granger & Anor* S-34-01.)

Mr *Biti* submits, in relation to the first charge brought against the respondent, B that the court *a quo* misdirected itself on a question of law in two ways;

(i) by determining that the task in question was one that could be delegated; and
(ii) by making a finding of fact to the effect that the respondent's role was restricted to "spot checks" when his job description specifically provided C that the responsibility to record the till resets was his (i.e. branch manager's) personally.

As far as the issue of delegation of the responsibility in question is concerned, I am persuaded by the appellant's contention that the determination of whether or not the function in question was one that the respondent could delegate was a question of law. In *Media Workers Association of South Africa and Others v* D *Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A), the learned judge pointed out that the term "question of law" is used in three distinct though related senses. In relation to the third sense, he stated:

> "… and third, any question which is within the province of a judge instead of the jury is called a question of law." E

I am satisfied the determination, based on an interpretation of the provision in question, of whether or not the respondent could delegate the task in point, properly falls "within the province of a judge."

The evidence before the court shows that the respondent's responsibilities in respect of re-set numbers mentioned in the first charge brought against him were explained during the proceedings in the court *a quo*F .

The relevant paragraph of the TM Management Controls Manual was read to the court *a quo*, as follows:

> "Reset numbers are recorded separately in a book by the Branch Manager and cross-checked with the weekly Balance Summary."

By his own admission, the respondent did not personally record the till reset G numbers in a Tills Reset Control Book, as required, but delegated the function to one of his subordinates. He thereafter failed to follow the matter up to ensure that the task had been properly carried out. One result of this delegation of responsibilities was that the appellant was defrauded of the amount referred to. H

2004 (1) ZLR p189

Gwaunza JA

A Given the facts placed before the court on that charge, it is evident that the court *a quo* did not give due weight to the clause in the appellant's manual that set out the function that the respondent was to personally carry out. This is evident from the court's assessment of this charge, where it is noted as follows in the judgment:

> "I find it incredible and highly improbable that the Branch Manager could B have been required to scrutinize the work of till operators when there were supervisors and section managers to do the job. It sounds more probable and reasonable to this Tribunal that it was the responsibility of supervisors and section managers to scrutinise the work of till operators and draw any irregularities to the appellant's attention. In the circumstances I believe the appellant when he says his roll (*sic*) was restricted to carrying out spot C checks which were not meant to unearth all anomalies and irregularities."

Mr *Biti* contends, correctly, in my view, that contrary to this assessment, the responsibility in question was not about scrutiny or spot checks, but about who recorded the till resets. The manual was very specific as to who was to shoulder this responsibility. It was the manager. Therefore, the question of it being "probable" that supervisors were to do it, did not arise.

D I am also persuaded by the contention that the court *a quo* in this particular respect misinterpreted the evidence placed before it. This court has held, in *Reserve Bank of Zimbabwe* v *Granger supra* that such a circumstance amounts to a misdirection in law. At p 6 of that judgment, Muchechetere JA stated as follows:

> E "And a misdirection of fact is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented."

This authority, I find, is apposite *in casu*. The court *a quo* took the view that the responsibility in question entailed simply checking the resets and not recording the reset numbers. The evidence makes it clear this was not so. The F misdirection of the court is thus evident.

The other charges brought against the respondent put in question his style of management in relation to:

(i) the extent to which he supervised the work of various levels of subordinates working under him.

(ii) the determination of what responsibilities to delegate, and to whom and G

(iii) the actions he was expected to take to ensure that those subordinates who stole from the supermarket or otherwise failed to perform to expectation, were disciplined.

I find merit in the appellant's submission that the decision of the court *a quo* H on these issues was on points of law.

2004 (1) ZLR p190

Gwaunza JA

Lastly, the appellant takes issue with the decision of the court *a quo* that even A if there was admitted negligence on the part of the respondent, that alone was not enough to justify his dismissal. The contention is made for the appellant that the respondent was not charged with negligence, but with conduct inconsistent with the implied or express terms of his employment contract. As a result, the appellant contends, the determination by the court *a quo* that B negligence was not a basis for the respondent's dismissal was a 'serious misdirection'.

I have no doubt that the basing of a conclusion on non-existent facts, in this case the absence of a charge of negligence, does amount to a misdirection at law.

I am satisfied, in the result, that the sum effect of the appellant's appeal is to C raise points of law. Such appeal therefore, is properly before this court.

Before I deal with the merits of the appeal, it is pertinent to note that the respondent, while admitting that the appellant did suffer the financial loss referred to, denied any fault on his part. It

is noted in the judgment of the labour court that his defence was simply that as branch manager, he was not expected D to attend to the minute details pertaining to the running of the supermarket.

With regard to the first charge brought against the respondent, and on the merits, it is contended for the appellant that while in terms of its Management Controls Manual, various functions were assigned to different officers (e.g. section managers and till operators), the function of recording reset numbers E separately in a book and cross checking with the weekly balance summary, was assigned specifically to the Branch Manager, who in this case was the respondent. It is further contended that therefore this was not a function that he could delegate. Even assuming he could delegate, it is also contended, the onus lay on him to carefully supervise the subordinate he had delegated the function to, to satisfy himself the work had been done properly. The appellant F avers the respondent had not discharged this burden.

I am persuaded there is merit in these submissions. Had the intention of the appellant been for any other official to record the reset numbers separately in a book, it is not unreasonable to assume that the relevant provision in the management manual would have been so worded as to convey that intention. That this is not so in this case suggests an intention to have the particular G function personally carried out by the branch manager. According to the evidence, the task in question was directly linked to cash management, said to be critical to the success of the appellant's business. It is stressed that for any supermarket, it is the cash generated on a daily basis that has to be "protected most." The evidence of Mr Mashingaidze ("Mashingaidze"), representing the H appellant in the court below, was to the effect that a missing reset number

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Gwaunza JA

A represented a loss to the supermarket since the cash paid for the purchase of goods through the till in question would not be recorded. According to Mashingaidze, this meant nobody knew:

> "… that the till has been operated and the only check for the manager on a weekly basis is to check those reset numbers."

It was also Mashingaidze's evidence that this was the reason the reset control B book had to be kept personally by the branch manager. In the face of the respondent's "abdication" of this responsibility, it is contended for the appellant that the respondent's actions amounted to gross dereliction of duty since he not only delegated where he should not have done so, he then failed to check that the task he had delegated had been carried out properly. Because C of that conduct, the appellant suffered financial loss.

I am satisfied the respondent delegated to a subordinate a function that, given its sensitive nature, he should have carried out himself. He compounded the error by not checking to see that the work had been done properly. This, in my view, suggests an inability to appreciate the seriousness of one's responsibilities. This is particularly so given the fact, according to Mashingaidze, that the D appellant had taken the trouble to stress to each and everyone of its managers, the importance of personally keeping the reset control book. The respondent thus defied both the appellant's Management Control Manual, and the appellant's explicit instructions. His conduct resulted in substantial financial loss to the appellant.

E I am satisfied such conduct was inconsistent with the fulfilment of the implied and express conditions of his contract.

The respondent was also charged with failing to timeously take disciplinary action against eight till operators responsible for shortages in one operational week. He did not deny that the loss suffered by the appellant was due to the conduct of the errant till operators. His defence was that it was not his F responsibility to initiate disciplinary proceedings, since such responsibility lay with one of his subordinates, referred to as a designated officer. He believed that he would have been accused of interfering with the investigations of the designated officer if he had pressed the latter on his handling of the task.

I do not find merit in these averments. The respondent occupied a senior G position within the appellant. As branch manager, he had overall responsibility to ensure that the business of the appellant was conducted properly and efficiently. He was ultimately accountable for all that happened at and within his branch. Because of that overall responsibility and accountability the respondent would have been acting within his mandate had he instructed the relevant subordinates to investigate the shortages that had been drawn to his H attention.

Gwaunza JA

That this is what the appellant expected the respondent to do was made clear A by Mashingaidze, who said there could not have been any question of the respondent "interfering" if what he had done was to properly and timeously instigate investigations into the suspected cases of fraud. Mashingaidze made it clear that the appellant expected its branch managers to maintain total control over all that happened within the supermarket, and not to entertain B high expectations of subordinates being able to efficiently and honestly discharge their respective duties.

I find, again, that the respondent's conduct is suggestive of an inability to appreciate the importance of his responsibilities. It also indicates a readiness to delegate, which was not matched with an appropriate degree of supervision. That such conduct clearly fell short of what is expected of a manager was C underlined by the resultant financial loss to the appellant.

The respondent was also charged with failure to ensure proper filing and storage of audit rolls and DBS printouts. The audit rolls were supposed to be collected and filed daily by the section manager. That officer did not assiduously carry out this task, and the respondent's "spot checks", it would D appear, failed to identify this laxity. The appellant asserted it was the role of the branch manager to ensure the audit rolls were collected, accounted for and securely stored not only through checking this was done, but requiring the relevant section manager to do so where he/she had not. Mashingaidze for the appellant asserted in relation to this responsibility that it was specifically listed in the Management Controls Manual as one of the branch manager's E responsibilities.

The respondent's defence to this charge was that he could not be expected to do a thorough checking of all the audit rolls filed and in any case, only one audit roll out of many that were stored in about 15 to 20 bags went missing. It was missing not because it had been F mis-filed but because it had been deliberately removed and destroyed by the employees who had perpetrated the fraud. So no blame, according to the respondent, should be placed on him.

The labour court was persuaded by this argument and determined that the respondent could not be blamed for the loss of one out of 15 to 20 bags of audit rolls, in circumstances where the roll had been "deliberately removed and destroyed" by the employees who had perpetrated the fraud. The court rejected G the appellant's contention that if the respondent had been vigilant, he would have discovered the loss of the audit roll, since he was responsible for everything that went on at his branch.

It would appear the court *a quo* missed the point, which was that the respondent had not checked properly to see that all audit rolls had been H

Gwaunza JA

A collected, accounted for and stored securely, not that the missing audit rolls had been mis-filed or destroyed. In particular, the respondent had failed to perform a function specifically assigned to him, resulting in loss to the appellant. As Mashingaidze put it:

> "Mr Mangwiro seems to think that it is not his role to look after the safe custody of all records, in our view the branch manager as the head of that B particular branch is responsible for everything that goes on at his branch; everybody else does it for him, in other words, he is in charge …"

There were functions that were to be personally carried out by the respondent, and others that were to be performed by other people, who, albeit at different levels of operation, were all ultimately accountable to the respondent. While he could not thoroughly check the work of each and every employee at the C branch, the respondent could nevertheless have ensured that the "spot checks" that he carried out were effective, both as a deterrent to errant employees and as a means to monitor the various operations of the supermarket. The evidence before the court shows that the "spot checks" that he carried out failed to detect any sign of the fraud that was being perpetrated at his branch.

D The appellant's attitude, in light of all this, was that the respondent's conduct evinced an inability to fully appreciate his responsibilities as a manager, to adequately supervise subordinates or to establish the controls necessary to minimise the loss of cash to it. In other words, the appellant was saying (and I am persuaded to the same view) that the respondent was not possessed of the

managerial, administrative and leadership skills requisite for the discharge of E a branch manager's responsibilities.

The respondent conceded in relation to all the charges that he faced, that his conduct amounted to negligence but denied such negligence warranted his dismissal. The appellant, on the other hand, submitted that while the conduct in question did amount to negligence, that specific charge had not been F brought against the respondent.

There is substance in this submission. The appellant alleged against the respondent, conduct inconsistent with the terms of his employment contract. It placed before the court evidence to prove the charges in question. The respondent denied the charges but admitted his conduct amounted to another act with which he had not been charged. The court *a quo* then decided that the G latter conduct did not warrant the respondent's dismissal. It is my opinion that such a determination was not justified on the evidence before the court, and is therefore unsustainable.

I have no doubt that the respondent's conduct as analysed above was inconsistent with the implied and express conditions of his contract of H employment. It follows that the decision to dismiss him was properly taken.

Gwaunza JA

The appeal must, accordingly, succeed. A

It is in the result, ordered as follows:

1. The appeal is allowed with costs.
2. The decision of the Labour Tribunal is set aside and substituted with the B following:
   "The appeal is dismissed with costs."

Chidyausiku CJ & Cheda JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

Mushonga & Associates, respondent's legal practitioners C

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Source:
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GONYORA v ZENITH DITRIBUTORS & ORS 2004 (1) ZLR 195 (H)

Citation	2004 (1) ZLR 195 (H)
Case No	Judgment No. HH-44-04
Court	High Court, Harare
Judge	Gowora J
Heard	29 October 2003
Judgment	25 February 2004
Counsel	*R K H Mapondera,* for the applicant *O C Gutu,* for the respondents

Case Type Opposed application

Annotations No case annotations to date

Flynote

Practice and procedure — *execution — sale in execution — immovable* C *property jointly owned by judgment debtor and innocent party — validity of*

Headnote

The first respondent obtained a civil judgment against the fourth respondent who owned an immovable property jointly with the applicant. The first respondent proceeded to execution, and the property was sold in execution D to the third respondent. The applicant then brought proceedings to set aside the sale.

Held, that the sale was defective from the onset, in that the property of an innocent party was attached and sold in execution.

Held, further, that the *bona fides* of the purchaser was irrelevant. The E application would succeed, with costs against the third respondent.

Cases cited

Bhura v Lalla 1974 (1) RLR 31 (A)

Cairns' Executors v Gaarn 1912 AD 181

Chizikani v CABS 1998 (1) ZLR 371 (S)

F *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A)

Legislation considered

Magistrates Court Rules 1980 (SI 290 of 1980), Order 26, r 7(2) and 7(4)

Case information

G *R K H Mapondera,* for the applicant

O C Gutu, for the respondents

Judgment

GOWORA J: On 29 October 2003, I granted an order in favour of the applicant H and I indicated that my reasons would follow. These are they.

Gowora J

On 31 May 2002, Hlatshwayo J granted the applicant a provisional order in A the following terms:

> "TERMS OF ORDER MADE
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> That the sale in execution in respect of case No. 19871/00 of the B Magistrates Court Harare of stand No. 215 Glen C Lorne Township 8 of 10140A Salisbury Township held on 5 October 2001 by the second respondent and the subsequent purchase by the third respondent be and is hereby set aside.
>
> That the first and second respondents be and are hereby ordered to instruct their conveyancer to stop any transfer process of the stand No. 215 Glen Lorne Township 8 of Lot 40A Glen Lorne Township, Salisbury.
>
> That respondents who oppose this application pay the costs of suit.
>
> INTERIM RELIEF GRANTED
>
> Pending the finalisation or discharge of this order;

IT IS HEREBY ORDERED THAT:

The first and second respondents be and are hereby interdicted from proceeding with the intended transfer of the stand No. 215 Glen Lorne Township 8 Lot 40A Glen Lorne, Salisbury to the third respondent.

That the first and second respondents be and are hereby directed to instruct their chosen conveyancers, Mabuye & Co. Legal Practitioners to stay any transfer efforts in respect of the said stand.

SERVICE OF THE ORDER

Leave be and is hereby granted for this provisional order to be served on the respondents by the applicant's legal practitioners. Leave be and is hereby granted for service to be effected on the third respondent through publication of notice in a daily newspaper."

The order thus granted was served on all five respondents. Only the third respondent has filed papers opposing the confirmation of the provisional order.

At the centre of the dispute is an undeveloped stand which is registered in the joint names of the applicant and the fourth respondent.

The applicant states that she and the fourth respondent are husband and wife. She does not describe in detail the matrimonial regime under which they happen to be married and in my view, the details thereof are not pertinent for the purpose of resolution of the matter currently in issue.

On 7 July 2000, through its legal practitioners, the first respondent issued summons against the fourth respondent in the Magistrates Court in Harare for

an amount not exceeding $31 722.73. On 10 October 2000, the Magistrates Court granted summary judgment with costs against the fourth respondent in favour of the first respondent. Subsequent to that a warrant of execution was issued against the fourth respondent. There is no reference to an immovable property in the said warrant. The date on which the warrant was issued is not clear on the stamp. It is common cause however that the stand was sold at an auction conducted on the instructions of the second respondent on 5 October 2001 and the third respondent was the third highest bidder. On 30 November 2001, the magistrate wrote to the second respondent confirming that the sale of the stand to the third respondent had been confirmed. The second respondent thereafter set in motion procedures to have the stand transferred to the third respondent. It was suggested by the applicant that the property was mortgaged to CABS and an enquiry by the conveyancers to CABS, who happen to be her employers, then alerted her to the fact that the property in question had been sold at a sale in execution.

The debt to the first respondent by the fourth is not in dispute, and in fact, it would seem that the debt has now been settled in full, albeit the payment was after the sale in execution of the stand in Glen Lorne. In my view, the payment of the debt after the sale would not affect the outcome of these proceedings.

It is contended on behalf of the applicant that a sale in execution may be set aside on any good ground.[1] It was submitted further that what constitutes good grounds will depend upon the merits of each case.[2]

The contention on behalf of the applicant is that the sale was defective right from its inception and that for that reason the sale ought to be set aside. It was the further submission on behalf of the applicant that the second respondent instead of attaching the fourth respondent's half share of the property had attached the whole stand even though the applicant was not a party to the proceedings between the first respondent and the fourth respondent and there had been no judgment entered against the applicant justifying the disposal of an asset belonging to her at a forced sale. It was also submitted that the public auction was unlawful in that the first respondent caused the attachment of property which did not solely belong to the judgment debtor when it was apparent that the property did not belong to the judgment debtor alone. As a result, the question had to be asked as to what the *causa* for transferring the applicant's share was.

In opposing the relief being sought, the third respondent submits that r 352 of

the High Court Rules makes it mandatory for any sale in execution to be A advertised, and *in casu* the sale was advertised on two occasions. It is submitted further that the third respondent was a genuine purchaser who responded to the adverts and what she and the second respondent did when the sale was effected was within the confines of the law. The respondent sought reliance on *Chizikani* v *CABS* 1998 (1) ZLR 371. B

In my view, the starting point is the examination of the Magistrates Court Rules and the provisions thereof relating to the attachment of and sales in execution of immovable property. Order 26 r 7(2) provides for the attachment of an immovable property by service of the warrant of execution on the execution debtor as owner thereof, the Registrar of Deeds and all other interested parties including bondholders and any occupiers of the property in C question. The Messenger is also required to ascertain whether there is any claim ranking in priority to that of the execution creditor and inform the same accordingly. The Messenger is also enjoined in terms of subr 4 of the same to require the debtor to deliver to him all documents relating to title in the property. D

From the circumstances of this sale, it is not in doubt that the Messenger did not ask the fourth respondent to deliver documents in proof of ownership of the immovable property, as such documents would have shown that the property sought to be attached was jointly owned with the applicant who could not by any stretch of the imagination be described as an execution debtor thereby entitling the Messenger to attach and sell in execution her half share E in the immovable property. The applicant as a joint owner of the stand would be entitled to deal with her property in a manner she found appropriate. This includes alienation of her share. It is inconceivable and legally impossible that her share could be lawfully attached and sold in execution without *causa.* As there was no attachment in respect of the applicant's half share of the immovable stand it could not be sold in execution to satisfy the first F respondent's claim against the fourth respondent.

I find merit in the submission by the applicant that the sale was defective from the onset as the property of an innocent party was attached and sold in execution.

It was the contention of the applicant that an owner has the right to deal with G his or her property as he or she wishes and in this instance in view of the defective sale the transfer could not be effected as the applicant would have to consent to the transfer. Indeed, it is incomprehensible how the third respondent would be able to take transfer as the messenger would have only been able to sign transfer documents on behalf of the fourth respondent. H

2004 (1) ZLR p199

Gowora J

A The further contention on behalf of the respondent is that she was a *bona fide* purchaser who was not privy to the events that occurred prior to the sale. That may be the true position. The question however that arises is whether the *bona fides* of the purchaser would validate a sale in execution the basis of which was defective from the attachment of the item eventually sold. In this matter, it is not the sale *per se* which is being impugned, rather it is the whole process from B the attachment to the very sale itself. The sale is not capable of being divorced from the process of attachment and as long as that is defective in the sense that the property of a party who was not a party to the dispute had been mistakenly attached when no debt was owing, the attachment is a nullity. In those circumstances, it is irrelevant whether or not the purchaser was *bona fide.*

In the result, the applicant succeeds and an order is granted in her favour in the C following terms:

1. The sale in execution in respect of case No 19871/2000 in the Magistrates Court Harare in respect of stand No, 215 Glen Lorne Township 8 of 10140A Salisbury Township held on 5 October 2001 held by the second respondent and the subsequent purchase by the third respondent be and D is hereby set aside.
2. That the first and second respondents be and are hereby ordered to instruct their conveyancers to stop any transfer process of the stand No. 215 Glen Lorne Township 8 of Lot 40A Glen Lorne, Salisbury
3. The third respondent pays the costs of this application.

E *Madanhi & Associates*, applicant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners

The Messenger of Court Harare, second respondent

Gutu & Chikowero, third respondent legal practitioners

1 See *Bhura* v *Lalla* 1974 (1) RLR 31.
2 See *Cairns' Executors* v *Gaarn* 1912 AD 181; *Silber* v *Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345; *Bhura* v *Lalla supra.*

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Source:
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S v MUNYUKI 2004 (1) ZLR 200 (H)

Citation	2004 (1) ZLR 200 (H)
Case No	Judgment No. HH-207-03
Court	High Court, Harare
Judge	Paradza J
Heard	25 February 2004
Judgment	25 February 2004
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Immigration — *Immigration Act [Chapter 4:02] — s 36(1)(a)(ii) — using forged passport — use must be for one of the stated purposes — using passport for another purpose not a contravention of section*

Headnote

The accused had obtained a forged Malawian passport which showed her to be a citizen of Malawi, which in fact she was not. She presented the passport when she was attempting to buy air tickets. She was convicted D on her plea of contravening s 36(1)(a)(ii) of the Immigration Act.

Held, that the conviction was improper. The section penalised a person who used a forged passport for the purpose of entering, remaining in or departing from Zimbabwe in contravention of the Act. The accused had not "used" the passport for that purpose. E

Cases cited

S v Magunda 1994 (1) ZLR 212 (S)

Legislation considered F

Immigration Act [*Chapter 4:02*], s 36(1)(a)(ii)

Judgment

PARADZA J: The accused in this matter was convicted of contravening s 36(1)(a)(ii) of the Immigration Act [*Chapter 4:02*], after she pleaded guilty to using a forged travel document knowing it to be forged. She was sentenced G to pay a fine of $200 000.00 or in default thereof 10 months' imprisonment. The forged passport was surrendered to the Registrar-General.

The facts that the accused admitted to are as follows:

The accused is a Zimbabwean citizen. At some time prior to May 2002 she obtained a Malawian passport which was forged in such a manner that it described her as a Malawian citizen, when in fact she was a Zimbabwean H

Paradza J

A citizen. On 15 September 2003, while in possession of the passport, she approached Egypt Airways with the intention of buying some tickets. Presumably these were air tickets. Before she could purchase the tickets she was referred to the Malawian Embassy "for clearance" of the passport before it could be used to buy tickets. When the accused went to the Malawian Embassy she tendered the passport for clearance. It is alleged that she was arrested by their passport officer after he had discovered that the passport was not authentic.

Section 36(1)(a)(ii) of the Immigration Act [*Chapter 4:02*] provides as follows:

> "(1).Any person who —
>
> (a) for the purpose of entering, remaining in or departing from Zimbabwe in contravention of this Act or any other enactment or of assisting any other person so to enter, remain or depart, whether or not such other person is *doli capax* —
>
> (i) …;
>
> (ii) forges any permit or travel document, or any other certificate or document whatsoever or *uses any such permit, travel document, certificate or document knowing it to be forged;* or
>
> (iii) …
>
> shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding ten years or to both such fine and imprisonment…" (My emphasis).

E Clearly, the essential elements of that provision in so far as it relates to the charge preferred against the accused can be summarised as follows:

(a) use of the document;

(b) for the purposes of entering, remaining or departing from Zimbabwe; F

(c) knowledge that passport is forged.

What is of importance in this matter is that the court that convicted the accused should have been satisfied that indeed the accused had "used" the forged document for whatever purpose the accused intended to use it. It is therefore necessary under the circumstances that the presiding magistrate was expected to canvass those points fully and satisfy himself that indeed the forged G document was "used" for a purpose that was clearly defined for it to fall under the provisions of s 36(1)(a)(ii).

The word "use" is defined and interpreted both in our jurisdiction and elsewhere and the conclusion has been that the word "use" must be understood H in the context within which it is placed. In the matter of *S* v *Magunda* 1994 (1) ZLR 212 (S) at p 214

Paradza J

Gubbay CJ, making reference to a number of English A authorities and other dictionary sources, concluded:

> "The task, of course, remains essentially of maintaining the proper meaning of the word in its particular legislative setting."

I am unable to be persuaded to assign any meaning of the word "use" other than its ordinary grammatical and linguistic meaning. A deviation from such an B ordinary and grammatical meaning

would only happen if it can be shown that it is warranted in the circumstances. My view is that if a person is alleged to have used a forged passport, the meaning of the word "use" of the forged passport should be confined to its ordinary meaning which relates to the usual and ordinary use of a passport which, in my view, is to facilitate either the coming in or exit of the possessor through a port of entry. In this matter under C review the accused could not use the passport for its intended purpose because she was discovered before she could use it and while she was in the process of trying to purchase certain tickets that would then enable her to use the passport in the ordinary sense.

In the *Oxford English Dictionary* Vol X1 the word "use" is defined at page D 468 as follows:

> "The act of using a thing for any (especially profitable) purpose; a fact, state or condition of being so used; utilization or employment for, or with some aim or purpose;

It is therefore clear from such a definition of the word that it involves some E positive action in dealing with that document. To present a document for purposes of clearance or in an attempt to find whether that document is authentic does not to me amount to the use of the document in the ordinary sense. I must emphasise, however, that as indicated above the context of the piece of legislation must be borne in mind. It could very well be different if the offence is related to forgery or uttering of such documents. In the context in F which the accused in this matter was charged for the use of a forged document I find myself unpersuaded that indeed the conviction against the accused was proper.

Accused could very well have been convicted of other charges as defined in the same s 36 or elsewhere in the Immigration Act. Unfortunately the record before me shows that nothing in that regard was canvassed. G

This brings me to the issue of the essential elements as they were put to the accused. I have already indicated above what the elements of the offence are. It is therefore expected that before convicting the accused, the magistrate should have dealt with the essential elements of the charge as they appear in s 36(1)(a)(ii). H

2004 (1) ZLR p203

Paradza J

A The following questions were put to the accused:

> "Q. Confirm that on 15 September 2003 at Egypt Airways and the Malawian Embassy, you unlawfully intentionally used a forged Malawian passport?
>
> A. Yes. B
>
> Q. Do you admit you knew it was forged?
>
> A. Yes.
>
> Q. Why did you do that?
>
> A. My husband is in the United Kingdom and I have not seen him in a year and he also has not seen his son.
>
> Q. Do you admit by so doing you were breaking the law? C
>
> A. Yes.
>
> Q. Any lawful right to do so?
>
> A. No.
>
> Q. Any defence to offer?
>
> A. No.
>
> D I find you guilty as you pleaded."

It is clear from the above that nobody knows why she was in possession of the forged passport. She did not tell the court that she wanted to go and join her husband at all or that indeed she had the means to purchase the tickets that would enable her to travel to join her husband. Inferences can be drawn from E her answer to the question why she did it but that is not enough. Where a person is pleading guilty the questions put to her must be clear and exhaustive and the answers she gives must be clear and exhaustive.

Further, although she indicated that she knew that the passport was forged, it is not clear to as when, how and where that passport had been forged. Questions intended at finding out exactly who

did what, when and where and F whether she was present when the passport was forged would help to satisfy the court that indeed she knew that the passport was forged.

Also we do not know whether indeed she was going to leave the country and if so when, and whether she had the means to do so. The essential elements put to the accused during the hearing to me are insufficient. Under the circumstances G I am unable to confirm the conviction and I therefore make the following order:

The conviction is hereby quashed and the sentence is set aside.

H Hungwe J concurred

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DZENGA v NYAKABANGO 2004 (1) ZLR 204 (H)

Citation	2004 (1) ZLR 204 (H)
Case No	Judgment No. HH-20-04
Court	High Court, Harare
Judge	Hungwe J & Guvava J
Heard	27 March 2003
Judgment	25 February 2004
Counsel	*P Nherere*, for the appellants *L T Biti*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Court — *magistrates court — jurisdiction — action for ejectment — amount* C *in "clear value to the occupier" — meaning of — person occupying house belonging to another after house sold to a third party — purchase price exceeding amount prescribed in rules — not relevant to question of jurisdiction*

Headnote

The plaintiff bought, by way of cession, the right, title and interest in a D dwelling house from the legal holder of those rights, who was the defendant's father. The purchase price paid was more than the amount prescribed in the rules of court in terms of s 11(1)(b)(iii) of the Magistrates Court Act [*Chapter 7:10*]. The defendant was in occupation of the premises and refused to vacate. The plaintiff brought an action for E ejectment in the magistrates court. The defendant claimed that he had a right of perpetual occupation of the property arising from and as

consideration of the many years of financial support he gave to his father. The defendant also raised a plea in bar that the court had no jurisdiction in view of the purchase price paid.

Held, that jurisdiction would be excluded if he showed that the "clear value" F to him, as the occupier, exceeded the prescribed amount. The expression "clear value to the occupier" imports value over and above the rent payable. It is not the same as value to the defendant, as pleaded by the defendant. In order to determine what value to attach to a disputed right of occupation, a conspectus of the whole transaction should be taken. G Had there been any transaction between the plaintiff and the defendant, the defendant's value of the purchase price could have been arguably justified. In the absence of any such transaction there could be no basis for the defendant's argument. H

Hungwe J

Cases cited A

Hiddingh v CIR 1941 AD 119

Jordaan v de Beer Scheepers 1975 (3) SA 845 (T)

Langham Court (Pty) Ltd v Mavromaty 1954 (3) SA 742 (T)

Malherbe v Britstown Municipality 1949 (1) SA 281 (C)

Munsamy v Govender 1950 (2) SA 622 (N)

B *Smith v Farrelly's Trustee* 1904 TS 949

van der Westhuizen v Peterson 1922 TPD 412

Legislation considered

Magistrates Court Act [*Chapter 7:10*], s 11(1)(b)(iii)

Case information

C *F M Katsande,* for the appellant

M Hungwe, for the respondent

Judgment

HUNGWE J: The appellant appeals against two judgments of the court of the D magistrate. In the first judgment, the court *a quo* granted an order of ejectment in favour of the respondent against the appellant with costs on the higher scale. In the second judgment, the court *a quo* granted leave to the respondent to execute the writ of ejectment, notwithstanding the notice of appeal filed by the appellant.

E The appellant raised six grounds of appeal, namely:

1. That the magistrate "erred in law by failing to disperse justice impartially, leaving no doubt that he had preconceived his judgment."
2. That "due to the antipathy and bias, the magistrate perfunctorily evaluated the defence's version crediting the plaintiff's case even in the face of F allegations of fraud/corruption when she failed to produce a key witness to refute the defence case".
3. That the magistrate had no jurisdiction to determine a dispute whose monetary value of $420 000 far exceeded the court's jurisdiction.
4. That the magistrate erred by refusing to allow an application to amend the defendant's plea. G
5. That the magistrate erred in law by failing to appreciate that the respondent, enjoying only a personal right, lacked competence to eject the appellant.
6. That he misdirected himself at law by making an award of costs on a higher H scale where there was no justification for such an award.

Hungwe J

In the second appeal, the appellant relies on two grounds, namely: A

(a) that the magistrate erred in law in granting the respondent leave to execute on a judgment pending appeal as there was overwhelming prospects of success on appeal.

(b) That the magistrate erred in ordering the enforcement of a writ which was issued prematurely. B

Dealing with the first two grounds of appeal, the appellant did not persist with these in his main heads of argument as well as his supplementary heads. These grounds allege serious misconduct on the part of the trial magistrate. To make such allegations against a judicial officer is a serious matter. It is unethical for an officer of the court such as a legal practitioner of Mr *Katsande's* standing to make such allegations without foundation. A perusal of the record does not C support the allegations of prejudicial bias and antipathy that the appellant alleges in his grounds. D The reasons for judgment of the court does not in any way reflect any bias on the part of the magistrate. No wonder Mr *Katsande* could not advance any submission in his heads or in court to support these two grounds.

As to the question of jurisdiction, the magistrate dealt with this point when it was raised *in limine.* The magistrate decided against the appellant.

The appellant persists with the point that the court *a quo* had no jurisdiction in terms of s 11(1)(b)(iii) of the Magistrates Court Act [*Chapter 7:10*].

The section provides: E

> "Every court shall have in all civil cases, whether determinable by general law of Zimbabwe or by customary law, the following jurisdiction –
>
> (a) …
>
> (b) with regard to causes of action –
>
> (i) …
>
> (ii) … F
>
> (iii) in actions of ejectment against the occupier of any house, land or premises situated with the province;
>
> Provided that, where the right of occupation of any such house, land or premises in dispute before the parties, such right does not exceed such amount as may be prescribed in rules in clear value to the occupier." G

At the time, the prescribed amount in terms of the rules was $200 000.

It is necessary, for the better understanding of this appeal, to recite briefly the undisputed facts which gave rise to this suit.

In 2001, Graham and Douglas Real Estate (Pvt) Ltd advertised stand No. 6029, Tafara Township, Mabvuku, for sale. H

Hungwe J

A The respondent, who lived in the same suburb with the registered owner, one Finhai Frederick Dzeka, offered to buy the property. On 21 October 2001, she entered into an agreement of sale with the said Finhai Dzeka and duly paid the full purchase price $420 000. On 30 October, the Municipality of Harare approved the assignment of the cession by the seller to the respondent. A memorandum of agreement of assignment was duly executed on that date.

B During this period, the appellant, a son of the seller, was in occupation. In the court *a quo,* the court accepted the evidence that the appellant's father advised him of the sale and that he could come out to the rural areas where he had secured him a plot. Further, it was accepted by the trial court that the respondent had discussed the sale with the appellant who agreed to vacate and C make way for her. The agreed date came and went without any sign that the appellant will vacate. The respondent then sued for eviction. She got an order for ejectment. Against that order the appellant appeals.

The appellant's position initially was that he would vacate the premises. He then changed his mind. When the summons were issued he claimed in his plea that he had a right of perpetual occupation granted to him by his father as D consideration for years of financial support he had given to his

father, as well as for improvements he had effected on the property. Despite these claimed rights, the respondent and his father had proceeded with the sale to his prejudice.

In order to decide whether or not the magistrates court has jurisdiction in the E matter, it is important to determine whether the right of occupation is in dispute, before the clear value to the occupier yardstick is considered.

For the jurisdiction of the magistrates court to be ousted under s 11 of the Act, the defendant must show:

(i) that there is a *bona fide* dispute as to the right of occupation; and

F (ii) that the right of occupation is worth more than $200 000 in clear value to the occupier.

See *van der Westhuizen* v *Peterson* 1922 TPD 412; *Malherbe* v *Britstown Municipality* 1949 (1) SA 281 (C); *Munsamy* v *Gorender* 1950 (2) SA 622 (N) and *Jordaan* v *de Beer Scheepers* 1975 (3) SA 845 (T).

That being the legal position, the first step, it seems to me, is to enquire what G right of occupation, if any, is in dispute and whether such a dispute is bona fide.

The pleadings in this case show this. The plaintiff's case is that she bought, by way of cession, the right, title and interest in this premises from the legal holder of those rights, who is the defendant's father. There is proof of that. The H cession was approved by the relevant authorities, the City of Harare, and a

certificate in proof of that is on the papers. Both the City of Harare and the A seller recognised the plaintiff as the new "owner". There is evidence that this new situation was explained to the appellant, by virtue of his being in occupation by his father, the estate agents and the City of Harare. At that time, there was no allegation that he occupied the premised under the guise of any right whatsoever besides being in gratuitous occupation. He was indebted to B his father for that.

The agreement of sale executed by Finhai Dzeka and the respondent by operation of law terminated whatever arrangement gave the appellant the gratuitous occupation of the house which was the subject of the sale. As holder of those rights, Finhai Dzeka was entitled to alienate such rights without recourse to or consultation with the defendant. The act of cession extinguished C any rights that the defendant may have had, if such right existed at all, in occupying the house.

The defendant states in his pleadings that he had a right of perpetual occupation of the property arising from and as consideration of the many years of financial support he gave to this father, Finhai. D

As to whether there was *a bona fide* dispute about the defendant's right of occupation, that issue was not addressed in the grounds of appeal. The magistrate dealt with it and found that the defendant's point *in limine* lacked good faith. He dismissed the point *in limine* on that basis.

As observed by Wessells JP in *van der Westhuizen* v *Peterson* supra at 414: E

> "Now where the law says 'in actions of ejectment against the occupier of any premises or land within the district …' the magistrate has jurisdiction 'provided that where the right of occupation of any such premises or land is in dispute F between the parties, such right does not exceed [R1 000], clear value to the occupier' it must mean that there must be an actual *bona fide* dispute. It is not sufficient for a person to go to court and say 'I dispute your right'. There must be some proof that the dispute rests upon some grounds that are not more or less frivolous."

I respectfully agree with his Lordship's remarks. It seems to me that this approach commends itself in that it obviates the vexatious defences that may be put up by tenants for the purpose of postponing the day of reckoning. Where an occupier has no *bona fide* defence to an ejectment action, it is difficult to G see how any dispute could be said to be *bona fide.*

In the present case, the defendant does not say that he occupies the premises as owner. He lays claim to a right arising from possible heirship or inheritance. He does not join his father in the action although he promises to do so in his pleadings. He does not even call his father to the witness stand to buttress his H claims.

Hungwe J

A In my assessment, the defendant failed in the first hurdle to show that the dispute was *bona fide.*

Even if I were wrong to so hold it seems to me that he was still bound to fail on different grounds.

The defendant raised a special plea in bar excluding jurisdiction of the B magistrates court. As such, the onus was on him to establish that defence. The onus is on the defendant to establish the defence pleaded: *per* Broome J in *Mumsamy* v *Govender supra.*

The defendant claimed lack of jurisdiction, citing the sum of $420 000 as the value to him of the premises in dispute. That is the value of the premises at the time it was sold. It cannot, in my view, be the same as clear value to the C occupier. What must be shown is the clear value of the right of occupation. The expression "clear right to the occupier" in s 11 (1)(b)(iii) of the Magistrates Court Act imports value over and above the rent payable. See *Jordaan* v *de Beer Scheepers supra.* It is not the same as value to the defendant, as pleaded by the defendant: See *Langham Court (Pty) Ltd* v *Mavromaty* 1954 (3) SA 742 (T) at 746.

D In order to determine what value to attach to a disputed right of occupation, a conspectus of the whole transaction should be taken: *Van der Westhuizen* v *Peterson supra. In casu*, had there been any transaction between the plaintiff and the defentant, the defendant's value of $420 000 would have been arguably justified. In the absence of any such transaction, there could be no E basis at all for the appellant's argument. In any event, the defendant failed to discharge the onus upon him to establish that defence.

In the premises, the trial magistrate, correctly, in my view, dismissed the special plea in bar taken by the defendant.

As to the ground that the court erred in refusing to grant an application to F amend the defendant's plea, counsel for the defendant sought to make a comparison of s 66 of the Magistrates Court Act with r 132 of the High Court Rules. He urged the court to find that on the basis of the similarly worded provisions of the High Court Rules, that court cannot act otherwise than in terms of the Magistrates Court Act. It cannot do what the Act does not specifically empower it to do.

G It therefore cannot apply the provisions of r 132 to vest itself with the wider powers to amend pleadings at any stage before judgment is rendered.

Section 66 of the Magistrates Court Act is worded similarly to s 111 of the old South African Magistrates Court Act No. 34 of 1994, as amended.

The South African Act allows parties to amend pleadings at any stage but H before judgment. Our Act specifically limits amendments to pleadings to

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Hungwe J

"before or at the hearing." In other words, one cannot seek to amend pleadings A during trial. This is what the defendant sought to do. The magistrate quite rightly refused to grant the application.

The fifth ground attacks the lack of capacity on the part of the plaintiff to eject the defendant arising on the basis that the plaintiff ought to have joined the City of Harare as it is the owner of the premises in question. B

The argument, as I understood it, was that the plaintiff only enjoyed a personal right in the property owned by the City of Harare. That being so, she could not on her own, seek to eject another person.

A cession is effected by an agreement between the cedent and the cessionary. Thus the contractual rights in question are transferred or ceded by the former C to the latter. See *Hiddingh* v *CIR* 1941 AD 119.

The word "cession" simply means a transfer or making over, and just as the word "delivery" is used to denote the transfer of a corporeal thing, so "cession" is employed to denote the transfer of an incorporeal thing, whether it be a real right or a personal right. See *Smith* v *Farrelly's Trustee* 1904 TS 949 at 956.

Thus, by approving the cession between Finha Dzeka and the plaintiff, the D Harare City Council similarly ceded all its rights, including the right to sue for ejectment to the plaintiff. The magistrate therefore correctly held that the plaintiff was properly suited.

As for the grant of leave to execute a judgment under appeal, taking a conspectus of the whole matter before that court, I am unable to say that that E court failed to exercise its discretion judiciously.

Similarly, I find nothing to criticize in the order of costs in a higher scale granted by the court *a quo.*

In the result, the appeal is dismissed in its entirety. F

Guvava J concurred.

Katsande & Partners, applicant's legal practitioners

Hungwe & Partners, respondent's legal practitioners G

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S v CHIADZWA 2004 (1) ZLR 211 (H)

Citation	2004 (1) ZLR 211 (H)
Case No	Judgment No. HH-28-04
Court	High Court, Harare
Judge	Chinhengo J & Makarau J
Heard	31 July 2003
Judgment	25 February 2004
Counsel	*P Chiutsi*, for the appellant *S Mushongwe*, for the respondent C
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Intellectual property — *copyright — nature of protection granted by copyright* D *— infringement — need for existing article to be reproduced or copied*

Headnote

Copyright law protects only the forms of expression of ideas, not the ideas themselves; it protects creativity in the choice and arrangement of words, colours, shapes, etc. Copyright is not in the idea, but in the material that embodies that idea. Thus there cannot be an infringement of copyright D unless there is existing material which the infringer has copied.

The appellant had been charged in a magistrates court with contravening s 27(1)(e) of the Copyright Act [*Chapter 26:01*], the allegation being that he had exhibited for sale 16 sculptures which were made in the style of a well-known sculptor and inscribed with the sculptor's name and E initials, but which the appellant knew were infringing copies of the sculptor's work made by someone else. The evidence at the trial established that the sculptures were indeed made in the sculptor's style, but there was no evidence that they were copies or reproductions of any of the sculptor's existing work, nor was it shown that the appellant had knowledge that a breach of copyright law was being committed. He was F convicted nevertheless, and appealed.

Held, that for an offence to be committed under s 27(1)(e) of the Copyright Act, there must be a reproduction of an article in which copyright subsists. In this case the evidence did not show that the person who made the sculptures copied anything other than the sculptor's idea, and that was not the subject of protection under copyright law.

G *Held*, further, that knowledge, in the sense of notice of facts that would suggest to a reasonable man that a breach of copyright law was being committed, was a requirement for a conviction under s 27(1)(e) of the Act. There had been no attempt to show that the appellant had such H knowledge.

2004 (1) ZLR p212

Chinhengo J

Cases cited A

Donoghue v Allied Newspapers Ltd [1938] Ch 106

George Hensher Ltd v Restawile Upholstery (Lancs) Ltd [1976] AC 64,

Gramophone Co Ltd v Music Machine (Pty) Ltd & Ors 1973 (3) SA 188 (W)

Paramount Pictures Corp v Video Parktown North (Pty) Ltd 1983 (2) SA 251 (T) B

Legislation considered

Copyright Act [*Chapter 26:01*], s 27(1)(e)

Case information

P Chiutsi, for the appellant

S Mushongwe, for the respondent C

Judgment

CHINHENGO J: The appellant was charged with the offence of contravening s 27(1)(e) of the Copyright Act [*Chapter 26:01*] ("the Act"). After a trial, he was convicted and sentenced to a fine of $400 or in default of payment to 10 days' imprisonment. A further 10 days' imprisonment was D suspended for five years on condition that, during that period, he does not commit any offence involving the sale of artifacts in contravention of the Act for which he is sentenced to imprisonment without the option of a fine. He was also ordered to surrender possession of the alleged infringing artifacts to the complainant. He appealed to this court against both conviction and sentence.

It was alleged that the appellant bought certain sculptures from one Taurai E Chimba between January 2000 and March 2002. Those sculptures were said to be copies of sculptures created and produced by the complainant, a well-known sculptor, Dominic Benhura. The appellant was alleged to have exhibited, by way of trade, the infringing copies at his art galleries at Ambassador Gallery near Boka Auction Floors and at Africa Gallery along Chiremba Road, both F in Harare. The alleged infringing copies were sixteen in number and seven of them were inscribed "D.E. Benhura" or "Dominic". It was alleged that the appellant knew that the complainant was the creator of the sculptures and that he had no right to infringe the complainant's copyright.

The appellant's grounds of appeal were that:

"1. The learned magistrate erred in finding that the complainant had a G copyright in respect of the works exhibited.

2. The learned magistrate seriously failed in her judgment to address the issue of whether the complainant has a copyright or not in the artifacts.

3 The learned magistrate failed to consider that the State provided H evidence that the complainant is not the originator of the idea but one

---

Chinhengo J

A Vickson Kampande and as such the complainant has no copyright over the works.

4. The court *a quo* did not address the evidence placed before it demonstrating that the complainant had no copyright in the works.
5. Appellant further contends that the court *a quo* misdirected itself in finding that the complainant and the Police had no reason to lie B against the applicant.
6. The learned magistrate further misdirected herself by not referring to the provisions of the Copyright Act particularly the failure by the State to comply with s 6 of the Act.
7. The learned magistrate further misdirected herself by failing to consider the fact that the complainant had possession of the artifacts C immediately after they were confiscated and as such could have tampered with them.
8. The court *a quo* failed to take note of the contradictions in the State case as to where the artifacts were exhibited, particularly in the evidence of Constable Murove and the complainant. D
9. The judgment herein is so fatally lacking in detail and substance that the conviction is fatally ill-founded."

In the appeal against sentence, the challenge was against the imposition of the maximum sentence and the failure to consider that the appellant purchased the sculptures and has suffered financial prejudice.

It seems to me that the main issue for decision in this appeal is whether or not E the complainant has or had copyright in the sculptures in question in this matter. If it is found that he had no copyright, that would be the end of the matter. If it is found that he had copyright, it then becomes necessary to examine the other grounds of appeal.

The appellant was charged under s 27(1)(e) of the Act which provides that:

F "(1) Any person who at any time when copyright subsists in a work or other subject-matter —

(a)-(d) [not relevant];

(e) by way of trade exhibits in public;

any article which he knows to be an infringing copy of the work or other subject-matter shall be guilty of an offence."

G The sculptures in issue in this case are encompassed by the definition of "work" in the Act. A reading of s 27(1)(e) shows that the essential elements of the offence are:

(a) copyright must subsist in a work or other subject matter; H

(b) the article must be exhibited in public by way of trade;

Chinhengo J

(c) the accused must know that the article which he exhibits in public is an A infringing copy of the work concerned.

In order to establish criminal liability, those elements of the offence must be proved. Whilst the evidence in this case seems to point to the fact that the appellant exhibited certain sculptures in public by way of trade, the real issue is whether or not copyright subsisted in the sculptures and whether or not the B appellant knew that the sculptures were infringing copies of the complainant's work. I will first examine whether any copyright subsists in the work.

In terms of s 6 of the Act, copyright subsists in every original artistic work which is unpublished or which is published, provided certain other conditions are met. Section 6(4) of the Act provides that the acts restricted by copyright C are the reproduction of the work in any material form, publishing the work, including the work in a television broadcast, or causing the work to be transmitted to subscribers to a diffusion service.

The word "copyright" is not defined in any helpful manner in the Act. It is defined in relation to acts which a right holder may do or authorise to be done in relation to the work and to the acts restricted by copyright. The Copyright D and Neighbouring Rights Act No. 11 of 2000, published on 17 November 2000 but not yet in force, contains a more helpful definition of "copyright" in s 9. It

states that copyright is a real right which subsists in a work by virtue of the Act and which entitles its owner exclusively to do in Zimbabwe and to authorise others to do in Zimbabwe the things which the Act designates in relation to that work. Copyright must be understood, therefore, as a legal term E which describes the rights given to creators for their artistic and literary works. Sculptures, as I have already mentioned, are artistic works. The creators of the original works are protected by copyright and they, or their assigns, have the basic right to the exclusive use or authorisation to others to use their works on agreed terms. The creator of a work can for instance prohibit or authorise its F reproduction in various forms. It is important to bear in mind that copyright law protects only the forms of expression of ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangements of words, colours, shapes, etc. In *George Hensher Ltd* v *Restawile Upholstery (Lancs) Ltd* [1976] AC 64, it was held that copyright law is in essence concerned with the protection of the negative right of G preventing the copying of physical existing material in the field of literature and the arts. Thus, for infringement of copyright to exist, there must be existing material that the infringer has copied.

The concept can find further explanation in the decision in *Donoghue* v *Allied Newspapers Ltd* [1938] Ch 106 where it was held that the law of copyright is concerned only with the protection of the copying of physical material and not H

Chinhengo J

A with the reproduction of ideas and does not seek to create a monopoly for any particular form of words or design. Copyright is not in the idea, but in the material that embodies that idea.

In this case, the complainant was concerned with the most basic right under copyright law — the right to prevent others from making copies of his works.

There is no doubt at all that the complainant would have copyright in his B sculptures and that he would be protected by the Act against infringement of his copyright in those sculptures. In this regard I refer to the sculptures that he had carved and are already in existence. It is, in my view, necessary to determine the wrong which the complainant said has been done.

The evidence adduced at the trial is not at all clear. This may be so because of C the obscurity of the subject of copyright. It is not often that our courts are called upon to decide copyright cases.

The evidence shows that the appellant purchased sculptures from a third party, Taurai Chimba. It is these sculptures which, by way of trade, he exhibited in public. The initial question is whether these sculptures infringed the D complainant's copyright. In his evidence, the complainant could not show that the sculptures were reproductions of his work. The most that he could say was that the sculptures exhibited by the appellant were similar to his work or that they "looked like" pieces of his work. The complainant said that he was the originator of sculptures which show a female form without features such as a nose, mouth or toes. There was a dispute as to whether the complainant or one E Vickson Kampande was the original maker of such sculptures. In my view, this dispute is not really material. What is material is whether the maker of the infringing sculptures reproduced the complainant's work i.e. copied it in a material form. There was no evidence, based on a comparison of the pieces, to establish beyond doubt that the alleged infringing copies were a reproduction of the complainant's existing work.

F The complainant, in my view, emphasised more the copying of his idea — that of creating female human forms without features or digits. The facts in the outline of the state case are helpful in an understanding what it is the complainant was concerned about. In para 3, thereof it is stated:

> "The complainant, Dominic Benhura, is an experienced sculptor of world G repute who developed a range of pieces of sculpture which are original and distinctly his own creations in 1987. The form and appearance of these pieces of sculpture are distinct and original by virtue of the following features:
>
> all forms of work repeat a female human form in various postures of H family motif like mother and child images;

Chinhengo J

- all forms have human limbs but the limbs have no digits and the faces A have no facial features;
- the faces and limbs are polished black;
- all forms have raw untouched rock for hair and rasped unpolished;

– all forms of sculpture are distinctly marked Dominic Benhura or D Benhura." B

The complainant gave evidence which described his sculptures in the same way as in the outline of the State case. The same evidence was given by other witnesses for the prosecution case. The following evidence of the complainant is important:

"Q. Accused says you collected 16 sculptures? C

A. Yes because 7 had inscriptions. I am not sure about the figure we collected.

Q. In terms of the Copyright Act you must be able to produce 16 sculptures as one (*sic*) collected from accused as original works?

A. We are talking about art not coins. There is no way it can be identical. This material is natural and not artificial. It's not plastic. There is no D way they could reproduce exactly the same because that is impossible to get similar stones as (the) ones I use because the stones are quarried from different areas from where I get mine.

Q. You acknowledge that it is impossible that any of your original works can be copied?

A. I am not saying they can't be copied. All I am saying is that they won't E be like a reproduction (meaning) it has to be identical.

Q. You are saying that they will never be the same?

A. Yes, because of form of stone but would be copies of my work.

Q. If they are not similar to your work how can they be copies?

A. They are similar not identical because of stone formation. F

Q. Do you have items similar to the ones collected from accused?

A. No, most of them are overseas. If I did not have exhibits I wouldn't be arguing with you here.

Q. Demonstrate from exhibits, similar items as one taken from accused?

A. I would not need to see the pieces. G

Q. Exactly the same.

A. No, similar, not exactly (*sic*)."

What is clear from this evidence is that the complainant was concerned about the protection not of his copyright as I have endeavoured to define it, but of his idea. His idea, being that of a female form, which has no features or digits. H

2004 (1) ZLR p217

Chinhengo J

A That to me is an idea which is not protected by copyright law. In order to be graphic about this point of view, one has simply to picture a situation where sculptors are prohibited from making sculptures of female human forms whose faces are polished black but without features and whose limbs do not have digits. If that were to be the case, then to my mind copyright law will have been used against copying an idea, which is perfectly permissible, as against B reproducing or copying existing works of art.

I think some sympathy must be expressed in favour of the complainant, especially because the sculptures in issue have some similarity to his own works. But as I have said, copyright law is not designed to provide protection of ideas. The second basis for extending some sympathy to the complainant C is that there was some passing off of the sculptures by inscribing the name of the complainant on some of the pieces. This, however, would provide a basis for action in delict.

The evidence adduced at the trial does not show that Taurai Chimba copied anything other than the complainant's idea. That, as I have said, is not the subject of protection under copyright law.

D Returning now to s 27(1)(e) of the Act, it must be clear that for an offence to be committed the complainant's work of art should have been reproduced, not that his idea should have been adopted. There must be a reproduction of an article in which copyright subsists. The evidence in this case did not establish that any such article was copied or reproduced. Section 27(1)(e) also requires E that the accused person should have knowledge that the article which he exhibits is an infringing copy of the complainant's work. As to the requirements for establishing such knowledge, see *Paramount Pictures Corp* v *Video Parktown North (Pty) Ltd* 1983 (2) SA 251(T) at 261F-262 A, where in reference to *Gramophone Co Ltd* v *Music Machine (Pty) Ltd & Ors* 1973 (3) SA 188 (W) it was said that "knowledge" meant:

F "notice of facts such as would suggest to a reasonable man that a breach of copyright law was being committed."

In this case, there was no attempt to prove that the appellant had knowledge that a breach of copyright law was being committed. It was undisputed that he purchased the sculptures from another person, but it was not shown that he had G knowledge that the sculptures were infringing copies of the complainant's work.

The judgment in the court *a quo* was most superficial. The learned magistrate was in my view, wide off the mark when she stated in her judgment that:

> "The issue is sculptures bearing complainant's name were exhibited and H on that score alone accused had to explain how that happened."

2004 (1) ZLR p218

Chinhengo J

This statement was made in relation to the application for discharge at the A close of the State case, which the magistrate dismissed. Further in her short judgment on the merits, the magistrate was again wide off the mark when she said:

> "We are faced here with a case of artifacts having the complainant's name and how accused would be exhibiting is only an issue that he alone can B explain."

In terms of s 27(1)(e) of the Act, the issues are whether the appellant exhibited in public works of art in which the complainant had copyright and whether he did so with the knowledge that the works of art concerned infringed the complainant's copyright. C

The essentials of the offence were not canvassed. I am satisfied that the appellant should not have been convicted of contravening s 27(1)(e) of the Act. He may well have been liable in delict, but that is a different matter.

In the result the appeal is upheld and the verdict of the court *a quo* is set aside, so also is the sentence. The order relating to the return of the sculptures to the complainant is also set aside. D

Makarau J concurred.

Puwayi Chuitsi, appellant's legal practitioner

Office of the Attorney-General, respondent's legal practitioners E

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S v ZENDERE 2004 (1) ZLR 219 (H)

2004 (1) ZLR p219

Citation	2004 (1) ZLR 219 (H)
Case No	Judgment No. HB-19-04
Court	High Court, Bulawayo
Judge	Ndou J
Heard	25 February 2004
Judgment	25 February 2004
Counsel	Details not supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Court — *jurisdiction — extra-territorial — whether Zimbabwe court has* C *jurisdiction over an offence committed in no-man's land between Zimbabwe and Botswana*

Criminal law — *statutory offences — Immigration Act [Chapter 4:02] — s36 (1) (a1) — passport offences — provides for extra-territorial jurisdiction*

Headnote

D The accused altered a passport to effect a forgery in the no-man's land between Zimbabwe and Botswana, for the purpose of entering Botswana. He was convicted in the Zimbabwean magistrates court but on review the issue of jurisdiction arose, since the prejudice was apparently to the Botswana government.

Held, that where a substantial element of a crime or its harmful effect E occurred in Zimbabwe, and there is no conflict with the right of another State, there is no breach of international law when a Zimbabwean court assumes jurisdiction over an offence committed by its national outside its territory. Since the accused was a Zimbabwe national, the forgery occurred in an area patrolled by the ZRP, the passport was the property F of the Zimbabwe government and there was no danger of interfering with another country's jurisdiction, the jurisdiction of a Zimbabwe magistrates court was confirmed.

Held, further, that the Immigration Act s 36(1)(a1) provides for extra-territorial criminal jurisdiction for forgery of passports.

Cases cited G

DPP v Stonehouse [1977] 2 All ER 909 (HL)

S v A 1979 RLR 69 (G)

R v Baxter [1971] 2 All ER 359 (CA)

S v Kanyamula 1983 (2) ZLR 222 (S)

H *S v Mharapara* 1985 (1) ZLR 350 (H)

Ndou J

R v Vickers [1975] 2 All ER 945 (CA) A

Treacy v DPP [1971] 1 All ER 110 (HL)

Legislation considered

Immigration Act [*Chapter 4:02*] s 36 (1) (a1) B

Judgment

NDOU J: The accused was charged with contravening two sections of the Immigration Act [*Chapter 4:02*]. He pleaded guilty to both and was convicted.

On count 1 he was convicted of departing from Zimbabwe at a place other than the gazetted point of exit (border jumping) in contravention of s 11(1) of the Act. He was sentenced to a fine of $1 000 or in default of payment, 10 days' C imprisonment. Nothing turns on this conviction and sentence; it is therefore confirmed as being in accordance with true and substantial justice.

On count 2 the accused was charged with forging entries in a Zimbabwean passport, whilst in the so-called "no-man's land" intending "to prejudice the Botswana Immigration Department". I queried

whether in light of the fact that D the charge sheet alleges that the prejudice would be suffered by the Botswana authorities the Plumtree Magistrates' Court had the requisite territorial jurisdiction. The facts of this case are the following:

> "1. After crossing the border into Botswana, the accused got to the Ramakgwebane Border Post where he teamed up with his other friend who could not be arrested by the police. E
>
> 2. The accused saw the complainant Colleta Chasi, a 48 year old woman who had been enied entry into Botswana at the Ramakgwebane Immigration Offices.
>
> 3. The accused took the complainant's Zimbabwean passport and lured her to follow them to the place commonly known as "no-man's land".
>
> 4. The accused then stopped at the bushy area where they forged the F complainant's passport by altering the letters and figures on a previous print of a date-stamp using a coloured pencil.
>
> 5. On seeing police officers who were patrolling the area the accused ran away and the accused was caught being in possession of the complainant's passport and three coloured pencils used in the altering of the date-stamp prints." G

With the benefit of hindsight the trial magistrate opines that he did not have the requisite territorial jurisdiction to entertain the charge in count 2. He bases his view on the decision of *S* v *Mharapara* 1985 (1) ZLR 350 (H). In this case Mfalila J held that under the principle of nationality or active personality in international law, a State has jurisdiction with respect to any crime committed H

Ndou J

A outside its territory by a person or persons who is or are its nationals at the time when the offence was committed or when he is or they are prosecuted and punished. So long as there is no conflict with the territorial principle and the right of other states there can be no breach of international law in a State assuming jurisdiction. It is however, a principle which should not lightly be applied in view of the possible conflict with the legitimate rights of other B States – see also *S* v *A* 1979 RLR 69 (G); *Treacy* v *Director of Public Prosecutions* [1971] 1 All ER 110 (HL); *R* v *Baxter* [1971] 2 All ER 359 (CA) and *Director of Public Prosecutions* v *Stonehouse* [1977] 2 All ER 909 (HL).

In general, Zimbabwe adheres to the Anglo-American principle of territoriality and as such assumes criminal jurisdiction where offences have been committed by its own subjects or within the geographical ambit of its land. It does not by C its legislation invade the jurisdictional province of other sovereign states. This principle seems to be losing ground in the face of a trend indicating that where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements, or their harmful effect, occurred – *R* v *Treacy, supra*, at page 124.

D In my view, there may be circumstances where, in a case reflecting foreign and domestic elements, it becomes irrelevant to ask where the crime was committed or whether the last essential act occurred within the territory of Zimbabwe. The court is not compelled to disclaim jurisdiction if satisfied that either a substantial element of the offence or the harmful effect thereof occurred within Zimbabwe. But where the foreign elements in an offence predominate, E the connection between the physical acts of the offender or the harmful effects on the one hand, and Zimbabwe on the other, may indeed be so tenuous that our courts will hesitate to exercise criminal jurisdiction *South African Criminal Law and Procedure* Vol V A V Lansdown and J Campbell at pages 7-11.

F *In casu*, the accused was arrested at what is termed "no-man's land" between Zimbabwe and Botswana. The forged passport is the property of the Zimbabwe Government. The accused person and his accomplice (who is erroneously referred to as the complainant) are nationals of Zimbabwe. The area where the forgery occurred is patrolled by the Zimbabwe Republic Police. In fact the accomplice had been prevented from entering Botswana by its authorities. I G hold the view that the laws of Zimbabwe are as applicable there as they are in any other part of the country. I draw strength in this view from *S* v *Kanyamula* 1983 (2) ZLR 222 (S) and *R* v *Vickers* [1975] All ER 945 (CA).

If I am wrong in this regard the conviction will still stand because the wording of the Immigration Act [*Chapter 4:02*] gives our courts extra-territorial H criminal jurisdiction for this type of contravention. There are many statutes

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Ndou J

that do so. Section 36 (1) (a1) of the Immigration Act provides: A

"Any person who *outside Zimbabwe* —

(i) forges any Zimbabwean permit or travel B document; or

(ii) is in unlawful possession of or uses any forged Zimbabwean permit or travel document, knowing it to be forged; or

(iii) is in unlawful possession of or uses any Zimbabwean permit or travel document which he is not entitled to possess or use;

shall be guilty of an offence and liable to a fine not exceeding …"

From the foregoing I am satisfied that the Plumtree Magistrates Court was correct in exercising criminal jurisdiction in count 2. In the circumstances I certify the proceedings in both charges as being in accordance with true and substantial justice on both counts. C

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Source:
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MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS & NATIONAL HOUSING v MUDZURI & ANOR 2004 (1) ZLR 223 (H)

Citation	2004 (1) ZLR 223 (H)
Case No	Judgment No. HH-62-04
Court	High Court, Harare
Judge	Gowora J
Heard	17 September 2003
Judgment	25 February 2004
Counsel	*C Muchenga,* for the applicant *E Matinenga,* for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

C **Local government** — *mayor — suspension of by Minister — consequences of suspension — no discretion given to Minister once mayor is suspended*

Practice and procedure — *interdict — final interdict — grant of — grounds for — clear right to interdict — Minister responsible for administration of Act — right to ensure Act complied with — injury suffered or apprehended – not confined to actionable wrongs — defiance of* D *decision by Minister made under Act — Minister suffering injury thereby*

Headnote

The Minister had suspended the elected Mayor of Harare in terms of s 54(2)(a) of the Urban Councils Act [*Chapter 29:15*]. In defiance of the order, the Mayor attended a meeting of mayors and later reported for duty E at the city council. The Minister sought an interdict preventing the Mayor from exercising any of the functions of his office. The Mayor did not seek an order declaring his suspension unlawful and arbitrary, although this was raised during the court hearing. Instead, it was argued that the interdict should not be granted, the argument being that the normal grounds for the grant of an interdict had not been proved.

F *Held*, that once a mayor has been suspended in terms of s 54(2)(a), he may not carry out any of the functions that are referred to in s 64. The provisions of s 54(2) are peremptory and the Minister has no discretion at all in the matter, as the exercise of the functions of mayor during the period of suspension is prohibited by the Act and not by a decision of the Minister. In the absence of compliance by the mayor with the provisions G of the Act, it then behoves the Minister, as the official responsible for the administration of the Act, to ensure that the provisions of the Act are abided with. It would be absurd to find that the Minister did not have a clear right entitling him to seek an interdict.

Held, further, that where an authority charged with certain administrative H functions makes a decision which is thereafter openly

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Gowora J

defied, such defiance causes impairment to the authority of the law. It would be A erroneous to conceive of harm or injury merely as actionable wrongs which can be claimable in monetary terms. It could not be doubted that the Minister suffered an injury.

Held, further, that there was no other remedy available to the Minister. Accordingly, the interdict would be granted. B

Cases cited

Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njainjai & Ors 2000 (1) ZLR 85 (S)

Legislation considered C

Urban Councils Act [*Chapter 29:15*], s 54(2)(a)

Case information

C Muchenga, for the applicant

E Matinenga, for the respondent

Judgment

GOWORA J: On 29 July 2003, Mavangira J granted a provisional order the D terms of which were the following:

"A. TERMS OF ORDER MADE

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

1) That the first respondent is hereby interdicted from carrying out E any mayoral functions whilst on suspension including reporting for duty at Town House or any other public gathering or function as Mayor.

2) That the first respondent is hereby interdicted from interfering with any investigations into his allegations of misconduct.

3) That the first respondent pays the applicant's costs of suit. F

B. INTERIM RELIEF GRANTED

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

1) That the first respondent is hereby interdicted from carrying out any Mayoral functions whilst on suspension including reporting G for duty at Town House or any other public gathering or function as Mayor.

2) That the first respondent is hereby interdicted from interfering with any investigations into his allegations of misconduct

C. The relief claimed against the second respondent is hereby dismissed with costs. H

2004 (1) ZLR p225

Gowora J A

D. SERVICE OF THE PROVISIONAL ORDER

The applicant shall serve the provisional order granted in this application on the respondents."

The applicant is seeking confirmation of the provisional order, which relief is opposed by the respondent.

The background facts to this dispute are common cause. The respondent was B in March 2002 elected as Executive Mayor of Harare. It is not in dispute that the respondent contested the mayoral elections under the banner of the opposition party MDC and in fact the majority of the councillors within the City Council belong to that party. The applicant on the other hand, who is the Minister responsible for the administration of the Urban Councils Act, C belongs to the ruling party ZANU PF. On 29 April 2003, the applicant suspended the respondent from carrying out his functions as Mayor, such suspension being without benefits. The record does not reflect when the letter was received by the respondent, but it is not in dispute that on 30 April 2003, the respondent attended a meeting of executive mayors held at Bulawayo and which meeting was arranged by the Urban Councils Association of Zimbabwe. D In addition, on 5 May 2003, the respondent reported for duty at Town House and went into the mayor's office with the intention of carrying out his functions as Mayor. On the same day, a letter addressed to the applicant by the respondent's legal practitioners of record made it very clear that the respondent did not consider himself to have been properly suspended and that therefore as a result he intended to not only attend at Town House to carry out the E functions of mayor but he would conduct himself as mayor as he was under no obligation to comply with an unlawful and arbitrary decision. These events are apparently what then prompted the applicant to seek the relief which was obtained by way of urgent chamber application and which is now before me for confirmation or discharge.

F Whereas before Mavangira J the applicant was seeking a temporary interdict, Mr *Muchenga* submitted that the applicant was now seeking a permanent interdict. He contended that in order for a court to grant a final interdict three requirements were necessary to be satisfied. He cited the following as the necessary requirements: that the applicant must establish a clear right; that actual injury must have been committed or was reasonably apprehended; and G the absence of similar protection by any other remedy.

WHETHER OR NOT THE APPLICANT HAS ESTABLISHED A CLEAR RIGHT

It was submitted on behalf of the applicant that as the suspension of the H applicant had been effected in terms of s 54(2)(a) of the Urban Councils Act

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2004 (1) ZLR p226

Gowora J

[*Chapter 29:15*], the applicant had demonstrated that it had a clear right to the A permanent interdict which he was seeking and that the existence of the right, which right is a statutory one, was indisputable and was not open to any doubt. It was further contended that the suspension of the respondent had been effected lawfully as the applicant had reasonable suspicion that the respondent was guilty of misconduct. B

Mr *Matinenga* submitted that the onus to establish the existence of a clear right was on the applicant. He contended that the applicant had not addressed what his right was and, further, that what constituted a clear right was a matter of substantive law. The right to suspend was enshrined in s 54 of the Act but it was necessary to read further than the said section however. It was further contended that the applicant did have a right which, however, should be C supported by evidence as to whether the right was a clear right or not, which must be established on a balance of probabilities. It was contended further that all the Minister did was to make allegations against the respondent without bothering to substantiate the allegations in question. In his submission, it did not take the matter very far to show that the respondent did not have a defence, D but there must be some reasonable investigations on which the reasonable suspicion is based.

He submitted further that the substantive right was created by s 54(2) where there are reasonable grounds to suspect that there has been misconduct. The onus on the Minister when suspending a mayor was much higher than when a councillor is suspended in terms of s 113 and there must be reasonable E grounds for suspecting that the mayor was guilty of misconduct warranting suspension. The person suspending the mayor must thereafter satisfy the court that the right to suspend may be relied upon. It was further submitted that the facts must clearly indicate that the person sought to be interdicted thus must not have a defence. F

Section 54(2) of the Act provides as follows:

> "The Minister may suspend a mayor —
>
> (a) whom he suspects on reasonable grounds of having been guilty of conduct referred to in paragraph (a) of subsection (1); or G
>
> …
>
> and while the mayor is so suspended he shall not carry out any functions as a mayor."

The functions of a mayor are detailed in s 64 of the Act as follows:

> "(1) The mayor shall be responsible for —
>
> (a) the supervision and co-ordination of the affairs of council and the development of the council area; and H

Gowora J A

> (b) through the town clerk, controlling the activities of the employees of the council concerned
>
> (2) In addition to the responsibilities referred to in subsection (1), a mayor of a municipality shall have the following functions – B
>
> (a) presiding over all meetings of the council at which he is present; and
>
> (b) presiding over all meetings of the council's executive committee at which he is present; and
>
> (c) presiding over all ceremonial functions of the council; and
>
> (d) signing orders, notices and documents that require execution or authentication by or on behalf of the council; and C
>
> (e) when necessary, causing investigations to be conducted into allegations of misconduct, whether on the part of councillors or employees of the council; and
>
> (f) with the approval of the council, fixing the conditions of service of employees of the council; and
>
> (g) exercising any function that council may delegate to him in terms D of subsection (3); and
>
> (h) exercising any function that may be conferred or imposed upon him, whether in terms of this Act or any other enactment."

It is not open to any doubt that once a mayor has been suspended in terms of the provisions of subs (2) of s 54 of the Act such mayor shall not carry out any E of the functions that are referred to in s 64. The provisions of subs (2) of s 54 are peremptory and the Minister would appear not to have any discretion at all in the matter, as the exercise of the functions of mayor during the period of suspension is prohibited by the Act and not by a decision of the Minister. Therefore, the right of the Minister to stop the mayor from exercising the duties or functions of mayor during the mayor's suspension under the Act is F not in dispute. I do not understand the respondent to say that the Minister is not possessed of that right, as the right derives by operation of law. It is also not in dispute that the respondent, subsequent to his receipt of the letter of suspension carried on exercising the functions of mayor, his position being that the suspension by the Minister was null and void and he was therefore entitled to ignore the suspension and attend at his office and attend other G functions in his capacity as mayor.

The position of the respondent is that before proceeding to suspend a mayor in terms of s 54(2), the Minister must satisfy himself that reasonable grounds exist for him to suspect that the mayor is guilty of conduct that renders him unsuitable to remain in the position of mayor. It is the further submission of H the respondent that the Minister could not have had reasonable grounds to

Gowora J

suspect him of being guilty of misconduct such as would render him (the A respondent) unfit to be mayor and that in the circumstances, the Minister's failure to investigate the allegations prior to the suspension and the delay in appointing an investigative committee thereafter would tend to show that the decision by the applicant is clear proof of his abuse of his powers for political purposes. In respect of the Chegutu Town Council, the applicant's ministry B had commissioned a report which pointed to wrongdoing on the part of the Deputy Mayor but no action had been taken, presumably due to the fact that he belonged to the same political party as the applicant. It was contended as well that the lack of an investigative process prior to the applicant making the decision to suspend the respondent tended to show that the applicant was not acting in the interest of the ratepayers of Harare who voted the respondent into C office. Further, the applicant's failure to act with speed in having the suspension dealt with has rendered the suspension of no force and effect and *ultra vires* the Act. As a consequence, the Minister's perceived right to apply for an interdict to stop him from carrying out the duties of mayor cannot be confirmed as it is predicated on a nullity. D

In her judgment in respect of the application for the provisional order, Mavangira J stated thus at p 9:

> "In my view, it is important that sight is not lost of the fact that the first respondent did not make any attempt to legally challenge and have the suspension order of 29 April 2003 set aside. The suspension order stands and the first respondent must abide by it until or unless it is set aside." E

In this dispute, the terms of the final order to be determined are not concerned with the appropriateness or otherwise of the suspension of the respondent by the applicant. There is before me no prayer for the setting aside of the suspension on the alleged grounds of lack of reasonableness on the part of the Minister. If I were persuaded that indeed the Minister had been unreasonable, I cannot grant an order that would result in the suspension being set aside or F being declared a nullity as that is not an issue before me. In the event that the respondent intended to have a substantive order made regarding the suspension, it was up to him to make the proper application to this court instead of seeking a pronouncement which would not be of benefit to the parties or in the resolution of the dispute before the court. In my view, it cannot assist a party G to seek a declaration on a point or dispute when the court before which there is a matter involving such dispute cannot grant a substantive order in the terms being moved. Any court which makes a pronouncement on an issue not for determination before it will unnecessarily bind the court before which the dispute is eventually brought as the pertinent issues to the dispute will already have been determined in the absence of a specific prayer for appropriate relief. H

Gowora J

A Such a pronouncement would also prejudice the litigants as as the matter would have been already determined even though no specific relief would have been ordered. As already stated by Mavangira J, the respondent has not made any effort for the suspension to be set aside and as a consequence it stands and he must abide by it. It appears to me that the respondent, in submitting that the suspension is unreasonable and that therefore the interdict should not be B granted for that reason, is seeking to have the suspension set aside through the back door. I therefore, decline to render a determination on whether or not the suspension was grounded on reasonable suspicion that the respondent had committed acts of misconduct as stipulated in the Minister's letter of suspension.

As I see it, the right of the Minister to apply to court for an interdict against C the respondent is not open for scrutiny as the prohibition against a suspended mayor carrying out the functions of a mayor is not as a result of the decision by the Minister to stop the mayor from so acting. The prohibition is by operation of law, such that had the respondent not insisted on carrying on with his duties as mayor, the Minister would not have been required to come to court for an order interdicting the mayor from so acting. Once a mayor has been D suspended, it is a consequence of the suspension that he ceases to carry out the duties and functions of mayor. In the absence of compliance by the mayor with the provisions of the Act, it then behoves the official responsible for the administration of the Act to ensure that the provisions of the Act are abided with. In these circumstances it would be absurd in my view to find that the Minister did not have a clear right entitling him to seek an interdict.

E **WHETHER OR NOT THE APPLICANT HAS SUFFERED AN INJURY OR IF INJURY IS REASONABLY APPREHENDED**

The respondent contended that in the event that the court found that the Minister indeed had a clear right, then it must be found against the Minister that there had been no injury to the Minister. The applicant on the other hand G contended that the defiance by the respondent of the letter of suspension and his vowed intention to continue as mayor despite the intimation by the Minister in the letter to the respondent to stop acting as mayor during his suspension amounted to an injury as well as apprehension of harm in the future.

G Neither counsel has referred to any authority on what constitutes injury for purposes of granting an interdict and despite diligent search I have not been able to find any. In the absence of case authority on the meaning of the word injury, it becomes necessary to look at its ordinary everyday meaning.

The *Shorter Oxford Dictionary* describes the verb "injure" as follows:

> "to do injustice to, to wrong; to do outrage to in speech; to insult, revile, H calumniate. To do hurt or harm to; to damage; to impair."

Gowora J

The same dictionary describes the noun 'injury' in the following terms: A

> "Wrongful action or treatment; violation of another's rights; suffering or mischief intentionally inflicted."

The applicant is the Minister to whom has been assigned the responsibility for the administration of the Act and he is the one who is in terms of s 54 given the power to suspend a mayor where he has reason to believe that such mayor B is guilty of misconduct which renders him unfit to be mayor. A defiance of the suspension order and an avowed intention on the part of the mayor to carry on with the duties of mayor would be a clear violation of the provisions of s 54(2).

It cannot be in dispute that where an authority charged with certain administrative functions makes a decision which is thereafter openly defied such defiance C causes impairment to the authority of the law. It would be erroneous in my view to conceive of harm or injury merely as actionable wrongs which can be claimable in monetary terms. The respondent refused to accept the authority of the applicant and the latter's capacity to send him on suspension. The stance of the respondent was that as he had been elected into office by the residents of Harare, it was they who had the capacity and right to send the mayor on the D suspension and not the Minister, hence the respondent's stated intent to remain and act as mayor until the residents should have decided to the contrary. On these facts, it cannot be doubted that indeed the Minister suffered an injury.

In casu, the applicant has proved a clear right and it is therefore not necessary for him to show that he is likely to suffer irreparable harm or injury. In E *Charuma Blasting & Earthmoving Services (Pvt) Ltd* v *Njainjai & Ors* 2000 (1) ZLR 85 (S) at 90E-G, Sandura JA stated as follows:

> "Since Charuma proved a clear right, it was not necessary for it to establish that it would suffer irreparable harm if the interim interdict was not granted. Support for this conclusion is found in what Innes JA (as he then was) said in *Setlogelo* v *Setlogelo supra* at 227. There the learned Judge F of Appeal said:
>
> 'The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in van der Linden's Institutes where he enumerates the essentials for such an application. The first he says, is a clear right; the G second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such cases, he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable harm to the applicant. If so, H the better course is to grant the relief if the discontinuance of the act

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Gowora J

> A complained of would not involve irreparable injury to the other party: van der Linden Inst (3,1,4,7). But he certainly does not lay down the doctrine that where there is a clear right the injury complained of must be irreparable in order to justify an application for an interdict'."

I respectfully associate myself with those views and agree with counsel for the applicant that there is no requirement for him to prove that the injury is B irreparable.

ABSENCE OF ANY OTHER REMEDY

In her judgment of 10 July 2003 in which she granted the provisional order, MAVANGIRA J stated on p 8 of the judgment:

> "In this matter, it appears to me that if the interim interdict is granted but C the grant of it is later shown to be wrong, the first respondent's suspension should fall away and the first respondent should resume his duties as Mayor. If on the other hand, the interim interdict is refused and the refusal is later shown to be wrong, then the applicant's authority and powers under the Act will have been irreversibly and irreparably disregarded or defied. This is particularly so as the applicant has no other adequate D remedy available to him. As submitted by the applicant's counsel, a claim for damages is, in the circumstances, not available to the applicant and the interim relief sought is the only available remedy that he may use. I also agree with the applicant's counsel that the provisions of s 318 of the Act do not provide the applicant with a remedy as rights under the section accrue to the Council and not the Minister."

E I believe that those remarks by the learned judge apply with equal force in this application which is to do with the confirmation of the provisional order, and I respectfully associate myself with them. There is no other remedy available to the Minister. The respondent in opposing the confirmation of the order has not pointed this court to any other remedy that the Minister might avail himself of apart from the interdict.

F In the result, the application succeeds and the provisional order granted by this Honourable Court on 10 July 2003 is hereby confirmed and a final order is issued in the following terms:

1. The respondent is interdicted from carrying out any mayoral functions whilst on suspension including reporting for duty at Town House or any G other public gathering or function as Mayor.
2. The respondent is hereby interdicted from interfering with any investigations into his allegations of misconduct. H
3. The respondent is ordered to pay the applicant's costs of suit.

Gowora J

Attorney-General's Office, applicant's legal practitioners A

Kantor & Immerman, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/S v MAKAMBA (2) 2004 (1) ZLR 233 (S)

S v MAKAMBA (2) 2004 (1) ZLR 233 (S)

Citation	2004 (1) ZLR 233 (S)
Case No	Judgment No. S-11-04
Court	Supreme Court, Harare
Judge	Ziyambi JA (In chambers)
Heard	23 February 2004, 24 February 2004
Judgment	26 February 2004
Counsel	*S Moyo*, for the appellant *V Shava*, for the respondent

Case Type Appeal against refusal of bail

Annotations No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* C *Rights — s 13(1)(e) — refusal of bail where accused charged with "economic" offences, even though no prima facie case shown — constitutionality of provision*

Criminal procedure — *bail — refusal of where accused charged with "economic" offences — no requirement for State to show even a prima facie case — constitutionality of provision*

Headnote

D The appellant appeared before a magistrate on charges under the exchange control legislation. The charges alleged that he had sold foreign currency to a local telephone company, and in his capacity as a director of that company to have bought foreign currency from persons who were not E authorised dealers. Bail was refused on the grounds that an amendment to the Criminal Procedure and Evidence Act [*Chapter 9:07*], effected under the Presidential Powers (Temporary Measures) Act, prohibited the grant of bail. A bail application to the High Court also failed.

The amendment to the Criminal Procedure and Evidence Act was to the effect that, where a person is charged with a specified offence (the offences F specified being primarily "economic" ones), the accused person may not be admitted to bail for seven days even if there are no *prima facie* grounds for the charge. Even if there are such grounds, the accused person must be detained for a further 21 days.

Held, that the amendment was patently unconstitutional. However, the issue was not before the judge in chambers and could only be decided by the G Supreme Court in its capacity as a constitutional court. The proper procedure to challenge the constitutionality of the provision would have been for the appellant to have brought an urgent application under s 24 H of the Constitution.

2004 (1) ZLR p234

Ziyambi JA

Case cited A

Martin v Attorney-General & Anor 1993 (1) ZLR 153 (S)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 32(2) B

Case information

S Moyo, for the appellant

V Shava, for the respondent

Judgment

ZIYAMBI JA (In Chambers, in terms of Rule 5 of the Supreme Court (Bail) Rules):

This is an appeal against an order of the High Court refusing bail to the C appellant. On 14 February 2004 the appellant appeared before a magistrate on allegations of contravening s 5 of the Exchange Control Act [*Chapter 22:05*], as read with ss 4(1)(a)(i) and 11(1)(a) of the Exchange Control Regulations, SI 109 of 1996 ("the Regulations"). It was alleged that on eleven occasions he sold foreign currency to Telecel Zimbabwe. In his capacity as director of Telecel Zimbabwe, he is alleged to have issued cheques for payment of foreign D currency purchased from persons who were not registered dealers. Neither the appellant nor Telecel are registered foreign currency dealers.

The appellant is also alleged to have opened a foreign currency account in Sandton, Johannesburg, South Africa, without the requisite exchange control authority and to have illegally exported maize to South Africa and caused the proceeds E of the sale to be banked in a Telecel Zimbabwe Ltd foreign currency account in Luxembourg.

The magistrate before whom the appellant appeared placed him on remand but declined jurisdiction to grant bail to him because of the provisions of the Presidential Powers (Temporary Measures) (Amendment of Criminal Procedure and Evidence Act) Regulations, SI 37 of 2004 ("the Amendment Regulations"), which she felt prohibited her from doing so. By then, the appellant had been in police custody for six days, having been arrested on 8 February 2004.

On or about 15 February 2004 (the date is not clear on the record), the appellant made an urgent application for bail to the High Court. Before the learned judge, the argument for the appellant was that, firstly, the State had not G alleged that the appellant might abscond or interfere with witnesses. There was, therefore, no ground for refusing bail. Secondly, the appellant had not been placed on remand in terms of s 32 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act"), but pursuant to a court order issued by Chitakunye J. Therefore the Amendment Regulations, which sought to amend s 32 of the Act, did not apply to his case. Thirdly, and in any event the H

Ziyambi JA

A said Amendment Regulations, being subsidiary legislation, could not amend a provision in an Act of Parliament.

The learned judge in the court *a quo* found against the appellant on the second and third contentions and the application was dismissed. The learned judge did not consider the merits of the application for bail, presumably because of her conclusion that the provisions of the Amendment Regulations were B applicable to this case.

The appellant appealed to this court with the leave of the court *a quo*. In his grounds of appeal, he challenged the constitutionality of the provisions of the Amendment Regulations, a challenge which was not raised before the court *a quo*.

C In addition, the appellant took issue with the finding of the learned judge in the court *a quo* that the appellant was placed on remand in terms of s 32 of the Act and not by virtue of a court order. The appellant sought, on appeal, an order that the Amendment Regulations be declared invalid and the appellant be admitted to bail. With the exception of the ground relating to the finding that the appellant was placed on remand in terms of s 32 of the Act and not by virtue D of a court order, all the grounds of appeal were directed at challenging the constitutionality of the provisions of the Amendment Regulations.

This appeal was opposed by the respondent, which took the view that the appeal introduced extraneous matters not covered in the judgment or raised at the hearing before the court a quo. It was pointed out too, in the respondent's E response, that the issues raised in the notice of appeal were for determination only by a Constitutional Court and the appellant had therefore followed the wrong procedure.

At the hearing before me, Mr *Moyo*, who appeared for the appellant, applied for an amendment to his grounds of appeal filed of record. The amendment sought to delete the grounds of appeal and to replace them with the following:

> F "The learned judge erred in failing to appreciate that SI 37 of 2004 was not applicable to the allegations against the accused person in his personal capacity."

Mr *Moyo* indicated that this was the only ground of appeal that he would rely on. He was aware, he submitted, that only a Constitutional Court could deal G with the other issues raised in the notice of appeal. The notice of amendment was handed to Mr *Shava*, who appeared for the respondent, only minutes before the hearing. I, therefore, at his request, granted Mr *Shava* a postponement to the following day (24 February 2004) in order to enable him to file his H submissions on this new ground of appeal.

Ziyambi JA

Although this ground of appeal was not before the court *a quo*, it is a point of A law which therefore can be raised for the first time on appeal.

On behalf of the appellant, Mr *Moyo* contended as follows: The appellant is charged with eleven counts of contravening s 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*], as read with s 4(1)(a)(i) of the Regulations. Only these eleven counts are charged against him in his personal capacity. The B charges preferred against him in his personal capacity are not specified in the Amendment Regulations and the court *a quo* was wrong in its finding that these offences were non-bailable. With respect to the remaining counts, the appellant was charged only in his representative capacity as a director of Telecel Zimbabwe. Because a director representing a company which is being prosecuted cannot be incarcerated, the appellant could not legally be detained C in respect of those charges for which he was being prosecuted merely as a representative of the company.

Mr *Shava*, however, submitted that, on the contrary, the appellant was being charged in his capacity as a director of Telecel on his own account in terms of s 385(6) of the Act. This was not a case where Telecel was being prosecuted D and the appellant was being charged as its representative. The appellant was being personally charged on all counts.

Section 385(6) of the Act deals with the personal liability of directors or employees of a company where an offence has been committed and the company is liable to be prosecuted. It provides as follows: E

> "(6) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or employee of the corporate body, shall be deemed to be guilty of the offence unless it is proved that he did not take part in the commission of the offence, and shall be liable to prosecution therefor, either jointly with the corporate body or apart F therefrom, and shall, on conviction, be personally liable to punishment therefor."

Section 385(3) deals with the prosecution of a corporate body. It provides:

> "(3) In any criminal proceedings against a corporate body, a director or employee of that corporate body shall be cited, as representative of that G corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question:
>
> Provided that –
>
> (i) ...;
>
> (ii) ...; H

Ziyambi JA A

> (iii) if the said person, as representing the corporate body, is committed for trial, he shall not be committed to prison but shall be released on his own recognizance to stand trial;
>
> (iv) if the said person, as representing the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other B than a fine, even if the relevant enactment makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of any property of the corporate body in terms of section *three hundred and forty-eight*;
>
> (v) the citation of a director or employee of a corporate body to represent that corporate body in any criminal proceedings instituted against it shall not exempt that director or employee from prosecution for that offence in terms of subsection (6)."

The Request for Remand Form 242 cites the appellant in his personal capacity, not as a representative of Telecel or any other company. There is substance in Mr *Shava*'s submission that the appellant is being charged personally on all counts.

The charges enumerated in the Remand Form are as follows:

1. Contravening s 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*] as read with s 4(1)(a)(i) of the Exchange Control Regulations SI 109 of 1996 (eleven counts). On these counts, the appellant is alleged to have sold foreign currency to Telecel Zimbabwe Ltd. Neither the appellant nor Telecel is an authorised dealer for the purposes of the Exchange Control Act.
2. Fraud, alternatively, contravening s 5(1)(a) of the Exchange Control Act [*Chapter 22:05*], as read with s 4(1)(a)(i) of the Exchange Control Regulations SI 109 of 1996 (four counts).

3. Contravening s 11(1)(a) of the Exchange Control Regulations SI 109 of 1996 (forty-five counts).

Section 11(1)(a) of the Regulations provides as follows:

> "11(1) Subject to subsection (2), unless otherwise authorised by an exchange control authority, no Zimbabwean resident shall –
>
> (a) make any payment outside Zimbabwe ..."

I turn to consider whether these charges are covered by the Amendment Regulations. Sections 2 and 4 of the Amendment Regulations provide as follows:

> "2. Section 32 ('Procedure after arrest without warrant') of the Criminal

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Ziyambi JA

Procedure and Evidence Act [*Chapter 9:07*] is amended in subsection (2) **A** by the repeal of the proviso thereto and the substitution of –

> 'Provided that if the person arrested without a warrant is charged with any offence referred to in paragraph 10 or 11 of the Third Schedule –
>
> (a) the judge or magistrate before whom he is brought in terms of this section shall not decline to order his further detention or to issue a B warrant for his further detention solely on the basis that there are no *prima facie* grounds for the charge, and no court shall admit such person to bail for a period of seven days from the date when an order or warrant for his further detention was issued in terms of this paragraph; or
>
> (b) and the judge or magistrate before whom he is brought in terms of this section is satisfied that there are *prima facie* grounds for the C charge, the judge or magistrate shall order his further detention or issue a warrant for his further detention for a period of twenty-one days (unless the charge is earlier withdrawn), and no court shall admit such person to bail for a period of fourteen days from the date when an order or warrant for his further detention was issued in terms of this paragraph …' D
>
> 4. The Third Schedule ('Offences in Respect of Which Power to Admit Persons to Bail is Excluded or Qualified') of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is amended by the insertion of the following paragraph after paragraph 10 –
>
> ' 11. Committing a serious economic offence, that is – E
>
> (a) contravening the Prevention of Corruption Act [*Chapter 9:16*];
>
> (b) contravening section 63 ("Money-laundering") of the Serious Offences (Confiscation of rofits) Act [*Chapter 9:17*];
>
> (c) the sale, removal or disposal outside Zimbabwe of any controlled product in contravention of the Grain Marketing Act [*Chapter 18:14*]; F
>
> (d) contravening subsection (1) of section 3 ("Prohibition of dealing in or possession of gold") or subsection (1), (2) or (3) of section 6 ("Disposal of gold by persons authorised to possess gold") of the Gold Trade Act [*Chapter 21:03*];
>
> (e) contravening subsection (1) of section 3 ("Unlawful dealing in or G possession of precious stones prohibited") or subsection (1) or (6) of section 6 ("Registers to be kept and returns to be made") of the Precious Stones Trade Act [*Chapter 21:06*];
>
> contravening subparagraph (i) of paragraph (a) of subsection (1) of section 5 of the Exchange Control Act [*Chapter 22:05*] as read with – H

Ziyambi JA A

(i) subsection (1) of section 10 of the Exchange Control Regulations, 1996, subparagraph (*sic*) and subparagraph (g) called (*sic*) "the Exchange Control Regulations"), by unlawfully making any payment, placing any money or accepting any payment in contravention of paragraph (a), (b), (c) or (d) of that section of the Regulations; B

(ii) paragraph (a) or (b) of subsection (1) of section 11 of the Exchange Control Regulations, by unlawfully making any payment outside Zimbabwe or incurring an obligation to make any payment outside Zimbabwe;

(iii) paragraph (b), (e) or (f) of subsection (1) of section 20 of the Exchange Control Regulations, by unlawfully exporting any C foreign currency, gold, silver or platinum, or any article manufactured from or containing gold, silver or platinum, or any precious or semi-precious stone or pearl from Zimbabwe;

(iv) subsection (2) of section 21 of the Exchange Control Regulations, by unlawfully exporting any goods from D Zimbabwe in contravention of that provision of the Regulations;

(g) contravening paragraph (b) of subsection (1) of section 5 of the Exchange Control Act [*Chapter 22:05*] by making any false statement or producing any false document in connection with a contravention of subsection (2) of section 21 of the Exchange Control Regulations; E

(h) *a conspiracy, incitement or attempt to commit any offence referred to in subparagraphs (a) to (g)*'" (my emphasis).

Thus, the amendment effected by ss 2 and 4 makes non-bailable contraventions of s 5(1)(a)(i) as read with s 11(1)(a) or (b), s 20(1)(b), (e) or (f) and s 21(2) of the Regulations.

F With regard to the charges against the appellant set out in paras 1 and 2 of the Form 242, of contravening s 5(1)(a) of the Exchange Control Act as read with s 4(1)(a)(i) of the Regulations, these relate to the sale of foreign currency to Telecel by the appellant. I am in agreement with Mr *Moyo* that s 4 of the Regulations is not one of the provisions specified in the Amendment Regulations.

G The charges which relate to contraventions of s 11(1)(a) of the Regulations are, however, covered by the Amendment Regulations.

One point of concern to me is that the facts alleged by the State on p 43 of the record do not establish *prima facie* that any payments were made by the H appellant in contravention of s 11(1)(a) of the Regulations.

2004 (1) ZLR p240

Ziyambi JA

The State alleged that: A

> "The accused required exchange control authority to operate an external account. The accused without authority opened an account with Ned Bank Sandton, Johannesburg and thereafter, caused by facsimile or by other means, transferred moneys to America or other countries on four occasions, contrary to the provisions of section 11 of the Exchange Control Regulations SI 109/1996. B
>
> The accused acting together with others would illegally export maize to South Africa to a company in Industrial Commodities Holdings and other companies. He would then cause the proceeds to be banked in Telecel Zimbabwe's foreign currency account Invik Bank in Luxembourg. Presently there is evidence to show that this happened on four occasions. C In so doing, the proceeds from the sale of maize were externalised instead of being repatriated. This costitutes (*sic*) loss and prejudice to Zimbabwe."

What is alleged is that, moneys were transferred by the appellant, presumably, from Ned Bank, Sandton, Johannesburg, South Africa, to America or other countries. There is no allegation that the moneys were transferred as payment to anyone. D

Normally, an accused person cannot be placed on remand where no *prima facie* case has been made out against him. See *Martin* v *Attorney-General & Anor* 1993 (1) ZLR 153 (S). However, the mandatory provisions of the Amendment Regulations are such that the judge or magistrate before whom the accused person (in this case the appellant) appears on a mere allegation of E contravening any of the provisions listed therein is obliged to order the detention of the accused person for a minimum of seven days. If a *prima facie* case has been established, the judge or magistrate is obliged to order the accused's detention for twenty-one days and no bail application can be entertained before the expiry of fourteen days from the date of the order.

Thus, the judge or magistrate before whom the accused person appears in F terms of the proviso to s 32(2) of the Act as amended by the Amendment Regulations is deprived of his discretion whether or not to grant bail and merely acts as a rubber stamp to give a semblance of legality to the detention. This strikes me as being patently unconstitutional but the issue of the constitutionality of the provisions of the Amendment Regulations is not before me and, as was conceded by Mr *Moyo*, can only be determined by the G Constitutional Court.

I have found that the charges brought under s 11(1)(a) of the Regulations are governed by the provisions of s 4 of the Amendment Regulations. This means that the proviso to s 32(2) of the Act, as amended by the Amendment Regulations, applies to any application for bail brought in respect of these H charges.

2004 (1) ZLR p241

Ziyambi JA

A The record does not show in terms of which subparagraph of the proviso the magistrate acted in ordering the detention of the appellant when he first appeared on remand. Indeed, the learned judge who dealt with the bail application in the court *a quo* found herself unable to determine whether the magistrate had acted in terms of subpara (a) or (b) of the proviso.

If the appellant was detained in terms of subpara (a) of the proviso, it seems B to me that the seven days mandatory detention have long elapsed and a bail application can now be entertained.

If the magistrate acted in terms of subpara (b) of the proviso, a bail application may be entertained fourteen days from the date of the order of detention. On the papers, it would appear to me that those fourteen days may have already C elapsed. If this is so, the appellant would now be free to make a bail application in the usual manner. At this application, the merits of the bail application would be considered and the court could then exercise its discretion as to whether or not to grant bail.

In view of the above, I would remit the matter to the court *a quo* to determine, on evidence to be placed before it, whether a bail application by the appellant D may now be entertained and if so to enquire into the merits of any such application.

Before concluding this judgment, I wish to make the following observations on the manner in which this matter was handled.

In the first place, no application was made for leave of the High Court to appeal E to this court by the legal practitioner before filing the notice to appeal. It was only after the respondent had pointed this out in its response to the application that leave to appeal was obtained from the court *a quo*. It is unfortunate that the appellant's legal practitioner was remiss in such an elementary matter.

The second issue is the challenge as to the constitutionality of the provisions F of the Amendment Regulations. As stated earlier, only a Constitutional Court is endowed with jurisdiction in such matters. The proper course would have been to proceed, albeit on an urgent basis, in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution"). On this issue, again, the appellant's legal practitioner adopted the wrong procedure.

The third issue is that no challenge as to the constitutionality of the provisions G of the Amendment Regulations was raised before the court *a quo*. The constitutional issues raised under the guise of a notice of appeal were not before the court *a quo*. Had they been raised, the court might have considered whether to refer the matter to the Supreme Court in terms of s 24(2) of the Constitution.

H It appears to me that had the proper procedures been followed less time would

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Ziyambi JA

have been wasted and a resolution of the real issues in this matter be obtained A more speedily.

Accordingly, the matter is remitted to the High Court in order to determine, on evidence to be placed before it, whether a bail application by the appellant may now be entertained and if so to enquire into the merits of any such bail application as may be brought before it. B

Scanlen & Holderness, appellant's legal practitioners

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Source:
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CIRCLE CEMENT (PVT) LTD v NYAWASHA 2004 (1) ZLR 243 (S)

Citation 2004 (1) ZLR 243 (S)

Case No	Judgment No. S-60-03
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA & Gwaunza JA
Heard	29 September 2003
Judgment	2 March 2004
Counsel	*G Mandizha*, for the appellant *J Mambara*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Employment** — *appeal — to Labour Court — against decision to dismiss employee for conduct amounting to repudiation of employment contract — power of court to set aside dismissal — when exercisable*

Employment — *misconduct — absence from work without reasonable cause — need for reasonable cause to be established on the facts*

Headnote

D The respondent was employed as a nursing sister by a large company. Without leave from her employer, she embarked on a diploma course at a university and absented herself from work to attend the course for 19 days before being recalled to work. Her employer charged her under a registered employment code of conduct with the offence of absence from work without reasonable excuse. The disciplinary committee which E considered the charge found that she knew she had to obtain permission before attending the course, and considered her misconduct in deliberately absenting herself from work constituted a repudiation of her contractual obligations. She was accordingly dismissed. She appealed to the Labour Court, which set aside her dismissal on the ground (not supported by the evidence) that she was genuinely unaware that she had to obtain leave F before absenting herself from work in the way she had done. The employer then appealed to the Supreme Court.

Held, that the question of a penalty other than dismissal could arise only if it were established that the employer acted unreasonably in taking a serious view of the respondent's misconduct.

G *Held*, further, that the respondent had not shown a reasonable cause for her absence. A cause had to be established on the facts, and only then would it become a question of law whether the facts found were such as to H constitute a reasonable cause for her conduct.

2004 (1) ZLR p244

Malaba JA

Cases cited A

King v Port of London Authority [1920] AC 1

Zikiti v United Bottlers 1998 (1) ZLR 389 (H)

Case information

G Mandizha, for the appellant

J Mambara, for the respondent B

Judgment

MALABA JA: This is an appeal from a judgment of the Labour Court dated 3 October 2002, in which a decision of the grievance and disciplinary committee constituted under the employment code of conduct operated by the appellant ("Circle Cement") finding the respondent ("Nyawasha") guilty of misconduct and having her dismissed from employment was on appeal set C aside and an order substituted in its place to the effect that she be reinstated, without loss of salary and benefits, or damages be paid to her in lieu of reinstatement.

The facts of the case are these. Nyawasha was employed by Circle Cement as a sister-in-charge of the occupational health, safety and environment department. In July 2001, she applied to the University of Zimbabwe ("the University") for D a place to study for a diploma in community health. She was offered the place and, on 24 August 2001, obtained authority from the head of department to attend at the University on that day for purposes of registration on the course. The course was to run for eighteen months from 10 September 2001. Without having obtained leave of absence from her workplace, Nyawasha commenced E attendance at the University from 10 September 2001 and continued attending lectures in the course thereafter until she was recalled to work on 4 October 2001, when it was discovered that she had not been granted leave of absence. She had been away from work without leave for nineteen days.

On 8 October 2001, Nyawasha was charged with the offence of absence from work for five or more working days without the employer's permission or F without reasonable excuse in contravention of s 5(e) of Part VI of the registered employment code of conduct. She appeared before the grievance and disciplinary committee on 8 November 2001. In answer to the charge, she admitted that she had not obtained leave of absence from her head of department. She alleged that she was confused as to the person from whom she G had been expected to seek leave because when she sought authority to attend at the University for registration purposes she had been referred to Mr Mutasa, the industrial resources manager. It transpired at the hearing that although Mr Mutasa had told her to go and register for the course, the authority had been given by her head of department, the human resources manager.

It was established during the disciplinary hearing that Nyawasha knew before H

A she attended the course that Circle Cement had no provision for study leave. She knew that no employee could be away from work for five days or more without the employer's permission. She, as head of a section, had processed applications for leave submitted by junior employees. It was established that she had exhausted all her annual leave days. It was not her defence to the charge when she appeared before the disciplinary and grievance committee B that she had a reasonable excuse for her absenteeism.

The disciplinary and grievance committee found that Nyawasha knew that she had to seek and obtain leave of absence from work before attending the lectures at the University. They adjudged her conduct of staying away from work for nineteen days as deliberate. The view of the committee was that such C misconduct was of so serious a nature as to constitute a repudiation of her contractual obligations. Their recommendation to the managing director to the effect that Nyawasha be dismissed from employment was accepted. She was dismissed by letter dated 15 November 2001.

On 28 November 2001, Nyawasha lodged an appeal with the Labour Court, now contending that the course she had embarked on at the University would D have benefited Circle Cement. She contended that, because of the benefit her employer would have derived from the knowledge she would have acquired after attending the course, she had a reasonable excuse for being absent from work for nineteen days. The member of the Labour Court who heard the appeal said:

> E "That there was need to apply for study leave cannot be disputed. An employee cannot just take off without securing official leave. The employer did not immediately question her absence from work until nineteen days later. When she was questioned she immediately dropped from the course and resumed her duties.
>
> Her conduct suggests that she was genuinely mistaken as to the need to F formally apply for leave. She openly went about her activities in the honest belief that nothing was amiss. When confronted after nineteen days she quickly abandoned the course and resumed her duties.

That she had erred by going without leave cannot be disputed but I am of the view that under the circumstances the penalty meted out was unjustifiably harsh.

G … The respondent ought to have opted for a less severe form of punishment. The circumstances of this case do not warrant a dismissal. The employer improperly exercised its discretion. In *Zikiti* v *United Bottlers* 1998 (1) ZLR 389 (H) at 396A the court stated that where dismissal is the maximum permissible punishment, the employer has a H discretion to impose a less harsh sentence."

2004 (1) ZLR p246

Malaba JA

The relief granted by the Labour Court was that: A

" The decision to terminate the contract of employment is set aside. The appellant is to be reinstated into her former position with effect from the date of dismissal. The employer is to consider a less harsh penalty. Alternatively, if reinstatement is no longer an option the appellant is to be paid damages for the premature loss of employment calculated from the B date of dismissal."

The Labour Court accepted that the employer had established the essential elements of the offence charged against Nyawasha. It was not her defence before the disciplinary and grievance committee that she was genuinely mistaken as to her obligation to apply for and obtain the employer's permission before staying away from work for five days or more. Her defence was that she C had been confused as to the person from whom to seek the requisite permission. The disciplinary and grievance committee found that her actions were deliberate. The suggestion by the Labour Court that Nyawasha conducted herself in the manner she did because she was genuinely mistaken as to her contractual obligation to seek and obtain leave from her employer before staying away from work for five days or more has no factual basis. That was D not part of her case before the disciplinary and grievance committee. She was a managerial employee who knew that leave had to be obtained from the employer before one went away from work for five days or more. Her contractual obligation was to be at work and provide the services that she had bound herself to provide to her employer at the time agreed upon by the parties. E

The Labour Court did not apply its mind to the facts on which the disciplinary and grievance committee concluded that the respondent's conduct was of so serious a nature as to amount to a repudiation of the contract of employment between the parties. These facts were that she knew that there was no provision in the conditions of service for an employee to go on study leave and that she had exhausted all the annual leave days she would have taken for the purpose F of attending the course at the University. In staying away from work for nineteen days without leave, the employee was adjudged to have acted deliberately in breaching her contractual obligation to be at her workplace at the particular time.

Once the employer had taken a serious view of the act of misconduct G committed by the employee to the extent that it considered it to be a repudiation of contract which it accepted by dismissing her from employment, the question of a penalty less severe than dismissal being available for consideration would not arise unless it was established that the employer acted unreasonably in having a serious view of the offence committed by the employee. The principle enunciated in *Zikiti*'s case *supra* was inapplicable to H

2004 (1) ZLR p247

Malaba JA

A the decision of the disciplinary and grievance committee to dismiss Nyawasha because it was not shown to the Labour Court that its finding that her act of misconduct was of so serious a nature as to constitute a repudiation of her contractual obligation entitling Circle Cement to dismiss her from employment was one a reasonable employer would not have made.

B Not only did the Labour Court make a finding of fact which was not supported by the evidence, it also applied a wrong principle of law in setting aside the decision of the disciplinary and grievance committee to dismiss the respondent from employment.

Nothing was said by the Labour Court in its judgment about the contention (not advanced before the disciplinary and grievance committee) that the C respondent had a reasonable cause for being away from work for nineteen days because she was doing a course from which she would have acquired knowledge, the use of which would have benefited her employer. The contention had no basis. A cause had to be a reasonable cause for the purpose of the defence to the offence with which the respondent was charged by having reference to herself. There had to be established facts which

showed the D existence in her mind a belief that she was doing the course to benefit her employer and that the belief caused her to stay away from work for the period in question. Once that cause was established as a fact, it would become a question of law whether the facts found were such as to constitute a reasonable cause for her conduct: see *King* v *Port of London Authority* [1920] AC 1 at E 20, 23 and 31.

In the absence of any proof of a belief in her mind that she was doing the course for the benefit of her employer, the contention that Nyawasha had a reasonable cause for having been away from work for nineteen days was bound to fail. I am accordingly of the opinion that the decision of the Labour Court should be set aside.

F The appeal succeeds with costs. It is ordered that the decision of the Labour Court be and is hereby set aside and in its place substituted the following:

" The appeal against the decision of the disciplinary and grievance committee is dismissed with costs."

G Sandura JA and Gwaunza JA concurred.

Muzangaza, Mandaza & Tomana, appellant's legal practitioners

H *Musunga & Associates*, respondent's legal practitioners

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KUMALO v KUMALO 2004 (1) ZLR 248 (H)

Citation	2004 (1) ZLR 248 (H)
Case No	Judgment No. HH-65-04
Court	High Court, Harare
Judge	Makarau J
Heard	1 March 2004
Judgment	2 March 2004
Counsel	Miss *E Mushore*, for the applicant *R M Fitches*, for the respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Family law — *child — abduction — child removed from jurisdiction by one* C *parent — order for return of child under Convention on Child Abduction — limited circumstances in which return may be refused — risk of harm to the child — meaning*

Headnote

The applicant wife and respondent husband had become estranged. They had two minor children. These children were left in the respondent's custody D while the applicant went overseas for study purposes. The applicant visited the respondent and the children on three occasions, and the respondent took the children to visit the respondent on three occasions.

The respondent took the children to the United States at the end of 2003, without the knowledge or consent of the applicant. Shortly afterwards, E he filed a summons for divorce. In that summons he prayed for the custody of the children. The applicant then obtained an order from the High Court, declaring the removal of the children to be wrongful within the meaning of the Hague Convention on International Child Abduction and compelling the return of the children to the jurisdiction of the court noted an appeal against that order. The applicant sought F . The respondent an order to execute the order, notwithstanding the noting of the appeal. In his opposition to the application, the respondent argued that the judge *a quo* should have refused to grant the order for two reasons: (a) there was a risk that the return of the minors would expose them to physical or psychological harm; and (b) the applicant was not actually exercising custody of the minors, the respondent being the *de facto* custodian. G

Held, that as the Convention was part of the domestic law of Zimbabwe by virtue of the Child Abduction Act [*Chapter 5:05*], it was proper to refer to the provisions of the Convention directly.

Held, further, that the purpose of the Convention is to secure the prompt return to the jurisdiction of habitual residence of children abducted by H

Makarau J

A one parent. An application under the Convention is not an inquiry into who, as between feuding parents, should have custody. It is to determine whether there are any exceptional reasons why the courts of the country of the child's habitual residence, rather the courts of the assumed residence of the abducting parent, should not determine the issue of the child's custody. There is almost a presumption that abducted children B will be returned to the jurisdiction of the court of habitual residence unless that is injurious to the best interests of the child. There are two grounds under art 13 of the Convention for not ordering the child's return: (a) the person having care of the child was not actually exercising his or her custody rights; or (b) there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise C place the child in an intolerable situation.

Held, further, that the protection afforded under the Convention is not confined to those having physical custody of the child at the time of removal. The test is whether the applicant retains rights to be consulted over the welfare of the child. In our law, both parents have the right to D determine the place of residence of the children of their marriage. Had the applicant known of the respondent's intentions, she could have applied for an order barring the respondent from removing the children from the jurisdiction. She had rights of custody as envisaged by the Convention.

Held, further, that the grave risk envisaged in the article must relate to the bringing of the child back into the jurisdiction of habitual residence and E not necessarily into the custody of the applicant parent. The child could be returned and placed in the custody of the abducting parent if the best interests of the child so dictate. The normal trauma associated with relocation is not the kind of harm envisaged. Undertakings by the parents that the children will not come to any harm or that the harm will be minimised will also be enough to defeat the defence.

F *Held*, further, that the preponderance of equities were in favour of granting the application. The children's best interests were served by allowing the order for their return to stand pending the determination of the appeal. An order to the contrary would defeat the spirit of the Convention.

Cases cited G

Chief Family Advocate & Anor v G 2003 (2) SA 599 (W)

Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd 1998 (1) ZLR 149 (H)

Fox & Carney (Pvt) Ltd v Carthew-Gabriel (2) 1977 (2) RLR 152 (G); 1977 (4) SA 970 (R)

H *Kuperman v Posen* 2001 (1) ZLR 208 (H)

Makarau J

Sonderup v Tondelli & Anor 2001 (1) SA 1171 (CC)

WS v LS 2000 (4) SA 104 (C)

ZDECO (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd 1991 (2) ZLR 61 (H)

Legislation considered B

Child Abduction Act [*Chapter 5:05*], s 3

Convention on the Civil Aspects of International Child Abduction 1980, art 13

Case information

Miss *E Mushore*, for the applicant C

R M Fitches, for the respondent

Judgment

MAKARAU J: This is an application for leave to execute a judgment pending appeal. After hearing counsel, I granted the application on the turn and indicated that full reasons would follow in a written judgment. These they are. D

The applicant and the respondent are husband and wife. They are estranged. They have two minor children, namely KG (born 1989) and KZV (born 1 994).

The applicant left Zimbabwe for the United Kingdom further studies in 2002. She left K and Z in the custody of the respondent. Up to November 2003, the applicant had visited the respondent and the children on three occasions and the respondent had in turn taken the children to visit the applicant on three E occasions. In November 2003, the respondent removed the children from Zimbabwe and went to the United States of America. This he did without the knowledge or consent of the applicant and without the leave of this court. In December 2003, the respondent filed divorce summons with this court, in which, as ancillary relief, he prays for the custody of the children. F

On 27 January 2004, the applicant obtained an order from this court in which the removal by their father of K and Z from the jurisdiction of this court was declared to be wrongful within the meaning of the Convention on the Civil Aspects of International Child Abduction (commonly referred to as the Hague Convention on International Child Abduction). The order also compelled the return of the two children to this jurisdiction. On 6 February 2004, the G respondent filed a notice of appeal against this judgment. The grounds upon which the appeal was initially brought were as follows:

> "1 The honourable court erred in law in failing to hold that he had no jurisdiction to deal with the respondent's application,
>
> 2. The honourable court erred in law and in fact in failing to find that the H

Makarau J

> A High Court of Zimbabwe would not in the circumstances of this matter be in a position to properly determine the interests of the minor children concerned;
>
> 3. The honourable judge erred in fact in failing to find that the appellant being the custodian parent removed the minor children from Zimbabwe lawfully;
>
> 4. B The orders sought in paragraphs 2 and 3 of the draft order were in any event not competent."

Paragraphs 2 and 3 of the order requested the central authority in the United States of America to take all appropriate measures to secure the voluntary return of the minor children to Zimbabwe and for the authority to recover its C expenses from the respondent.

Following the noting of the appeal the applicant filed this urgent chamber application, seeking an order to execute the earlier judgment, pending determination of the appeal. The application was opposed and attached to the notice of opposition was a notice to amend the notice of appeal. The amendment to the notice of appeal seeks to introduce two new grounds of D appeal. These are:

" 5. The Honourable Judge a *quo* misdirected himself in the order made in that the papers revealed there was a risk that the return of the minors would expose them to physical and psychological harm or otherwise place them in an intolerable situation, and the Honourable Judge *a quo* ought to have refused the application under Article 13 (b) of the E said Convention;

6. In any event, the Honourable Judge *a quo* misdirected himself in the order in that the papers revealed that the applicant *a quo* was not actually exercising custodial rights at the time of the minors' removal in that the appellant was *de facto* custodian and accordingly ought to have refused the application in terms of Article 13 of the Convention."

F At the hearing of the application, Mr *Fitches* confined himself to argument on the last two grounds of appeal and conceded that the jurisdiction of this court to determine the matter was not in issue and is not disputed. The Child Abduction Act [*Chapter 5:05*] ("the Act") has incorporated the provisions of the Convention on the Civil Aspects of International Child Abduction into G domestic law in Zimbabwe. Section 3 of the Act provides that the Convention shall have the force of law in Zimbabwe. Thus, it is proper to refer to the provisions of the Convention directly, as they are part of the domestic law.

As indicated at the beginning of this judgment, the application before me is for leave to execute pending the determination of the appeal noted by the H respondent. The approach to be taken by a court in considering an application

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Makarau J

for leave to execute a judgment pending appeal has been dealt with in many A judgments of this court. The approach is well settled. In determining such an application, the court must have regard to the preponderance of equities, the prospects of success on the part of the appellant and whether the appeal has been noted without the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or to harass the other party: see B *Econet (Pvt) Ltd* v *Telecel Zimbabwe ('Pvt,) Ltd* 1998 (1) ZLR 149 (H) *Fox* & *Carney (Pvt) Ltd v Carthew-Gabriel(2)* 1977 (2) RLR 152 (G); 1977 (4) SA 970 (R) and *ZDECO (Pvt) Ltd* v *Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H). Leave to execute a judgment pending appeal is therefore in the discretion of the court.

The order appealed against in the matter before me was made under the C Convention as read with the Child Abduction Act. The purpose of the Convention, according to its preamble, is to secure the prompt return, to the jurisdiction of habitual residence, of children abducted by one parent. Hearings of applications brought under the Convention are not inquiries into who as between the feuding parents should have custody of the child or children whose custody is in dispute. The purpose of such hearings is to D determine whether there are any exceptional circumstances why the court of habitual residence of the child or children should not determine the custody issue of the child or children concerned. Such hearings are inquiries aimed at determining which court, between the court of the country of habitual residence and the court of the assumed residence of the abducting parent, is E best placed to determine the issue of the custody of the child or children whose custody is disputed. The inquiry starts off with the court of habitual residence in a favoured position such that it almost akin to a presumption that abducted children will be returned to the jurisdiction of that court unless there are exceptional circumstances making such a return injurious to the best interests of the minor children This is so because the entire purpose of the Convention F is to ensure the prompt return of abducted children to the courts of habitual jurisdiction. The legal position relating to abducted children to which the Convention applies, in my view, is that such children are to be promptly returned to the country of habitual residence unless the court which determines the application is satisfied that such a return wil1 be injurious to the welfare of the children under the two safe harbour defences provided for under Art 13 G of the Convention. Apart from these two safe harbours, no other defences can defeat an application for the return of abducted children to the country of habitual residence, where an application for their return is made under the Convention.

The Convention provides the exceptional circumstances under which a court H

Makarau J

A hearing an application under the convention may refuse to order the return of the child or children in art 1 3 of the Convention. I shall deal with these in detail when I consider the respondent's prospects of success on appeal. At this stage, I wish to observe that any considerations of the balance of equities and the prospects of success on appeal in an application such as the one before me has to be considered with the import of the Convention in mind so that this B is not undermined.

It is my view that the prospects of success of the appeal noted are non- existent.

The appellant argues, firstly, that the judge *a quo* misdirected himself in that the papers before him revealed that the return of the children to the jurisdiction of this court will expose them to physical or psychological harm or will place C them in an intolerable situation. In raising this argument, the respondent seeks refuge under the provisions of art 13 (b) of the Convention. This provides that a court may refuse to order the return of the child if there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The harm that is envisaged in the article is harm to the child attendant upon its return to the D jurisdiction of the court of habitual residence and not upon his or her return to the applicant parent as the issue of custody is not determined by the court hearing an application under the Convention. The minor children can be brought back to the jurisdiction and remain in the custody of the abducting parent should the best interests of the children so dictate. Such an order was made by an Israeli court in an order returning the children in that matter to the E jurisdiction of this court. See *Kuperman* v *Posen* 2001 (1) ZLR 208 (H) at 209 E.

The issue of what constitutes grave risk of physical and psychological harm to abducted children ordered to return to the court of habitual jurisdiction was before the court in the case of *WS* v *LS* 2000 (4) SA 104 (C). There, a detailed F analysis of what would constitute grave risk in terms of art 13 of the Convention was carried out. It was accepted in that case that the normal trauma associated with relocation did not constitute the degree of harm envisaged in the Convention. The court further accepted that the giving of undertakings or guarantees by the parents that the harm to the children will be kept to a G minimum is enough to defeat the sting of the defence offered in the Article.

The meaning of the risk referred to in art 13 was also discussed in *Sonderup* v *Tondelli & Anor* 2001 (1) SA 1171 (CC). The South African Constitutional Court had this to say at p 1189 para 45:

> " An art 13 inquiry is directed to the risk that the child may be harmed by H a court-ordered return. The risk must be a grave one."

Makarau J

Later on the same page, the court considered that the harm that the minor child A in the inquiry before it would suffer upon return to the country where her custody would be determined, was not of a serious nature but was harm "which is the natural consequence of her removal from the jurisdiction of the courts of British Columbia, a court-ordered return, and a contested custody dispute in which the temperatures had been raised by the mother's unlawful action." That harm, the court held, is the harm that all children who are subject to B abduction and court-ordered return are likely to suffer and it is not enough to make a court refuse to order the return of the child.

The points that emerge from the decided cases are, in my view, firstly, that the grave risk envisaged in the article must relate to the bringing of the child back into the jurisdiction of habitual residence and not necessarily into the custody C of the applying parent. A distinction between the two is, in my view, to be made, as they do not necessarily mean the same. Secondly, the risk of harm must be a grave one and it must be objectively tested. The harm must transcend the ordinary trauma that the child will suffer upon being separated from the abducting parent. Undertakings by the parents that the children will not come to any harm or that the harm to the children will be minimised is enough to D defeat the defence and, finally, the harm must be as a result of the court-ordered return.

In casu, the respondent does not allege that there is any grave risk that the return to this jurisdiction in itself would expose K and Z to physical or psychological harm. His allegations are that the applicant threatened him with E physical harm upon her return from the United Kingdom on one of her visits. There is no allegation that she has physically abused the children during the periods she has been in contact with them. In any event, the order by this court does not grant the applicant custody of the children but simply compels their prompt return to the jurisdiction of this court. The

implied allegation that the children are not safe in the vicinity of the applicant is belied by the respondent's F own admission that he will allow her to have access to the children whilst they are in the United States as she used to have in Zimbabwe.

On the basis of the foregoing, it is my view, that there is no merit in the respondent's fifth ground of appeal.

Secondly, Mr *Fitches,* for the respondent, argued that the applicant was not G the *de facto* custodian of the minor children and the judge *a quo* ought to have refused to make the order under art 13 (a) of the Convention. This paragraph allows the court to refuse to order the return of the child if the applicant was not actually exercising the custody rights in respect of that child at the time of removal H .

Makarau J

A Again, with respect, the respondent misconceives the protection that is afforded under the Convention. The protection afforded under the Convention is not confined to those having physical control over the child at the time of removal. The protection is afforded to all those who have rights and responsibilities towards the child under the municipal laws of the court of habitual residence. The test is whether the applicant retains rights to be B consulted over the welfare of the child, including the removal from the jurisdiction of habitual residence of the child. See *Chief Family Advocate & Anor* v *G* 2003 (2) SA 599 (W). In our law, both parents of children born to a marriage have the right to determine the place of residence of the children of their marriage. Thus, the consent of each parent has to be sought before the children leave the jurisdiction and it is only when consent has been unreasonably C withheld that leave of this court, as upper guardian of all minors, is sought.

In the circumstances of the matter before me, the applicant could have applied under our domestic laws for an order barring the respondent from removing the children from the jurisdiction had she known of his intentions in this regard. The parties are still married. They enjoy joint custody and guardianship over D their children. No competent court has made an order as to the custody of the children. The respondent has, in his divorce suit, prayed that custody be granted to him.

On the basis of the above, it appears clear to me that the applicant was thus enjoying rights of custody as envisaged under the Convention.

E In my view, the appeal by the respondent was clearly noted to buy time to enable the children to settle in the United States before the custody issue is resolved on appeal or by the divorce court. The grounds of appeal, as initially framed, are clearly without merit. The amendment to the grounds of appeal, designed as they are to enable the respondent to rely on all the possible defences under the Convention, give the impression that the appeal was noted F solely for the perceived temporary advantages it may bring the respondent in suspending the order compelling the return of K and Z to this jurisdiction.

Weighing all the above together, it appeared to me that the preponderances of equities are in favour of granting the leave sought by the applicant. The best interests of the children are best served by allowing the judgment in favour of m G their return to this jurisdiction pending determination of the appeal. An order to the contrary would defeat the spirit in which the Convention was concluded, to ensure the prompt return of children to the jurisdiction of their habitual residence for a due inquiry into their welfare by the courts best placed to do so. It is clearly in the best interests of the children that the issue relating to their custody be settled at the earliest opportunity and this is partly achieved by their H prompt return to the court that is seized with their custody dispute. For the

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Makarau J

above reasons, I granted the applicant's application on the turn and indicated A that my reasons would follow.

Kantor & Immerman, applicant's legal practitioners.

Gill, Godionton & Gerrans, respondent's legal practitioners. B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/LAW SOCIETY OF ZIMBABWE v MINISTER OF TRANSPORT & COMMUNICATIONS & ANOR 2004 (1) ZLR 257 (S)

LAW SOCIETY OF ZIMBABWE v MINISTER OF TRANSPORT & COMMUNICATIONS & ANOR 2004 (1) ZLR 257 (S)

Citation	2004 (1) ZLR 257 (S)
Case No	Judgment No. S-59-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Malaba JA & Gwaunza JA
Heard	15 May 2003
Judgment	3 March 2004
Counsel	*A.P de Bourbon SC*, for the applicant *Y Dondo,* for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 20 — right to freedom of expression, to receive and impart ideas etc — lawyer-client privilege — subsumed under generality of section — Postal and Telecommunications Act [Chapter 12:05] —* D *s 98(2) — right given to President to direct interception of postal articles etc — s 103 — right given to President to give directions to licensees — a breach of rights guaranteed by s 20 — unfettered discretion given with no mechanism to prevent abuse — not justifiable in a democratic society*

Legal practitioner — *privilege — lawyer — client privilege — extent of privilege — not absolute nor specifically guaranteed under Constitution —* E *limitations on lawyer-client privilege*

Statutes — *Postal and Telecommunications Act [Chapter 12:05] — s 98(2) — right given to President to direct interception of postal articles etc — s 103 — right given to President to give directions to licensees — constitutionality of such provisions*

Headnote

F Under s 98(2) of the Postal and Telecommunications Act [*Chapter 12:05*], the President is given the power to direct that postal articles or telecommunications be intercepted if, in his opinion, it is necessary in the interests of national security or the maintenance of law and order to do so. Section 103 of the Act gives him the right to give to "licensees" G (which includes cellular telephone providers and internet service providers) such directions of a general character as appear to him to be requisite or expedient in the interests of national security or relations with the government of a country or territory outside Zimbabwe. The Law Society brought an application under s 24 of the Constitution, seeking an order declaring those sections invalid and of no legal force or effect H because they are inconsistent with s 20 of the Constitution, which

provides for the right to freedom of expression, communication and so A on. The Society contended that the privileged status of legal communications between legal practitioner and client goes beyond the general protection to all persons by the Constitution, is time-honoured and is enshrined in common law and in s 8 of the Civil Evidence Act [*Chapter 8:01*]. It argued that the sections did not fall within any of the B exceptions permissible under s 20(2) of the Constitution. Secondly, and in the alternative, it contended that even if the impugned sections fell within the exceptions set out in s 20(2) they were too vague to satisfy the requirement as provided by law and were not reasonably justifiable in a democratic society.

Held, that the lawyer-client privilege is not absolute, but is subject to such C exceptions as the right of accused persons to fully defend themselves; communications that are criminal in themselves or that are intended to obtain legal advice to facilitate criminal activities; and when safety of the public is at risk. The sanctity of lawyer-client privilege is largely applicable in the domain of litigation or court proceedings. A proper reading of s 20 shows that the privilege, as such, is not constitutionally D guaranteed; it is only guaranteed to the extent that it is subsumed in the right to freedom of expression, which includes freedom from interference with one's correspondence.

Held, further, that ss 98(2) and 103 are a derogation of the right to freedom of expression conferred by s 20 of the Constitution. They confer on the President unfettered powers to intercept correspondence and E communications, the only limitation being is that he has to hold the "opinion" that it is necessary in the interests of national security or necessary for the maintenance of law and order. There is no requirement that his "opinion" be based on reasonable grounds or good cause; the only restriction being that the President should, in respect of certain F directives, consult the Minister, an appointee of the President, who is accountable to him. The effect of the failure to provide statutory mechanisms to control or limit the exercise of the power conferred by the Act on the President leads to an unfettered discretion to intercept mail and communications. The sections provide no guidance as to what a citizen should not do to avoid conduct that might lead to the exercise of G the powers conferred by the sections. In the absence of such limitations and control mechanisms the powers conferred on the President are too broad and overreaching to be reasonably justified in a democratic society. The impugned sections are thus so vague that the citizen is unable to regulate his conduct in such a way as to avoid the interception of his mail or communications, and were therefore struck down. H

2004 (1) ZLR p259

Chidyausiku CJ

Cases cited A

Baker v Campbell (1983) 153 CLR 52 (HCA)

Chavunduka & Anor v Min of Home Affairs 2000 (1) ZLR 552 (S)

Dexoteaux v Mierzwinski (1982) 141 DLR (3d) 590 (SCC)

Klass & Ors v Federal Republic of Germany (1978) 2 EHRR 214

Mahomed v President of the Republic of South Africa & Ors 2001 (2) SA 1145 (C) B

R v McClure (2001) 151 CCC (3d) 321 (SCC)

S v Safatsa & Ors 1988 (1) SA 868 (A)

Smith v Jones (1999) 169 DLR 385 SCC

Solosky v The Queen (1979) 105 DLR (3d) 745 (SCC)

Legislation considered C

Civil Evidence Act [*Chapter 8:01*], s 8

Constitution of Zimbabwe [1980], s 20(1) and (2)

Postal and Telecommunications Act [*Chapter12:05*], ss 98(2) and 103

Case information

D *A.P de Bourbon SC,* for the applicant

Y Dondo, for the respondents

Judgment

CHIDYAUSIKU CJ: The applicant in this case is the Law Society of Zimbabwe, established in terms of the Law Society of Zimbabwe (Private) Act [*Chapter 223*] of 1974. It has capacity to institute legal proceedings in terms E of s 51 of the Legal Practitioners Act [*Chapter 27:07*]. Although the papers do not expressly allege this, this application is brought in terms of s 24 of the Constitution of Zimbabwe ("the Constitution"). In terms of s 24 of the Constitution, an applicant is entitled to approach this court directly on the basis that the applicant's fundamental right has been, is, or is about to be, F violated. The applicant represents over 600 practising legal practitioners. The applicant's case is that its members' right to freedom of expression as enshrined in s 20 of the Constitution is threatened by the provisions of s 98(2) and s 103 of the Postal and Telecommunications Act [*Chapter 12:05*] ("the Act"). The applicant seeks an order declaring ss 98(2) and 103 of the Act invalid and of no legal force or effect because they are inconsistent with s 20 G of the Constitution.

It is the applicant's case that its members, legal practitioners, are in law entitled to free and unhindered communication between themselves and their clients and amongst each other. The applicant contends that the privileged status of legal communications between legal practitioner and client goes H beyond the general protection to all persons by the Constitution. The

privileged status of lawyer-client communication is time-honoured and A enshrined in common law and in s 8 of the Civil Evidence Act [*Chapter 8:01*]. The applicant contends that legal practitioners receive from their clients, private, personal and confidential information. Their clients must of necessity disclose to them information that has not yet been made public or which is of a private and confidential nature and should not be disclosed to the public. In B order for legal practitioners to advise their clients effectively they must receive full information and instructions from their clients. Often, the dissemination of such information to third parties or the public would cause potential or actual loss, harm and/or prejudice to clients. It is for the protection of clients that the legal privilege accorded to legal practitioner and client communication is recognised and enforced by law. C

Subsection (2) of s 98 of the Act allows the President to give a direction that postal articles shall be intercepted and detained. The Act defines "postal services" in very broad terms and the Act does not impose any restriction on the manner in which, or the persons by whom, such interception or detention may be effected. In terms of the Act the President is allowed to give a direction that any article shall be delivered to an employee of the State to be disposed D of in such a manner as the President may direct. The Act allows the President to give a direction that communications shall be intercepted or monitored. The President may give any of the directions referred to above if, in his opinion, it is necessary in the interests of national security or the maintenance of law and order. E

Section 103 of the Act similarly allows the President to give such directions to any licensee as appears to him to be requisite or expedient in the interests of national security or relations with the Government of a country or territory outside Zimbabwe. Section 20(1) of the Constitution expressly provides that no person shall be hindered in the enjoyment of his freedom of expression, F which includes freedom from interference with correspondence.

Subsection 20(2) of the Constitution provides for the derogation from the freedom of expression if it is necessary to do so in the interests of defence, public safety, public order, etc, but such derogation has to be reasonably justifiable in a democratic society.

The applicant contends, firstly, that the impugned sections do not fall within G any of the exceptions permissible under s 20(2) of the Constitution.

Secondly, and in the alternative, the applicant contends that even if the impugned sections fall within the exceptions set out in s 20(2) they are too vague to satisfy the requirement as provided by law and are not reasonably justifiable in a democratic society. H

A The respondent, on the other hand, concedes that ss 98(2) and 103 of the Act are a derogation from the guaranteed freedom of expression but argued that both provisions fall within the permissible exceptions under s 20(2) of the Constitution and are reasonably justifiable in a democratic society, and therefore constitutional.

B It is apparent from the stance of the parties that the facts of this case are common cause. The issue that falls for determination is whether ss 98(2) and 103 of the Act are consistent with s 20 of the Constitution. The applicant has submitted that the issue here relates in general terms, to the interception of communications, but more specifically relates to interference with lawyer-client privilege, which would result from the interception of mail and C telecommunications between a lawyer and his client. The concern of the applicant is that the right of the State to intercept communications in terms of ss 98 and 103 of the Act put at risk the privilege of such communication and this constitutes an interference with the constitutional rights of both the lawyer and the client in terms of s 20 of the Constitution. The applicant contends that ss 98 and 103 of the Act place at risk the confidentiality of the D communications and thus negate the privilege that is granted to those communications.

LAWYER-CLIENT PRIVILEGE

Mr *de Bourbon*, for the applicant, argued strenuously that the lawyer-client privilege was fundamental to the proper administration of justice. He argued E that the existence of the privilege is in the interests of all sectors of the community, including the State itself. It was also argued that at the heart of this privilege are two fundamental rights. Firstly, the right of persons to freely communicate with one another; and secondly, the right to fair justice. If this privilege is destroyed or threatened then these rights become meaningless.

F The court was referred to a wide range of authorities that underpinned the importance and significance of the lawyer-client privilege. In the case of *Baker* v *Campbell* (1983) 153 CLR 52 (HCA) it was held that the privilege existed not simply in relation to litigation but to advice sought between a client and a lawyer so that the client can regulate his affairs. In another case cited to this court, it was held that the privilege between a lawyer and client even overrode G the policy consideration that no innocent man should be convicted of a crime – see *S* v *Safatsa & Ors* 1988 (1) SA 868 (A) at pp 878-887.In this regard, see also *Mahomed* v *President of the Republic of South Africa & Ors* 2001 (2) SA 1145 (C) at pp 1151 and 1152-1155. The sanctity of the lawyer-client privilege and the need to minimise in roads into that privilege are emphasised H in a number of Canadian cases that were cited by the applicant: see *Solosky*

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v *The Queen* (1979) 105 DLR (3d) 745 (SCC) at p 760; *R* v *McClure* (2001) 151 CCC (3d) 321 (SCC) at p 332; A*Dexôteaux* v *Mierzwinski* (1982) 141 DLR (3d) 590 (SCC).

It is also very clear from the cited authorities that the privilege is not absolute. The following are some of the recognised exceptions to the rule:

(a) the right of the accused to fully defend themselves; B

(b) communications that are criminal in themselves or that are intended to obtain legal advice to facilitate criminal activities;

(c) when safety of the public is at risk: see *Smith* v *Jones* (1999) 169 DLR 385 SCC para 52 p. 401, para 55 p. 402, para 57 p. 403.

In Zimbabwe, the lawyer-client privilege is provided for in a statute. Section C 8 of the Civil Evidence Act [*Chapter 8:01*], which protects the lawyer-client privilege provides as follows:

> **"Privilege relating to legal profession**
>
> (1) In this section –
>
> 'client', in relation to a legal practitioner, means a person who consults D or employs the legal practitioner in his professional capacity;
>
> 'confidential communication' means a communication made by such a method or in such circumstances that, so far as the person making it is aware, its contents are disclosed to no one other than the person to whom it was made;

'legal practitioner' means a person entitled to practise in Zimbabwe as a E legal practitioner or entitled to practise outside Zimbabwe in an equivalent capacity;

'third party', in relation to legal proceedings, means a person who is not a party to those proceedings.

(2) No person shall disclose in evidence any confidential F communication between

(a) a client and his legal practitioner or the legal practitioner's employee or agent; or

(b) a client's employee or agent and the client's legal practitioner or the legal practitioner's employee agent;

where the confidential communication was made for the purpose of G enabling the client to obtain, or the legal practitioner to give the client, any legal advice.

(3) No person shall disclose in evidence any confidential communication between a client, or his employee or agent, and a third party, where the confidential communication was made for the dominant purpose of obtaining information or providing information to be submitted H

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A to the client's legal practitioner in connection with pending or contemplated legal proceedings in which the client is or may be a party.

(4) No person shall disclose in evidence any confidential communication between a client's legal practitioner, or his employee or agent, and a third party, where the confidential communication was made for the dominant purpose of obtaining information or providing information B for the client's legal practitioner in connection with pending or contemplated legal proceedings in which the client is or may be a party.

(5) The privilege from disclosure specified in this section shall not apply –

(a) if the client consents to disclosure or waives the privilege; or

(b) if the confidential communication was made to perpetrate a fraud, an C offence or an act or omission rendering a person liable to any civil penalty or forfeiture in favour of the State in terms of any enactment in force in Zimbabwe; or

(c) after the death of the client, if the disclosure is relevant to any question concerning the intention of the client or his legal competence.

(6) D Any evidence given in contravention of this section shall be inadmissible."

It is quite clear from the cited authorities and s 8 of the Civil Evidence Act that the sanctity of lawyer-client privilege is largely applicable in the domain of litigation or court proceedings. Indeed, a proper reading of s 20 of the Constitution reveals that the lawyer-client privilege, as such, is not E constitutionally guaranteed. It is only constitutionally guaranteed to the extent that the lawyer-client privilege is subsumed in the right to freedom of expression which includes freedom from interference with one's correspondence. I have no doubt that a breach of the lawyer-client privilege almost invariably leads to the violation of one's entitlement to a fair trial F guaranteed under s 18 of the Constitution, but that is not the basis of the present application.

ARE SECTIONS 98(2) AND 103 OF THE ACT INCONSISTENT WITH SECTION 20 OF THE CONSTITUTION?

Section 20 of the Constitution provides as follows:

G **"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 correspondence.

H (2) Nothing contained in or done under the authority of any law shall

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be held to be in contravention of subsection (1) to the extent that the law A 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;

…

except so far as that provision or, as the case may be, the thing done under B the authority thereof is shown not to be reasonably justifiable in a democratic society."

The impugned sections of the Act provide as follows:

"98. Interception of Communications

(1) …

(2) If, in the opinion of the President, it is necessary in the interests of C national security or the maintenance of law and order, he may give a direction that –

(a) any postal article or class of postal articles or any telegram or class of telegrams shall be intercepted or detained and shall be delivered to an employee of the State specified in the direction to be disposed of D in such manner as the President may direct; or

(b) any communication or class of communication transmitted by means of a cellular telecommunication or telecommunication service shall be intercepted or monitored in a manner specified in the direction; or

(c) any cellular telecommunication or telecommunication service established, maintained or worked by a cellular telecommunication E or telecommunication licensee or any class of such service shall be suspended or that such service shall be suspended in respect of a person named in the direction."

103. Directions to licensees in the interests of national security

(1) The President may, after consultation with the Minister and the licensee concerned, give that licensee such directions of a general F character as appear to the President to be requisite or expedient in the interests of national security or relations with the government of a country or territory outside Zimbabwe.

(2) If it appears to the President to be requisite or expedient to do so in the interests of national security or relations with the government of a country or territory outside Zimbabwe, he may, after consultation with the G Minister and the licensee concerned, give to that licensee a direction requiring him to do, or not to do, a particular thing specified in the direction.

(3)A licensee shall give effect to any direction given to him in terms of this section notwithstanding any other duty imposed on him by or under H this Act.

2004 (1) ZLR p265

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(4) A The President shall, at the earliest opportunity, publish in the *Gazette* every direction given under this section, unless he is of the opinion that such publication is against the interests of national security or relations with the government of a country or territory outside Zimbabwe, or the commercial interests of any person.

(5) A person shall not disclose, or be required by virtue of any B enactment or otherwise to disclose, anything done by virtue of this section if the President has notified him that the President is of the opinion that disclosure of that thing is against the interests of national security or relations with the government of a country or territory outside Zimbabwe, or the commercial interests of some other person.

(6) The President may make *ex gratia* payments to licensees for the C purpose of defraying or contributing towards any losses they may sustain by reason of compliance with any direction given in terms of this section.

(7) Any licensee who refuses to comply with a direction given in terms of this section shall be guilty of an offence and liable to a fine not exceeding two hundred thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

D It is quite clear from a reading of the above provisions that ss 98(2) and 103 are a derogation of the right to freedom of expression conferred by s 20 of the Constitution.

It is also clear that the protection given, under the Constitution, to freedom from interference with correspondence is not an absolute right but may be E restricted, as with freedom of expression, in certain circumscribed circumstances:

(a) the interference with the right must be in accordance with a law;

(b) it must be, *inter alia*, in the interest of defence, public safety, public order, the economic interests of the State, public morality or public health;

(c) F the interference must be reasonably justifiable in a democratic society.

The impugned sections, 98(2) and 103 of the Act, confer on the President unfettered powers to intercept correspondence and communications. The only limitation to the exercise of that power is that the President has to hold the "opinion" that it is necessary in the interests of national security or necessary for the maintenance of law and order. It is not a legal requirement that the G holding of the opinion be based on reasonable grounds or good cause. In terms of s 103 of the Act, the only

restriction on the President before he gives certain directives is that he should consult the Minister, an appointee of the President, who is accountable to him.

Sections 98(2) and 103 of the Act have no built-in mechanism restricting or limiting:

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(a) who the President may authorise to make the interception;

(b) what is to become of the mail or other communication once it has been intercepted;

(c) who has access to the contents in the intercepted communication;

(d) what steps are to be taken to ensure that any lawyer-client privilege is not unduly interfered with.

The net effect of the failure to provide statutory mechanisms to control or limit the exercise of the power conferred by the Act on the President leads to an unfettered discretion to intercept mail and communication. The impugned sections provide no guidance as to what a citizen should not do to avoid conduct that might lead to the exercise of the powers conferred by the impugned sections. The Act provides no legal recourse or safeguard for the innocent. The Act does not provide any mechanisms for accountability. Similar legislation in other jurisdictions provides, or is required to provide, for prior scrutiny, independent supervision of the exercise of such powers and effective remedies for possible abuse of the powers: see *Klass & Ors* v *Federal Republic of Germany* (1978) 2 EHRR 214. The Act provides for no such safeguards.

The issue here is not that the powers have been abused or are likely to be abused by the President but rather that there are no mechanisms in the Act to prevent such an abuse. In the absence of such limitations and control mechanisms, the powers conferred on the President are too broad and overreaching to be reasonably justified in a democratic society. The impugned sections, as I have already stated, are so vague that the citizen is unable to regulate his conduct in such a way as to avoid the interception of his mail or communication. Thus, in this regard, the impugned sections of the Act are too vague and do not satisfy the constitutional requirement of "provided by law"–*Chavunduka & Anor* v *Minister of Home Affairs* 2000 (1) ZLR 552 (S). In the result, the application succeeds and ss 98(2) and 103 of the Postal and Telecommunications Act [*Chapter 12:05*] are hereby declared unconstitutional and are struck down. The costs of this application shall be paid by the respondents jointly and severally, the one paying the other to be absolved.

Sandura JA, Cheda JA, Malaba JA & Gwaunza JA concurred.

Gill, Godlonton & Gerrans applicant's legal practitioners

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

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CABRI (PVT) LTD v TERRIER SERVICES (PVT) LTD 2004 (1) ZLR 267 (H)

Citation 2004 (1) ZLR 267 (H)

Case No Judgment No. HH-51-04

Court High Court, Harare

Judge Gowora J

Heard 16 September 2002

Judgment 3 March 2004

Counsel *A P de Bourbon SC,* for the plaintiff
P Nherere, for the defendant

Case Type Civil trial

Annotations No case annotations to date

Flynote

Contract — *consumer contract — what is — sale or supply of "services" — meaning of "services"— wide meaning to be given*

C **Contract** — *exclusion clauses — principles relating to — when clause may relieve party of liability for negligence — belated notice of clause — effect*

Contract — *whether contract of hire or for services*

Negligence — *liability for — effect of exclusion clause in contract*

Headnote

D The defendant offered its services as a crane hirer and mover of heavy equipment and machinery. The plaintiff entered into a contract with it to move heavy equipment and machinery. In the process of moving a lathe, the sling with which it was attached to the crane broke, causing the lathe to fall on to another machine. Both machines were damaged beyond E repair. The defendant denied liability on the grounds that the contract was one for the hire of its crane and equipment and operators, not for the provision of services. There was no written contract between the parties. The evidence showed that an employee of the defendant supervised the moving operation. At the end of each day an employee of the plaintiff F signed a "waybill" to confirm the hours worked on the job. At the bottom of the waybill was a note that the goods were carried subject to conditions which could be found at the defendant's offices. One clause of these conditions excluded liability for damage caused. The conditions were not specifically drawn to the plaintiff's attention before the contract was entered into.

G It was also argued for the plaintiff that the contract was a consumer contract as defined in s 2 of the Consumer Contracts Act [*Chapter 8:03*] and contained an unfair term.

Held, that the plaintiff needed machines to be moved and the defendant had the expertise and the equipment to do the moving. After the plaintiff accepted the defendant's quote, the latter proceeded with the job. The H contract was thus one of service and not of mere hire.

Held, further, that even if the exclusion clause could be said to be part of the A contract (which was doubtful), the normal principles relating to such clauses would apply.

Held, further, that the words of the exclusionary clause must be read as part of the contract as a whole. They must be sufficiently clear and comprehensive so as to require a court to give effect to them. Any B ambiguity as to the meaning or scope of the excluding or limiting term must be resolved against the *proferens.*

Held, further, that if there is no express reference to negligence in the exclusion 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 C may be based on some ground other than negligence. In this case, the contract did not specifically exclude liability where there was negligence on the part of the defendant.

Held, further, 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. It will not avail the

proferens unless the other D party was aware of it before the contract was entered into. A belated notice is valueless.

Held, further, that while a court may presume notice of the exempting term from previous dealings between the parties, there was no evidence that in their previous dealings the plaintiff had been made aware of the E exemption.

Held, further, that the defendant's employees had exclusive control over not only their own equipment but also over the plaintiff's equipment. The defendant had exclusive control over the manner of effecting the proper performance of the contract. There was a lack of reasonable care and skill in the manner in which the defendant performed A the contract and it F followed that the defendant's employees were negligent.

Held, further, that the contract was a consumer contract as defined in the Act, as it involved the supply of "services". "Services" had a wide meaning. The degree of control exercised by the defendant meant that the contract was not merely one of hire.

Held, further, that the exclusion clause fell squarely within the provisions of G para 2 of the Schedule to the Consumer Contracts Act. The court could grant relief by cancelling the clause.

Cases cited

Boka Entprs (Pvt) Ltd v Pine 1991 (2) ZLR 308 (S) H

Bristow v Lycett 1971 (2) RLR 206 (A)

Gowora J

A *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 305 (PC)

Central South African Rlys v McLaren 1903 TS 727

Frocks Ltd v Dent & Goodwin (Pty) Ltd 1950 (2) SA 717 (C)

Hughes NO v S A Fumigation Co (Pty) Ltd 1961 (4) SA 799 (C)

J Spurling Ltd v Bradshaw [1956] 2 All ER 121 (CA)

Kemsley v Car Spray Centre (Pty) Ltd 1976 (1) SA 121 (SE)

B *Kings Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N)

Micor Shipping v Treger Golf & Sports (Pty) Ltd & Anor 1977 (2) SA 709 (W)

Olley v Marlborough Court Ltd [1949] 1 All ER 127 (CA)

Peard v John T Rennie & Sons (1895) 16 NLR 175

Radar Holdings Ltd & Anor v Eagle Insurance Co Ltd 1999 (2) ZLR 246 (S)

C *SAR & H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A)

Shubara Ranch (Pvt) Ltd v Shield of Zimbabwe Ins Co Ltd 1988 (2) ZLR 306 (S)

Stocks & Stocks (Pty) Ltd v T J Daly & Son (Pty) Ltd 1979 (3) SA 754 (A)

Transport & Crane Hire (Pvt) Ltd v Hubert Davies (Pvt) Ltd 1991 (1) ZLR 190 (S) D

Tubb (Pvt) Ltd v Mwamuka 1996 (2) ZLR 27 (S)

Legislation considered

Consumer Contracts Act [*Chapter 8:03*], ss 2 & 4; Schedule, para 2

Case information

E *A P de Bourbon SC,* for the plaintiff

P Nherere, for the defendant

Judgment

GOWORA J: The defendant offers services as a crane hirer and mover of heavy equipment and machinery. In August 2000, the plaintiff entered into a contract with the defendant for the movement of heavy equipment and F machinery within its premises and to an adjacent building. In the process of moving a lathe, the sling with which it was attached to the crane broke, causing it to fall on a wire cut EDM machine. Both were damaged extensively and are beyond repair. The cost of replacing them is US$109 600. The plaintiff claims that amount as damages arising out of an alleged breach of the terms of the G contract between the parties, on the grounds that the defendant in effecting the lifting and moving of the lathe, used slings that were worn and unserviceable and further, that the defendant's employees failed to attach the slings to the appropriate attachment points on the lathe. The defendant denies liability on the basis that the contract between the parties was one for the hire of its crane and other equipment and operators. The contract was not one for the provision H of services.

Gowora J

The issues which fall for determination are as follows: A

1) Whether the contract between the parties was one of service or hire.
2) Whether the terms of exhibit 4, the document attached to the defendant's further particulars filed on 31 July 2001, formed part of the contract between the parties.
3. Whether – B
   3.1 the contract qualifies as a consumer contract, as defined in the Consumer Contracts Act [*Chapter 8:03*] ("*Chapter 8:03*"); and
   3.2 in the circumstances of this matter and out of fairness to the plaintiff, this Court ought to exercise its discretion in terms of subs 4(1) of *Chapter 8:03* and delete clause 22 of the contract which excludes C responsibility for the quality of the slings and riggings supplied.
4. Whether the defendant's employees who were operating the crane were negligent.
5. The quantum of the plaintiff's damages.

[*The learned judge then analysed the evidence and continued:*] D

I turn now to the issues for determination in this matter.

WAS THE CONTRACT BETWEEN THE PARTIES ONE OF SERVICE OR HIRE

It is common cause that the contract concluded by the parties was oral. The contract was concluded at the plaintiff's premises after the defendant's E representative Emerick had been shown the equipment that the plaintiff wanted to be moved within the premises and to the adjoining premises. The defendant was to provide the cranes for the various sizes of equipment to be moved, as well as the operators of those cranes. The defendant also provided a truck when it was necessary to provide one. The plaintiff was quoted an F hourly charge by the defendant for the equipment that was used.

Mr *de Bourbon* contended that the agreement between the parties constituted an hourly contract to move the equipment from one point to the next and that what was actually hired was the defendant's services to move the equipment. I find that his submission has merit. Firstly from the evidence of Emerick it does not appear as if the "in and out" option was ever discussed between G himself and Pitout even though from the evidence of both witnesses for the defence such an option was available. In addition by providing operators for the various pieces of equipment used on the job, which operators he would frequently visit to oversee and supervise to check on the progress, Emerick gave out to the plaintiff that he was supervising the defendant's operators. The doctrine of quasi mutual assent would therefore operate against the defendant. H

Gowora J

A Lastly, the employees of the defendant themselves never approached the plaintiff for directions or instructions on how to move any of the equipment and this very salient fact has not been disputed by the defendant's witnesses.

Mr *Nherere, per contra,* argued that the plaintiff contracted with the defendant for the hire of equipment, namely the crane the rigging equipment and the B truck. Had the plaintiff wanted to hire the services of the defendant in moving the equipment, then the defendant would have given the plaintiff a global quotation for the whole job, referred to as an "in and out" by Griffiths. This latter quotation would include charges for supervision. Pitout's evidence was clear that he was only quoted the charges for the hire of the crane and the rigging. He had no recollection of a separate quotation for a truck. He did not C recall having been quoted for supervision. His impression was that the quotation for crane hire included the truck, although he could no longer be certain. The evidence of Emerick, on the other hand, was that he had given Pitout an hourly rate for the crane, the vehicle needed for moving the machines and the riggers. For each of the items there was a separate charge. They never discussed an overall rate. At times the defendant would give an overall D quotation which would include everything, namely the crane, transport and riggers but his evidence was that this was not the case here as there was no discussion between him and Pitout on an overall charge. As regards supervision, his view was that it was difficult to ascertain who was responsible. His assumption was that the plaintiff would have someone to show the defendant's employees which machine to move or lift.

E In the absence of a written agreement between the parties as to whether the contract was one for hire or for service it is necessary to look at the conduct of the parties in relation to the contract.

The defendant accepted a mandate to move the plaintiff's machines and gave a quotation for the work required to be done. There was no requirement from F the defendant that the plaintiff should furnish information to the defendant on the manner of moving the equipment and securing it when lifting it by crane. The defendant's crane manager would visit the site two or three times a week to see how things were going, on which occasions he would have realised that the defendant's employees who were on site were not receiving instructions, supervision or assistance from the plaintiff. The crane, the truck and the G riggers were all operated by the defendant's employees without any input by the plaintiff. The slings belonged to the defendant. The defendant's employees decided which particular slings to be used for lifting the lathe and the wiro cutter. The manner of attaching the slings to the machines was decided by the defendant's employees. In my view the defendant assumed and took upon H itself the responsibility for supervising the movement and slinging of machines.

Gowora J

The view I take is that the manner of quoting for the service that the defendant A was providing for the plaintiff did not, in this instance, determine whether this was a contract for the hire of equipment or of services. Emerick had been with the defendant for a period in excess of four years. If it was the custom of the defendant to quote a global amount when the defendant was to be responsible for the movement and the supervision, he would have mentioned it to Pitout. I am satisfied that, in so far as both parties were concerned, the plaintiff needed B machines to be moved and the defendant had the expertise and the equipment to do the moving. After the plaintiff accepted the defendant's quote, the defendant got on with the job. The contract between the parties was one of service and not of mere hire of equipment.

DID EXHIBIT 4 FORM PART OF THE CONTRACT? C

Mr *de Bourbon* contended that the signing of exhibit 3, the waybill, could not make exhibit 4 ,which constituted the defendant's written terms and conditions for undertaking work, part of the contract between the parties. He submitted further that the impression created was that the terms arose out of previous dealings between the parties. D

Per contra, Mr *Nherere* submitted that the terms and conditions of exhibit 4 became part of the contract by virtue of the fact that exhibit 3, the consignment note, was signed every day by an employee of the plaintiff. At the bottom of the consignment note it is stated that:

> "All goods are handled and carried subject to our conditions covering the acceptance, consequence, delivery and warehousing of goods, a copy of E which can be seen at the company's registered office."

It was the further submission of Mr *Nherere* that the case of *Tubb (Pvt) Ltd* v *Mwamuka* 1996 (2) ZLR 27 (S) which Mr *de Bourbon* sought to rely on was distinguishable on the basis that in that case the condition sought to be relied on was an unsigned notice appearing on the wall. *In casu,* exhibit 3 was signed F by the plaintiff's employee and it clearly referred to another set

of documents. He submitted that the consistent course of conduct had not been challenged. The *caveat subscriptor* principle applied and, by virtue of the plaintiff's signature on the bottom of exhibit 3, the plaintiff was taken to have accepted that the goods were handled subject to the terms and conditions which were available should the plaintiff choose to avail himself of them. He added that, G in view of the consistent course of dealing between the parties prior to the conclusion of the agreement *in casu*, exhibit 4 could not be taken as a post-contractual document.

In *Micor Shipping* v *Treger Golf & Sports (Pty) Ltd & Anor* 1977 (2) SA 709 (W) at 713H-714C, Franklin J said: H

> A "The law relating to this issue is reasonably well settled. If a person receiving a document knows that there is writing on it and that it contains conditions relative to the contract, he is bound whether he reads them or not; if he knows that there is writing but does not know that it contains conditions relative to the contract, he is not bound, unless the other party has done what is reasonably necessary to bring the conditions to his B notice. See *Central South African Railways* v *Mclaren* 1903 TS 727; *Frocks Ltd* v *Dent and Goodwin (Pty) Ltd* 1950 (2) SA 717 (C); *Hughes, NO* v *SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C) at pp 803-804; *King's Car Hire (Pty) Ltd* v *Wakeling* 1970 (4) SA 640 (N) at pp 642-644; *Kemsley* v *Car Spray Centre (Pty) Ltd* 1976 (1) SA 121 (SE) at pp 123-124. See also Mackeurtan *Sale of Goods in South Africa* 4 ed, pp 36-37.
>
> C A distinction must, however, be drawn between documents which a person ought reasonably to suppose to contain conditions, and documents which he cannot reasonably be held to suppose to contain conditions: see *Central South African Railway* v *Mclaren supra* at 734, where the court drew a distinction between documents such as a bill of lading or even certain railway tickets, on the one hand, and a cloakroom ticket on the other. Similarly, in *Frocks Ltd v Dent and Goodwin (Pty) Ltd supra* [at D 725], it was held that the exclusion clause was printed on a warehouse invoice on which no reasonable person would expect to find conditions limiting the liability of the bailee.

Later at 714E of the *Micor Shipping* case, Franklin J quoted quoting from the judgment of Harcourt J in *King's Car Hire (Pty) Ltd* v *Wakeling supra*:

> E "In judging of what is reasonably sufficient, the party bearing the onus of establishing the incorporation of the condition in question should bear in mind the degree or magnitude of risk that the steps he has taken may not prove sufficient to convey the necessary notice to persons acting reasonably. He must (as in cases of negligence) bear in mind the extent of the risk of non-observance by the other party in relation to the steps which he has F taken and the degree of probability that such steps will bring to the notice of such other party, if acting reasonably, the existence of the condition sought to be implied in the contract."

The case for the defendant is that exhibit 4 formed part of the contract between the parties and that, as a result, clause 22 thereof applied to exclude liability on the part of the defendant for all claims for loss or damage arising out of the G use of slings belonging to the defendant. Clause 22 provides:

> "There shall be no obligation upon the owner to supply slings or crane assistants but in the event that the owner agrees to supply his/its standard selection of slings, he/it gives no warranties that the said slings will be suitable for the hirer's purposes or for any lift to be performed by the Crane described overleaf and the hirer's instance and all directions and or H instructions for rigging and methods of slinging shall be the sole and

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> absolute responsibility of the hirer who indemnifies and holds harmless A the owner against all claims for loss or damage of any nature whatsoever arising out of the use of the said slings by the hirer, the rigging and methods of slinging."

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 B following well established propositions:

(1) The words of the exclusionary clause must be read as part of the contract as a whole. See *Bristow* v *Lycett* 1971 (2) RLR 206 (A) at 221G-H; *Transport & Crane Hire (Pvt) Ltd* v *Hubert Davies & Co (Pvt) Ltd* 1991 (1) ZLR 190 (S) at 195F-G. They must be sufficiently clear and C comprehensive so as to require a court to give effect to them: see the *Transport & Crane Hire* case *supra* at 196A-B.

(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 (Pvt) Ltd* v *Shield* D *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 be E based on some ground other than negligence", *per* Lord Morton of Henryton in *Canada Steamship Lines Ltd* v *Regem* [1952] 1 All ER 305 (PC) at 310C, quoted with approval in the *Transport & Crane Hire* case *supra* at 198B-D.

(4) Where the existence of an "owners risk" clause excluding liability for negligence is not in dispute, the burden of establishing any other F possible ground of liability, such as gross negligence or *dolus,* rests upon the claimant: see *King's Car Hire (Pty) Ltd* v *Wakeling supra* at 643B; *Stocks & Stocks (Pty) Ltd* v *T J Daly & 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 G party against whom its protection is sought; or otherwise be within his knowledge: see *Micor Shipping supra* at 713H-714A. Where an "owner's risk" notice is displayed so conspicuously that a normal 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 H

A 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 unilaterally the terms of the contract: see *Olley* v *Marlborough Court Ltd* [1949] 1 All ER 127 (CA) at 134C-D; *Peard* v *John T. Rennie & Sons* (1895) 16 NLR 175 at 183A.

(7) B 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.

(8) A party cannot exempt himself from liability for the wilful misconduct or criminal or dishonest activity, of himself, his servants or agents; or C 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 Contract in South Africa* 2ed at 213-214; *Tubb (Pvt) Ltd* v *Mwamuka (supra)* at 31E-32G.

The witnesses for the plaintiff were adamant that they had never seen exhibit 4, which contains the clause which the defendant would seek to invoke to D evade liability. I have no reason not to believe them. Indeed, it is the evidence of the defendant's chief executive officer that exhibit 4, which sets out the standard terms and conditions of contract, would have been available at the defendant's offices for anyone with an interest to pick it up and read it. The contention by the defendant is that reference to exhibit 4 was made in exhibit 3, thereby incorporating exhibit 4 into the contract.

E It is common cause that exhibit 3 was signed at the end of the day, after each of the teams had completed its task. There is no suggestion by the defendant that exhibit 3 formed part of the contract when the agreement was entered into. The contract was verbal and I accept the testimony of Pitout that the purpose of exhibit 3 was to establish a record between the parties of the work done, the F time taken and the details of the defendant's employees engaged in the task. Emerick accepted that the contract between the parties was verbal and in the circumstances it begs the question as to when exhibit 4 became part of the contract. There was no suggestion by the defendant that exhibit 3 formed part of the contract between the parties.

The parties had had previous dealings for a considerable time dating back G some years. They had recent dealings in 1997, 1998 and 1999. The scope of the work involved in those days, however, was much less as the plaintiff, on those previous occasions, had requested the movement of only a few machines. The plaintiff had not, on those occasions, been required to sign a waybill. If the plaintiff's employees had been required to do so, it had not been brought H to the attention of the plaintiff's managing director. Certainly, he was unaware

of the existence of any document resembling exhibit 4 until after the A occurrence of the mishap when the two machines were damaged and I have no reason to doubt his evidence on this aspect. Pitout, who concluded the agreement on behalf of the plaintiff was not shown the printed standard terms and conditions of the contract (exhibit 4), and significantly, the writing on the bottom of the waybill (exhibit 3) was not brought to his attention and he did B not focus on it. He was more concerned with the number of hours recorded as having been worked by the defendant's employees. He was not aware that any of the plaintiff's employees had, prior to August 2000, been shown the printed standard terms and conditions under which the defendant conducted business.

Emerick, according to his evidence, only went to the site two or three times a week. There is no suggestion that at any stage he brought the conditions C appearing at the bottom of the waybill to the attention of Pitout with whom he was dealing. Prior to the conclusion of the contract, the provisions of clause 22 of the standard terms and conditions were not conveyed to the plaintiff's employees. Nor were they brought to the plaintiff's attention subsequent to the conclusion of the contract. The evidence of previous dealings does not suggest that the plaintiff had ever been given notice of the standard terms and D conditions on which the defendant did business, let alone the exemption clause.

In casu, I am not convinced that the standard terms and conditions (exhibit 4) formed part of the contract between the parties. As a consequence the defendant is not entitled to rely on the provisions of clause 22 thereof, to evade E liability.

Even if I am wrong in this conclusion, and exhibit 4 did form part of the contract, was the defendant entitled in the circumstances to rely on the exemption clause therein.

I turn now to consider whether the defendant was entitled to rely on the F exclusion clause and deny liability in accordance with the provisions of clause 22 of Ex 4. In *Transport and Crane Hire (Pvt) Ltd* v *Hubert Davies & Co (Pvt) Ltd* 1991 (1) ZLR 190 at 195 (S), Korsah JA stated:

> "At common law, the right of a contracting party to claim for 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 G negligence may be excluded if words are used which sufficiently indicate that the parties intended, in the context of the agreement, that such should be the case."

In considering the exemption, close regard must be had to the entire contract.

It was Mr *de Bourbon*'*s* contention that the loss did not fall within the terms of the exemption clause. He suggested that the exemption clause was not H

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A normal. In his view, exemption clauses are interpreted very restrictively. In the *Transport and Crane Hire* case *supra,* McNally JA, at 204-205, referred to the interpretation of exemption clauses as being policy based. Further on, when describing the approach of courts to exemption clauses, he stated thus at 207D:

> "The first case on which I rely is *Alderslade* v *Hendon Laundry Ltd* [1945] B KB 189; [1945] 1 All ER 244 (CA) at 245 in which Lord Greene MR said this:
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> "… where the head of damage … is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some C ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms, the clause is to be construed as relating to a different kind of D liability and not to liability based on negligence."

The learned Judge of Appeal at 207 also quoted with approval the following passage from a judgment by Lord Morton in *Canada Steamship Lines Ltd* v *Regem* [1952] AC 192: [1952] 1 All ER 305 at 310:

> "(i) if the clause contains language which expressly exempts the person E in whose favour it is made (hereinafter called the *proferens*) from the consequence of negligence of his own servants, effect must be given to that provision …
>
> (ii) if there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the

proferens. If a F doubt arises at this point it must be resolved against the *proferens* …

(iii) if the words used are wide enough for the above purpose, the court must then consider whether the … 'head of damage may be based on some other ground other than that of negligence' to quote again Lord Greene MR in the *Alderslade* case. The 'other ground' must not be so fanciful or remote that the *proferens* cannot be supposed to have G desired protection against it, but subject to this qualification, which is, no doubt, to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are, *prima facie*, wide enough to cover negligence on the part of his servants."

The next authority he examined was the decision of Steyn CJ in *SA Railways* H *and Harbours* v *Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) from which he

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quoted with approval the following passage which is found at 419C-E of the A judgment:

"The rule to be applied in construing an exemption of this nature appears from *Essa* v *Divaris* 1947 (1) SA 753 (AD) at p 756. Generally speaking, where in law the liability for damages which the clause purports to eliminate, can rest upon negligence only, the exemption must be read to exclude liability for negligence, for otherwise it would be deprived of all effect: but where in law such liability could be based on some ground other than negligence, it is excluded only to the extent to which it may be so based, and not where it is founded on negligence."

Finally in *Cotton Marketing Board of Zimbabwe* v *National Railways of Zimbabwe* 1988 (1) ZLR 304 (S) at 325C, Dumbutshena CJ stated thus: C

"In my opinion, for this exemption clause to exclude liability arising from negligence, there must be express reference to negligence. I do not believe that the words are wide enough, in their ordinary meaning, to cover negligence on the part of the servant of the respondent. And if the words are wide enough to cover negligence, I believe the head of damage may be based on some ground other than that of negligence." D

In casu, clause 22 is to the following effect:

"There shall be no obligation upon the owner to supply slings or crane assistants but in the event that the owner agrees to supply his/its standard selection of slings, he/it gives no warranties that the said slings will be suitable for the hirer's purposes or for any lift to be performed by the Crane described overleaf and the hirer's instance and all directions and or E instructions for rigging and methods of rigging shall be the sole and absolute responsibility of the hirer who indemnifies and holds harmless the owner against all claims for loss or damage of any nature whatsoever arising out of the use of the said slings by the hirer, the rigging and methods of slinging."

The defendant did not specifically exclude liability where there was negligence F on the part of its employee. The evidence is clear that slings which were used belonged to the defendant and it was the defendant's employees who attached the same to the lathe machine in an effort to lift the same. The manner in which the slings were attached caused them to snap, resulting in the machine falling.

In my view, the employees of the defendant were negligent, which negligence G I intend to deal with later on in the judgment. The negligence of the defendant's employees, I find, went to the very root of the contract in that having been contracted, as experts in the moving of heavy equipment and machinery, which function included the slinging and lifting of the machinery they were negligent in the manner in which they attached the slings for lifting the machinery. H

Gowora J

A In the absence of express reference to the exclusion of liability on the basis of negligence, I must consider whether the words used in the exemption clause are wide enough to their ordinary meaning to cover the negligence on the part of the defendant's employees.

In *Transport and Crane Hire (Pvt) Ltd* v *Hubert Davies & Co (Pvt) Ltd supra* B at 209C-210B, McNally JA stated thus:

"Clearly, the exemption clause does not expressly refer to negligence. That answers the first point. Clearly, the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. In this connection, I adopt and accept the reasoning of Squires J in *Minister of Education* v *Stuttaford & Co (Rhodesia) (Pvt) Ltd supra* at 523E-H, that 'any loss' must include loss arising from C negligence. See also the speech of Lord Frazer of Tulley–belton in the *Ailsa Craig* case *supra* 15107g.

But that is not the end of the matter. We have to answer the third question, which introduces the 'policy-based interpretation'. I repeat that question:

' If the words used are wide enough for the above purpose, the court must D then consider whether the head of damage may be based on some ground other than negligence'."

In my view, there is clearly at least one other ground, which is neither fanciful nor remote. It is the ground of strict liability of the merchant seller, which arises regardless of negligence. Late delivery might be another ground. Accordingly, I would interpret the exemption clause as E applying to those grounds, and not that of negligence. It follows that the respondent has not discharged the onus of satisfying the court that his negligence is covered by the exemption clause: see Chitty on *Contracts Generals Principles* 26 ed, para 956.

It seems to me, in conclusion, that if a party to a contract wishes to exempt himself from liability for his own negligence, he should say so in so many F words, unless the context indicates that the exemption clauses relates only to negligence. Ideally, he should add words to the effect that the other party should take out insurance to cover any possible risk of loss from the negligence of the *proferens.* This is what happened in the case of *Government of the Republic of South Africa* v *Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A). In that case, the court was satisfied that G the exemption clause did not exclude the liability of the *proferens* for its own negligence. A major, if not the major factor in that decision was that it was convenient for both parties, and expressly agreed, that the defendant (who was in the position of the respondent in this case) would insure the goods at an agreed rate. The agreement to insure was a satisfactory *quid pro quo* for the exemption."

H The clause in this matter specifically seeks to contract out of liability for

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consequential damage caused by defects or the unsuitability of the slings used A in lifting the equipment.

In his work, the *Law of Contract in South Africa* 3 ed, p 209, RH Christie states:

"The second method by which the courts endeavour to confine exemption clauses within reasonable bounds is by interpreting them narrowly. The B method is particularly applicable to clauses which do not specifically set out the legal grounds for liability from which exemption is granted. In interpreting the such clauses, the court must first examine the nature of the contract in order to decide what legal grounds of liability would exist in the absence of the clause (for instance strict liability, negligence, gross negligence), and the clause will then be given the minimum of effectiveness C by being interpreted to exempt the party concerned only from the ground of liability for which he would otherwise be liable which involves the least degree of blameworthiness."

In *SAR & H* v *Lyle Shipping Co. Ltd* 1958 (3) SA 416 (A), in examining an exemption clause Steyn JA had this to say at 419B-D.

"The question raised on appeal is whether or not the clause quoted above D exempts the appellant from liability for negligence. It does not do so either explicitly or in general terms so all embracing as clearly to draw such liability into the scope of the exemption. It refers in comprehensive language to possible events as a result of which damages may be sustained, but not to the possible legal grounds of responsibility for such damages on the occurrences of any such event, with the result that, having E regard only to the wording of the clause, it is open to the interpretation that it bars actions arising from causes of one or more classes leaving unaffected those founded on causes of one or more other classes. The rule to be applied in construing an exemption of this nature, appears from *Essa* v *Divaris* 1947 (1) SA 753 (AD) at p 756. Generally speaking, where in law the liability for the damages F which the clause purports to eliminate, can rest upon negligence only, the exemption must be read to exclude liability for negligence, for otherwise it would be deprived of all effect; but where in law such liability could be based on some ground other than negligence, it is excluded only to the extent to which it may be so based, and not where it is founded upon negligence."

The view I take in the light of the authorities adverted to above is that the failure G by the defendant to specifically exclude liability for negligence in its exemption clause is fatal to its cause. The defendant's liability for damages occasioned to the plaintiff could have been based on some ground other than negligence. It should have sought to explicitly exclude liability for negligence. I find that therefore the exemption clause is inoperative against the plaintiff's claim. H

Gowora J

A **WERE THE DEFENDANT'S EMPLOYEES OPERATING THE CRANE NEGLIGENT?**

It is common cause between the parties that the slings for lifting the equipment were attached to the lathe incorrectly. Instead of iron bars being placed in the appropriate holes in the lathe and the slings being attached to the iron bars, the slings were passed through the holes and under the lathe. When the lathe was B lifted, the sharp edges where the slings passed under the lathe cut into the slings and caused them to break. That was the probable cause of the accident. It might have been, however, that the lathe was too heavy and the slings could not support the weight. Whichever was the cause, however, it was the defendant's employee who was operating the crane, who had decided which C slings to use and who had decided what method of slinging should be used. Clearly the slings or the method used was not satisfactory. That was the fault of the operator.

It was submitted by Mr *de Bourbon* that the proven facts give rise to the application of the doctrine of *res ipsa loquitur.* He contended that after the slings were put around the lathe for a second time, the slings snapped causing D the lathe to drop downward onto the wiro cutter. He referred to *Boka Enterprises (Pvt) Ltd v Pine* 1991 (2) ZLR 308 (S). At 313 Korsah JA stated:

> "Before the invocation of the doctrine it must be established that whatever caused the accident was in the exclusive control of the defendant. In the two cases cited by the learned trial judge *viz Arthur Bezuidenhout and Mieny* 1962 (2) SA 566 (A); and *Naude NO* v *Transvaal Boot and Shoe* E *Manufacturing Company* 1938 AD 379, to illustrate the application of the doctrine, the motor vehicle in each case was under the exclusive control of the defendant."

In the instant case, the defendant's employee was operating the crane, the slings were attached by the defendant's employee and the lathe machine was F lifted by the defendant's employee. The decision as to which slings to attach to the lathe was made by the defendant's employees, as was the manner of attachment of the slings to the machinery being lifted and moved. The slings themselves belonged to the defendant. The decision as to which crane to use was that of the defendant's servants and the machinery was moved from point to point by the defendant's employees. The supervision of the defendant's G employees was done by Emerick twice or three times a week for the duration of the period that the defendant was on site. It is therefore not in dispute that the defendant's employees had exclusive control over not only their equipment but also the plaintiff's equipment. Further the defendant had exclusive control over the manner of effecting the proper performance of the contract. IIn my H view, it is a proper scenario to invoke the doctrine. There was in this case a lack

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of reasonable care and skill in the manner in which the defendant performed A the contract. Therefore, it follows that the defendant's employees who were operating the crane were negligent.

The loss suffered by the plaintiff was caused by the negligence of the defendant's employees.

WAS THE CONTRACT A CONSUMER CONTRACT IN TERMS OF — B *CHAPTER 8:03***?**

Assuming that I am wrong in finding that the contract is a service contract, when in fact it is a contract for the hire of equipment, I have been urged by Mr *de Bourbon* to find that the contract, which is a consumer contract, contained an unfair term. He contended that the *onus* to show that the contract did not C contain an unfair term was upon the defendant.

Mr *Nherere* argued that the contract is not a consumer contract as the defendant was supplying neither goods nor services. The contract was also not one for the sale of goods, rather the defendant was hiring out equipment. He further submitted that the defendant was acting in the course of business whilst the plaintiff was not. He contended that clauses 10 and 22 of the D standard terms and conditions were not unfair as contemplated by *Chapter 8:03*. He submitted that Griffiths explained why it was important for the hirer to supervise the moving as he would know how the machine operated. Further, it was the hirer who obtained insurance for the movement of the equipment: see clause 2 to Schedule. He further submitted that the defendant's employees E were under the supervision and control of the plaintiff whilst they were operating the crane and the negligence of the plaintiff cannot be attributed to the defendant. Both counsel referred me to the case of *Radar Holdings Ltd & Anor v Eagle Insurance Co Ltd* 1999 (2) ZLR 246.

In s 2 of *Chapter 8:03* the term "consumer contract" is defined as follows:

"'consumer contract' means a contract for the sale or supply of goods or F services or both, in which the seller or supplier is dealing in the course of business and the purchaser or user is not but does not include –

(a) a contract for the sale, letting or hire of immovable property; or

(b) a contract of employment."

In the context of this case, the dispute between the parties would be whether G the defendant was supplying or selling services. In the *Radar Holdings* case *supra* in defining services Gubbay CJ at 248F-249C stated:

"I respectfully agree that 'services' is a word capable of an expansive meaning. *Webster's International Dictionary* defines it as 'acts or instances of helping or benefiting; conduct contributing to another's advantage or welfare or benefit'. The *Oxford English Dictionary* is to much the same H

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A effect. It provides the meaning (*inter alia*) of 'the action of serving, helping or benefiting; conduct tending to the advantage of another … supply of the needs of persons'.

What scant judicial authority there is has considered the use of the word 'services' in the context of income tax legislation. Nonetheless, a meaning broader than work and labour alone is given. In *Ochberg* v *Commissioner* B *for Inland Revenue* 1931 AD 215 at 230, it was held that an agreement to assist a company financially was an agreement to render services. In *Commissioner for Inland Revenue* v *Transvaal Bookmakers' Association (Co-operative) Ltd* (1953) 19 SATC 14 (T) at 19, Price J was satisfied that the entitlement of members of the respondent association to borrow from it specified sums of money on easy terms of payment constituted a service C rendered by the association. And in this jurisdiction, in the case of *H* v *Commissioner of Taxes* 1957 R & N 688 (SR) at 693A, Hathorn J found it to have been correctly conceded that by the grant of credit facilities and a guarantee for certain indebtedness of a company, the taxpayer rendered a service to his co-shareholders and to the company, and in doing so he also benefited himself.

D Citing the exclusion of contracts of lease of immovable property (*locatio conductio rei*) and of employment (*locatio conductio operarum*) in the definition of a consumer contract, Mr *de Bourbon,* for the respondent, submitted that by a contract for the sale or supply of services the lawmaker must have meant a contract of *locatio conductio operis,* one party using their labour to bring about a result, like a mechanic repairing the engine of a motor vehicle or a plumber unblocking a sink."

E The plaintiff required the movement of equipment from one building to an adjacent one as well the movement of certain equipment within the factory environment. To give effect to the contract, the defendant brought on site the necessary equipment as well as the requisite operators for each of the tasks to be performed. The supervision of the defendant's employees was done by F Emerick, the crane manager of the defendant. Emerick would attend at the plaintiff's premises twice or three times a week and there is no suggestion that the defendant ever referred technical issues to the plaintiff for clarity on how to move and lift the equipment. By the time that the machines fell resulting in their being damaged, the defendant had been on the premises for about three weeks and yet had not required any input or assistance from the plaintiff: G meaning that the defendant was completely in charge and in control of the whole process. In my view, what distinguishes hire from the provision of services is the amount of control being exercised not only over the equipment being used but also who specifically has control over the operators of the equipment, as that is the person in charge of the process. In my view, the facts H disclose that control was being exercised by the defendant, and as a consequence

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what the defendant was offering was a service and not a hire of equipment. A

I am persuaded, therefore, that the contract between the parties was a consumer contract.

Section 4 of *Chapter 8:03* provides:

"(1) Subject to subsection (3), if a court is satisfied –

(a) in accordance with section *five,* that any consumer contract is B unfair; or

(b) in accordance with section *six,* that any actual or reasonably anticipated exercise or non-exercise of a power, right or discretion under a consumer contract is or would be unfair; or

(c) that any consumer contract contains a scheduled provision; C

the court may make an order granting any one or more of the following forms of relief –…"

If Mr *de Bourbon'*s argument is to be accepted clauses 10 and 22 of the standard terms and conditions are scheduled provisions. Mr *Nherere* on the other hand contends that the clauses are not unfair as contemplated by D *Chapter 8:03*. Apparently, he accepted that the Schedule to *Chapter 8:03* is the operative provision. The Schedule to *Chapter 8:03* describes what are defined as scheduled provisions. Paragraph 2 thereof reads as follows:

> "2. Any provision whereby the seller or supplier of goods or services excludes or limits the liability which he would otherwise incur under any E law for loss or damage caused by his negligence."

The exclusion clauses of the standard terms and conditions are clauses 11 and 22 which read as follows:

> " 11. Notwithstanding anything herein contained to the contrary while the crane is on the site, the owner shall not be responsible or liable to the hirer or any other person for any acts or omissions on the part of the owner's F operator while such operator is carrying out the instructions of the hirer or any acts or omissions on the part of the hirer or the hirer's operator or for any loss or damage whatsoever occasioned to the hirer or any other person, property or thing and the hirer indemnifies and holds harmless the owner against all claims of any nature whatsoever for any loss or damage aforesaid, including all costs relating to such claims, but this indemnity G shall not extend to include an act solely attributable to the owner's operator.
>
> There shall be no obligation upon the owner to supply slings or crane assistants but in the event that the owner agrees to supply his/its standard selection of slings, he/it gives no warranties that the said slings will be suitable for the hirer's purpose or for any lift to be performed by the crane H

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> A described overleaf and the hirer's instance and all directions and or instructions for rigging and methods of rigging shall be the sole and absolute responsibility of the hirer who indemnifies and holds harmless the owner against all claims for loss or damage of any nature whatsoever arising out of the use of the said slings by the hirer, the rigging and the methods of slinging."

B Whilst the earlier clause seems to accept responsibility for loss or damage arising out of acts attributable solely to the defendant's operator, it does not provide for responsibility where the loss or damage is attributable to omissions on his part. The last clause excludes liability for loss or damages howsoever caused or incurred. In my view this clause falls squarely within the C provisions of para 2 of the Schedule to *Chapter 8:03* and is therefore a scheduled provision.

Mr *Nherere* invited me, in the event of finding that the contract contains a scheduled provision, to vary the contract. Although the Act empowers me to cancel the contract, such a course would not be practical as the major part of the contract had been performed. The parties are not seeking performance in D terms of the contract, but the dispute is centred upon whether or not the plaintiff can be awarded damages as a result of the defendant's inability to perform the contact properly.

In terms of s 4(1) of *Chapter 8:03*, if the court is satisfied that a consumer contract contains a scheduled provision it may make an order granting a form of relief specified in that subsection. One of the forms of relief is to cancel any E part of the consumer contract. I consider that it would be fair to cancel clause 22 of the standard terms and conditions.

QUANTUM OF PLAINTIFF'S DAMAGES

The plaintiff produced quotations which establish that the cost of replacing the wire cut EDM and the lathe would amount to US$109 600. That evidence F was not disputed by the defendant.

Mr *de Bourbon* has applied for an amendment to the prayer relating to the damages. He seeks that the order reflects that the amount be paid in Zimbabwe dollars at an exchange rate of $55 to the American dollar. Mr *Nherere* indicated that there had been no evidence adduced as to the rate of exchange G in respect of the currencies. I agree with the submissions of Mr *Nherere* that in the absence of evidence on the conversion rate of the Zimbabwe dollar to the American dollar it would be impossible to fix a rate for purposes of the judgment. The rate of conversion will be the prevailing official rate at the time the payment is effected.

H It is ordered that the defendant pay the plaintiff –

Gowora J

1 US$109 600 or the equivalent in Zimbabwe dollars converted at the A official rate as at the time of payment with interest thereon at the rate of interest paid by a commercial bank in Zimbabwe on a foreign currency account denominated in US dollars from 2 August 2000 to date of payment.

2 Costs of suit. B

Wintertons, plaintiff's legal practitioners

Mucharehwa & Partners, defendants' legal practitioners C

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/FIRST MUTUAL LIFE ASSURANCE v MUZIVI 2004 (1) ZLR 287 (S)

FIRST MUTUAL LIFE ASSURANCE v MUZIVI 2004 (1) ZLR 287 (S)

Citation	2004 (1) ZLR 287 (S)
Case No	Judgment No. S-62-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Malaba JA
Heard	23 September 2003
Judgment	15 March 2004
Counsel	*I Chagonda,* for the appellant The respondent in person
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

C **Employment** — *strike — right to strike — strike in defence of an immediate threat to the existence of a workers' committee — management effectively dissolving managerial workers' committee by regrading committee members as non-managerial — a direct attack on existence of committee, entitling members to strike*

Employment — *workers' committee — managerial workers' committee —* D *right of managerial employees to form committee — dispute over composition of committee — must be referred to Tribunal, not to a labour relations officer*

Headnote

The respondent was employed by the appellant at a grade regarded as a managerial employee. He and others of the same grade decided that they E should form a managerial workers' committee to represent their interests. Other employees in another grade, who were regarded for practical purposes as managers, also became members of the committee. The appellant disputed their right to do so and referred the dispute to a labour relations officer. The officer referred the matter to the Labour Tribunal, but also directed the committee to suspend its operations until the

F Tribunal had made a ruling. While the Tribunal's ruling was pending, the appellant regraded the respondent and his colleagues to non-managerial posts, which move had the practical effect of dissolving the committee. The respondent and his colleagues went on strike. The appellant retaliated by dismissing him.

G *Held,* that in terms of s 104 of the Labour Act [*Chapter 28:01*], employees are entitled to go on strike without observing any formalities if their action is in defence of an immediate threat to the existence of a workers committee.

Held, further, that as there was a dispute over whether members of the committee were managerial employees, the matter should have been H referred to the Tribunal directly, not to a labour relations officer. The

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Chidyausiku CJ

labour relations officer had no jurisdiction to adjudicate in the dispute A and her order suspending the committee was incompetent. It could not therefore be argued that there was no committee in existence.

Held, further, that by regrading the respondent and his colleagues and making them ineligible to serve on a managerial workers' committee, the appellant was making an actual and direct attack on the existence of the managerial B workers committee. The members were thus entitled to go on strike.

Legislation considered

Labour Relations Act [*Chapter 28:01*] ss 4(1)(d), 23 (2) & (3), 46(1)(b), 92(2) and 104(4)(b) C

Case information

I Chagonda, for the appellant

The respondent in person

Judgment

CHIDYAUSIKU CJ: The facts of this case are to a large extent common cause. In terms of the letter of appointment, the appellant appointed the respondent D as a Sales Trainer Grade 8. There is no dispute that the respondent was regarded as an assistant manager.

A concession is made at p 15 of the record that the respondent was a managerial employee.

On 14 August 1997 the respondent, together with other employees of the E appellant of the same grade, grade 8, held a meeting to canvass the possibility of forming a managerial workers committee in terms of s 23(1) of the Labour Relations Act [*Chapter 28:01*] ("the Act"). At a meeting held the following day, 15 August 1997, which now included employees in grade 9, the employees elected an interim executive committee of the Managerial Workers Committee. The respondent was elected its chairman. A meeting was F subsequently held between the interim managerial workers committee and senior management. At that meeting senior management recognised the right of managerial employees to form a managerial workers committee in terms of the Act but had certain reservations which senior management subsequently set out in a circular issued by management dated 29 September 1997. The circular reads in part: G

> "*Clearly some of the members of staff at Grade 9-1 who are regarded for practical purposes as Managers* do not fall within the definition of the Act and therefore do not qualify for membership of such a committee. Consequently, the society is of the opinion that the creation of a Management (Managerial) Workers Committee cannot proceed until a determination on this issue by the Ministry of Labour. H

Chidyausiku CJ

> A Those persons who do not fall within the definition of Manager will obviously have to be represented by the existing Workers Committee since the Act only allows for one workers' committee." (My emphasis)

In response to that circular the respondent, as chairman of the interim executive committee, pointed out that by custom and practice the appellant recognised employees in grades 9 to 1 as

managerial employees. That practice B is acknowledged in the above circular. That being the case they were entitled to form and belong to a managerial workers committee in terms of the Act.

Thus a dispute emerged between the grade 8 and 9 employees and the appellant. On 25 March 1997 the appellant referred the dispute to a labour relations officer in terms of s 23 of the Act. A labour relations officer, Mrs C Makamure, referred the dispute to the Labour Tribunal in terms of s 46(1)(b) of the Act. The labour relations officer did not only refer the dispute to the Labour Tribunal, she also issued the following directive:

> "The elected Workers Committee should suspend its operations until the dispute is resolved by the Tribunal and its legitimacy specified."

Shortly after this ruling and upon advice the respondent wrote to the appellant. D The letter, in part, reads as follows:

> "On further consultation, we believe that the ruling on the status of MWC (Managerial Workers Committee) is out of line as the MWC is a *universitas* at law and an argument over the composition of its membership does not have effect on its *locus standi*, please advise."

E The appellant responded to this letter by addressing a letter to the principal labour relations officer which read in part as follows:

> "Mr Muzivi is seeking through the back door to:
>
> a) overrule the determination of Mrs Makamure in respect of the status of managerial workers committee;
>
> b) to pre-empt the decision of the Labour Relations Tribunal, his F request of your advice on the status of the managerial workers committee is irregular and improper in view of the fact that the matter is *sub judice*."

While this dispute was pending determination by the Labour Tribunal, the appellant embarked on a regrading exercise which removed the respondent G from the managerial grade. It would appear the same fate befell all the other members of the managerial workers committee. They were regraded at new levels that were not managerial. They were regraded as general employees with technical expertise. Conditions of service were also changed to what the respondent and his colleagues considered were unfavourable. In effect the executive of the managerial workers committee was indirectly dissolved by H regrading its members as non-managerial employees.

Chidyausiku CJ

Aggrieved by these developments the appellant's employees, including the A respondent, at a meeting held on 23 July 1998 resolved to go on strike. According to the respondent the employees at that meeting resolved thus:

> " Unanimously resolved that if the Workers Committee could not negotiate with management, then it was no use and as good as non-existent. The meeting unanimously and spontaneously resolved to go on a collective B job action in defence of the Workers Committee."

As a result of the above decision 132 employees of the appellant, out of a workforce of 259, went on strike from 23 to 29 July 1998. The respondent participated in the collective job action and admits the same. The respondent was dismissed from employment for participating in an illegal collective job action. However, the Labour Tribunal concluded that the collective job action C was in defence of, among other things, the existence of the managerial workers committee. The Labour Tribunal further concluded that the respondent's and his fellow employees' conduct was lawful and permissible in terms of s 104(4)(b) of the Act which provides that:

> " 104(4) Nothing in subsection (1),(2) or (3) shall be deemed to prevent D collective job action from being resorted to –
>
> (a) …
>
> (b) in defence of an immediate threat to the existence of a workers committee or a registered or certified trade union."

It is clear from s 104 of the Act that employees are entitled to go on strike without observing any formalities if their action is in defence of an immediate E threat to the existence of a workers committee.

It is against this decision that the appellant now appeals upon the following grounds set out in the notice of appeal:

"1. The Honourable Chairman misdirected himself in holding that the industrial action which the Respondent participated in was in defence F of an immediate threat to a managerial workers committee.

1.1 That finding was made notwithstanding the fact that at the time that the industrial action took place, there was no Managerial Workers Committee in existence and as such there could not have been an immediate threat to something that did not exist. G

1.2. The finding aforesaid was also made notwithstanding an admission by the Respondent himself that the strike was in defence of the Ordinary Workers' Committee which was in existence at the time that the strike occurred.

2. Alternatively and in any event, the Honourable Chairman of the H

2004 (1) ZLR p291

Chidyausiku CJ

A Labour Relations Tribunal erred in holding that there existed an immediate threat to the existence of any Workers Committee particularly when there was no evidence at all pointing to the probable demise of any Workers Committee.

3. The aforesaid factual misdirections were made in circumstances where such misdirection could not have been made if the court *a quo* B had reasonably applied its mind and as such, the misdirections amount to a misdirection on a point of law.

4. The court *a quo* erred in law in holding that the industrial action in which the Respondent participated in was lawful."

There is no factual dispute as to what the respondent did which prompted his dismissal. It is common cause that he participated in a collective job action and C it is for that reason that the appellant dismissed him. The issue that now falls for determination is, was the Labour Tribunal correct in concluding that the industrial action in which the respondent participated constitutes conduct protected by law in terms of s 104(4) of the Act? If that conduct falls within the ambit of the above section then his dismissal was unlawful. If such conduct D does not fall within the ambit of the above section then his dismissal was lawful. I have no doubt that the issue raised here is a question of law, and not fact. The issue of whether the admitted conduct of the respondent constituted a lawful dismissal is a question of what interpretation is to be ascribed to s 104(4), therefore a question of law.

I have no hesitation in dismissing the respondent's contention *in limine* that E the appeal is on fact and not law and consequently not competent in terms of s 92(2) of the Act. I also do not see any merit in the respondent's other preliminary objection to the late filing of the appellant's heads of argument. The issue of condonation for the late filing of heads of argument was disposed of by Sandura JA in a Chamber application before the hearing of this matter.

F As already stated in terms of s 104(4) of the Act an employee is entitled to resort to collective job action without any formalities in defence of the workers committee.

The appellant has argued that the managerial workers committee, chaired by the respondent, was not properly constituted because some of its members were not managerial employees. The respondent, on the other hand, argued G that the managerial workers committee was properly constituted as all its members were managerial employees.

The appellant referred this dispute to the Labour Relations Officer for resolution in terms of s 23 of the Act. Section 23 of the Act provides as follows:

"23(1) Subject to this Act and any regulations, employees employed by H any one employer may appoint or elect a workers committee to represent

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2004 (1) ZLR p292

Chidyausiku CJ

their interests: A

(1a) Subject to subsection (1b), the composition and procedure of a workers committee shall be as determined by the employees at the workplace concerned.

(1b) Notwithstanding subsection (1a), if a trade union is registered to represent the interests of not less than fifty *per centum* of the B employees at the workplace where a workers committee is to be established, every member of the workers committee shall be a member of the trade union concerned:

Provided that no managerial employee shall be appointed or elected to a workers committee, nor shall a workers committee represent the interests of managerial employees, unless such workers committee is C composed solely of managerial employees appointed or elected to represent their interests.

(2) For the purposes of appointing or electing a workers committee, employees shall be entitled to –

(a) be assisted by a labour relations officer or a representative of the appropriate trade union; and D

(b) reasonable facilities to communicate with each other and meet together during working hours at their place of work; and

(c) be provided by their employer with the names and relevant particulars of any employees employed by him;

so however, that the ordinary conduct of the employer's business is E not unduly interfered with.

(3) In the event of any dispute arising in relation to the exercise of any right referred to in subsection (2), the labour relations officer concerned or any other officer acting in a similar capacity shall, after considering the representations of the parties concerned, make such fair and reasonable determination as he deems fit, and such F determination shall be binding on the parties:

Provided that if any person is aggrieved by the determination of the labour relations officer or such other officer, he may appeal to a senior labour relations officer who, after taking into account the representations of the parties concerned, shall determine the matter G and his decision shall be final."

In the event of a dispute between the appellant and the respondent in relation to any right conferred by subsection 23(2), namely, the right to be assisted by a trade union or a labour relations officer, the provision of reasonable facilities to communicate with each other or meet together during working hours at their place of work, and the provision of names and particulars of employees by the H

Chidyausiku CJ

A employer, such a dispute can be referred to a labour relations officer in terms of subs (3) of s 23.

The dispute between the appellant and the respondent was not about the rights conferred in subs (2) of s 23 of the Act. The dispute between the parties was whether some of the employees on the managerial workers committee were managerial employees and the appellant should have referred that dispute to B the Tribunal in terms of s 46(1)(b) of the Act which provides as follows:

"46 (1) In the event of any dispute as to –

(a) …

(b) whether any employees are managerial employees;

the matter shall be referred to the Tribunal for determination."

C Upon the dispute being referred to the labour relations officer, Mrs Makamure, she in turn referred the dispute to the Labour Tribunal in terms of s 46(1)(b) of the Act. In this regard she was correct. However, she went beyond merely referring the matter to the Labour Tribunal and issued the following order:

"The elected Workers Committee should suspend its operation until the D dispute is resolved by the Tribunal and its legitimacy specified."

In my view this is where the labour relations officer went into error. The dispute referred to her was not a dispute envisaged in s 23(2) and in respect of which she had jurisdiction. The dispute referred to her was a dispute envisaged in s 46(1)(b) of the Act and in respect of which she had no jurisdiction to adjudicate. She therefore had no power to suspend the E managerial workers committee as she did. Even if she had the jurisdiction to suspend the managerial workers committee, such a suspension of the managerial workers committee would not render the committee non-existent.

On this basis the appellant's submission that the managerial workers committee was non-existent at the time of the collective job action is simply not tenable. F I will now turn to the issue of whether the collective job action was in defence of immediate threats to a workers committee. When the appellant was advised of the formation of the managerial workers committee it disputed the eligibility for appointment of some of the members of the interim executive committee on the basis that the members were not managerial employees. The appellant, as previously stated, referred

this dispute to the labour relations officer. The G labour relations officer correctly referred the matter to the labour tribunal but erroneously suspended the activities of the interim executive committee. Before the matter was resolved by the labour tribunal the appellant embarked on a restructuring exercise whose net effect was to render members of the interim executive of the managerial workers committee, non-managerial H employees. The direct consequence of the appellant's conduct in this regard

Chidyausiku CJ

was to abolish the managerial workers committee by rendering all its members A disqualified for appointment or election to that workers committee. This conduct of the appellant is more than a threat to the managerial workers committee. It is an actual and direct attack on the existence of the managerial workers committee. It is quite apparent from this conduct and the subsequent conduct of the appellant that it wished to prevent the formation of the B managerial workers committee. It is difficult to imagine a greater and more imminent threat to the managerial workers committee than this.

It is quite apparent from the conduct of the appellant through its various officers' actions that they were determined to eliminate the managerial workers committee and prevent its resuscitation.

As the learned chairman of the labour tribunal correctly observed, s 4(1)(d) of C the Act confers on employees the following rights:

(1) The right to be a member or an officer of a workers committee;

(2) The right to take part in the formation of a workers committee.

The above rights cannot be alienated or suspended at the whim of an employer without due process of the law. The respondent and his fellow employees were D within their rights to form as they did the managerial workers committee. If there was a dispute as to the managerial status of some of the members of the interim executive that dispute could only be resolved by the labour tribunal. Until the matter had been resolved the respondent was entitled, in terms of s 104(4)(b) of the Act to take or take part in collective job action in defence E of an immediate threat to the existence of that managerial workers committee.

In this regard the learned Chairman of the labour tribunal concluded:

> "It is clear that the respondent's conduct which barred and hindered the appellant and his colleagues from forming and belonging to a managerial workers committee constituted an immediate threat to the existence of the interim managerial workers committee. F
>
> That being the case the appellant and his colleagues responded by embarking on collective job action from the 23rd to the 29th June. The protest was among other things in defence of the existence of the managerial workers committee."

I find myself in agreement with the above observation of the learned chairman. G I am satisfied that there is no substance in the appellant's submission that at the time of the collective job action the managerial workers committee was not in existence by reason of the purported suspension of such committee by the Labour Relations Officer, who in fact had no jurisdiction over the matter.

In the result the appeal is dismissed with costs. H

Chidyausiku CJ

A Cheda JA and Malaba JA concurred

Atherstone & Cook, appellant's legal practitioners

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Source:

S v DAMBA; S v CHANAKIRA 2004 (1) ZLR 296 (H)

Citation	2004 (1) ZLR 296 (H)
Case No	Judgment No. HH-69-04
Court	High Court, Harare
Judge	Makarau J
Heard	18 March 2004
Judgment	18 March 2004
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *general principles — multiple counts —* C *when counts to be treated as one for sentence*

Headnote

The approach that a court must take in sentencing an accused person convicted of more than one count can be summarised as follows:

1. The general position is to impose a separate sentence for each conviction.
2. Where multiple counts are similar in nature and not merely kindred, D and are closely related in terms of time, the sentencing court has an option either to take each count separately or to take all counts as one.
3. The option to take all counts as one need not be taken. It is, however, preferable that it should be taken E.
4. The option to take all counts as one is not available where the multiple charges are not similar in nature, even if they are closely linked in terms of time.
5. The option to take all counts as one is not available where the multiple counts are not closely linked in terms of time, even if they are similar in nature, unless they are committed as part of a continuous F course of conduct, especially in fraud and theft by conversion matters involving the same complainant and using the same *modus operandi*.

Cases cited

S v Chawasarira 1991 (1) ZLR 66 (H) G

S v Leshaba & Ors 1968 (4) SA 576 (T)

S v Mudzingwa 1999 (2) ZLR 225 (H)

S v Nkosi 1965 (2) SA 414 (C)

S v Sawyer 1999 (2) ZLR 390 (H) H

Makarau J

Judgment

A **MAKARAU J:** The above two matters raise the same issue and it is convenient that the issue be dealt with in the same judgement.

In the first matter, the accused pleaded guilty to one count of assault common and to one count of malicious injury to property. He was duly convicted. On 11 January 2003, whilst outside the complainant's house, he assaulted the complainant with open hands upon her face. The complainant ran indoors to B take refuge, whereupon the accused forced open and broke the key to the door of the house into which the complainant had run. He also broke the door and shattered two windowpanes to the house. Both counts were taken as one for the purpose of sentence and the accused was sentenced to a fine of $5 000 or in default of payment, to three months' imprisonment. In addition, three C months' imprisonment was suspended on condition the accused paid the sum of $15 500 to the complainant.

The regional magistrate who scrutinised the record of the proceedings in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*] queried the propriety of treating the two counts as one for sentence. In response to the query, the trial magistrate was of the view that since the two offences were D closely related in terms of time and purpose, she could treat them as one for the purpose of sentence.

In the second matter, the accused was convicted of two counts of attempted rape. On 11 January 2004, he attempted to rape the complainant in the first matter who was in the bush, looking for firewood. He approached the E complainant suddenly and felled her to the ground. At that stage, the complainant's sister arrived at the scene and the accused fled. On 1 February 2004, he approached the complainant who was bathing in a river and, grabbing her by the neck, pushed her to the ground. Whilst the complainant was on the ground, he attempted to insert his penis into her vagina but was overpowered by the complainant. The complainant's father arrived at the scene and the F accused fled. Both counts were treated as one for the purposes of sentence. The accused was sentenced to 36 months' imprisonment. In addition, two years' imprisonment that had been suspended for an earlier transgression was brought into effect.

The approach that a sentencing court should take in a case where the accused A stands convicted of multiple counts has been dealt with extensively by this court. The position at law is quite settled and simple in my view. It was spelt out in *S* v *Chawasarira* 1991 (1) ZLR 66 (H) at 69D-E by Smith J in the following words:

> "Separate punishments should, save in exceptional cases, be imposed for each separate charge. One globular sentence for two or more offences H should only be considered where the offences are of the same or similar

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> nature and are closely linked in point of time. If these two requirements A are not satisfied then a separate sentence must be imposed in respect of each offence."

In arriving at his decision, the learned judge was persuaded by the views expressed in two South African cases that followed the English practice of entering judgement and sentence separately for each charge. These views were B expressed in the cases of *S* v *Nkosi* 1965 (2) SA 414 (C) and *S* v *Leshaba & Ors* 1968 (4) SA 576 (T). In *S* v *Leshaba supra*, the rationale for entering judgment and sentence on each separate charge was given as the need to attach relevant importance to each transgression. This view also appeals to me and, in my view, lays a sound basis for imposing a separate sentence for each conviction generally unless the exceptional factors referred to by Smith J are B present and the resultant sentence will not distort the gravity of each conviction.

The approach enunciated by Smith J in the *Chawasarira* case was approved of by Chatikobo J in *S* v *Mudzingwa* 1999 (2) ZLR 225 (H) and by Gillspie J in *S* v *Sawyer* 1999 (2) ZLR 390 (H).

The approach that a sentencing court must take in sentencing an accused D convicted of more than one count can in my view, be summarised as follows:

1. The general position is to impose a separate sentence for each conviction.
2. Where the multiple counts are similar in nature and not merely kindred, and are closely related in terms of time, the sentencing court has an option either to take each count

separately or to take all counts as one.

3. The option to take all counts as one need not be taken. It is, however, E preferable that it be taken.
4. The option to take all counts as one is not available where the multiple F charges are not similar in nature, even if they are closely linked in terms of time.
5. The option to take all counts as one is not available where the multiple counts are not closely linked in terms of time, even if they are similar in nature, unless they are committed as part of an ongoing course of conduct, especially in fraud and theft by conversion matters, involving the same complainant and using the same *modus operandi*.

Gillspie J succinctly summarises points 4 and 5 of the above in *S* v *Sawyer* at G 393B when he said:

> "Where the counts are all disparate in name or nature, time or circumstances, then it is improper to impose a globular sentence."

In the first matter under review, the accused was convicted of two offences that are different in nature. The different nature of the offences makes it improper H to impose a single sentence in their respect although they were closely linked

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2004 (1) ZLR p299

Makarau J

A in terms of time. According to the *ratio decidendi* in *Chawasarira* case, the two criteria have to be met before the sentencing court may impose a single sentence. In this case, the facts fail the test on the first rung. The imposition of a single sentence for the two offences blurs the relevant importance that the sentencing court attached to each transgression. The impropriety of the sentence is further revealed when one has regard to the second part of the B sentence. The accused was sentenced to three months' imprisonment, wholly suspended on condition he paid to the complainant the sum of $15 500 representing the value of the damaged property. In this case, fortuitously, the accused had indicated a willingness and ability to pay the compensation to be ordered. Assuming the same sentence had been passed on an accused without the means to pay the compensation, that accused might have to serve a term of C imprisonment for common assault had he failed to pay the value of the damaged property. This would outrage the public's sense of justice. A single sentence for disparate offences is undesirable and improper as it does not give the relevant importance to each transgression and may bring the administration of justice into disrepute. A further practical complication that D may arise is in suspending a portion of the sentence on account of good behaviour. It would not only be difficult but most inelegant to frame the condition upon which to suspend a portion of the sentence where the accused stands convicted of two different offences.

I now turn to the second matter. The accused was convicted of two counts of attempted rape. The complainants in the two counts are different. The offences E were committed on different dates and in different circumstances. It is accepted that the two convictions are for the same offence and that the accused used a similar unsuccessful approach in each case. He would suddenly pounce on unsuspecting women whom he perceived to be alone. The offences are, however, separate and distinct. They are disparate in terms of circumstances F and in terms of time. In the first count, the complainant's sister disturbed the accused after he had felled the complainant. In the second count, the accused approached the complainant who was bathing in the river. She was without her clothes for the purposes of bathing and was thus more vulnerable. The accused went a step further in the second matter and might have succeeded in raping the complainant had she not overpowered him. In my view, the circumstances G of the second matter make the attempt therein more serious than in the first count and thus deserving of sterner censure. To treat both as one for the purpose of sentence blurs the relative degrees of the gravity of each offence. It is on this basis that the approach becomes improper.

In the result, in respect of the first matter, I make the following order:

H The sentence imposed by the trial court is hereby set aside and is substituted

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2004 (1) ZLR p300

Makarau J

by the following: A

> "Count 1. A fine of $2 000 or in default of payment, four days' imprisonment.

Count 2. A fine of $3 000 or in default of payment, four days' imprisonment. In addition three months' imprisonment is wholly suspended on condition the accused pays the sum of $15 500 to the complainant B through the Clerk of Court, Chiredzi by 30 April 2004."

In respect of the second matter, I decline to certify the sentence as being in accordance with real and substantial justice.

Gowora J concurred. C

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/ZIMBABWE BANKING CORPORATION v CHIBUNE & ANOR 2004 (1) ZLR 301 (H)

ZIMBABWE BANKING CORPORATION v CHIBUNE & ANOR 2004 (1) ZLR 301 (H)

Citation	2004 (1) ZLR 301 (H)
Case No	Judgment No. HH-67-04
Court	High Court, Harare
Judge	Hungwe J
Heard	23 January 2002
Judgment	24 March 2004
Counsel	*A P de Bourbon SC*, for the plaintiff *E W W Morris*, for the respondents
Case Type	Civil action
Annotations	No case annotations to date

Flynote

C**Banking** — *bank — customer's account with — credit made to account on strength of negotiable instrument — instrument subsequently dishonoured — right of bank to debit account with amount previously credited even if no overdraft facilities agreed upon*

Headnote

In the normal course of banking practice, a bank is entitled to reverse a credit it has entered on a customer's account in respect of a negotiable D instrument or cheque deposit when the instrument in question is later dishonoured. The law treats the relationship between banker and customer as a contractual one. The reciprocal rights and duties included in the contract are to a great extent based upon custom and usage. It is now accepted that the basic, albeit not the sole, relationship between the E banker and customer in respect of a current account is one of debtor and creditor. The fact that the bank might permit the customer to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the customer in law from liability to make payment to the bank. If the effects are not cleared, it is

the customer who must bear the loss, not the bank. The bank is entitled to debit the F customer's account with the amount drawn, even if there is no agreement for overdraft facilities.

Cases cited

ABSA Bank Ltd v I W Blumberg & Wilkinson 1997 (3) SA 669 (SCA)

Capital & Counties Bank v Gordon [1903] AC 240

G*Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226

Joachimson v Swiss Bank Corp [1921] All ER Rep 92; [1921] 3 KB 110 (CA)

Case information

A P de Bourbon SC, for the plaintiff

H*E W W Morris*, for the respondents

2004 (1) ZLR p302

Hungwe J

Judgment

HUNGWE J: This matter was called up for trial in the first term of 2002. A Evidence was led and judgment was reserved. Before I could write that judgment, the record of proceedings could not be located after diligent search. Thereafter, the Registrar caused a transcript of the mechanically recorded proceedings. Unfortunately, all this took time, thereby delaying a resolution of the matter. B

In this matter, the plaintiff bank sued its customer, a firm of legal practitioners, for the sum of $224 362.99 being amount due and owing by the defendants to the plaintiff in terms of an unauthorised overdraft in the defendants' bank account with its First Street, Harare, Branch which occurred in May 1998, together with interest and costs.

The defendants deny that they owe the plaintiff the sum claimed and have C counter-claimed for $107 760.58 which amount was the credit balance held in their account, which amount they claim was unlawfully debited in their account.

Most of the facts in this matter are common cause. These were summarised by Joshua Manyere, the plaintiff's witness, as follows: D

On May 9 1998, Mr Chibune of the defendants' firm, telephoned the plaintiff's First Street Branch and spoke to Mr Joshua Manyere. He inquired if funds had been transferred into the defendants' account as some people would come to cash cheques. On checking the account, he noted that no funds had been credited to the defendants' account and advised Chibune accordingly. E This was around 0830 hours on a Saturday.

Three hours later, a gentleman approached Manyere with a cheque for cashing, drawn on the defendants' account. Manyere telephoned Chibune advising him of this presentation. Chibune advised that the signatures on that cheque were in order but should there be no sufficient funds on the account, he was to advise the bearer of that cheque of the position. He could only be able to meet F the cheque on Monday if funds were then available.

When he went downstairs to physically check, he met a teller who advised that a clearance voucher in respect of a transfer of funds had already been processed and sent for clearance. The waste section of the bank confirmed this. The amount of the clearance voucher had then been credited to the defendants' account. On that basis, he had then authorised the teller dealing with the G cheque drawn on the defendants' account to cash it. He trusted Chibune as he knew him to be a legal practitioner.

On 13 May 1998, Barclays Bank returned the clearance voucher with the endorsement

> "signature differ[s] from specimen held." H

2004 (1) ZLR p303

Hungwe J

A Barclays advised that the document had been stolen and the signature on it forged.

By then, a withdrawal of $370 000 had been made.

The issue is whether the defendants are liable for the debit balance created by a reversal of the entries by the plaintiff.

B The plaintiff urged the court to hold the defendants liable. The defendants, on the other hand, deny all liability. Both parties called one witness each.

Mr Manyere testified for the plaintiff. Mr Chibune testified for the defendants.

Manyere's evidence amounted to this: the defendant operated a trust account held by a law firm. They are familiar with banking practice prevailing at the C time whereby, should a client run up an unauthorised overdraft, that client was liable, notwithstanding the fact that the bank could have prevented this. This could arise in a variety of ways.

For example, upon receipt of a cheque to be deposited to the client's credit, a credit may appear on the clients' account although the clearing bank would not at that time have cleared the cheque. Should the cheque turn out to be a bad D cheque, the bank automatically reversed the credit entry.

In the instant case, according to Manyere, the debit entries were occasioned by the defendant who passed off a clearance voucher for value when it was a bad instrument. Chibune knew the true nature of the parties to the transaction. The bank did not. Chibune acted as a conduit for these parties, one of who E dishonestly accessed the plaintiff's money.

If Chibune believes he was led up a garden path, he knows who to sue. On the other hand, Chibune relied on the bank's systems to avoid the occurrence that resulted in the loss suffered. He said he had expressly asked Manyere to send away the cheque bearers should there be no sufficient funds held in that account. Yet Manyere authorised cashing of the cheque without ensuring that F the necessary clearances from the other bank had been obtained. He claimed that, being a lawyer, he had the responsibility of ensuring that his trust account was not abused by third parties. He disputed the banking practice spelt out by Manyere.

As for credibility, Mr Manyere impressed as a better witness than Mr Chibune. G Mr Chibune did not impress as a truthful witness in the witness stand. For instance, he could not give the full names of the person in whose name he had written the cheque. He could not tell the court this person's address or other particulars. All this, in spite of the fact that he had in his pleadings described the firm from which this Patrick came as a reputable client. If this was indeed H so, he would have easily established the elusive Patrick's particulars. It would

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appear that Chibune was intentionally withholding evidence from the court for A his own purposes.

Secondly, as a legal practitioner, Chibune displayed either an unfathomable abuse of a trust account or total diligence in ignorance of his obligations towards a bank that holds his firm's trust funds.

In view of the paucity of case authority on this subject (I have researched the B subject of clearance vouchers to no avail, as did both counsel), I have decided to approach the subject on the basis that a clearance voucher is as good as what is commonly referred to as a bank cheque. This is a bank certified cheque issued by the bank holding the account upon which it is drawn. If a person deposits in his account a bank certified cheque and proceeds to draw cheques against the credit created by that deposit but the bank cheque turns out to be C forged who should bear the loss?

Writing on this subject, in Paget *Law of Banking* 3ed at p 361 Megrah and Ryder point out:

> "The right to debit the customer with a returned cheque, notwithstanding that is has been credited as cash, was recognised by Lord Lindley when D he said in *Gordon*'s case:
>
> ' It is no doubt true that if the cheque had been dishonoured, Jones (the customer) would have become liable to reimburse the bank the amount advanced by it to him when it placed the amount to his credit. This he would have to do where any cheque, crossed or not, was placed to his credit and was afterwards dishonoured'." E

See *Capital and Counties Bank* v *Gordon* [1903] AC 240 at 248 *per* Lord Lindley.

At issue is the bank's entitlement to reverse a credit it has entered on a customer's account in respect of a negotiable instrument or cheque deposit when the instrument in question is later dishonoured. The defendant does not F dispute that in the normal course of banking practice a bank

may reverse such a credit. His dispute with the plaintiff turns on the situation where the bank informs the customer that a deposit has been made and the bank allows the customer to draw on the strength of, and in reliance on, the credit.

On whom should the loss occasioned by the dishonoured cheque deposit fall – the bank or the customer? G

It is necessary to go into detail on the evidence of Mr Chibune so as to put my findings in their proper perspective.

Mr Chibune had two clients, Texdale Consultancy and Rainbow Holdings. These two entered into an agreement. Rainbow Holdings was to receive goods from Texdale Consultancy. There was dispute as to how payment was to be H

Hungwe J

A effected. It was agreed that Rainbow Holdings would transfer money from their Barclays Bank account into the defendants' trust account with the plaintiff. Once a representative of Rainbow Holdings confirmed receipt of goods Chibune was to pay from Texdale Consultancy the deposit in his trust account.

Rainbow telephoned Chibune indicating that a transfer would be made the B following day. This was on 8 May. On 9 May, a Texdale Consultancy representative approached Chibune. He did not have proof of transfer as it was assumed Rainbow Holdings had forwarded such proof to Chibune. It was then that he telephoned Manyere who indicated that no credit transfer reflected in the defendants' account. Chibune's client then telephoned Chibune giving C him a reference with which to confirm the transfer.

When he contacted Barclays Bank Chibune says that that bank confirmed having effected transfer to the defendants' account with the plaintiff. He then advised his client to go and sort the issue between the respective banks. He wrote a cheque for $370 000 on the defendants' account with the plaintiff payable to his client.

D Later that morning, Manyere of the plaintiff telephoned Chibune in order to verify the authenticity of the signatures on the $370 000 cheque. In that conversation Manyere confirmed to Chibune that indeed, a voucher for transfer was being held by the bank. The effects had not, however, cleared but would clear on Monday or Tuesday. He asked Manyere to explain this to the E bearer of that cheque.

He learnt on Monday that the plaintiff had been paid when the same Textile representative came and demanded another cheque in payment of the transferred funds. He wrote another cheque. Later, to his dismay, he learnt that the plaintiff had debited his account with the sum claimed together with interest.

F In their plea, the defendants did not allege estoppel. Even if it were held that by implication such a plea might have been investigated during trial, I am unable to say that, on the evidence, the defendants have met the requirements of estoppel.

The defendants seem to rely on the fact that as the loss was due to the plaintiff's failure to satisfy itself that the clearance voucher was genuine, they cannot be G held liable. I cannot agree. The fact is that the bank, by paying Nyanyiwa on behalf of the defendants, was entitled to look to the defendants for that value. This basic accounting relationship created by debit and credit entries in the account held by the bank, was not disputed by the defendants.

The law treats the relationship between banker and customer as a contractual H one. The reciprocal rights and duties included in the contract are to a great

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Hungwe J

extent based upon custom and usage. It is now accepted that the basic, albeit A not the sole, relationship between the banker and customer in respect of a current account is one of debtor and creditor. See *Joachimson* v *Swiss Bank Corporation* [1921] All ER Rep 92; [1921] 3 KB 110 (CA).

Willis' *Banking in South African Law* at p 37 states:

> "Current practice in banking operations is for a bank to credit a customer's B account immediately upon deposit of funds, even though the payment of cheques in that deposit (has) not yet (been) collected. The bank will then debit the account of the customer in the event of any cheques being dishonoured when sent for collection."

Zulman JA in *ABSA Bank Ltd* v *IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) at 675 stated: C

> "The fact that the appellant might have permitted the respondent to draw cheques against uncleared effect, despite there being no agreement in this regard, would not excuse the respondent in law from liability to make payment to the appellant. The appellant was perfectly entitled to choose to honour such cheques, notwithstanding the fact that the effects earlier deposited had not been cleared, and to waive any benefit afforded to it in D this regard by its agreement with the respondent. It would be strange indeed if it were permissible for a customer of a bank to draw a cheque on a bank requesting the bank to honour the cheque and thereafter, when the bank honoured the cheque despite the absence of an overdraft facility, to then plead that this could have resulted in an overdraft which had not been agreed upon. In essence this is precisely what the respondent is contenting E for. It hardly lies in the mouth of the respondent who drew the two cheques in question against uncleared effects, albeit contrary to the agreement between the parties, to be heard to complain that the bank should not have honoured the cheques and debited its account.
>
> Put differently, it is the appellant, so it is suggested, who must bear the loss if the uncleared effects were not met. This cannot be F so."

In *Cuthbert* v *Robarts Lubbock & Co* [1909] 2 Ch 226 at 233 Cozens-Hardy MR put it this way:

> "If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."

The *ABSA* case is on all fours with the present case. In that case, a law firm in G which Blumbeg was practising for his own account drew cheques on his bank account held by the appellant on the understanding that a foreign bank deposit to his account would be good. It turned out that the deposits had not been genuine. The bank sued. *A quo*, the respondent pleaded negligence on the bank's part. He won. On appeal, he lost. I find myself in respectful agreement H

Hungwe J

A with his Lordship's remarks. They are applicable in the present case.

As Zulman JA held in the *ABSA* case, the fact that the defendants account was "a trust banking account" is irrelevant for the purpose.

In the result, I dismiss the defendants' counter claim with costs and grant judgment B for the plaintiff with costs as prayed with the summons.

Gill, Godlonton and Gerran, plaintiffs' legal practitioners

Honey & Blanckenberg, defendant legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/DOGO v TEDCO MANAGEMENT SERVICES (PVT) LTD 2004 (1) ZLR 308 (H)

DOGO v TEDCO MANAGEMENT SERVICES (PVT) LTD 2004 (1) ZLR 308 (H)

Citation 2004 (1) ZLR 308 (H)

Case No Judgment No. HH-71-04

Court High Court, Harare

Judge	Gowora J
Heard	13 May 2003
Judgment	24 March 2004
Counsel	Applicant in person *R Moyo,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *application — declaratory order — when application may be treated as such rather than as application for review — allegation that proceedings under consideration were a nullity due to failure to properly appoint presiding official — not an application for review of the proceedings — declaratory order granted*

Headnote

The applicant was dismissed from her employment after having gone on D strike. A disciplinary hearing in terms of the applicable code of conduct took place before her dismissal. Well out of the time allowed for instituting review proceedings, she brought an application to set aside the proceedings. Various procedural irregularities were alleged. It was also alleged that the official who dealt with the matter was not properly E appointed. It was argued for the applicant that what was being sought was a declaratory order, so it was not necessary to seek condonation for the late institution of review proceedings.

Held, that most of the points raised related to procedural irregularities which could only be dealt with by way of review and thus were not properly F before the court.

Held, further, that it was necessary for the respondent to prove that the official had been properly appointed, and it failed to do so. He therefore had no jurisdiction to administer the code of conduct and any act performed by him as a designated officer was as a consequence null and void. G

Cases cited

Geddes Ltd v Tawonezvi 2002 (1) ZLR 479 (S)

Kwete v Africa Community Publishing & Development Trust & Ors HH-216-98 H

Gowora J

A*Minerals Marketing Corp v Mazvimai* 1995 (2) ZLR 353 (S)

Mugwebie v Seed Co Ltd & Anor 2000 (1) ZLR 93 (S)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 259

Labour Relations Act [*Chapter 28:01*], s 47(5)

Case information

B Applicant in person

R Moyo, for the respondent

Judgment

GOWORA J: This application was argued before me on 13 May 2003. C Unbeknown to the court, the applicant, and counsel for the respondent, the legislature had promulgated an amendment to the Labour Relations Act, being Act 17 of 2002, which had come into effect on 7 March 2003, the effect of which was to restrict the jurisdiction in labour issues to the Labour Court created in terms of the statute in question. In October 2003, I requested additional heads of argument from the parties on whether, notwithstanding the D provisions of the amendment to the Act, the court had jurisdiction to determine the matters already pending before it at the time the amendment came into effect.

In terms of the recent amendment to the Labour Relations Act, s 89(6) thereof provides as follows:

> E " No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)."

The matters referred to in subsection (1) are, variously: the hearing and determining of applications and appeals in terms of the Act or any other enactment; hearing and determining matters referred to it by the Minister in F terms of the Act; referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute; appointing an arbitrator from the panel of arbitrators provided for in the Act, and doing any such things as may be assigned to it in terms of the Act.

Without going into the question of whether or not the matter before me would G fall into the category of matters referred to in subs (1) of s 89, in s 47(5) it is provided that any proceedings that were commenced in terms of Part XII of the Act before the date of commencement of the amendment to the Act, or were pending before the Labour Relations Tribunal, shall be deemed to have been commenced in terms of the appropriate provisions of the principal Act as amended by the H amendment of 2002, and shall be proceeded with accordingly.

Gowora J

In the event the matter may safely proceed before me. A

Having determined that the court had jurisdiction to determine the issue between the parties, I turn now to determine the matter on the merits.

The applicant has applied for relief on a draft order phrased in the following terms:

1. That misconduct proceedings since concluded against the applicant in B terms of the Code of Conduct of the Commercial Sectors of Zimbabwe, and the applicant's discharge from employment with the respondent, be and are hereby declared null and void.

   In the alternative.

   That the discharge of the applicant from employment with the respondent C be and is hereby set aside.
2. That the respondents (*sic*) shall pay the applicant the full amount of salary, benefits and bonuses she should have received for the period of her suspension and discharge.
3. That the respondents shall pay for the costs of this application. D

Prior to the hearing, the applicant had filed an application seeking condonation for the late filing of an application for review. At the hearing, at which she was not represented, she indicated that she did not intend to pursue the application for condonation, as her application was not one for a review, but was rather for a declaratory order. The respondent in turn sought a condonation for the E late filing of the opposing affidavit. This was granted by consent.

The applicant was employed by the respondent as an assistant bookkeeper. It is common cause that on 8 November 2000, employees of the respondent went on strike. The applicant left her station at about the time the strike was going on and did not return to her station until after a period of two days. On 10 November 2000, she was summoned to the office of Chishanga and subsequent F to a discussion with him she was given on the same day a letter advising her that she was being suspended without salary or benefits. She was also in terms of the same letter advised to attend a disciplinary hearing before Chishanga on 17 November 2000. She duly attended the hearing at which she was represented by a member of the Union of the Commercial Sectors.

The hearing was presided over by Chishanga and another of the respondent's G representatives; Mashava also attended. He gave evidence and also asked questions of the applicant. He also called

two witnesses on behalf of the respondent. Subsequent to the hearing, Chishanga wrote a letter to the applicant on 23 November 2000, stating that she had been found guilty on the charge of misconduct and that he was recommending that she be dismissed H

2004 (1) ZLR p311

Gowora J

A from her employment with the respondent. On the same day, the respondent's Finance and Retail Manager also addressed a letter to the respondent advising her that her services had been terminated with effect from 8 November 2000, the date of the suspension. The applicant filed an appeal with the Finance and Retail Manager, which up to the time the matter came up for hearing had not yet been determined.

B In its opposing affidavit which was deposed to by one Wellington Mutambanengwe, the Human Resources Manager for the respondent, issue was taken with the nature of the relief being sought by the applicant. The respondent stated that the applicant was seeking a review of the decision to send her on suspension and also the decision to dismiss her. The applicant, C however, had not complied with r 259 of the High Court Rules, 1971. The applicant had not brought the application within eight weeks of the date of the termination of employment as required by the rules. Having failed to bring the application for review within the required period, the applicant should have applied to the court for an order condoning her failure to comply with the rules. The respondent has in addition averred that the applicant, in seeking the D review, should have cited Chishanga as he was the designated officer whose decisions and actions she wishes to have reviewed and ultimately set aside.

The position of the applicant on the other hand, is that what she is seeking is not a review but a declaration in terms of the draft order attached to her application and in that respect she had no need to comply with r 259 or apply E for condonation in the absence of due compliance with the same.

In *Kwete* v *Africa Community Publishing and Development Trust & Ors* , in considering whether or not what was before him was an application for a declaratory order or an application for review as envisaged by r 259, Smith J stated:

> "In *Matsambire*'s case *supra,* Gubbay CJ held that the application was a F review because it was 'clearly designed at bringing the claimed irregularities in the procedures adopted by the Gweru City Council under the scrutiny of the High Court and for the exercise of that court's review powers'. It seems to me that that is the crux of the matter. Is the application aimed at, and based on 'irregularities in the procedures adopted' by the body or person concerned? Order 33 of the High Court Rules, 1971, deals with G reviews. Rule 256 therein provides that any proceedings to bring under review the decision or proceedings of an inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of a court application."

2004 (1) ZLR p312

Gowora J

It becomes necessary, in my view, to determine whether the application is A aimed at bringing under review alleged irregularities on the part of the respondent's designated officer. In the court application, the applicant lists the following as the grounds upon which she is seeking a declaratory order.

(a) absence of jurisdiction in that the official who dealt with the matter was not appointed "Designated Officer" in writing after consultation with the B Works Council;

(b) the proceedings were vitiated by the sitting in of the Creditors Supervisor who is not conferred with any disciplinary functions;

(c) the procedure of the Code of Conduct which binds both parties was not given effect to; C

(d) the proceedings were not *bona fide* and were not well founded;

(e) the charges were not properly formulated and were not fairly considered.

In respect of grounds (b), (c), (d) and (e) the applicant contends as follows. The Creditors Supervisor is not a designated officer and therefore his presence at the hearing, his active participation in the proceedings by questioning the D applicant and calling witnesses on behalf of the complainant, had rendered the entire proceedings null and void. In *Minerals Marketing Corp* v *Mazvimavi*,[2] Gubbay CJ stated:

> "Nonetheless, it is certain that Mr Sibanda was not present merely as an observer. The minutes reflect that he was permitted to put questions to and make statements concerning the respondent, although the occasions on E which he did so were few. The purpose of his attendance was, in his own words, 'to guide the committee'. It is probable, therefore, that he took part in their deliberations. The extent to which he may have influenced the deputy chairman and the two divisional managers or hampered their discussions is not known. What is plain is that in allowing Mr Sibanda to be present, in a capacity other than a silent observer, the disciplinary F committee went beyond the parameters of the code. It was an act impliedly forbidden. Thus a procedural irregularity occurred which, if not vitiating the proceedings, rendered them voidable at the instance of the respondent."

In casu, on almost similar facts I would say that what the applicant is seeking to have declared a nullity is a procedural irregularity which can only be dealt with by way of review, and is not null and void *per se*. G

The applicant has also complained that the procedures in the code of conduct were not adhered to. She also states that the proceedings were not *bona fide* and well founded and that the charges were not properly formulated and were not fairly considered. All these, in my view, are irregularities which should be H

Gowora J

A determined pursuant to an application for a review. I am unable to consider them as the application for review is not properly before me for want of compliance with the rules.

However, notwithstanding my comments above, the applicant has, as one of the grounds on which the declarator is predicated, maintained that the officer who dealt with the matter was not appointed a 'Designated Officer' in writing B after consultation with the Works Council.

In her founding affidavit, the applicant states that the Code of Conduct should be administered by a Designated Officer duly appointed in writing after consultation with the Works Council. She avers further that Chishanga was not so appointed and that she had consulted with members of the Works C Council over the issue and was convinced that he had not been properly appointed. She challenged the respondent to produce the letter in terms of which Chishanga was appointed as well as the minutes of the Works Council relating to the appointment.

In its opposing affidavit, the respondent stated that Chishanga had been D properly appointed and produced as proof of his appointment a list of designated and proposed designated officers within the respondent as at 10 August 1998. It did not, as requested by the applicant, provide either the letter in terms of which Chishanga was appointed or the proof of its consultation with the Works Council.

In her heads of argument, the applicant contended that the respondent, despite E being challenged by her to prove that Chishanga had been properly appointed as a Designated Officer had failed to provide any proof in respect of the same. There were no affidavits either from the person who appointed Chishanga or from members of the Works Council regarding the appointment of Chishanga as Designated Officer. The applicant further submits that in the absence of F proof that Chishanga was appointed in writing, it follows therefore that he was not properly appointed as the appointment was not in accordance with the provisions of the code, and consequently he had no jurisdiction to deal with the matter, even the suspension itself. She contends that absence of jurisdiction is a fatal defect, which renders the whole process null and void. She submits that any act done without jurisdiction is null and void and of no legal force or G effect. She contends further that any act therefore done by Chishanga in respect of the misconduct proceedings is null and void *ab initio* as if it never was.

The respondent contends that the onus to establish that Chishanga was not appointed in writing was on the applicant and not on the respondent. It was contended that as the applicant had made the averment, it was up to her to prove H it. It was the further contention on behalf of the respondent that the list

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Gowora J

produced by the respondent as Annexure "I" to the opposing affidavit showed A that Chishanga was one of the Designated Officers of the respondent. It is further contended that the code merely

requires that such appointment be in writing and that the list complied with the provisions of the code of conduct.

In the code of conduct Designated Officer is defined as:

> "'designated officer' means a person appointed in terms of paragraph 3.3 B of this code."

Paragraph 3.3 reads as follows:

> 'The employer, after consultation with the Works Council, shall appoint in writing one or more persons in his employ to be the "Designated Officer" for the purpose of administering this code.'

In *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S), the Supreme Court was C confronted with a similar set of facts. The code of conduct at issue was the same one – *viz.* the code of conduct for the Commercial Sectors. The respondent had been dismissed from employment after a suspension and hearing which had been effected by a Mrs Madyara. After the hearing, the respondent had been dismissed from his employment with the appellant. D Thirty three months after his notification that he had been dismissed he had filed an application with the High Court for an order setting aside his dismissal on the basis that the official who dealt with the matter lacked jurisdiction and also that the charges had not been properly formulated as they did not disclose any misconduct. It was his further allegation that the determination had no basis in evidence or factual allegations and the procedures in the code had not E been adhered to. At p 485 D-F, this is what Malaba JA had to say:

> "In highlighting the want of jurisdiction on the part of Mrs Madyara to do what she did, the respondent did not need to review her actions. The approach adopted by the respondent receives authority from the decision in *Bayat & Ors* v *Hansa & Anor* 1955 (3) SA 547 where at 552C-D, Caney J said: F
>
> '… the situation, as I see it, is that if the second respondent did decide the question of contractual rights adversely to the applicants, it remained open to them to review the decision of the second respondent, notwithstanding that they had taken part in a contest before the second respondent on the very question, or *ignoring the second respondent's decision on that question and treating it as a nullity as being beyond*G*the powers of the second respondent, to bring proceedings for a declaration of rights…'* " (my emphasis).

The respondent is, in my view, mistaken in its averment that the applicant must prove that Chishanga was not appointed in writing. It was incumbent upon the respondent to establish that Chishanga was appointed in terms of the code of H

Gowora J

A conduct. The code requires the appointment of a Designated Officer to be in writing and only a person appointed in terms of the code of conduct can administer the code. It is not for the applicant to disprove the adequacy of the appointment, but rather it was for the respondent to establish that there had been due compliance with the code in the manner in which it appointed its B designated officers. As Malaba JA remarked in the *Geddes* case *supra* at 486

> "Even at the eleventh hour the appellant failed to produce the letter in terms of which it appointed Mrs Madyara as a designated officer. It is clear from the provisions of the Code that only a person appointed a designated officer by the employer in writing could investigate allegations of misconduct against an employee, suspend him from work and institute disciplinary proceedings."

C Similarly, in *Mugwebie* v *Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S) at 96H-97A, Sandura JA, in considering an application brought in almost the same set of facts had the following to say:

> "The question which now arises is whether the appellant's suspension was valid. There is no doubt in my mind whatsoever that it was null and void. D It was a complete nullity. In this respect, I can do no better than quote what Lord Denning said in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I:
>
> 'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. *There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes*E*convenient to have the court declare it to be so.* And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse'" (my emphasis).

In the absence of proof in the form of a letter appointing him as such, Chishanga was not, in my view, appointed designated in writing. He therefore F had no jurisdiction to administer the Code of Conduct. Any act performed by him as a designated officer was as a consequence null and void.

The applicant has, as part of the relief being sought also sought an order she be paid the full amount of salary benefits and bonuses she should have received for the period of her suspension

and discharge. In my view, this is G relief that would have followed an order in which the suspension and dismissal were setaside after a review process and there had been an order of reinstatement. I do not believe that an order, which is of a declaratory nature, would encampass an order pertaining to salary and benefits. The applicant therefore succeeds as far as the main paragraph in her draft order and I order as follows:

1 H That the misconduct proceedings against the applicant in terms of the

Gowora J

Code of Conduct of the Commercial Sectors of Zimbabwe and the A applicant's discharge from employment be and are hereby declared null and void.

2. That the respondent shall pay the costs of this application.

Coghlan Welsh & Guest, respondent's legal practitioners B

1 HH-216-98 at p 4
2 1995 (2) ZLR 353 (S) at 362C-E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/NDAZA v ZIMRA 2004 (1) ZLR 317 (H)

NDAZA v ZIMRA 2004 (1) ZLR 317 (H)

Citation	2004 (1) ZLR 317 (H)
Case No	Judgment No. HH-79-04
Court	High Court, Harare
Judge	Kamocha J
Heard	24 March 2003
Judgment	24 March 2003
Counsel	*T Tivaone,* for the applicant *B Chidziva*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Customs and excise — *forfeiture of goods — vehicle used in smuggling goods —* C *forfeiture of — relevance of mens rea of owner/manager — seizure not peremptory*

Headnote

The applicant, a tour operator, managed a house boat on Lake Kariba. It was hired for use on the lake. Unbeknown to the applicant, or to the owner, it was used for smuggling goods to Zambia. The users were caught and D prosecuted. The respondent seized the boat and declared it forfeited to the State under s 188 of the Customs & Excise Act [*Chapter 23:02*]. It argued that the section made seizure and forfeiture peremptory, irrespective of whether the owner of the boat knew or ought to have known that the vessel was going to be used for criminal activities by the hirers. On E application for an order for its release:

Held, that the section did not create an offence of strict liability. Smuggling cannot be classified as one of the public welfare offences for which strict liability is appropriate and is accordingly not a strict liability offence. Neither the applicant nor the owner was aware of the purpose for which the boat was hired, nor were they negligent; in the premises the application F for the release of the boat was to be granted.

Legislation considered G

Customs & Excise Act, [*Chapter 23:02*], s188

Case information

T Tivaone, for the applicant

B Chidziva, for the respondent

Judgment

KAMOCHA J: After hearing argument by both legal practitioners I granted the application in terms of the draft order and indicated that my reasons would follow in due course. These are they.

H The applicant sought for an order that the respondent be ordered to release to

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Kamocha J

him a house boat described as Shai Shai, House Boat KF368, engine A No. 0607088 G. 00550302 D seized by respondent on notice of seizure No. 97057D dated 5 October 2002.

The circumstances giving rise to the application are these. The applicant is a professional tour operator and has been so for some years. He manages a house boat known as Shai Shai house boat registered as KF368 which belongs to one B Jeremiah Nhete who resides in Mandara, Harare. The applicant – "Chamu" — resides in Kariba and the house boat is based at Cutty Sark Harbour, Kariba.

Apart from this particular house boat, Chamu also manages other boats for various tour operators. His business is mainly to hire out boats for a fee to tour operators. When boats are hired out the hirers also pay for and get the services of the boat captain and the cook. Payments for the hire of the boats are made C before the hirers take boats and receipts are issued.

On 4 October 2002, one Robert Matenda hired Shai Shai to spend two nights on it. Matenda is in the business of chartering boats. He paid $70 000 up front for the two nights.

At about 0700 hours on 5 October 2002, an official of the respondent D discovered that Shai Shai was loaded with goods that were to be unlawfully transported to Zambia. The goods were going to be smuggled to Zambia. Among the occupants of the hired boat were some Zambian nationals. All the occupants including Matenda were then arrested and charged with smuggling the goods which were forfeited to the state by the trial court after conviction. E

The respondent's official placed the vessel under seizure as it was the means of conveyance of the smuggled goods. The applicant has been trying to secure the release of the boat in vain ever since. He averred that he was not aware that the clients who had hired the vessel were going to use it for smuggling. He believed that they had hired it for a normal house boat cruise. He had no knowledge of the illegal activity of the hirers on the vessel. He said he himself F was innocent and had never in anyway participated, aided or gave any blessings to the illegal activities of the hirers. It is in fact common cause that he was never arrested for any wrong doing relating to the smuggling of the said goods. He asserted, further, that once a boat has been hired it was not his business to accompany it

so as to ensure that the hirers use it for the purpose they have hired it. He therefore had no way of knowing what illegal activities G the hirers engaged in.

In this case, the culprits appeared in the Kariba Magistrates Court and were convicted and sentenced to pay fines while their goods were forfeited to the State. But the respondent wanted the applicant's vessel to be forfeited to the State when he is not being accused of any wrong doing. Further, the H

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Kamocha J

A respondent wants to forfeit the boat without affording the owner an opportunity to be heard.

The respondent contended that it acted properly in placing the boat under seizure and went on to argue that the vessel should be forfeited to the State. Reliance was placed on s 188 of the Customs and Excise Act [*Chapter 23:02*]. B The relevant provision recite as follows:

> "188 Goods and Ships, aircraft, vehicles or other things liable to forfeiture
>
> (1) Any C goods which are the subject matter of an offence under this Act shall be liable to forfeiture.
>
> (2) Any ship, aircraft, vehicle or other thing used for the removal of goods which –
>
> (a) are liable to forfeiture; or
>
> (b) are being exported or have been imported or otherwise dealt with contrary to or not in accordance with –
>
> (i) the provisions of this Act or any other law relating to Customs and Excise; or
>
> (ii) D any enactment prohibiting, restricting or controlling the importation of such goods;
>
> shall itself be liable to forfeiture."

It was respondent's contention that since the above provisions are peremptory the vessel was subject to forfeiture, irrespective of whether or not the owner E knew or ought to have known that the vessel was going to be used for criminal activities by the hirers — thus, imposing strict liability. I do not agree.

These courts have normally implied strict liability in statutory provisions which create public welfare offences. Professor G Feltoe in *A guide to the Criminal Law of Zimbabwe* 2 ed at p 133 discusses the question of strict F liability as follows:

> "In Zimbabwe, the imposition of strict liability has not come about as a result of the legislature laying down expressly that certain offences are strict liability offences. Instead, the courts, taking into account certain recognised factors, have come to the conclusion that it was the implied intention of the legislature to introduce strict liability in respect of these G offences. All of the cases where the courts have decided that strict liability was impliedly imposed have involved statutory provisions which have created so-called public welfare offences. These offences involve prohibitions or duties designed to prevent grave potential danger to the welfare of the State generally and/or to public amenities.
>
> Public welfare offences include such things as public health legislation, safety regulations, legislation aimed at preventing the spread of animal

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2004 (1) ZLR p320

Kamocha J

> disease, legislation aimed at preventing contamination of drugs and food A stuffs which are being processed and manufactured, etc."

As can be seen from the above passage, smuggling cannot be classified as one of the public welfare offences and is accordingly not a strict liability offence. It must, therefore, be established that there was intention or culpa on the part of the owner for liability to attach. *In casu*, there is no doubt that the applicant B had no knowledge of the commission of the crime which led to the seizure of his vessel. Neither was he negligent in any way.

Finally, I wish to emphasize that although the provisions of s 187 and 188 of the Customs and Excise Act are indeed peremptory, they do not create a strict liability offence.

In the light of the foregoing, I would grant the application in terms of the draft C order.

Mangwana Chirairo & Tivaone, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/A-G v MASASI 2004 (1) ZLR 321 (H)

A-G v MASASI 2004 (1) ZLR 321 (H)

Citation	2004 (1) ZLR 321 (H)
Case No	Judgment No. HH-77-04
Court	High Court, Harare
Judge	Malaba J
Heard	9 September 2003
Judgment	31 March 2004
Counsel	Mrs *F Ziyambi,* for the applicant *J Dondo,* for the respondent
Case Type	Revocation of bail application
Annotations	No case annotations to date

Flynote

C**Appeal** — *Court Martial Appeal court — certificate of appeal — when required*

Military law — *court martial — appeal against decision of — when certificate of appeal required — bail pending appeal — not competent for any court to grant bail*

Headnote

D The respondent was convicted by court martial and sentenced to a term of imprisonment. The Attorney-General consented to the grant of bail pending appeal but later applied to have the bail order revoked, on two grounds. The first was that the grant of bail pending an appeal from a court martial was not competent; the second was that the respondent had E failed to obtain an appeal certificate under s 80(1)(b) of the Defence Act [*Chapter 11:02*].

Held, that a certificate of appeal is only required in those instances where the appeal is not based on the usual grounds of appeal i.e. a finding of fact or a conclusion of law or both a finding of fact and a conclusion of law. A certificate may be required where, for example, a convict is not legally F represented and is unable to say whether the ground, as formulated by him, is a ground of appeal on a question of law or on a question of fact or both. He will have to seek a certificate of appeal certifying as sufficient the ground as formulated by him.

Held, further, that the plain and unambiguous meaning of s 80(4) is that the fact that an appeal or application for an appeal certificate has been lodged G shall not interrupt the running of the sentence imposed. It was incompetent for both parties to have consented to the grant of bail in the face of an express prohibition against an order whose effect would be to suspend the

operation of the sentence imposed. As the order was a result of an error common to both the parties and the court, it was competent for the H court to correct that order.

Hungwe J

Legislation considered A

Defence Act [*Chapter 11:02*], s 80 (1)(3)(4)

Defence Forces (Courts Martial Appeal) Rules (FGN 222 of 1956)

Defence Forces (Courts Martial Appeal) (Amendment) Rules (FGN 41 of 1960) (No.1)

High Court Rules 1971(RGN 1047 of 1971), r449(1)(c) B

Case information

Mrs *F Ziyambi,* for the applicant

J Dondo, for the respondent

Judgment

HUNGWE J: This is an unusual application placed before me when I was on C the bails application court roll. The applicant, in HCB 201/03, on 14 March 2003 consented to bail being granted to the respondent who had filed a notice of appeal against both conviction and sentence in the court martial proceedings wherein he had been sentenced to an effective two years imprisonment for crimes amounting to theft. Being a member of the defence forces, he was charged under the Defence Act [C*hapter 11:02*], hence the seemingly stiff D sentence.

The order was granted by consent. It is against that order that this application for revocation of the order granting bail is being sought. Two grounds are advanced in support of the application.

Firstly, the applicant states that the consent to bail was made in error, as no E regard had been paid, at the time the matter was considered, to the provision of s 80(4) of the Defence Act ("the Act"). In the applicant's view that subsection precludes the grant of bail to anyone convicted in terms of the Act.

Secondly, the applicant submits that s 80(3) of the Act was not complied with as no appeal certificate was granted or obtained by the respondent prior to lodging his notice of appeal with the Appeal Court as is required by that Act. F

Section 80(3) provides:

" (3) The procedure for —

(a) noting of an appeal; and

(b) applying for an appeal certificate; and

(c) furnishing the Commander with a copy of — G

(i) the notice of appeal; or

(ii) the application for an appeal certificate;

shall be as prescribed by the rules of court." H

Hungwe J

A The Defence Forces (Courts Martial Appeal) Rules FGN 222 of 1956 provide:

Entry of Appeal

"4 Any member who decides to appeal from a court martial to the Appeal Court shall institute his appeal by giving notice of his intention to appeal in form No. 1 within a period of twenty-one days following the B date on which the finding of the court martial is confirmed.

Application for an appeal certificate

5. Any member who decides to obtain an appeal certificate shall submit his application for such certificate in form No. 2 within a period of twenty-one days following the date on which the finding of the court marital is confirmed."

C These two sections were amended by the Defence Forces (Court Martial Appeal)(Amendment) Rules, 1960 (No.1) (FGN 41 of 1960).

Section 4 now requires a member who decides to appeal a court martial decision to do so by giving notice of his intention to appeal in form No. 1 within 21 days following the date on which the finding of the court martial is D confirmed or, if he has applied for and has been granted an appeal certificate, within 21 days of the date of grant of such a certificate.

The question then becomes whether the respondent is an appellant who required an appeal certificate. As the name implies, it is a certificate issued in respect of the sufficiency of grounds of appeal in terms of s 80(1) (b) of the Act. As the name implies, It is a certificate issued by either the Appeal Court E or the confirming authority certifying as sufficient, any ground of appeal other than that which involves a question of law, a question of fact or a mixture of both fact and law.

This arises from s 80(1) which provides:

"80 *Appeals*

(1) F Subject to this section, an appellant may appeal against conviction to the Appeal Court —

(a) on any ground of appeal which involves –

(i) a question of law alone; or

(ii) a question of fact alone; or

(iii) G a question of mixed law and fact; or

(b) on any other ground which is certified to be sufficient by —

(i) the Appeal Court, where the appellant is stationed in Zimbabwe; or

(ii) the confirming authority, where the appellant is stationed H outside Zimbabwe."

Hungwe J

Mr *Dondo,* for the respondent, argued that that section cannot be read as A requiring, in every appeal, the appellant to first obtain a certificate of appeal before filing such a notice. It is only required in those instances where the appeal is not based on the usual grounds of appeal i.e. a finding of fact or a conclusion of law or both a finding of fact and a conclusion of law.

I agree. B

It is not difficult to envisage a situation where this may arise. Where a convict is not legally represented, he may be unable to say whether the ground, as formulated by him, is a ground of appeal on a question of law or on a question of fact or both. He will have to seek a certificate of appeal certifying as sufficient the ground as formulated by a layman in the law.

I came to the conclusion that the appellant's appeal needed not be covered by C a certificate of appeal. Such was not required in terms of the Act. As such I came to the conclusion that the notice of appeal was filed in terms of s 80(1)(a) of the Act, in terms of which a certificate of appeal is not required.

It is with respect to the interpretation of s 80 (4) that Mr *Dondo's* argument could not be sustained. That section states: D

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

He urged this court to find that this court could not revoke its own orders as it was *functus officio.*

At common law an appeal has the effect of suspending judgment. It seems to E me that s 80(4) specifically alters the common law position. It was incompetent, therefore, for both parties to have consented to the grant of bail in the face of such express prohibition against an order whose effect would be to suspend the operation of the sentence imposed. As the order was a result of an error common to both the parties and the court, it is in my view competent for this court to correct that order (see R 449(1)(c) of the High Court Rules). F

The plain and unambiguous meaning of that section is that the fact that an appeal or application for an appeal certificate has been lodged shall not interrupt the running of the sentence imposed. In other words, if bail affects the running of sentence, it shall not be allowed.

Mr *Dondo* urged this court to hold that the section cannot be read so as to oust G the jurisdiction of this court. I am unable to agree. Where the statute clearly ousts a court's jurisdiction in

unambiguous language, such as here, the courts cannot exercise jurisdiction. The courts cannot render some other interpretation than that expressed by the statute. To do so would offend the golden rule of interpretation and defeat the purpose of the legislature. H

2004 (1) ZLR p325

Hungwe J

A As to the lack of jurisdiction to revoke its own orders, I am of the view that in the absence of authority to the contrary, there is nothing to stop this court from correcting patently erroneous orders issued by itself for as long as there is shown good cause for doing so.

One must not forget that as part of its inherent jurisdiction, the High Court B exercises this very power to correct its own orders.

In the result, the order of this court in HC B201/03 dated 14 March 2003 be and is hereby revoked.

Attorney-General, legal practitioners for applicants

C*Chinamasa, Mudimu & Chinogwenya*, legal practitioners for respondent

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Source:
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MUZEYA v MARAIS & ANOR 2004 (1) ZLR 326 (H)

2004 (1) ZLR p326

Citation	2004 (1) ZLR p326 (H)
Case No	Judgment No. HH-80-04
Court	High Court, Harare
Judge	Chinhengo J
Heard	25 September 2003; 27 November 2003; 28 November 2003; 23 February 2003; 26 February 2003
Judgment	31 March 2004
Counsel	*T D Muskwe*, for the plaintiff *R Y Phillips*, for the defendants
Case Type	Civil action
Annotations	Link to case annotations

Flynote

Damages — *assessment — principles — declining value and reduced* C *purchasing power of money — debt sounding in money — any award must be paid in terms of nominal value, not an amount which has equivalent purchasing power*

Damages — *assessment — principles — loss of future earnings — approached to be adopted* D

Damages — *assessment — principles — loss resulting in expenditure of foreign currency* E — *permissible for make award in foreign currency*

Practice and procedure — *judgment — claim expressed in foreign currency — when permissible to give judgment in foreign currency — loss resulting in expenditure of foreign currency*

Headnote

The plaintiff's daughter was severely and permanently injured in a road accident, caused by the negligence of the first defendant. There were conflicting medical opinions about her long-term prospects, but one of the medical experts was of the view that treatment available in the United States would be beneficial. She would have to be accompanied by at least F one of her parents.

The claims were initially made in January 2001. For the next two years the case did not proceed. At a pre-trial conference in June 2003 the plaintiff indicated his intention to amend the claim. The amended claim included an amount in United States dollars to cover the cost of the treatment G there. The trial commenced but the plaintiff applied to further amend his claim. The amended claim included amounts for past expenses, basing these, not on the amounts which were actually incurred at the time, but on what the items would cost at today's prices.

Among the issues for determination were the following:

(a) Was the plaintiff entitled to claim in today's money terms the amount H

A of expenses actually incurred i.e. was he entitled to convert an expenditure actually incurred and paid to a figure representing that amount in today's money after factoring in inflation?

(b) What is the correct approach to a claim for loss of future earning capacity in a claim by or on behalf of a minor?

(c) Was it permissible in a claim in delict, such as the present, to make B an award in foreign currency of any part of the claim?

Held, that where making a claim for a debt sounding in money, the principle of nominalism requires that any award must be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. To depart from this principle, even where the inflation rate is high, would create such uncertainty in the law that the whole system C would be unworkable. Any problem with inflation could be resolved by the responsible minister adjusting the prescribed rate of interest so as to take account the effect of inflation on the purchasing power of money. The principle of nominalism does not apply to loss of future earnings or future support or where a comparison has to be made of previous awards D in quantifying non-patrimonial loss.

Held, further, that there are two main approaches to assessing damages for loss of future earning capacity. One is to make a globular award in respect of general damages inclusive of loss of future earning capacity. The other is to assess the damages under separate headings – damages E for pain and suffering and loss of amenities of life separately from damages for pain and suffering and loss of amenities of life separately from damages for loss of future earning capacity. The latter approach depends on the evidence placed before the court including actuarial evidence. This approach is the preferable one, because damages for pain and suffering are concerned with a loss which cannot be measured in money, whereas the loss of future earnings is concerned with patrimonial loss F and can be calculated. The court is not tied by actuarial calculations, but has a large discretion to award what it considers right.

Held, further, that where a loss incurred in Zimbabwe will result in expenditure of foreign currency (as where the victim of an accident has to receive treatment outside the country), it is permissible for the court to make an G award in foreign currency.

Cases cited

Cosmopolitan National Bank of Chicago v Steinberg 1973 (1) RLR 23 (G); 1973 (4) SA 579 (R)

H*Deutsche Bank Filliale Nürnberg v Humphrey 272 US 517 (1926)*

Chinhengo J

Everson v Allianz Ins Ltd 1989 (2) SA 173 (C)A

Hokonya & Anor *v* Chinyani & Ors 1995 (1) ZLR 102 (H)

Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe 1988 (2) ZLR 482 (SC); 1989 (3) SA 191 (ZS)

Min of Defence & *Anor v Jackson* 1990 (2) ZLR 1 (S)

S A Eagle Ins Co Ltd v Hartley 1990 (4) SA 833 (A)

Southern Ins Assn v Bailey NO 1984 (1) SA 98 (A)B

Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A)

Treseder-Griffin & Anor v Co-op Ins Soc Ltd [1956] 2 QB 127 (CA)

Voest Alpine Intertrading GmbH v Burwill & Co S A (Pty) Ltd 1985 (2) SA 142 (T)C

Case information

T D Muskwe, for the plaintiff

R Y Phillips, for the defendants

Judgment

CHINHENGO J: This is a claim for personal injury and other consequential D damages arising from a motor car accident on 20 May 1999 in which the plaintiff's daughter, a minor called Tapuwa Melissa Tasiyana ("Tapuwa"), was severely injured. The plaintiff is suing in his capacity as father and natural guardian of Tapuwa. The defendants admit liability but do not admit the amount claimed. This is a claim which should have been brought to court much sooner and resolved but for the delays which I will indicate hereunder. The E claim was amended three times and it is now for $754 064 402 of which $685 574 642 is claimed in Zimbabwe currency and the balance in United States currency in the sum of US$30 865.

THE INJURIES SUFFERED BY TAPUWA AND TREATMENT RECEIVED

Tapuwa was a pupil at Avondale Primary School in Harare in 1999. She was F in grade 2 and about 8 years old then. On 20 May that year she was on her way home on foot from school and was crossing Aberdeen Road in Avondale when she was knocked down by the first defendant's motor vehicle. That motor vehicle was comprehensively insured by the second defendant. Tapuwa was severely injured. The first defendant was later prosecuted in terms of the Road G Traffic Act and was convicted and sentenced to a fine of $1 000 or in default of payment to imprisonment for three months.

Tapuwa was immediately taken to Parirenyatwa Hospital and spent a long time in the intensive care unit there. She was later transferred to the Avenues Clinic. Upon her release from hospital she was admitted to St Giles Rehabilitation H

A Centre first as an in-patient and later as an out-patient. She now "attends" school at St Giles and continues to receive rehabilitative treatment. She is 100 per cent disabled and will remain so disabled for the rest of her natural life. She will also continue to require and hopefully receive rehabilitative treatment.

> The injuries which Tapuwa sustained in the accident are summed up in a report compiled by Mr William Carol Auchterlonie, a neurological surgeon on B 5 September 2001. He stated that:
>
> "The current problems are that tragically this child:
>
> 1 Cannot talk.
> 2 Cannot sit without support.
> 3 Cannot walk. C
> 4 Cannot feed herself.
> 5 Cannot attend to or have control of her bowel or bladder.
> 6 Cannot move or turn without assistance. She requires a full-time nurse during the day and is looked after by her parents at night.

7 She has difficulty in breathing and becomes chesty. D

8 Secretions spill over from her constantly dribbling mouth.

9 She cannot chew, so only takes soft food and chokes easily.

10 She has dental problems with constant sores in her mouth and is prone to thrush.

On examination I found an extremely tragic, pitiful picture of a severely E impaired child in a wheel chair.

The child's limps were held mainly in flexion, with increased plasticity. She was dribbling from the mouth constantly. She had obviously no understanding or awareness of her surroundings. All reflexes were brisk, there was no power in her limbs. Her eyes did not appear to focus or follow objects.

F I did not have access to any records or X-rays. I requested an updated CT scan, which showed atrophy and possible hydrocephalus developing.

These scans, I understand, were sent to Professor Kalangu, her physician.

In my opinion this child Tapuwa has suffered a severe irreparable head injury with resultant permanent brain damage.

G This child is 100 per cent disabled and the prognosis for her future extremely poor. She will be uneducatable and never be employable. Her life expectancy will be limited.

Medical expenses for her future will be high, as she will require constant nursing care, continuing rehabilitative therapy, drugs for possible recurrent and urinary tract infections.

H She will tend to develop limb contractures and pressure sores which may

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require surgery. Her wheelchair will have to be replaced from time to A time."

In the same report Mr Auchterlonie said that in addition to the closed head injury, Tapuwa had bruises and cuts on her face and body; was bleeding from head and mouth. She had a bruised pelvis and fracture on the right hip. The surgeon was her referring to the injuries that were observed just after the B accident. Except for his remarks concerning the irreparable nature of damage to her brain and reduction in life expectancy, Mr Auchterlonie's report is confirmed by Professor Kalangu in his reports and by his evidence in court.

Professor Kalangu's first report states in part as follows:

"3. On 20 May 1999, I attended the person of Tapuwa Tasiyana, aged 7.

4. … on admission the patient was deeply unconscious with fracture of C the right clavicle. CT Scan which was performed showed signs of cerebral contusions and also a subdural hygroma or collection of fluid between the brain and the dura. This child was treated for a long period of time in the Intensive Care Unit and she required intubation and ventilation followed by tracheotomy.

5. The treatment was successful following a lengthy battle and currently D this child is able to interact with the environment and the people who are surrounding her.

6. However, Tapuwa Tasiyana is not yet independent. She is unable to walk on her own, and she is still mentally very disabled. This disability needs to be quantified by a neurophychologist.

7. This child would have certainly several problems in the future E including learning difficulties, memory difficulties and also impossibility to be totally independent.

8. I consider the injuries to have been very very serious."

This report was compiled in year 2000. In another report of the same year Professor Kalangu stated that Tapuwa's disability was 100 per cent. He also F said that –

"There is however some hope for her if she could be allowed to go overseas for a special treatment called Oxygen Hyperbaric Therapy. It has worked in some patient (*sic*) in the same situation as Tapuwa and I believe that a chance should be given to this child …."

At the trial Professor Kalangu gave evidence concerning the treatment which G Tapuwa had received and the prospects for her condition improving even more if she received the Oxygen Hyperbaric Therapy ("HBOT"). I will sum up his evidence: Tapuwa still cannot talk, move or go to the toilet on her own. She cannot appreciate anything around her. Though she can hear she still cannot eat on her own or talk. Professor Kalangu tried to restore that part of the brain H

A which could be useful. He identified that the brain stem and the mid brain are in working order, hence Tapuwa can swallow and sleep and wake up. The cortex was, however, not functioning, hence she has lost speech and appropriate motor action and control of sphincters. She can improve with HBOT treatment which is available overseas. Although success depended on the extent of the primary damage she could improve to the point where she can go to the toilet B on her own, turn on her own and achieve some independence. The HBOT treatment involves the concentrated supply of oxygen to the brain. It is administered in sessions over a period not exceeding four months. First Tapuwa would have to be evaluated to establish whether HBOT treatment would be beneficial to her before treatment commenced. She would then C require a minimum of 20 sessions of treatment but, depending on her responses to it, she may require up to 50 or 60 sessions or even 80 sessions. These treatments have to be done en bloc and all within a period not exceeding four months. Although the evaluation can be done in Zimbabwe, it was the more appropriate thing that it be done in Florida, USA, where Tapuwa would receive the HBOT treatment. Professor Kalangu expressed confidence and D professional opinion that Tapuwa would benefit from the HBOT treatment. He did not agree with Mr Auchterlonie's assessment that Tapuwa had suffered irreparable brain damage. He said that she had already registered improvements such as that she now can flex and no longer dribbles from the mouth. There was, in his view, definite scope for more improvement. He also differed from Mr Auchterlonie in regard to Tapuwa's life expectancy. He said that Tapuwa E had a below average life expectancy if left alone but she will have a normal life expectancy if properly looked after. Her condition will improve and thereby reduce dependency on a nurse aid. Professor Kalangu said that whilst Tapuwa is receiving the HBOT treatment she would at the same time require and receive physiotherapy treatment. He said that she will need a hip operation F because her hip is not mobilizing sufficiently, will freeze, and require an operation. She will also require a replacement wheel-chair. In regard to the HBOT treatment in Florida, Professor Kalangu said that it was necessary for Tapuwa to be accompanied by one parent. He said that it was not necessary for both parents and another child in the family to accompany her.

The plaintiff gave evidence concerning the injuries sustained by his daughter, G the treatment that he received and continues to require and to receive. He said that at the time of the accident he and his family were renting a dwelling place in Avondale. After the accident they were constrained to leave the rented accommodation and to live at their own house in Mufakose, a high density suburb west of the city of Harare. He and his wife made daily visits to the H institutions where their daughter was receiving treatment Parirenyatwa Hospital,

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Chinhengo J

Avenues Clinic and St Giles Rehabilitation Centre. They made many other A visits to the specialist medical practitioners who attended to Tapuwa. When Tapuwa became an outpatient at St Giles, they took her there frequently for physiotherapy and speech therapy. They continue to do so now because that is where she "attends" school of necessity. They also had to hire a nurse aid to look after Tapuwa both at St Giles and at home when they are away. They spent a lot of money on hospital fees, drugs, specialist treatment of Tapuwa B both in Zimbabwe and in Florida. They will require money to pay a nurse aid and to take the child to St Giles. Their claim therefore encompasses these areas of expenditure, past and future, and loss of earnings capacity.

In regard to Tapuwa's treatment outside Zimbabwe, the plaintiff said that if it was necessary for both him and his wife and their other child to accompany C Tapuwa. He said that Tapuwa was a girl approaching puberty. If he went with her alone it would cause problems when it comes to bathing her or changing her clothes. If the mother went alone she would have problems lifting her or generally moving her around. They had assisted each other throughout the years to look after the child especially during the night when she had to be turned over. In his view it was therefore necessary that both of them accompany D her to Florida. He said that Tapuwa's brother, younger than her, should also go to Florida in order to provide a complete family environment which would enable Tapuwa to recover quickly. I shall deal with other aspects of the plaintiff's evidence in considering each of the heads of claim.

THE PLEADINGS AND THEIR AMENDMENT E

The plaintiff's claims, as contained in the declaration to the summons issued on 19 January 2001, was for the payment of medical and nurse aid expenses in the total sum of $2 293 989.70 and general damages inclusive of future medical expenses, loss of future earnings, future nurse-aid

expenses and transport cost in the total sum of $26 340 000. He therefore claimed the sum F of $28 633 989.70 altogether, plus interest at the prescribed rate of interest from the date of service of the summons to the date of final payment.

There was no progress in this matter for quite a while between 2000 and 2002. The plaintiff said that the parties were pursing a settlement out of court. On 17 June 2003 a pre-trial conference was held. The plaintiff indicated his intention to amend the claim. The presiding judge ordered him to file and serve G on the defendant a comprehensive amendment of the claim within two days of the pre-trial conference. It was noted by the judge that liability was not in issue. On 18 August 2003, the defendant's legal practitioners complained in writing that the plaintiff had not compiled with the judge's direction at the pre-trial conference. It seems to me that the plaintiff had in fact amended his claim H

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A and may simply not have served it on the defendant's legal practitioners. When the trial commenced on 25 September 2003, the plaintiff moved an amendment to the declaration which had been filed on 17June 2003. The amendment was not opposed. In terms of the amendment, of this plaintiff's claim was now for:

(a) $9 000 000 for general damages for pain and suffering and loss amenities of life

(b) B $10 000 000 for loss of future earnings capacity

(c) $1 607 042.92 for wheelchair and its repairs in the future

(d) $74 177 856 special damages covering past and future medical expenses, nurse aid and transport costs

(e) C US$320 000 for the HBOT treatment and other associated costs.

The trial commenced on the understanding that the plaintiff was to prove his entitlement to the amounts claimed in the amended declaration filed on 17 June 2003. This was not to be. The plaintiff again applied to further amend his claim. The trial had to be adjourned to allow the plaintiff to make a further amendment to his declaration. In February 2004 the trial resumed. The D plaintiff moved an amendment filed of record on 16 February 2004 in which he claimed an increased amount overall. The claim for general damages for pain and suffering remained at $9 000 000, however he now claimed $134 516 711 for what he termed "past liability". This amount was made up to the expenses claimed in respect of transport costs ($103 707 271), past E medical operations ($26 490 155), nurse aid reimbursement ($4 687 134) and lumber brace ($132 151). Future expenses were claimed as follows:

1. Medicals : St Giles	$ 69 858 134
2. Transport	$233 308 400
3. Loss of income (i.e. loss of earning capacity)	$ 96 910 232
4. F Nurse aid	$ 5 231 108
5. Nurse aid transport	$ 7 299 220
6. Doctors	$ 4 666 168
7. Repair wheel chair	$ 2 42 744
Total	**$419 898 005**
a) G Tickets (to Florida)	$ 58 350 240
b) Medical (HBOT treatment in Florida)	$126 840 000
c) Operations – St Annes	$ 5 614 000
d) Wheel chair	$ 2 000 000

e) H Appliances	$ 3 045 446

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Total	$195 849 686 A
Grand total for future expenses	$615 547 691
Actuarial fees	$ 4 000 000
Total Claim excluding legal fees and reviews in Zim$	$754 064 402
Amount claimed in Zim$	$685 574 642 B
Amount claimed in US$	US$ 30 865

In addition to these amounts, the plaintiff claimed interest at the prescribed rate of interest on the sum of $9 million from the date of the accident to the date of payment. He did not claim any interest on the other amounts. He claimed costs on a legal practitioner and client scale. The plaintiff's claim, as contained in this C last amendment, was compiled by an actuarial firm known as African Actuarial Consultants. A Mr Darlington Chamburuka of that firm gave evidence in support of the figures claimed. The plaintiff himself was unable to speak to his claim in so far as the figures were concerned. He deferred to the actuary.

I have to explain the basis on which the actuary calculated some of the amounts D claimed by the plaintiff. For costs incurred in the past, the actuary relied not on receipts or vouchers, but on figures or estimates given to him by the plaintiff and the plaintiff's legal practitioner. For future costs the actuary relied on quotations where available and other information provided by the plaintiff. The actuary said that he checked all the figures given to him by the plaintiff to establish that they were reasonable. The actuary determined the amounts of E the plaintiff's claims for past expenses by calculating the figures in such a way as attempted to compensate the plaintiff for the fall in the value of money. In other words, past expenses were calculated on their value in today's money, so that for example where the lumber brace actually cost $37 000 in April 2003, the actuary calculated the same amount for purposes of reimbursement to be $132 151, or where the cost of transport between 1999 and June 2003 F was $4 745 794, the claim is for $103 207 271; or where it cost the plaintiff $319 500 to pay the maid from 1999 to June 2003, the claim is $4 687 134. The actuary calculated all the expenses incurred and paid in the past in this way in order to fully reimburse the plaintiff in today's money for those expenditures. This indeed is a novel approach and it is for this reason that the plaintiff did H not claim interest on the amounts other than the amount for general damages for pain and suffering and loss of amenities of life.

The actuary calculated the amount in Zimbabwe currency of the cost of return air tickets to Florida and for the cost of HBOT treatment using the so called parallel exchange rate of 1US$ to Z$6 000. This is the reason why the cost of H

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A the air tickets in Zimbabwe currency is $58 350 240 and that of HBOT treatment is $126 840 000.

The actuary said that the future costs of providing a nurse aid, her transport and the costs of transporting the child to and from St Giles, future costs of rehabilitative treatment at St Giles, the costs of repairing the wheel chair and B other such costs were calculated for a 10 — 15 year period

over which it was assumed these expenses would be incurred. No explanation or satisfactory explanation was given as to why he used 10 — 15 years in view of Professor Kalangu's evidence that Tapuwa could have a normal life expectancy if properly looked after. The actuary said that he had discounted his figures by 5.75 per cent except for the future costs of treatment at St Giles. I must say that C the actuary's evidence and his calculations left a lot to be desired. He did not place before the court any source documents. He admitted that no receipts or other proof of expenditure were given to him to show what was actually paid by the plaintiff for transport. He relied on the plaintiff's estimation of costs. He did not take into account tax liability in respect of loss of future earnings.

The actuary's calculations of future loss of earnings was based on the salary D which it was expected Tapuwa would earn in the future. It was taken to be at equal to the average net income of the parents in the sum of $701 500 per month. Whilst in respect of claim for future transport and nurse aid expenses, for example, the actuary used 10 – 15 years as Tapuwa's life expectancy, in regard to the loss of future earnings, he made some references to 65 years E which is normal retirement age in Zimbabwe. The actuarial calculations did not provide a consistent and readily understandable and logical basis for making them. It was therefore detrimental to the plaintiff's case that some of the calculations or claims were not supported by any receipts or other documentary proof of expenditure. The actuary did not, nor did the plaintiff, provide any legal basis or authority for claiming past expenses, not in the F amounts actually incurred or expended, but in amounts reflecting today's money value of those expenses.

Issues for determination

The overall issue for determination in this case is, of course, the amount which should be awarded to the plaintiff as damages. There are other subsidiary G issues which I must determine first. These are:

(a) Is the plaintiff entitled to claim in today's money terms the amount of expenses actually incurred i.e. is he entitled to convert an expenditure actually incurred and paid to a figure representing that amount in today's money after factoring in inflation and claim, for example, $37 000 paid for H the lumber brace in April 2003 as being equivalent to $132 127 today?

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(b) Has the claim for future expenses sufficiently taken into account all the necessary A factors such as discounting the amount for various reasons?

(c) Is it permissible to use the unofficial (or parallel market) rate of exchange of 1US$ to Zim$6 000 in calculating the amount payable in Zim$ where the claim is in United States dollars?

(d) Is it permissible in a claim in delict such as the present, to make an award B in United States dollars of any part of the claim?

(e) What is the correct approach to a claim for loss of future earning capacity in a claim by or on behalf of a minor?

(f) Is there a basis for awarding an amount in respect of the travel to Florida of the whole of the plaintiff's family or is it sufficient to award an amount C in respect only of one parent and Tapuwa?

(g) Is the HBOT treatment sufficiently justified to warrant an award of damages for such treatment to be obtained?

(h) Is there a basis for the plaintiff's claim for interest at the prescribed rate of interest on the amount of general damages and for his claim for costs D on a legal practitioner and client scale?

Mr *Phillips* has, in addition to his submissions at the end of the trial, made further and very helpful written submission to me. Mr *Muskwe* promised to do the same but did not do so.

Some of the issues I have identified above may be quickly disposed of. Issue (c) is disposed of by simply stating that the exchange rate of exchange 1 US$ E to Zim$6 000 is an unofficial and illegal rate of exchange. This court cannot use or accept it. Issue (g) is disposed of on the basis of the evidence of Professor Kalangu that it was not necessary that the whole family should travel to Florida with Tapuwa for the HBOT treatment. The plaintiff and his wife will have to decide who between them should accompany Tapuwa on the trip. Whilst I am sympathetic to the plaintiff's

wishes that the whole family should F go to Florida, I think those wishes are based on emotions and considerations of convenience. They are not supported by any expert evidence. I do not think that a court should make any award to cater for the convenience of the plaintiff or to satisfy him or his family's emotional needs. Any award must be reasonable and deserved depending on the evidence before the court. The G amount of award must be necessary to meet the reasonable expenditures associated with the HBOT treatment.

PAST EXPENDITURE IN TODAY'S MONEY

The plaintiff calculated the amount of past expenses and adjusted it upwards in order to compensate the plaintiff for the loss of purchasing power of the H

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A money since the dates upon which those expenses were paid. This was attempted in *SA Eagle Insurance Co Ltd* v *Hartley* 1990 (4) SA 833 (A) where, in regard to the amount claimed for past earnings, the lower court had agreed to add an amount in order to compensate the claimant for the loss of purchasing power of money since the dates upon which the past losses of earnings had been incurred. The appellate court disapproved of this approach and stated B that such an approval was tantamount to altering the quantum of the debt according to when the plaintiff sought to exact it and that the result was in conflict with the principle of nominalism of currency which was entrenched in all aspects of South African Law, including the law of obligations. As stated by P J Visser and J M Potgieter in *The Law of Damages Through the Cases*C 2 ed at p 321:

> "The essence of nominalism of currency, in the field of obligations, was that a debt sounding in money had to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency."

This principle, the learned authors state, does not apply to loss of future earnings or future support or where a comparison has to be made of previous D awards in quantifying non-patrimonial loss. The principle of nominalism is dealt with in detail in *Hartley's* case (*supra*) where the appellate court disapproved of the decision on this point in *Everson* v *Allianz Insurance Ltd* 1989 (2) SA 173 (C). E M Grosskopf JA in *Hartley supra* referred to many cases in South Africa and other jurisdictions which dealt with the principle of nominalism of currency such as *Cosmopolitan National Bank of Chicago* v E*Steinberg* 1973 (1) RLR 23 (G) at F-G; 1973 (4) SA 579 (R) at 581F; *Voest Alpine Intertrading GmbH* v *Burwill & Co SA (Pty) Ltd* 1985 (2) SA 142 (T) at 151D; *Deutsche Bank Filliale Nürnberg* v *Humphrey* 272 US 517 (1926) at 519; *Treseder-Griffin & Anor* v *Co-operative Insurance Society Ltd* [1956] 2 QB 127 (CA) at 144. The learned Judge of Appeal stated that "it would F represent a revolutionary transformation of our legal system if courts were to be called upon to determine the true economic value 'in terms of purchasing power' of all obligations sounding in money". He then went on to say:

> " The principle of nominalisn is in my view to be applied as follows in the present case. The respondent suffered a loss of income, expressed in rands, prior to the trial. That loss had to be made good by the appellant by G paying to the respondent the number of rands which he has lost, irrespective of whether the purchasing power of the rand has varied in the interim."

I think that it is correct to adopt the principle of nominalism in dealing with all obligations sounding in money. I appreciate that the rate of inflation in Zimbabwe has been high and, as stated by Mr *Muskwe,* it is presently above 500 per cent. But a departure from the principle of nominalism will create such H uncertainty in the law that the whole system will be unworkable. The monetary

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obligation to be discharged will then depend on when the plaintiff sought to A exact it and, even more ominously, on when the court handed down its judgment. Therefore a debt sounding in money must be paid in terms of the nominal value of the currency irrespective of any fluctuations in its purchasing power. In any event, I think the principle of nominalism is even-handed because it places the risk of depreciation of the currency on the creditor and B that of appreciation on the debtor. The problem can be resolved by the Minister of Justice, Legal and Parliamentary Affairs adjusting the prescribed rate of interest to take into account the effect of inflation on the purchasing power of our money. I therefore conclude that the actuary's calculations are not legally sustainable

and the amounts claimed on behalf of the plaintiff for past expenditure cannot be awarded because they are not supported by any sound C principle of law. The calculations and the resultants amounts cannot be justified at law. I will therefore award the amount actually paid or the expenditure actually incurred in the number of dollars so paid or incurred and proved to the satisfaction of the court. In the result therefore for past expenses there will be an award of $37 000 paid on 8 April for the spinal cord brace; the sum of $1 462 577 for past medical expenses and nurse-aid expenses as agreed D between the parties. See the letter by the plaintiff's counsel dated 24 October 2003.

The plaintiff must have incurred some expenditure on transport for him and his wife and for Tapuwa and the nurse aid. They live in Mufakose and they obviously travelled into Harare and to St Giles in connection with the child's E treatment. Unfortunately they did not keep a record of the expenditure nor did they maintain a schedule of the number of trips covered. As a result they did not place before court any proof of expenditure. There is no denying that Tapuwa's accident was a major tragedy for the plaintiff and his family. There is no denying that he and his wife incurred expenditure on transport to and from the hospital and to and from St Giles. His evidence, though unsupported F by vouchers, was that they incurred such expenditure. The problem is simply one of lack of proof. I do not think that once I have accepted that such an expenditure was incurred, as indeed it was, it would be fair or just to deny the plaintiff any award at all. In his declaration before its amendment, the plaintiff claimed past transport expenses of $100 000 in respect of the nurse aid. In the amendment of 17 June 2003 transport costs claimed were in the total sum of G $2 700 540. It seems to me that a claim of $100 000 for past transport costs in respect of each of plaintiff, his wife, the nurse aid and Tapuwa as and when such expenditure was incurred, would be reasonable. I would, for the reason that I am satisfied that such an expenditure was incurred award, a globular figure of $400 000 for all transport cost incurred up to date of trial. H

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A **FUTURE MEDICAL AND OTHER EXPENSES**

There is no doubt that the plaintiff will incur future expenditure on medical and rehabilitative treatment, transportation and nurse-aids. The plaintiff's evidence in regard to the cost of consultation fees charged by expert medical practitioners, therapy at St Giles, nurse-aid expenses and transportation was B not very helpful to the court. Only the cost of future operations and adaptive appliances was supported by documentary evidence in the form of quotations. In this regard Mr *Phillips* agreed that the cost of future operations as per exhibit 6 should be allowed and so should the cost of adaptive appliances in exhibit 7. For the two operations therefore an award of $5 214 000 is made to cover the deposit required and the cost of the actual operation. The quotation C of adaptive appliances in exhibit 7 is qualified which means that the cost thereof may increase. The evidence was that this quotation was given in 2001. There is no basis for me to deny that the cost of these appliances in 2004 have increased. The actuary's calculations show a huge increase. I can accept those figures. I will however deduct $235 935, being the estimated cost of the 560 lumber brace which was purchased in May 2003 and has not been shown to D require replacement. I will award the plaintiff the sum of $808 330.40.

In regard to future visits to the doctors, I agree with Mr *Phillips* that no evidence was led of any need to see Dr Pazvakavambwa nor was there satisfactory evidence as to the number of visits. Mr *Phillips*' helpful calculations were based on four visits to each of Mr Bowers and Professor Kalangu per year E at a cost of $2 335 per visit over a period of 7 years. In his amended claim as at February 2004 the plaintiff stated that there will be eight visits per year and consultation fees are $50 000 (Bowers), $20 000 (Pazvakavambwa) and $30 000 (Kalangu). No explanation is given for the difference. I will take the consultation fee charged by Professor Kalangu and not the figure as at 31 August 2003 used by Mr *Phillips.* There has been an increase in these costs. F Using Mr *Phillips'* formula (the plaintiff's legal practitioner did not give me any such calculations) and discounting at a rate of 8 per cent I will award the sum of $844 090. See *Minister of Defence* v *Jackson* 1990 (2) ZLR 1 (S) for the discount factor of 8 per cent.

For the future therapies at St Giles I will adopt the helpful calculation by G plaintiff's counsel which had a discount factor of 4 per cent and further deduction of 10 per cent for contingencies. I will award the sum of $1 450 475. In regard to the cost of nurse-aid in the future, I will again adopt the calculations by counsel for the defendants. I, however, do not agree with him that the cost thereof

should be as at December 2001 when we have the cost as H at January 2003 of $7 000 per month. I will use this figure. The resultant figure

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on a discount of 4 per cent is the sum of $603 630 which I will award to A the plaintiff.

CLAIM IN DELICT FOR AWARD IN FOREIGN MONEY I.E. US DOLLARS AND WHETHER WHOLE FAMILY TO TRAVEL TO FLORIDA

The plaintiff had claimed payment for the HBOT treatment in United States dollars. Mr *Phillips* indicated that it was reasonable that an award, if found B due, can be made in United States dollars. There is authority to the effect that a court can grant a judgment in a foreign currency even where the claim arises in delict. This was stated in *Standard Chartered Bank of Canada* v *Nedperm Bank Ltd* 1994 (4) SA 747 (*per* Corbett CJ at 744) and in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC); C1989 (3) SA 191 (S). In the present case the justification for awarding the claim for HBOT treatment in United States dollars lies in the fact that, although the loss was basically felt in Zimbabwe because the delict occurred in Zimbabwe, the expenditure will be incurred in United States dollars. This is the currency in which the plaintiff's loss will be felt. Because of Mr *Phillips'* apparent concession in this regard I shall not consider the question, which it D would normally be necessary to do, whether or not the loss in United States dollars was reasonably foreseeable in this case.

As to the merits of such an award, I am satisfied that Professor Kalangu's evidence was cogent that the HBOT treatment was necessary. There is no doubt in my mind that the treatment will benefit Tapuwa. Mr *Phillips* submitted that the HBOT treatment and its benefits were in the realm of E conjencture at this stage. I do not agree. Professor Kalangu's evidence was positive in this regard. Where there is room for doubt is whether Tapuwa will require more than minimum 20 sessions of HBOT treatment. It appeared to me that in essence Professor Kalangu was of the view that 20 sessions would be adequate. He did not anticipate any reviews or the need to go to Florida at a F later stage. I think it will be fair in this case to award the plaintiff the cost of 20 sessions of HBOT treatment in Florida, USA. Tapuwa will be accompanied by one parent only unless the plaintiff can, on his own, bear the cost of sending the whole family. The award under this heading is the cost of a return air ticket for one adult and one child to the USA (Florida) in the respective sums of US$2756.76 and US$2105.76; twenty sessions at US$200 per session G (US$4000); cost of initial evaluation (US$140); cost of SPEC scanning (US$2400). The plaintiff claimed the cost of food and accommodation for a period of 6 weeks for two adults in the respective sums of US$8200 and US$8000. Having determined that only one parent should accompany Tapuwa an award of US$800 for food and accommodation over a period of six weeks H

Chinhengo J

A is reasonable. The award for all expenses associated with the HBOT treatment is US$19402.52.

CLAIM FOR LOSS OF FUTURE EARNING CAPACITY

The plaintiff's claim for loss of future income is the sum of $96 910 232. The actuary stated that the calculation was based on what can be assumed to be B Tapuwa's expected salary which was equal to the average net income of her parents, currently $701 500 per month. It is quite unfortunate that the plaintiff or his legal practitioner or the actuary did not provide me with any calculations indicating how they arrived at the figure of $96 910 232. On the other hand, in his written submissions, Mr *Phillips* showed how he arrived at the figure of $31 840 575 which he urges the court to award under this head.

C There are two main approaches to assessing damages for loss of future earning capacity. The one is to make a globular award in respect of general damages, inclusive of loss of future earning capacity. The other is to assess the damages under separate headings – damages for pain and suffering and loss of amenities of life separately from damages for pain and suffering and loss of amenities of D life separately from damages for loss of future earning capacity. The latter approach depends on the evidence placed before the court, including actuarial evidence. In *Southern*

Insurance Association v *Bailey NO* 1984 (1) SA 98 (A) the court expressed a preference for the second approach, pointing out that damages for pain and suffering, etc. are concerned with a loss which cannot be measured in money, whereas the loss of future earning capacity is E concerned with patrimonial loss and a logical approach based on some calculation can be done in respect of the latter. This approach commends itself to me and it has generally been adopted in Zimbabwe. Mr *Phillips* has attempted to do this, more so in this case because the plaintiff's claim for pain and suffering and loss of amenities of life was not disputed. In fact, Mr *Phillips* pointed out that the sum claimed ($9 000 000) may have been excessive at the F time that the claim was first made but not so now. He had regard to *Hokonya & Anor* v *Chinyani* & *Ors* 1995 (1) ZLR 102 (H), and opined that the sum claimed under this head is not outrageous, having regard to the present value of money, the prevailing economic conditions and inflation.

In calculating the award in this case, one major complication is the expected G period of livelihood of Tapuwa. Calculations of damages for future medical treatment in Zimbabwe, costs of transportation and nurse-aid were based on a period of livelihood between 10–15 years by the plaintiff and of seven years by the defendants. I adopted the latter in my assessment, mainly because the plaintiff was not clear as to why he opted for 10-15 years and also because he did not settle on any specific number of years. But in relation to future loss of H earning capacity I would have expected the parties to rely on the evidence of

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Professor Kalangu, who said that Tapuwa can have a normal life expediency A if properly looked after. The plaintiff rather surprisingly based his calculation on a period 10-15 years. I will for this reason adopt seven years as a basis for the calculation of Tapuwa's loss of future earning capacity. I will also use the average income of her parents in the sum of $701 500 per month rounded off to $700 000 per month. In *Bailey NO (supra)* Corbett CJ said the following B at 116G:

> " Where the method of actuarial computation is adopted, it does not mean that the trial judge is 'tied inexorably by actuarial calculations'. He has 'a large discretion to award what he considers right' (*per* Holmes JA in *Legal Assurance Co Ltd* v *Botes* 1963 (1) SA 608 (A) at 614F). One of the elements of exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes' of life bearing in mind that the C fortunes of life are not always adverse."

In making my calculations I shall bear in mind that inflation is likely to continue to ravage the economic well-being of Zimbabweans. I shall also bear in mind the need to avoid duplication. Tapuwa was until the accident, a normal child attending a reasonably good school in Harare. Being their first child, her D parents were keen, as the evidence reveals, to give her a good education and a good future. The likelihood of her having done reasonably well is good having regard to the family's general background. If I were not to be faulted for making a case for the plaintiff I would have calculated Tapuwa's loss of earning capacity over a period of 30 years and using a life expectancy of 53 years as stated by the actuary in is evidence. I say this because, having accepted E that Tapuwa would have worked and earned the average income of her parents, then it does not appear to me to be logical to give her a working life of 7 years as did Mr *Phillips* and as appears to have been accepted by the plaintiff who made a straight calculation over 11.5 years. I will discount the figure 4 per cent and further reduce it by 15 per cent to take into account the contingencies of F life. I have not used 25 per cent for the contingencies, as in *Bailey NO (supra)* because it seems to me that the loss of earning capacity calculation should have been based on a much longer period. I have used 15 per cent to underscore my view that a longer period should have been used. I will also further reduce the amount by 10 per cent for the reason that Tapuwa is receiving the money now rather than in the future when it would have been earned. My calculation, using G Mr *Phillips'* formula, results is an award of $39 332 475.

The cost of replacement of the wheelchair and its repairs over a period of seven years will be the sum of $1 612 212. That is awarded.

INTEREST AND LEGAL COSTS

I do not think that, whatever principle of law is adopted, the plaintiff is entitled H

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A to interest on any amount from a date earlier than the date of this judgment. This is so because the plaintiff amended his claim several times right up to the date of the resumed trial in February 2004. His claim remained unliquidated and there would be no justification for ordering the defendants to pay interest from a date earlier than the date of judgment. Additionally, the plaintiff's amendments meant that the defendants did not know the amount of the claim B until the last amendment. The reduction in value of the Zimbabwe dollar adversely impacted on the plaintiff because of the delay in prosecuting his case between 2001 and 2003. It seems to me that at some point the plaintiff was unhappy with his legal practitioner's services. This is understandable, having regard to the manner in which his legal practitioner handled this case. He failed C to lead any useful evidence to prove the cost of transport incurred up to the date of the trial. He relied on the actuary's calculations. Some of those calculations were based on an illegal rate of exchange and some on a wrong principle of law, to wit, that the loss of purchasing power of the Zimbabwe currency can be compensated thereby ignoring the principle of nominalism of a currency. He was generally either unprepared or did not fully understand how he would D prove the various claims. He offered very little guidance to the plaintiff.

Coming to the issue of the costs of suit, I do not think that there is any basis for awarding them against the defendants on the scale of legal practitioner and client. The shortcomings I have mentioned in respect of plaintiff's conduct of his case quite obviously do not entitle him to a high award of costs. In fact, the plaintiff and his legal practitioner caused delays in this trial which must E disentitle them to costs on the scale claimed. In this regard I will award the costs associated with the postponement of this matter on 28 November 2003 to the defendant.

The amount in United States dollars shall be paid by the defendants jointly and severally, the one paying the other to be absolved in the sum awarded i.e. in F United States dollars or, at the instance of the plaintiff, in the equivalent sum in Zimbabwe dollars at the legal rate of exchange prevailing on the date of such payment.

There is one other matter I need to mention. In a claim such as this the plaintiff should claim in his personal capacity for past expenses and in his capacity as father and natural guardian of Tapuwa for loss of future earning capacity, G general damages and for other future expenses. The plaintiff has only sued in a representative capacity. I have not taken issue with this point because Mr *Phillips* was happy that I deal with the whole claim as if the plaintiff had claimed in the manner I have stated as being correct. The actuarial report and H calculations has not been helpful to the court. If anything it caused confusion.

2004 (1) ZLR p344

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It relied on a principle which has been rejected as a basis of calculating the A amounts to be claimed. I will disallow the fees charged by the actuary.

In the result I order that —

1. the defendants, jointly and severally, the one paying the other to be absolved, shall pay to the plaintiff:
   a) $9 000 000 as damages for pain and suffering and loss of amenities of life; B
   b) $4 000 000 for past transport costs;
   c) $37 000 000 for the wheel chair purchased in April 2003;
   d) $1 462 577 for past medical expenses inclusive of past nurse-aid expenses;
   e) $5 214 000 for future operations in Zimbabwe; C
   f) $808 330.40 for adaptive appliances;
   g) $884 090 for future consultations;
   h) $1 450 475 for future therapies at St Giles;
   i) $693 630 for future nurse-aid expenses;
   j) $39 332 475 for loss of future earnings capacity; D
   k) $1 612 212 for wheel chairs replacement and repairs;
   l) Interest at the prescribed rate of interest on the amount in (a) – (k), being $60 894 789.40 from the date that this judgment is handed down to the date of payment in full.

2. The defendants shall pay to the plaintiff, jointly and severally the one E paying the other to be absolved, the sum of US$19 402.52 or at the instance of the plaintiff its equivalent in Zimbabwe dollars at the lawful exchange rate applicable at the time of the payment.
3. The defendant shall pay the costs of this action except for the costs occasioned by the postponement of the trial on 28 November 2003 which F shall be paid by the plaintiff to the defendants.
4. The claim for actuarial fees is dismissed with cost.

Muskwe & Associates, plaintiff's legal practitioners

Atherstone & Cook, defendants' legal practitioners. G

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NKOMO & ORS v ZESA 2004 (1) ZLR 345 (H)

Citation	2004 (1) ZLR 345 (H)
Case No	Judgment No. HH-96-04
Court	High Court, Harare
Judge	Hungwe J
Heard	15 October 2003
Judgment	31 March 2004
Counsel	*G Machingambi,* for the plaintiff *JC Muzangaza,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract — *sale agreement — offer — requirement for binding agreement —* C *parties must intend to be bound by mere acceptance of offer — parties must be of the same mind*

Headnote

ZESA, the owner of a block of flats known as Megawatt Court, offered them for purchase to the sitting tenants. The sales were to be on condition of receiving ministerial approval. Some tenants had already paid deposits D and signed agreements of sale when the sale was abrogated due to the refusal of ministerial consent. These tenants settled at the pre-trial conference. Other tenants attempting to pay at a later date found their deposits refused, and no agreements of sale were signed. This group proceeded to trial, claiming that ZESA was bound to a contract when the E tenants accepted the offer by tendering deposits. They claimed transfer of the properties against

payment, or damages. The court had to decide whether or not ZESA was bound by its initial offer.

Held, that a person is said to make an offer when he puts forward a proposal with the intention (which may be express or implied) that by its mere acceptance, without more, a contract should be formed. Although the F letters were specific as to the price of the flats being sold, it could not be said, in the absence of a full agreement setting out the details of the sale of the block of flats, that the features of the "offer" when made to the plaintiffs was such that the defendant intended that upon its mere acceptance without more it should be bound by it. The letter was really a request for an offer. Firstly, it merely stipulated the defendant's G intention to sell at a given price and asked for expressions of interest. Secondly, on giving the expression of interest, a requirement on a deposit was given as a minimum condition, otherwise it would be a cash sale unless acceptable arrangements for the payment of the case price had H been indicated.

2004 (1) ZLR p346

Hungwe J

Cases cited A

R v Hottentots Holland Motors (Pty) Ltd 1956 (1) PH K22 (C)

Wasmuth v Jacobs 1987 (3) SA 629 (SWA)

Case information

G Machingambi, for the plaintiff

JC Muzangaza, for the defendant B

Judgment

HUNGWE J: The plaintiffs issued summons against the defendant seeking the following relief:

"A. An order directing the defendant to effect transfer into the plaintiffs' names certain properties situate at Megawatt Court, 119 Josiah Tongogara Avenue, Harare, as itemised in Annexure 'A' to the C Declaration, and which properties were sold by the defendant to plaintiffs in the months of September to December 2001, against payment by the plaintiffs of the purchase prices thereof and tender of performance by the plaintiffs of their obligations under the said sale agreements.

B. In the alternative, plaintiffs claim an order cancelling the sale D agreements concluded with the defendant, repayment of the sum of $6 000 000 (six million Zimbabwe dollars) being the total amount paid by certain of the plaintiffs to the defendant towards the purchase price for the properties and the sum of $156 150 000 (one hundred and fifty six million one hundred and fifty thousand Zimbabwe dollars), representing the total damages suffered by all the plaintiffs E for breach of contract, which damages are calculated as the difference between the contract or purchase price for each property and the open market value of each property at the time of breach as more fully itemised in annexure 'A' to the declaration.

C. Interest at the prescribed rate from 4 January 2002, being the date of demand to the date of full payment. F

D. Costs of suit."

In their declaration, the plaintiffs state that they are all tenants of the defendant occupying different apartments at Megawatt Court at 119 Josiah Tongogara Avenue, Harare. The defendant let these apartments through Southgate and Bancroft. In September 2001, the defendant addressed letters through its G agent Knight Frank to each plaintiff in which the defendant offered for sale to the plaintiffs, the individual apartments let to them at stated prices. The letter indicated the price for each of the three categories of flats at Megawatt Court. It also indicated that those interested in purchasing the flats were to contact the agents by 19 October 2001 so that all formalities of the sale and transfer of the property are concluded by 30 November 2001. H

2004 (1) ZLR p347

Hungwe J

A Some of the plaintiffs entered into written agreements, the others alleged that they entered into oral agreements. Those who had signed their Agreements of Sale with the defendant paid deposits

totalling $6 000 000. The rest did not pay deposit as the defendant's agents declined to accept such deposit when it was tendered. All forty four plaintiffs sued for the above order.

B The defendant opposes the grant of the order sought.

In its plea, the defendant admits that it made an offer to sell the flats to the sitting tenants. It offers three explanations in respect of the three categories of tenants. It admits that written agreements of sale were concluded between it and the 1st, 2nd, 24th, 32nd, 37th, 40th, 42nd and 44th plaintiffs. It however, avers that at that stage it advised that it would sign the agreements of sale once ministerial C approval was obtained. It applied for that approval but was refused. That rendered the conclusion of the sale agreements impossible.

As for the 3rd, 4th, 5th, 9th, 12th, 13th, 16th, 21st, 25th, 29th, 30th, 38th and 41st plaintiffs, the defendant admitted that this group paid their deposit in response to the offer. At that stage, they were advised by the defendant that the sales of the flats would only be concluded upon the grant of ministerial approval. That approval D was applied for but was refused, rendering the conclusion of the agreements of sale impossible. They paid the deposits aware of the suspensive condition, therefore could not hold the defendant liable in damages.

As for the third group i.e. the 6th, 7th, 8th, 10th, 11th, 16th, 15th, 17th, 18th, 19th, 20th, 22nd, 23rd, 26th, 28th, 31st, 33rd, 34th, 35th, 36th and 39th plaintiffs, the defendant E admit that offers were made for the sale of the flats which they occupied in terms of lease. The defendant denies that such offers were accepted by the plaintiffs in any form or within the stated time limit. The defendant therefore denies that any agreement was entered into between this group and the defendant.

At the pre-trial conference, settlement was achieved between the first two F groups and the defendant. The matter proceeded to trial between the third group and defendant on two issues. The first issue was whether the offers for sale made by the defendant to these plaintiffs (21 of them) were accepted by the plaintiffs and whether sale agreements were thereby concluded.

The second issue was whether the defendant is liable to each of the plaintiffs G as claimed in the summons and, if so, what damages were suffered by the plaintiffs.

It is necessary at this point to restate the plaintiffs' positions at the time the trial opened. As I said, the first two groups had altogether disappeared from the picture on the day trial opened. Of the remaining twenty one plaintiffs only the 6th, 8th, 15th, 17th, 18th, 19th, 22nd, 23rd, 26th, 27th, 28th, 31st, 33rd, 34th, 35th and H 39th gave evidence (16).

Hungwe J

In deciding the first issue, it is necessary to examine the evidence tendered in A proof of acceptance of the offer made.

The letter constituting the offer is Exhibit 1 dated 25 September 2001 from Knight Frank, the defendant's agent. It reads as follows:

> " Our client, ZESA Pension Fund, has instructed us to sell the individual flats in Megawatt Court. As a sitting tenant, we have been instructed to B give you a two months right of first refusal, from 1 October to 30 November 2001, to purchase the flat you are leasing on the following prices:
>
> - Bachelor flat $650 000
> - 1 bedroom $900 000
> - 2 bedroom $1 200 000 C
>
> If you are interested in purchasing your flat, please contact us by 19 October 2001 in order to conclude all the formalities and transfer of the property by 30 November 2001. The flats are being sold through a sectional title scheme and title deeds will be made available to cash purchasers on transfer.
>
> Tenants with rent and water arrears will be expected to clear them before D being considered to purchase the leased flat."

The letter informs the tenant at Megawatt Court that the agent has been instructed to sell the individual flats. The recipient, being the sitting tenant, has been offered two months within which to exercise his/her rights of first refusal beginning 1 October 2001 ending 30 November 2001. The price of the E individual flat is stated. The letter goes on to advise what the sitting tenant who wishes to exercise the right of first refusal should do. The tenant should contact the seller's agent

by 19 October 2001. The process should be concluded by 30 November 2001. Title deeds will be made available to cash purchasers on transfer.

On 29 November 2001, the offer of the right of first refusal of the purchase of F the flats was extended to 20 December 2001. The letter of 29 November, in which the extension of the period within which the offers could be accepted was notified, was preceded by a letter by the plaintiffs to the defendant's agents dated 28 October 2001. That letter is also proof of acceptance of the offer to exercise the right of first refusal. The letter of 28 October 2001 by the G plaintiffs was received by the defendant's agents the next day. The defendant's agent then addressed a letter to its principal in which it highlighted the stages it had reached with some of the plaintiffs towards the conclusion of the agreements of sale. H

2004 (1) ZLR p349

Hungwe J

A These stages are:

(a) Agreements of sale have been executed between the parties after payment of deposit by the purchasers.

(b) Deposits had been accepted and agreements of sale drawn although these have not been signed by the parties

(c) B Offers made by the agents had been accepted and agreements were in the process of being drawn up.

Exhibits 25 and 26 set out the above stages graphically.

It will be clear from what I said above that the first two groups whose claims have since been settled fit into the first two stages (a) and (b). The trial C concerned the process in stage (c).

The 16 plaintiffs gave evidence in person.

The evidence of the plaintiffs was that they orally contacted the defendant's agents indicating their willingness to purchase their flats. They were then advised, in those discussions, to pay cash or deposit. None of the plaintiffs at the time had the required deposit. Each plaintiff resorted to different means to D raise his or her deposit. The period stipulated in the first letter expired. It was then extended to 20 December 2001. By that date, none of them had signed an agreement of sale on payment of a deposit.

They all seek to hold the defendant to the contract of sale.

It seems to me that when deciding whether Exhibit 1 constitutes such an offer E which on acceptance binds both parties it is important to consider the type of contract envisaged, the detail required in that type of contract, and most importantly whether both parties intended to be bound by a contract once the plaintiffs accepted the offer.

The subject of this contract was sale by sectional title, individual flats F constituting a block of flats. It would require individual contracts to be drawn up. It would require the parties to satisfy themselves on the description of the particular type of flat in question and an agreement as to the method of payment.

In respect of these plaintiffs, none of them had had sight of the agreement of sale which they would be required to enter into should they be invited to pay G a deposit. In short, all that there was an offer by the defendant's agent, for a right to purchase flats at a specified price within a specified period.

In contract, a person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed. The intention of course may be express or implied — see Christie H*The Law of Contract in South Africa*.

2004 (1) ZLR p350

Hungwe J

What distinguishes a true offer from any other proposal or statement is the A express or implied intention to be bound by the offeree's acceptance. In other words, looking at the terms of the offer without move, once should be able to come to the conclusion that the intention to contract *animus contrahendi*, is manifest in the offer.

There is a view that to be an offer, a statement of the price by the seller must B be made with the intention of being bound by the offeree's acceptance – see *R v Hottentots Holland Motors (Pty) Ltd* 1956 1 PH K22 (C) *per* van Winsen J.

The courts have progressively employed the language of business and described an offer as a firm offer. In *Wasmuth* v *Jacobs* 1987 (3) SA 629 (SWA) at 633D, Levy J said:

> " It is fundamental to the nature of any offer that it should be certain and C definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror."

Although the agent's letter is specific as to the price of the flats being sold, in the absence of a full agreement setting out the details of the sale of this block of flats, I cannot hold that the features of the offer when made to all the D plaintiffs was such that the defendant intended that upon its mere acceptance without more it should bind it. In my view, this letter which the parties have termed an "offer" was strictly speaking a request of an offer. I am fortified in that conclusion on the facts because, firstly, it merely stipulated the defendant's intention to sell at a given price and asked for expressions of interest. Secondly, on the plaintiffs' own word, on giving the expression of interest a E requirement of a deposit was given as a minimum condition, otherwise this was a cash sale unless acceptable arrangements for the payment of the cash price had been indicated. Before a plaintiff could be able to claim that the defendant was bound, he ought to show that he was in fact of the same mind with him in respect of the material aspects of the contract. He must demonstrate *consensus ad idem*. Terms were set in respect of dates by which the contracts F ought to have been concluded. These were not met. They were extended. At the time, the defendant granted an extension, it cannot, in my view, be said with regard to these 16 plaintiffs that an offer was in existence the mere acceptance of which bound the defendant. They needed more in order to create binding obligations. G

Having found that although designated an offer, Exhibit 1, the letter by the defendant's agents, is not a firm offer whose mere acceptance would have bound the defendants.

Having found against the plaintiffs on the first issue, it will not be necessary for me to decide the second issue. H

Hungwe J

A In the result, the plaintiffs claim is dismissed with costs.

G Machingambi, plaintiffs' legal practitioners

B*Muzangaza Mandaza & Tomana*, defendant's legal practitioners

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Source:
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DHEGE v MEDICAL CENTRE 2004 (1) ZLR 352 (H)

Citation	2004 (1) ZLR 352 (H)
Case No	Judgment No. HB-50-04
Court	High Court, Bulawayo
Judge	Ndou J
Heard	16 May 2003

Judgment 1 April 2004

Counsel *T Ndebele,* for the applicant
N Mahori, for the respondent

Case Type Opposed application

Annotations Link to case annotations

Flynote

Contract — *contract of employment — provision that "company may offer the car for sale to the employee" — effect of such provision*

Employment — *contract — parties — alienation of undertaking in which person is employed — effect — employee accepting terms less favourable than previous terms — propriety of*

Headnote

The applicant, a doctor, was employed by ZISCO Steel, who issued him with a motor vehicle. It was the written policy of ZISCO Steel that "after expiry of three years from the date of purchase the company may offer the car for sale to the employee …" Before the expiry of this period, ZISCO Steel sold its hospitals to the respondent, and the applicant became an employee of the respondent in terms of s16 of the Labour Act [*Chapter 28:01*]. In 2001 the applicant wrote to the respondent claiming the right to purchase the car. He received no reply. In 2002, he resigned and took with him the car, tendering what he calculated to be the proper purchase price. The respondent demanded the car back and ultimately had him arrested and charged, whereupon he brought the present application to compel the respondent to sell him the car. The applicant argued that he was entitled to the car, as under s 16(1) of the Labour Act [*Chapter 28:01*], employees shall not be offered less favourable conditions on transfer or alienation of a going concern. The respondent argued that under s 16(2), it was proper for employees to accept less favourable conditions. The respondent also counter-claimed for the return of the car.

Held, that the applicant signed the new contract of employment after some deliberations and negotiations, which implied that when he signed the contract, he fully accepted the terms and conditions therein in an informed manner.

Held, further, that the contract did not oblige the employer to sell the car to the applicant; it had a discretion. The option to offer for sale cars used by employees was a privilege and not a right. Since the respondent could

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Ndou J

choose either to sell or not to sell, the applicant could not claim a right to purchase. Even if there was a general practice to sell cars to employees, that did not convert a privilege into a right.

Held, further, therefore, that the application would be dismissed with costs and the counter-application granted with costs.

Cases cited

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

Foreman & Anor v KLM Royal Dutch Airlines 2001 (1) ZLR 108 (H)

Kenmuir Ltd v Frizzell & Ors [1968] 1 WLR 329 (QB)

Lloyd v Brassey [1968] 2 QB 832

Woodhouse & Anor v Peter Brotherhood Ltd [1972] 3 All ER 91 (CA)

Legislation considered

Labour Act [*Chapter 28:01*], s 16

Case information

T Ndebele, for the applicant

D*N Mahori,* for the respondent

Judgment

NDOU J: Sometime in 1996, the applicant entered into a contract of employment with ZISCO Steel. That same year the applicant was issued with a motor vehicle being a Mazda 323. The said vehicle was issued under ZISCO Steel policy document 802 which reads, *inter alia*:

"(a) E For the first three years from the date of purchase, the car shall remain the property of the company and shall not be subject to re-sale.

(b) After expiry of 3 years from the date of purchase, the company may offer the car for sale to the employee to whom the car had been issued for business or personal use.

(c) F The employee should have possessed the car for no less than three consecutive years."

On 9 April 1997, the applicant was appointed chief medical officer by ZISCO Steel and around the same time, he was issued with a Peugeot 405 registration No. 640-427Q.

In 1999, ZISCO Steel Hospitals were sold as a going concern to Bell Medical G Centre, the respondent. ZISCO Steel also sold the above mentioned Peugeot vehicle to the respondent for $147 000. Since ZISCO Steel had sold the hospitals to the respondent all medical employees were likewise transferred to the respondent. The applicant was one of the employees transferred to the respondent. The respondent drafted new contracts for all such employees. The H new contract between the applicant and the respondent did not address the

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issue of whether or not the applicant was still entitled to purchase the vehicle A after three years. In addition, the new contract took away some benefits which the applicant was entitled to, such as telephone allowance, electricity and water allowance and domestic worker allowance, and there had been several changes in relation to applicant's sick leave etc. The applicant queried this. Various discussions were entered into and, after negotiations, the applicant B understood that his transfer from ZISCO Steel to respondent was on conditions which were not less favourable than those that had applied immediately before the transfer. It is his case, therefore, that his employment was not interrupted. On 18 November 2001, the applicant wrote to the respondent stating that he had been issued the disputed car under ZISCO Steel policy document which gave him a right to purchase (after three years) and that he wished to exercise C that right. The respondent did not respond to that letter. On 29 April 2002, the applicant resigned from the respondent. Upon his resignation, he took the disputed vehicle with him and offered to pay the purchase price as calculated by the respondent. At that stage he had used the vehicle for around five years and he believed he was entitled to purchase it for 20 percent of the original purchase price as per above mentioned ZISCO Steel policy document. D

On 25 June 2002, the respondent wrote a letter to the applicant demanding that the latter return the disputed vehicle and threatened to make a report to the police if he did not did so. There was correspondence between the parties' legal practitioners which did not yield anything positive. Ultimately, on 5 August 2002, the applicant was arrested at the behest of the respondent and E charged under the Road Traffic Act in respect of his failure to return the vehicle. This resulted in this application wherein the applicant seeks an order in the following terms:

"It is ordered that:

1. The respondent is compelled to sell the Peugeot 405 registration No. 640-427Q to applicant for 20 percent of the original purchase price F within 14 days.
2. The respondent bears the costs of this application on an attorney-client scale."

In addition to opposing the application, the respondent filed a counter application seeking an order in the following terms: G

"It is ordered:

1. That the applicant be and is hereby ordered to return motor vehicle, Peugeot 504 (*sic*) GR, registration No. 640-427Q to Bells Medical Centre within forty-eight (48) hours of service of this order on him.
2. That, in the event that the applicant fails to comply with the above order, the deputy Sheriff, Kwekwe is authorised to take the motor H

2004 (1) ZLR p355

Ndou J

A vehicle from the applicant and hand it over to the respondent at Torwood Hospital, Redcliff.

3. That the applicant pays the costs of this application."

It goes without saying that the applicant opposes the counter application.

The applicant's case is mainly dependent on the interpretation of s 16 of the B Labour Relations Act [*Chapter 28:01*]. The applicant has confined his case to the provisions of subs (1) of s 16 which provides:

> "Subject to this section, whenever any undertaking in which any persons are employed is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated be deemed to be transferred to the transferee of the undertaking on terms C and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted."

The respondent's case is that, even if it offered less favourable conditions, a point made but not conceded, it would still be proper in terms of subs (2) (b) if the employee accepted those less favourable conditions. Section 16 (2) (b) D provides:

> "(2) Nothing in subsection (1) shall be deemed –
>
> (a) to prevent the employees concerned from being transferred on terms and conditions of employment which are more favourable to them than those which applied immediately before the transfer, or from E obtaining terms and conditions of employment which are more favourable than those which applied immediately before or subsequent to the transfer;
>
> (b) to prevent the employees concerned from agreeing to terms and conditions of employment which are in themselves otherwise legal and which shall be applicable on and after the transfer but which are F less favourable than those which applied to them immediately before the transfer:
>
> Provided that no rights to social security, pensions, gratuities or other retirement benefits may be diminished by any such agreement without prior written authority of the Minister.
>
> (c) to affect the rights of the employees concerned which they could have G enforced against the person, who employed them immediately before the transfer, and such rights may be enforced against either the employer or the person to whom the undertaking has been transferred or against both such persons at any time prior to, on or after the transfer;
>
> (d) to derogate from or prejudice the benefits or rights conferred upon H employees under the law relating to insolvency.

2004 (1) ZLR p356

Ndou J

> (3) It shall be an unfair labour practice to violate or evade or to attempt A to violate or evade in any way the provisions of this section."

As alluded to above, it is beyond dispute that ZISCO Steel sold all its hospitals to the respondent as a going concern and as such the respondent was obliged to employ all employees in terms of s 16 *supra*. There has been a transfer of business. The test generally used is "whether the effect of the transaction was B to put the transferee in possession of a going concern the activities of which he could carry on without interruption". There has been, *in casu*, sale of the whole business of running the affected hospitals: see *Kenmir Ltd* v *Frizzell & Ors* [1968] 1 WLR 329 at 335; *Lloyd* v *Brassey* [1968] 2 QB and *Woodhouse & Anor* v *Peter Brotherhood Ltd* [1972] 3 All ER 91 (CA). These English cases deal with their C legislative provisions relating to the effect of transfer of a trade business or undertaking similar to our s 16, *supra* [Schedule 13, para 17(2) of Employment Protection (Consolidation) Act, 1978].

My understanding is that subs (1) of s 16 *supra* provides a general rule that employees shall not be offered less favourable conditions on such transfer or alienation of the going concern. Subsection (2) (b) provides an exception to this general rule and it would be proper for the employees to accept less D favourable conditions. The fact that that applicant signed the new contract of employment,

after some deliberations and negotiations, implies that when he put his hand to sign the contract on 8 January 1999 he fully accepted the terms and conditions therein in an informed manner. A contract of employment is consensual. The parties may agree on whatever terms they wish, provided they E are consistent with the nature of the employment relationship and are neither illegal nor *contra bonos mores*: see *Riekert's Basic Employment Law* 2ed by John Grogan at p 23. In the circumstances, the respondent did not violate the provisions of s 16(1) of the Act. The respondent properly acted in terms of s 16(2)(b) of the Act.

Further, in terms of the aforesaid ZISCO Steel policy 802 and 803, the option F to sell the company car to an employee is discretionary. The wording of the relevant clause clearly shows that it is not mandatory for the company to sell the car to the employee. The operative words, "the company *may* offer the car for sale" (my emphasis), clearly shows that intention. It does not say the company *shall* sell the car. In the circumstances, it cannot be argued that the G respondent, as successor to ZISCO Steel, was obliged to sell the company car to applicant. The court cannot compel a party to exercise its discretion in a particular fashion. The court can compel a party to do what is mandatory in terms of an existing agreement. The right to purchase the company car could only be exercised after an offer had been made to the employee and not before. The option to offer for sale cars used by employees was a privilege and not a H

Ndou J

A right. Since the employer could choose either to sell or not to sell, the employee cannot claim a right to purchase. Such privileges are customarily voluntarily introduced by employers with the object of maintaining a stable and contended labour force. Although the applicant claims that ZISCO Steel always sold its cars to managerial employees, no proof has been offered. Besides, even it is accepted that that practice existed, it does not convert a B privilege into a right – *Foreman & Anor* v *KLM Royal Dutch Airlines* 2001 (1) ZLR 108 (H).

In that case, it was held that past practice does not transform a privilege into a right. At p 112G-H, Gwaunza J, as she was then, stated:

> "The very essence of a privilege is that it can be granted or not granted at C the discretion of whoever has authority to do so. While there may be, as is the case *in casu,* guidelines governing the exercise of such discretion, the discretion itself remains and one cannot be forced to exercise it in a particular way. Nor can one talk of a privilege having been infringed."

See also *Chairman, Public Service Commission & Ors* v *ZIMTA & Ors* 1996 (1) ZLR 637 (S) at 651G-655B. From the foregoing, the respondent did not D breach the provisions of s 16 of the Labour Relations Act as the applicant understandingly entered into a new contract of employment with respondent in terms of subs (2)(b). Furthermore, the respondent, as successor to ZISCO Steel, had a discretion in its option to offer the car for sale to the applicant.

Accordingly, the applicant's application is dismissed with costs and the E respondent's counter application for an order for the return of the motor vehicle, Peugeot 405 registration No. 640-427Q, is granted with costs in terms of the abovementioned draft.

Mhuruyengwe & Associates (c/o Calderwood, Bryce Hendrie & Partners), applicant's legal practitioners

F*Wilmot & Bennett (c/o Ben Baron & Partners)*, respondent's legal practitioners

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Source:
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BENCHMAN INVESTMENTS (PVT) LTD v COMMISSIONER, ZIMBABWE REVENUE AUTHORITY 2004 (1) ZLR 358 (H)

Citation	2004 (1) ZLR 358 (H)
Case No	Judgment No. HH-90-04
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	7 April 2004
Judgment	7 April 2004
Counsel	*Mrs J B Wood,* for the applicant *A Chinake,* for the respondent
Case Type	Stated Case
Annotations	No case annotations to date

Flynote

Customs and excise — *customs duty — value of imported goods — assessment* C *of — selling rate for foreign currency — fixing of — power to fix rate given only to Commissioner-General of the Zimbabwe Revenue Authority — not competent for Minister of Finance to fix selling rate*

Revenue and public finance — *customs duty — assessment of value of imported goods — selling rate of foreign currency — power to fix rate* D *given only to Commissioner-General of the Zimbabwe Revenue Authority*

Headnote

When the applicant sought to import certain motor vehicles, its agent was informed that their value would be assessed using the "selling rate" of local currency to foreign currency fixed by GN 359A of 2002 as read with E SI 225 of 2002. This would have resulted in a huge and unexpected increase in the customs duty payable. These two instruments were purportedly made by the Minister of Finance.

Held, that the notice constituted an attempt by the Minister to designate the selling rate for the purposes of s 115 of the Customs and Excise Act. The power to designate the selling rate was indisputably conferred on the F respondent, not on the Minister, so the Notice was invalid.

Legislation considered

Customs and Excise Act [*Chapter 23:02*], s 115

General Notice 359A of 2002 G

Exchange Control (Exchange Rate Management) (Amendment) Order 2002 (SI 225 of 2002)

Case information

Mrs J B Wood, for the applicant

A Chinake, for the respondent H

Hlatshwayo J

Judgment

A**HLATSHWAYO J:** The parties submitted the following stated case for determination:

1. On 18 June 2002, the applicant purchased 30 motor vehicles from Japan. The vehicles were immediately shipped to Durban where they arrived on 29 July 2002.
2. B On 2 August 2002, the Minister of Finance, Economic Planning and Development published General Notice 359A of 2002 and Statutory Instrument 225 of 2002, which designated the rate of Z$300 to US$1 as the selling rate for certain imported goods, including motor vehicles, for the purposes of s 115 of the Customs and Excise Act [*Chapter 23:02*] ("the Act"). The rate fixed in terms of that section is used to determine the C value in local currency of goods purchased in foreign currency.
3. The vehicles purchased by the applicants were imported into Zimbabwe on 5 August 2002. When the applicant tried to clear the vehicles, its agent was informed that their value would be assessed using the "selling rate" fixed by General Notice 359A of 2002 as read with SI 225 of 2002. This would have resulted in a huge and unexpected increase in the customs D duty payable in respect of the items covered by GN 359A of 2002.
4. The applicant filed an urgent application challenging the validity of the increase. At the hearing the parties agreed to submit the case as a stated one, and heads of argument had to be filed before the matter could be determined.
5. E The applicant contends that:
   (1) No selling rate has in fact been fixed in terms of s 115 of the Act because GN 359A of 2002 was not made by the Commissioner after consultation with the Reserve Bank, as provided in that section.
   (2) In any event, the fixing of a selling rate is a discretionary power, F which has to be exercised reasonably, and the sudden change in the rate by such a huge percentage was grossly unreasonable.
6. The respondent contends that GN 359A of 2002 as read with SI 225 of 2002 validly fixes the selling rate for the purposes of s115 of the said Act and that the applicant must comply with it.
7. Accordingly, the question for determination is whether the GN 359A of G 2002 as read with SI 225 of 2002 validly fixes a selling rate for the purposes of s 115 of the Customs and Excise Act, or whether that notice is invalid, either because it was not made in accordance with s 115 of the H Act or by reason of alleged gross unreasonableness.

2004 (1) ZLR p360

Hlatshwayo J

Section 115 of the Customs and Excise Act reads thus: A

> "When the value or cost of any imported goods, or any element that is required to be included in such value or cost, is expressed in the currency of a foreign country, it shall be converted to the currency of Zimbabwe at the selling rate for that foreign currency, as designated by the Director in consultation with the Reserve Bank of Zimbabwe, applicable as a customs rate at the time the goods concerned were entered in terms of this B Act."

The applicant's counsel, Mrs *Wood,* submitted that the above section clearly requires the "selling rate" to be designated, not by the Minister, but by the respondent or the Commissioner for Customs in consultation with the Reserve Bank. Mr *Chinake* for the respondent then appears to accept this, but C submitted that the Commissioner of Customs adopted the rate fixed by the Minister. He further contended that:

> "Via an internal administrative process, the Commissioner of Customs designated the rate of ZWD 300 to USD 1 as the selling rate for customs purposes".

In my view, it is not necessary to attempt to disentangle counsel's convoluted D reasoning here. More light can easily be gained by a quick reference to the actual order issued by the Minister concerned. General Notice 359A of 2 August 2002 reads in the preamble as follows:

> "It is hereby notified, for public information, that the Minister of Finance and Economic Development, in terms of subsection (2) of section 3 of E Exchange Control (Exchange Rate Management) Order, 2001, designates the rate of 300 Zimbabwean dollars to one United States dollar as the selling rate for the purposes of section 115 of the Customs and Excise Act [*Chapter 23:02*], in respect of the imported goods specified in the schedule with effect from the 2 August, 2002."

It is quite clear, therefore, that GN 359A constitutes an attempt by the minister F to designate the selling rate for the purposes of s 115 of the Act, which power is indisputably conferred on the

respondent by the Act. On this basis alone, the applicants are entitled to succeed. I note in passing though, that the s 3(2) upon which the Minister purported to act appears to have been repealed by s 2 of the Exchange Control (Exchange Rate Management)(Amendment) Order, 2001 (No. 1). G

The further contention made on behalf of the respondent that the general notice was enacted in terms of SI 225 of 2002 has no basis in either fact or law. As shown already, the general notice was enacted in terms of an apparently repealed provision of the Exchange Control Order. SI 225 of 2002, which is made by the Reserve Bank, merely authorizes the Commissioner of Customs to designate a selling price in excess of that specified if permitted to do so in H

Hlatshwayo J

A writing by the Minister after consultation with the Reserve Bank. But even that piece of legislation does not permit the Minister to designate the selling rate himself as he has purported to do by GN 359A of 2002.

The respondent's case could possibly have been bolstered through an examination of the interactions and apparently conflicting competencies of the relevant authorities under the Customs and Excise and the Exchange B Control Acts. This elementary step was not taken, making the respondent's case extremely weak, and therefore not meriting a departure from the rule that the costs should follow the outcome.

Accordingly, the stated question is answered as follows:

1. General Notice 359A of 2002 as read with Statutory Instrument 225 of C 2002 invalidly fixes a selling rate for the purposes of s 115 of the Customs and Excise Act.
2. General Notice 359A of 2002 is invalid because it was not made in accordance with s 115 of the Act.
3. D The respondent shall pay the costs of this application.

Applicant's Legal Practitioners, Byron Venturas & Partners

Respondent's Legal Practitioners, Kantor and Immerman

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Source:
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MUNJOMA v TONGOGARA NO & ANOR 2004 (1) ZLR 362 (H)

Citation	2004 (1) ZLR 362 (H)
Case No	Judgment No. HH-91-04
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	7 April 2004
Judgment	7 April 2004
Counsel	*P Chiutsi*, for the applicant
Case Type	Application for review

Annotations No case annotations to date

Flynote

Criminal law — *common law offences — malicious injury to property — jointly owned property — matrimonial property — spouse damaging* C *jointly owned property — may be convicted of malicious injury to property*

Headnote

Because a husband's marital power is not part of the matrimonial law in Zimbabwe, where a spouse damages jointly owned matrimonial property, he or she can be guilty of malicious injury to property, just like any other D joint-owner or partner in a partnership. It is unnecessary to inquire into whether the spouses were married in or out of community of property once the joint ownership has been proved. Such a enquiry was previously necessary in South Africa in order to determine whether the husband enjoyed immunity consequent upon community of property marriages E where the marital power had not been excluded, a position which was then erroneously imported into our own law. If any enquiry at all has to be made into the type of marriage property regime, it would be for the purpose of establishing whether the property in question was jointly-owned, in which case either spouse can be found liable, or whether it was individually and exclusively (*res sua*) owned, in which case neither F spouse nor indeed any other person, *ceteris paribus*, can be found liable.

Cases cited

S v Gashande 1990 (2) ZLR 393 (H)

R v Njokweni 1946 NPD 400

S v Seobi 1974 (1) SA 494 (O)G

R v Silas 1958 (3) SA 253 (E)

S v Swiegelaar 1979 (2) SA 238 (C)

Case information

P Chiutsi, for the applicant H

2004 (1) ZLR p363

Hlatshwayo J

Judgment

A**HLATSHWAYO J:** The applicant is facing a charge of malicious injury to property in the Harare Magistrates Court in case No. CRB 2141/03. The agreed facts appear in the State outline and can be summarised as follows. The applicant, Trevor Munjoma, is a male adult aged 40 residing at 143 Enterprise Road, Highlands, and the complainant, Catherine Munjoma nee Mafuka, is a female adult aged 35 and residing at 6 Chesterfield Road, Avonlea. The B applicant and the complainant have been married since 1993, but have been on legal separation since 2001 and the complainant had obtained a peace order barring the applicant from visiting 6 Chesterfield Road, Avonlea, the matrimonial home. On 30 August 2002 at around 2000 hours, the applicant went to the matrimonial house, which is jointly owned and registered in both C applicant's and complainant's names. After repeatedly pressing the intercom and making threats, the applicant entered the premises and smashed the bedroom, kitchen and dinning room window panes valued at Z$36 105.92.

The applicant was brought before the magistrates court, presided over by the first respondent, on12 January 2004. He applied for refusal of remand on the basis that the charge preferred against him "was improper since one (a D husband? A spouse?) cannot be charged with malicious injury to property where the property in question is matrimonial property". In essence, the applicant's

submission was that the house in question was jointly owned by him and the complainant, and that, therefore, the law cannot penalize him for destroying his "own property".

E For this proposition, the applicant sought to rely on *S* v *Gashande* 1990 (2) ZLR 393 (H). I shall examine the reasoning in that case in detail shortly. The trial magistrate dismissed the defence's application for refusal of remand, holding that on the basis of a passage in G Feltoe *A Guide to the Criminal Law of Zimbabwe* 2 ed (Legal Resources Foundation, 1997) p 106, a person who damages his own property may still be guilty of the crime of malicious injury F to property if he owns that property jointly with others or it is partnership property and he is a partner in the firm.

The applicant has brought this matter for review on two grounds; firstly, that since the State did not oppose his application for refusal of remand, it was irregular on the part of the magistrate to raise the matter *mero motu* and insist that there was a sound basis for the charge. In my view, it is not misdirection G at all on the part of the magistrate to have acted in this manner; she was perfectly entitled to take judicial notice of the law, as she understood it. The second ground for review is that the magistrate's decision to proceed with the matter on the basis of, and in preference to, the legal authority of a textbook "which is only of persuasive value" over case law authority is "so grossly H unreasonable that the provisions of s 26 of the High Court Act [*Chapter 7:06*]

Hlatshwayo J

apply." Once more, this ground for review does not merit any serious A examination, as it is self-evident that the magistrate approached the matter in a judicial manner. If she were wrong in so preferring textbook authority to case law, then the proper approach would be to appeal against such a decision; it certainly does not amount to a reviewable misdirection. However, the matter does not end there. There is still need to examine whether one spouse can be B guilty of the crime of malicious injury to property with respect to matrimonial property, which is jointly owned with the other spouse.

In *S* v *Gashande supra*, a review judgment by Smith J, with the concurrence of Greenland J, the learned judge referred at p 394 with approval to the South African cases of *S* v *Seobi* 1974 (1) SA 494 (O) and *S* v *Swiegelaar* 1979 (2) SA 238 (C) thus: C

> "In *Seobi*'s case *supra*, which was a review judgment, de Villiers JP held that the husband of a wife to whom he is married in community of property cannot be charged with malicious injury to property belonging to his wife. In *Swiegelaar*'s case *supra*, which was also a review judgment, van Vinsen and Baker JJ came to the same conclusion."

Smith J went on at p 395 to quote Baker J in *Swiegelaar*'s case *supra* at 239 D (p 471 of Translations) at length:

> "Our common law provides that where the husband in a marriage in community of property destroys or disposes of his wife's clothes, she is powerless. It was already decided in 1892 that in these circumstances the husband who prejudices his wife by setting a house alight, which was E previously her property but as a result of the marriage in community now formed part of the joint estate, could not be found guilty of arson (*R* v *van Vliet* 9 SC 273). The ratio is that the property which falls within the communal estate, falls under the husband's control and
>
> 'if he were wilfully to destroy chattels belonging to the joint estate he could not be properly convicted of malicious injury to property'." F

Hlatshwayo J

Smith J then concludes, at p 395:

> "In my opinion, the views expressed above apply equally in Zimbabwe."

With rspect, I find myself unable to agree with this conclusion, for the simply reason that the so-called marital power of a husband is not part of the matrimonial law in Zimbabwe. Even in South Africa itself at the time when the G decision in *S* v *Gashande* was made in 1990, the marital power of the husband had already been relegated to virtual oblivion six years earlier in 1984, and, with the advent of majority rule, the whole edifice of male superiority was swept away through the Matrimonial Property Act 132 of 1993 (see Hosten *et al*, *Introduction to South African Law and Legal Theory* 2 ed (Butterworths, 1995) p 579). H

Hlatshwayo J

A The previous and current positions in South Africa are summarized in J R L Milton's *South African Criminal Law and Procedure: Common Law Crimes* 3 ed, (Juta & Co Ltd, 1996) p 605, with respect to susceptibility to theft of matrimonial property, an offence whose requirements pertaining to jointly owned property, would, *mutatis mutandis*, apply to malicious injury to B property, thus:

> "In regard to (persons married in community of property), the general position seems to be that in respect of marriages entered into before 1 November 1984 the husband, being the administrator of the joint estate, cannot steal even those portions of the joint property which would loosely be regarded as belonging to his wife. Section 2(1) of the Matrimonial Affairs Act (Act 37 of 1953) appears to have created an exception by C vesting the exclusive control of the assets enumerated there in the wife. Such things can probably now be stolen by the husband. In the case of marriages entered into after 1 November 1984 the provisions of the Matrimonial Property Act 1984 create a regime in which the husband enjoys no marital power over his wife. Since the immunity from liability which exists in the pre-1984 marriages rests upon the marital power, the D abolition of this power must necessarily remove any immunity and thus render the husband liable to conviction of theft. A wife, whether married before or after 1984, on the other hand, can steal community property, but is usually unlikely to have the necessary intent, particularly if the thing was usually regarded as specially pertaining to herself."

In the light of what is stated above, it is quite clear why the reasoning in a chain E of South African case was so strained, as they grappled with an archaic relic of male domination, the husband's marital power, and the requirements of basic criminal justice (see, eg, *R* v *Silas* 1958 (3) SA 253 (E) and *R* v *Njokweni* 1946 NPD 400). It is equally clear also that the uncritical adoption of those South African decisions premised on the husband's marital power was, in my F respectful view, a grave error which must now be corrected. Because a husband's marital power is not part of our matrimonial law in Zimbabwe, where a spouse damages jointly owned matrimonial property, he or she can be guilty of malicious injury to property just like any other joint-owner or partner in a partnership. It would be unnecessary to inquire into whether the spouses were married in or out of community of property once the joint ownership has H been proved, for, as has been shown, such a enquiry was previously necessary in South Africa in order to determine whether the husband enjoyed immunity consequent upon community of property marriages where the marital power had not been excluded, a position which was then erroneously imported into our own law. If any enquiry at all has to be made into the type of marriage property regime, it would be for the purpose of establishing whether the H property in question was jointly-owned, in which case either spouse can be

found liable, or it was individually and exclusively (*res sua*) owned, in which A case neither spouse nor indeed any other person, *ceteris paribus*, can be found liable.

In the present case, the applicant filed a copy of the title deeds, which shows that the house is registered in the names of both spouses. In court, the applicant's legal practitioner indicated that the marriage of the parties was out B of community of property. However, the marriage property regime, as has been argued above, is irrelevant for a determination of criminal liability since the joint ownership, which has been proved, is sufficient for that purpose.

Accordingly, I hereby dismiss this application for review.

P Chiutsi Legal Practitioners, applicant's legal practitioners C

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Source:
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S v MAKAMBA (3) 2004 (1) ZLR 367 (S)

Citation	2004 (1) ZLR 367 (S)
Case No	Judgment No. S-30-04
Court	Supreme Court, Harare
Judge	Ziyambi JA
Heard	8 April 2004
Judgment	23 April 2004
Counsel	*G Chikumbirike,* for the applicant *M Nemadire,* for the respondent
Case Type	Bail application
Annotations	Link to case annotations

Flynote

Criminal procedure — *bail — application — factors to consider — need for court to assess strength of State case — allegations in police papers* C *raising prima facie case — need for accused to rebut allegations and show that he should be granted bail*

Headnote

The appellant was refused bail in the High Court on various charges under the exchange control legislation. Among other grounds of appeal, it was argued that the judge *a quo* should not have relied on the mere allegations D made by the investigating officer.

Held, that the strength of the State case was not assessed by the judge *a quo*, though it should have been. However, the allegations made in the affidavit of the investigating officer were fairly detailed and raised at least a *prima facie* case against the appellant. In such circumstances, an E applicant would be expected, in attempting to discharge the *onus* upon him, either to deny the allegations; or to place before the court such information as would tend to establish his innocence; or to show that even if he were to be convicted the likely penalties were not such as to present a temptation for him to abscond; or to show that the interests of justice would not be prejudiced by his release on bail. The appellant had F done none of these things. There was nothing in the papers to persuade the judge *a quo* that the appellant had discharged the *onus* which is upon him to satisfy the court that he would stand his trial if released on bail.

Cases cited

Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S)

G*S v Chiadzwa* 1988 (2) ZLR 19 (S)

S v Fourie 1973 (1) SA 100 (D)

S v Ncube 2001 (2) ZLR 556 (S)

Case information

G Chikumbirike, for the applicant

H*M Nemadire,* for the respondent

Ziyambi JA

Judgment

ZIYAMBI JA (in chambers, in terms of r 5 of the Supreme Court Rules): This A is an appeal against a judgment of the High Court refusing bail to the appellant.

The appeal is one in the narrow sense in that:

> "… in the absence of an irregularity or misdirection, this court has to be persuaded that the manner in which the [learned Judge] exercised his discretion was so unreasonable as to vitiate the decision reached – see *S*B v *Barber* 1979 (4) SA 218 (D) at 220E-G; *S* v *Chikumbirike* 1986 (2) ZLR 145 (S) at 146F."

See *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S). In other words, the powers of this court to interfere with the judgment of the court *a quo* are limited to the finding of a misdirection occasioning a substantial miscarriage of justice or a finding of an unreasonable exercise of the court's discretion with the resultant C effect set out above.

The facts, briefly, are that the appellant was arrested on charges of contravening s 5(1) of the Exchange Control Act [*Chapter 22:05*] ("the Act") as read with ss 4(1)(a)(i), 11(1)(a) and 11(1)(b) of the Exchange Control Regulations 1996 SI 109 of 1996 ("the Regulations"). He was subsequently placed on remand D in custody pending his trial on those charges. Following a referral back to the High Court of an earlier appeal to this court for the release of the appellant on bail, the matter was heard and determined on the merits by the High Court (Chitakunye J)and bail was refused on the grounds that the appellant was likely to interfere with the police investigations. It was ordered by Chitakunye J that the matter could be reviewed after three weeks. The three weeks having E elapsed, an application was again brought to the High Court and determined by Kamocha J.

The learned judge considered the application and refused bail on the grounds that:

> "There is a real danger that if the applicant has the capacity to repatriate F such huge sums of hard currency there is great temptation for him to abscond and live outside this country on those monies for the rest of his life. It therefore seems to me that on this ground the applicant is not a suitable candidate for bail."

It was submitted on behalf of the appellant that the finding of "huge amounts" was derived from bald allegations set out in an affidavit by the investigating G officer who did not indicate how the allegations would be proved at the trial, (See *S* v *Ncube infra*) and that accordingly, the learned judge misdirected himself when he accepted without more, the said allegations in arriving at the conclusion that the appellant had huge sums of money outside the country. It was also submitted that the learned judge, having accepted that the appellant H

Ziyambi JA

A would not abscond, misdirected himself when he denied bail on the ground that the likelihood of absconding was great.

Mr *Nemadire* for the State*,* on the other hand, submitted that there was no misdirection in that Chitakunye J was not conclusive on the issue of absconding and had not ruled out the likelihood of absconding by the appellant. What the B learned judge had said was that the level of the likelihood of absconding was not clear to him and that had this been the only ground on which bail was opposed he would probably have granted bail. This is the statement which was referred to with approval by Kamocha J. It certainly was not said by Chitakunye J or adopted by Kamocha J, that there was no likelihood of the appellant absconding.

C In exercising his discretion in this matter, the learned judge was bound by certain principles. They are:

> "The basic purpose from society's point of view of the procedure known as 'bail' is to strike a balance between two competing interests — the liberty of the accused, and the requirement of the State that he stand trial to be judged and that the administration of justice be safeguarded from D interference or frustration."

See *Aitken & Anor supra.*

The primary considerations applicable in assessing evidence and submissions in a bail application are:

(1) whether the applicant will stand trial in due course;

(2) E whether the applicant will interfere with the investigations of the case against him or tamper with the prosecution witnesses;

(3) whether the applicant will commit offences when on bail;

(4) other considerations the court may deem good and sufficient.

The onus is upon an accused person to show on a balance of probabilities why F it is in the interests of justice that he should be freed on bail – see *Aitken* & *Anor supra*; *S* v *Chiadzwa* 1988 (2) ZLR 19 (S).

> "It is a fundamental requirement of the proper administration of justice that an accused person stands trial and if there is any cognizable indication that he will not stand trial, if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the G liberty of the accused and despite the presumption of innocence."

See *S* v *Fourie* 1973 (1) SA 100 (D) at 101.

There is no indication on the record that the above principles were not followed. The learned judge, having considered the merits of the application, H arrived at his conclusion as set out above. Was there a misdirection?

2004 (1) ZLR p370

Ziyambi JA

The affidavit of the investigating officer attached to the application shows A that:

(a) in November 1998 the appellant concluded an agreement of sale with a UK resident to purchase a Harare property, No 19 Willowmead Lane, Colne Valley, at a price of 210 000 British pounds of which a deposit of 30 000 pounds was paid and the balance was to be paid by instalments. B It is alleged that the appellant is the owner of the property.

(b) in the year 2003 – 4 the appellant entered into another sale agreement with Athol (Pvt) Ltd South Africa for the purchase of property described as Unit 1 Solitaire, 73A Pretoria Avenue, Athol, Johannesburg, South Africa. The purchase price was ZAR 6 800 000. A down payment of ZAR 680 000 was made and the balance was to be paid in instalments. C

(c) In October 2000, the appellant entered into an agreement to purchase Ravine House, 87 George Hill, Wry Bridge, London, United Kingdom. The property was to be purchased by the appellant for 3 500 000 pounds.

(d) In December 2000, the appellant entered into an agreement with Mendelous, Jacobs Attorneys of 243 Djon Road, Johannesburg, South Africa, to D purchase the entire shareholding of Fortworth Properties (Pvt) Ltd in the amount of ZAR 6.1 million.

In addition, it was alleged that the appellant has operated the following foreign accounts without prior authorisation from the Exchange Control Authority:

(a) FNB, South Africa E

(b) Bankers Trust, New York

(c) Ned Bank of South Africa

(d) Bank of Ireland Private Banking (London account number given)

(e) General Pacific Bank Barclays Bank
(Channel Islands – United Kingdom, New F
Horizon (Pvt) Ltd offshore)
(All account numbers given).

It was alleged that the total amounts involved on all counts amount to: GBP 3 773 650, USD2 117 44 and ZAR14 97 966.03 and it was believed that in view of the appellant's many contacts and wealth abroad, the temptation to G abscond was great.

The learned judge took into consideration that should the appellant be convicted of the offences with which he stands charged, he would be required to repatriate those amounts within three months, failing which the mandatory provisions of s 5(7)(a) & (b) of the Act would take effect resulting in the H

2004 (1) ZLR p371

Ziyambi JA

A imposition, on the appellant, of an additional sentence of imprisonment over and above any fine required by s 5(4) of the Act.

Subsection 5(7) provides as follows:

> "(7) where a person convicted of an offence referred to in paragraph (a) of subsection (6) does not satisfy the court as to one or other B of the requirements mentioned in subparagraph (i) and (ii) of paragraph (b) of subsection (6) the court shall –
>
> (a) in all cases have regard to that as a factor in aggravation of sentence; and
>
> (b) if the convicted person is an individual and the value of the property concerned exceeds two hundred dollars, impose a sentence of C imprisonment for such a period as the court deems fit in addition to any fine required by subsection (4)."
>
> Subsection (6) provides:
>
> "Where a person –
>
> (a) is convicted of an offence in terms of – D
>
> (i) paragraph (a) of subsection (1) which involves the exportation from, or acquisition outside, Zimbabwe of any gold, currency, security, goods or other property whatsoever in contravention of this Act; or
>
> (ii) …
>
> and E
>
> (b) does not satisfy the court that –
>
> (i) foreign currency in an amount of not less than the value of such property which has been exported from, or acquired outside, Zimbabwe has been received in Zimbabwe; or
>
> (ii) …
>
> F the court may, before passing sentence, adjourn the proceedings for such period not exceeding three months as the court deems fit in order to give the convicted person an opportunity of so satisfying the court on the resumption of the proceedings."

The learned judge was entitled to take this factor into account. The amounts involved in the purchases of the various properties in the United Kingdom and G South Africa are considerable, far in excess of three million British pounds. In order to be able to commit to the purchase of these properties, considerable sums had to be available to the appellant in foreign currency in order to make good his commitments in relation thereto.

The bank account numbers so far as the police have been able to ascertain were H all given. It is the details concerning the amounts held in those accounts and

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any transactions in relation thereto which were not made available to the court A . It is known that documents relating to the account in South Africa were obtained by the police although details of this account were not presented to the court. However, even without actual knowledge of the amounts reflected in the bank accounts, the very purchase agreements and, in some cases, the deposits paid, raise a *prima facie* case that at the very least the appellant is B possessed of substantial wealth in the form of properties outside this country.

> "In judging this risk [of abscondment], the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if [the applicant is] convicted: the strength of the State case; the ability to flee to a foreign country and the absence C of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial. It is apparent that the more serious the charge and the heavier the sentence is expected to be, the greater will be the temptation to flee."

(See *Aitken & Anor supra* at p 254D-E)

The learned judge did not comment on the strength of the State case. However D the allegations against the appellant are that he, without exchange control authority, operated a number of accounts in South Africa, Britain and the United States of America and entered into binding agreements to purchase properties in South Africa and Britain in contravention of s 11(1)(a) and (b) of the Act, which provides as follows:

> "11.(1) Subject to subsection (2), unless otherwise authorized by an E exchange control authority, no Zimbabwean resident shall –

(a) make any payment outside Zimbabwe; or

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

In consequence of these agreements, it is alleged that the appellant paid deposits in foreign currency in contravention of s 11(1)(a) of the Act. It is F alleged that the appellant is the owner of a number of properties abroad. He is also charged with dealing in foreign currency in contravention of s 5 of the Act as read with s 4(1)(a)(i) of the Regulations.

Apart from his comment that there is no proof of such properties, the appellant has neither admitted nor denied the allegations against him. He has based his G application on the perceived misdirection by the judge, the fact that he has been in detention for a long period; and the fact that he is unlikely to abscond having regard to his substantial wealth and political and social standing in Zimbabwe. It was alleged that he is a well-known public figure who has strong roots and "massive investments" in Zimbabwe. He is a self-made businessman running billion-dollar businesses such as supermarkets, farms, and security H

Ziyambi JA

A organisations and owns several properties in Harare and Bindura. The allegation that he has many contacts, and owns several properties outside Zimbabwe has not been challenged. As was said in a similar case:

> "The implications from this are that the appellant(s) could reward most handsomely, in local and foreign currency, any party willing to undertake or assist in [his] illicit removal, and that he would be able to live fairly B comfortably outside Zimbabwe."

(See *Aitken & Anor supra* at p 257B.)

In the instant case, the learned judge arrived at the same conclusion after taking into consideration the wealth alleged to be possessed by the appellant externally. I find no misdirection in this aspect of the judgment.

C It was further submitted that the learned judge, having approved the judgment of Chitakunye J, misdirected himself in proceeding to refuse bail on the grounds that the appellant was likely to abscond. A reading of the judgment of Chitakunye J shows that he did not rule out the likelihood of absconding by the appellant. What he said was:

> "Another aspect of interest is the fact of the appellant's bank accounts D outside the country. Whilst two of those accounts were denied others were admitted. Each of those admitted accounts have some money which is available to the applicant. He indicated that there could be about R400-R5000 in his Nedbank Account and another 20 000-25 000 British pound sterling in his Bank of Ireland Private Banking Account in London.
>
> E Whatever the sources of those funds are, the reality is that money is available for the applicant's use should he wish to go to those countries.
>
> In as far as means to survive outside the country are concerned, the applicant is not short. He would not be incapacitated by lack of means. Abscondment cannot therefore be entirely ruled out. It is the level of its likelihood that is not clear to me. Had this been the only ground for F opposing the grant of bail, I probably would have granted bail. However, there are other aspects referred to below to be considered together with the above ground."

He went on to dismiss the application on the grounds that the appellant might interfere with investigations.

The words quoted above do not, in my view, indicate that the learned Judge dismissed the likelihood of absconding or that G he would definitely have granted bail if that were the only ground. It was merely a statement of what he might have done. In referring to that aspect of the judgment Kamocha J said:

> "I shall make reference with approval, to the judgment of the learned judge which summarised the State's objections to the granting of bail. When H dealing with the question of abscondment, the learned judge held a view

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Ziyambi JA

> that it (abscondment) could not be entirely ruled out. However, the level A of its likelihood was not clear to his lordship."

I do not agree with Mr *Chikumbirike* that these words suggest that the court *a quo* adopted a finding by Chitakunye J that bail could not be refused on grounds of the likelihood of absconding. Clearly the opposite appears to be true from that statement. Absconding in his view *could not be entirely ruled*B*out*. That was the finding adopted by the court *a quo*. On the facts placed before him, the learned judge found that the level of the likelihood of absconding was high. He was entitled to arrive at his own conclusion on the facts placed before him and that is what he did.

The other ground of contention advanced by the appellant is that the learned judge posed the question: C

> "'Is there any other reason why I may refuse to admit the applicant to bail which may seem to me good and sufficient?'
>
> I propose to deal with the question of the amounts involved and the provisions of the Exchange Control Act. It admits of no doubt that the amounts are huge regard being had to the fact that the amounts involved hard currencies. To my mind, £3 773 650, US$2 117 444, and D ZAR14 97 996.03 are huge sums of money."

The learned judge took the view that if the appellant were to be convicted, he would be required to repatriate the amounts and if he failed to do so he would be sentenced to a term of imprisonment by operation of law. For this reason, he felt that the temptation to the appellant to abscond was great in view of the E wealth possessed by him outside the country. He therefore considered the appellant not to be a good candidate for bail.

The contention advanced on behalf of the appellant was that the learned judge, by basing his decision on "another reason", had ruled out the likelihood of absconding as a reason for refusal of bail. He therefore contradicted and misdirected himself when he went on to refuse bail on the ground of the F likelihood of absconding.

It is true that the learned judge expressed himself in a somewhat muddled manner. But this having been said, it was the fact of the appellant's wealth abroad and the serious consequences of a possible conviction, which swayed the learned judge to think that absconding was a great likelihood in the G appellant's case. This view of the learned judge appears to be borne out on the papers. Accordingly, I do not regard this as a misdirection.

The final contention advanced was that there was no foundation for the finding that "huge sums of hard currency" were involved in that in his affidavit, (the excerpt is set out in the judgment of the court *a quo*), Chief Superintendent H

2004 (1) ZLR p375

Ziyambi JA

A Mabunda, the investigating officer, did not explain how these figures were arrived at but merely made bald assertions, a practice which was criticised in *S* v *Ncube* 2001 (2) ZLR 556 (S).

In that case, Sandura JA observed:

> "I should add that in determining a bail application the strength of the case B for the prosecution should be assessed. As Millin J said in *Liebman* v *Attorney-General* 1950 (1) SA 607 (W) at 609:
>
> 'The court looks at the circumstances of the case to see whether the person concerned expects, or ought to expect, conviction. If it is found on the circumstances disclosed to the court that the likelihood of conviction is substantial, that the person ought reasonably to expect conviction, then the likelihood of his absconding is greatly increased. Thus, the court C goes into the circumstances of the case, that is, the evidence at the disposal of the Crown. Where there has been a preparatory examination that is the material which is used. Where no preparatory examination has yet been held the court has to consider such material as is furnished to it by the accused himself (the applicant) or by the Attorney-General or his representative.'
>
> D In the present case, the strength of the State case was not assessed. The application was dismissed on the basis of bald allegations set out in an affidavit by the investigating officer who did not indicate how the allegations would be proved at the trial."

Similarly, the strength of the State case was not assessed in the instant case. E It ought to have been. However, the allegations made in the affidavit of the investigating officer are fairly detailed and raise at least a *prima facie* case against the appellant. The persons in foreign countries with whom the appellant entered into binding agreements of sale in respect of the properties have been mentioned as well as, in some cases, the deposits paid in respect of the purchase of the properties. In addition, Telecel, the company of which the F appellant is chairman, has been prosecuted and

convicted for its part in purchasing foreign currency from the appellant. Among the charges faced by the appellant are allegations that he illegally sold foreign currency to Telecel. In such circumstances, an applicant would be expected, in attempting to discharge the onus upon him, to deny the allegations or place before the court such information as would tend to establish his innocence. The appellant has G done neither. He has not denied or explained what he terms as the "bald allegations" made by the investigating officer. The only indication as to the appellant's response to the allegation that he operated several foreign currency accounts outside the country appears in the judgment of Chitakunye J where the appellant claimed to have some 2500 British pounds and 5 000 South H African Rand in two accounts outside the country – suggesting that oral

Ziyambi JA

submissions to that effect were made before him. A

Before Kamocha J, who reviewed the matter afresh, no attempt was made to deny the charges or to place any information before the court which might tend to show the appellant's innocence or that the prosecution against him on those charges was unlikely to succeed or, further, that even if he were to be convicted of these offences the penalties liable to be imposed are not so onerous as to B present a temptation for him to abscond; or that the interests of justice would not be prejudiced by his release on bail. What the appellant has told the court is that because of his position and standing as well as his substantial wealth in this country it would be "suicidal" for him to abscond. But this was countered by the State with the unchallenged allegation that other prominent persons of substantial wealth have fled this country when their arrest on C similar charges seemed imminent.

Accordingly, there is nothing on the papers filed of record which would persuade the learned judge that the appellant had discharged the *onus* which is upon him to satisfy the court that he will stand his trial if released on bail and I did not understand Mr *Chikumbirike* to argue otherwise.

In the circumstances, I am unable to find that the learned judge misdirected D himself in relying on the facts placed before him.

It follows from the above that I have found no misdirection resulting in a miscarriage of justice. Nor am I persuaded that the manner in which the learned judge exercised his discretion was so unreasonable as to vitiate the decision E he arrived at.

Accordingly, there is no option open to me but to dismiss the appeal, and it is hereby dismissed.

Chikumbirike & Associates, appellant's legal practitioners

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

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CHIPUNZA v MUZANGAZA NO 2004 (1) ZLR 377 (H)

Citation 2004 (1) ZLR 377 (H)

Case No Judgment No. HH-98-04

Court High Court, Harare

Judge Uchena J

Heard 24 March 2004, 25 March 2004

Judgment 28 April 2004

Counsel *R Y Phillips*, for the plaintiff
T Machingambi, for the defendant

Case Type Civil action

Annotations Link to case annotations

Flynote

Contract — *illegality — par delictum rule — when may be relaxed — contract* C *entered into with aim of evading tax and duties — not enforceable in whole or in part — contract void ab initio*

Headnote

The plaintiff and the defendant's father entered into a contract for the sale of a house. They drew up two written contracts, one of which substantially understated the price and gave a false statement of the improvements that D had been made. The purpose of this was to avoid payment of capital gains tax and to reduce the amount of stamp duty payable. The other one gave the real price and correctly described the property. After two-thirds of the purchase price had been paid, the plaintiff brought an action to compel the defendant, as executor of his father's estate, to pass transfer. He did not sue for the return of the money paid.

E*Held*, that the contracts were tainted with illegality. An illegal agreement which has not yet been performed, either in whole or in part, will not be enforced by the courts. In the circumstances of this case, the relaxation of the *par delictum* rule would not apply. The purpose of the *par delictum* rule is to prevent a party who has acted disgracefully by making performance in an illegal contract from recovering such performance. F Here, all that the plaintiff sued for was the transfer of the property, not for the return of the purchase price. He therefore seeks the enforcement of an illegal contract. The court can not enforce an illegal contract.

Held, further, that, in any event, since the illegal agreement was aimed at cheating the Treasury, the relaxation of the *par delictum* rule was not G applicable as s 44 of the Stamp Duties Act [*Chapter 23:09*] provides that such an agreement shall be void.

Cases cited

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

Nyamweda v Georgias 1988 (2) ZLR 422 (S)

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

Uchena J

Legislation considered A

Stamp Duties Act [*Chapter 23:09*], s 44

Case information

R Y Phillips, for the plaintiff

T Machingambi, for the defendant

Judgment

UCHENA J: The plaintiff entered into two agreements of sale with the now B deceased George Parafin Chibindi.

The first agreement was entered into on 16 June 2000. In that agreement, the parties deliberately agreed to cheat the treasury by agreeing on a purchase price of $800 000 and understated the developments on the property. They agreed to state that the property only had a cottage when in truth the property C had a main house and two cottages. The plaintiff told the court that they did this to ensure the seller would not pay capital gains tax. He said he did not at that stage realise he would benefit from the deception. He now, however, appreciates that he was to benefit by paying reduced stamp duty.

The second agreement was entered into on 25 June 2000. It now had the price D of $4 500 000 and the correct description of the property. It was meant for the parties' benefit and would not be disclosed to conveyancers and the Treasury. It was entered into for the benefit of the parties to correct the deceptive information they had put in the first agreement.

The deceased died before the property was transferred into the plaintiff's name. The plaintiff had by then paid $3 000 000 into the deceased's account. E The deceased had given him the property's title deeds for transfer purposes. The conveyancers were then processing the transfer.

The late George Parafin Chibindi's son Shephard Chibindi, giving evidence for the defendant, told the court that after the burial of the deceased he discovered the agreements of sale of their father's property. He became F suspicious because the two agreements had different purchases price for the same property. The agreements were by the same parties. The other agreement was for $800 000 and states the property only had a cottage. The other was for $4 500 000 and gave the correct description of the developments on the property. He instructed the defendant to stop the transfer. The family subsequently appointed the defendant executor of the deceased's estate. G

The defendant is being sued in his capacity as the executor of the estate of the late George Parafin Chibindi. He in that capacity declined to pass transfer to the plaintiff. The plaintiff's claim is for an order compelling the defendant to transfer the rights, title and interest in Lot 1 of stand No. 35 of Prospect to him.

The facts of this case are common cause. The issue between the parties is H whether any of the two agreements is enforceable.

Uchena J

A The plaintiff's counsel submitted that the agreement of 16 January 2000 is tainted with illegality but that of 25 June 2000 is not and can be enforced.

The defendant's counsel, on the other hand, submitted that both agreements are tainted with illegality and cannot be enforced.

The agreements in my view are a continuation of the plan to deceive the B Treasury: the first agreement was entered into for the purpose of enabling the seller to avoid paying capital gains tax. It had a false purchase price and a false declaration on improvements. It was on this agreement that both the seller and purchaser made their declarations using incorrect information when each of them was aware of the correct position as per the second agreement dated 25 June 2000. They both intentionally concealed the existence of the second C agreement from the conveyancers. The two agreements would, if the parties had succeeded in this deception, enabled them to cheat the Treasury and benefit themselves by paying lower stamp duty fees and not paying capital gains tax. To achieve this, both agreements were required: the first, for registration purposes and to deceive the Treasury; the second as security for the deceiving parties in case one of them was tempted to turn against the other D and enforce the first agreement to the disadvantage of the other.

I am therefore satisfied that both agreements are tainted with illegality. They were both entered into for the purpose of deceiving the Treasury.

I now have to determine whether the *par delictum* rule can be relaxed in this case as was submitted by Mr *Phillips.*

E In this case, I do not think the *par delictum* rule is relevant as the plaintiff is not claiming the return of his $3 000 000 due to the unenforceability of the contract. He is merely claiming the transfer of the property on the basis of the second contract which he believes is not tainted by the illegality. I have already found that it is tainted. I also have no hesitation in finding that the plaintiff and F the deceased George Parafin Chibindi are and were in equal guilt.

The purpose of the *par delictum* rule is to prevent a party who has acted disgracefully by making performance in an illegal contract from recovering such perfomance. In the present case all the plaintiff sued for was the transfer of the G property. He therefore can not rely on the relaxation of the *par delictum* rule as his claim is not for the return of the purchase price but transfer of the property.

As the transfer is based on an illegal contract it cannot be enforced and that should be the end of the matter.

Mr *Phillips* in his address relied on *Dube* v *Khumalo* 1986 (2) ZLR 103 (S), *Young* v *van Rensburg* 1991 (2) ZLR 149 (S) and *Nyamweda* v *Georgias* 1988 (2) ZLR 422 (S). H

2004 (1) ZLR p380

Uchena J

All these cases, involved the issue of unjust enrichment. They did not deal with A the enforcement of one of the tainted contracts.

In *Dube supra*, the claim was for the transfer of a house from the defendant to the plaintiff long after the fraud against the Municipality of Bulawayo had achieved its purpose. The plaintiff had paid for the house while the defendant had not paid anything. She had been used by the plaintiff to avoid the B Municipality refusing to sell a second house to him as he already had another house. The plaintiff's claim was for the registration of the house in his name. He was not enforcing the illegal contract but claiming the house acquired through the illegal contract back to him. The house had been registered in the defendant's name as a result of the deception.

In *Young supra*, what was to be enforced was a contract not related to the one C tainted with illegality but involving the farm purchased through what was believed to be an illegal contract.

In *Nyamweda supra*, the claim was for the return of the house, which had been registered in the name of his mistress, from the mistress to himself. He had registered the house in the name of the mistress as he already had a bond with D CABS Buillding Society and could not get another bond. The deception against CABS had already succeeded. The bond had been granted to the mistress and the house was acquired. The *par delictum* rule was relaxed to avoid the unjust enrichment of the mistress who had not paid anything for the house.

In cases of illegal contracts, one has to start by considering the plaintiff's E claim. If the claim is for the enforcement of the illegal contract itself then the maxim *ex turpi causa non oritur actio* applies. The rule is that an illegal agreement which has not yet been performed, either in whole or in part, will not be enforced by the courts. In the instant case, the illegal agreements were discovered before they were performed in whole. The court cannot assist the F plaintiff by enforcing the illegal agreement entered into as part of the contracting parties' criminal conduct. This rule is absolute and that should be the end of the matter.

The next consideration is whether plaintiff is claiming the return of performance disgracefully tendered pursuant to an illegal contract. In such a case, the *in pari delicto potior est conditio possidentis* rule applies. It is founded on G considerations of public policy that he who has acted disgracefully by making performance pursuant to an illegal contract should not be allowed to recover such performance. It follows that where a party to an unlawful agreement has performed but performance by him was not disgraceful because he is not equally guilty or was cheated into the illegal agreement he can recover that H which he has performed from the other party.

2004 (1) ZLR p381

Uchena J

A The relaxation of the *par delictum* rule therefore only applies to actions based on unjustified enrichment where the parties are not equally guilty.

In the instant case, the relaxation of the *par delictum* rule does not apply because the plaintiff's claim is for the enforcement of one of the contracts tainted with illegality.

B In *Dube supra*, Gubbay JA (as he then was) said at 109D-E:

> "There are two rules which are of general application. The first is that an illegal agreement which has not yet been performed either in whole or in part will never be enforced. This rule is absolute and admits no exception. See *Mathews* v *Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Estates Ltd* v *Wareham* 1950 (1) SA 125 (SR) at 128.

C*It is expressed in the* maxim ex turpi causa non oritur actio*. The second is expressed in another maxim* in pari delicto potior est conditio possidentis, *which may be translated as meaning 'where the parties are equally in the wrong, he who is in possession will prevail'. The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is*D*to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the* par delictum *rule and order restitution to be made.* They will do so in order to prevent injustice on the basis that public policy 'should take into account the doing of simple justice between man and man'" (my emphasis).

E Assuming I am mistaken in my finding and the relaxation of the *par delictum* rule applies, I am persuaded by Mr *Machingambi*'s submission that, since the illegal agreement was aimed at cheating the Treasury, the relaxation of the *par delictum* rule is not applicable as s 44 of the Stamp Duties Act [*Chapter 23:09*] provides that such an agreement shall be void.

F This section reads as follows:

> "Every contract, agreement or undertaking made for the purpose of evading, defeating or frustrating the requirements of this Act as to the stamping of instruments, or with a view to precluding objection or injury relative to the due stamping of any instrument shall be void."

This case falls within the provisions of s 44 as the parties' illegal agreement G was aimed at evading, defeating or frustrating the requirements of the Act. The provisions make such an agreement void. There are no exceptions under the Act similar to those under common law.

Once the case falls under the statutory provisions of an Act, the common law exceptions become inapplicable. I would therefore again find that the plaintiff's H claim for transfer should fail as the agreements he entered into with the

---

Uchena J

deceased are rendered void by the provisions of s 44 of the Act. A

The plaintiff's claim is, therefore, dismissed with costs.

Sawyer and Mkushi, plaintiff's legal practitioners

Muzangaza, Mandaza and Tomana, defendant's legal practitioners B

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Source:
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MAKALUMO v CHIEF IMMIGRATION OFFICER & ORS 2004 (1) ZLR 383 (S)

Citation	2004 (1) ZLR 383 (S)
Case No	Judgment No. S-64-0
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Malaba JA & Gwaunza JA
Heard	6 November 2003
Judgment	10 May 20043

Counsel *C Chinyama,* for the applicant
Ms *C R Mudenda,* for the respondents

Case Type Civil application

Annotations No case annotations to date

Flynote

C**Constitutional law** — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 22(1) — right of freedom of movement etc — right of citizen of Zimbabwe to have spouse reside with her in Zimbabwe — when such right may be interfered with — removal of prohibited persons — State's right to deport prohibited persons — husband already a prohibited* D *person under immigration laws when marriage took place — status not altered by marriage — citizen's rights not infringed if husband deported*

Headnote

The applicant, a Zimbabwean citizen and resident, married a Nigerian man after he had been declared to be a prohibited person in terms of s 14(1)(e) of the Immigration Act [*Chapter 4:02*]. He had been deported from E Zimbabwe after he had overstayed his permitted visit by over a year. He was also in the habit of using pseudonyms to enter the country illegally and had been intercepted twice by immigration officers. He managed to re-enter the country using another name and thereafter married the applicant. She brought an application under s 24 of the Constitution, F arguing that her right, under s 22 of the Constitution, to reside in Zimbabwe with her husband was being breached.

Held, that the applicant's husband's stay in the country after the temporary visa issued to him had expired was an G offence in terms of s 34 of the Immigration Act. After he was deported he had re-entered the country by misrepresenting his identity, by using a different name. This was also an offence.

Held, further, that even assuming the applicant did not know her husband's status, which was doubtful, it would still not be a genuine marriage if the other party entered into the marriage merely to protect his personal position, as he was aware of the limitations imposed against him of living H in Zimbabwe.

2004 (1) ZLR p384

Cheda JA

Held, further, that restrictions imposed on the movement of a person or persons for the purpose of excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe are permissible under s 22(3) and are not regarded as contraventions or infringements of the rights referred to in s 22(1) and (2) of the Constitution. The applicant's alien husband was a prohibited person and was not allowed to live in B Zimbabwe. He had committed offences which led to him being prohibited and his status could not be changed by the marriage.

Cases cited

Edwards v Chief Immigration Officer 2000 (1) ZLR 485 (S)C

Legislation considered

Constitution of Zimbabwe 1980, ss 11 & 22(3)(d)

Constitution of Zimbabwe Amendment Act No. 14 of 1996, s 8(2)

Immigration Act [*Chapter 4:02*] ss 34 and 36 D

Case information

C Chinyama, for the applicant

Ms *C R Mudenda,* for the respondents

Judgment

CHEDA JA: The applicant is a female Zimbabwean adult aged thirty-six years. She was born at Kwekwe on 3 January 1967.

The first respondent is the Chief Immigration Officer of Zimbabwe whose E duties involve, among other things, the issuance of resident permits to foreign nationals who wish to reside in Zimbabwe either permanently or temporarily.

The second respondent is the Minister of Home Affairs who is responsible for the administration of the Immigration Act [*Chapter 4:02*].

The applicant got married to one Ekwoka Ignatius John ("John"), a Nigerian F national, at the magistrates court on 10 May 2002. The marriage was in terms of the Marriages Act [*Chapter 5:11*]. The Nigerian national was born on 11 January 1965 at Agulu Anaocha in Nigeria.

The applicant says she first met John in the year 2000 and they continued to see each other during 2001. This resulted in their marriage in 2002. They G decided that they would live together here in Zimbabwe and this would be the country of their matrimonial home and domicile.

She said that as a Zimbabwean she has a right in terms of ss 11 and 22 of the Constitution of Zimbabwe ("the Constitution") to reside in Zimbabwe with her foreign husband. She said to do otherwise would impact negatively on her H right of freedom of movement.

Cheda JA

A The applicant said her alien husband, who had been residing in Zimbabwe on the strength of visa number 044568 issued by the first respondent, made an application for a permanent resident permit. The application was refused by the first respondent on grounds unknown to her. This refusal means that her right to freedom of movement and the right to reside permanently in Zimbabwe with her alien husband have been infringed by the first and second respondents' B decisions, as it meant that on the expiry of the extended visa period on 4 May 2003 her husband could not be allowed to live with her in Zimbabwe.

The applicant says that her rights should be protected as provided for in ss 11 and 22 of the Constitution. She submits that this court should order the respondents to issue her alien husband with a permanent resident permit and C pay the costs of this application.

In answer to the applicant's case, the first respondent, in an affidavit deposed to by the senior immigration officer, says the applicant's husband is known within the Immigration Department as John Ali Baba, who was deported from Zimbabwe on 11 July 1997 after he had overstayed his permitted visit by over a year. He is also in the habit of using pseudonyms to enter the country illegally D and has been intercepted twice by immigration officers. He managed to re-enter this country using the name Ekwoka Ignatius John.

A look at the documents filed with this application confirms that Ekwoka Ignatius John is from the Federal Republic of Nigeria. His date of birth is given as 11 January 1968, and he was born at Agulu Anaocha, Nigeria.

E Annexure "A" shows that a person named Ignatius Igwebuike Ekwoka was served with a Notice of a Prohibited Person on 10 July 1997.

On 3 July 1997 a document had been issued to this same person for the purpose of a journey to Lagos in Nigeria. It was issued by the Nigerian Embassy.

F These documents indicate that the applicant's husband was deported from Zimbabwe on 11 July 1997 and went to Lagos in Nigeria.

The applicant married John on 10 May 2002. This shows clearly that when she married him he was already a prohibited person in terms of s 14(1)(e) of the Immigration Act [*Chapter 4:02*].

G Section 11 of the Constitution provides as follows:

> "11 **Preamble**
>
> 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 H provisions of this Chapter shall have effect for the purpose of affording

Cheda JA

> protection to those rights and freedoms subject to such limitations on that A 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*." (emphasis added)

The fundamental rights allegedly infringed do not belong to the husband but to the applicant personally. Her alien husband does not have such rights. He B does not acquire them through his wife by marriage. She cannot pass them on to an alien by marrying him. He is a prohibited person and she cannot change that status by marrying him.

Section 22 of the Constitution provides as follows:

> "22 **Protection of freedom of movement**C
>
> (1) No person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Zimbabwe, the right to reside in any part of Zimbabwe, the right to enter and to leave Zimbabwe and immunity from expulsion from Zimbabwe.
>
> (2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be in contravention of D subsection (1).
>
> (3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –
>
> (a) to (c) (not relevent) E
>
> (d) for –
>
> (i) the imposition of restrictions on the movement or residence within Zimbabwe of any person who is neither a citizen of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe; or
>
> (ii) for excluding or expelling from Zimbabwe any person who is not a F citizen of Zimbabwe; whether or not he is married or related to another person who is a citizen of or permanently resident in Zimbabwe,
>
> (e) to (f) (not relevent)
>
> except, in the case of any provision referred to in paragraphs (a) to (e), so far as that provision or, as the case may be, the thing done under the G authority thereof is shown not to be reasonably justifiable in a democratic society."

The applicant is free to live and move anywhere in Zimbabwe. She is also free to move out of Zimbabwe and live with her husband elsewhere. What she cannot do is to defeat the established law of the country by getting her alien husband to live in Zimbabwe contrary to the laws of Zimbabwe. H

Cheda JA

A The applicant's husband is obviously a prohibited person. On 3 July 1997 he was issued with an emergency document by the Federation of Nigeria in order to travel to Lagos. This was when he was being deported from Zimbabwe for breaching immigration laws.

Section 34 of the Immigration Act [*Chapter 4:02*] ("the Act") provides as B follows:

> "34 **Re-entry of prohibited person**
>
> (1) Any person –
>
> (a) …
>
> (b) who has been removed from or ordered to leave Zimbabwe or has not been authorised in terms of this Act to enter or remain in Zimbabwe; and C who is found within Zimbabwe shall be guilty of an offence unless he is in possession of a permit authorising him to enter or remain in Zimbabwe."

The applicant's husband is in the country despite the fact that the temporary visa issued to him has expired. His continued stay is an offence in terms of s 34.

D Section 36 of the Act provides as follows:

> "(1) Any person who –
>
> (a) for the purpose of entering, remaining in or departing from Zimbabwe in contravention of this Act or any other enactment or of assisting any other person so to enter, remain or depart, whether or not such other person is *doli capax*,

(i) E makes any statement, verbally or in writing, which he knows to be false or does not know or reasonably believe to be true; or

(ii) …; or

(iii) …; or

(a1) - (i) (not relevent)

(j) F contravenes any provision of this Act for the contravention of which no penalty is specially provided;

shall be guilty of an offence …".

The applicant's husband continues to reside in Zimbabwe when his temporary visa or permit has expired. This is an offence in terms of the above provisions.

G According to the first respondent, after he was deported, John re-entered the country by misrepresentation of his identity, by using a different name. Again this is an offence.

Section 22 of the Constitution, while granting a right not to be deprived of freedom of movement, the right to move freely throughout Zimbabwe or reside H in any part of Zimbabwe, provides exemptions, one of which is subs (3), which

---

Cheda JA

reads as follows: A

"(3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –

(a) to (c) (not relevent)

(d) for – B

(i) the imposition of restrictions on the movement or residence within Zimbabwe of any person who is neither a citizen of Zimbabwe C nor regarded by virtue of a written law as permanently resident in Zimbabwe; or

(ii) excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe; …".

The above provisions of the Constitution show that the first respondent is entitled to act as he did in relation to the applicant's husband. The applicant now seeks to alter this because of her marriage to the alien concerned.

The applicant's husband was deported on 11 July 1997. On 10 May 2002 he was back in Zimbabwe and got married to the applicant. He knew he had no D right to reside in Zimbabwe.

On her part, the applicant was not being truthful about her alien husband's background. In her founding affidavit, she said she first met John in the year 2000 and they continued seeing each other in the year 2001, resulting in their marriage in 2002. She also said it was during this period that they decided to E marry each other and live together in Zimbabwe.

However, in her "Spouse's Interview" form, where the question reads: "Where and when did you first meet?", she answered: "We first met at Eastgate Building". In answer to the question: "How long was your relationship before you got married?", she answered: "Our relationship was for three weeks"; yet they only married after almost two years. She also stated in that form that she F visits her in-laws every two weeks. This seems strange as she said he was born in Nigeria and there is no mention in the papers of his parents coming to live in Zimbabwe. She could not have been visiting Nigeria every two weeks.

I am therefore not persuaded that the applicant was not aware of her alien husband's status as a prohibited person before their marriage. She must have G known that he was a prohibited person but nevertheless entered into a marriage with him to aid and abet him in breach of the law.

Even assuming she did not know his status, which is doubtful in this case, it would still not be a genuine marriage if the other party entered into the marriage merely to protect his personal position as he was aware of the limitations imposed against him of living in Zimbabwe. H

Cheda JA

A I have no doubt that both parties intended that their marriage would change the status of John so that he could live in Zimbabwe even if there was no genuine marriage.

The amendment of the Constitution by Act No. 14 of 1996 makes it clear that restrictions imposed on the movement of a person or A persons for the purpose B of excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe are permissible and shall not be regarded as contraventions or infringements of the rights referred to in s 22 of the Constitution (see s 22(3)(d)).

The applicant got married to her alien husband after the amendment was passed and, as such, while her rights are not affected, his rights are affected C by this amendment (see s 8(2) of Act 14 of 1996).

In *Edwards* v *Chief Immigration Officer* 2000 (1) ZLR 485 (S) at 409E Gubbay CJ held that:

> "Thus the actuality of being a prohibited person at the date of her marriage to a citizen of Zimbabwe effectively disqualified the appellant from becoming a non-prohibited person under para (d) to s 15(2) of the Act. A D contrary interpretation would give rise to the ability of a prohibited person to evade the restriction against entry or removal from Zimbabwe by marriage to a Zimbabwean citizen. It would defeat the predominant purpose behind immigration laws, which is to protect the State in the interests of its citizens by the control and supervision of aliens who seek to enter and remain within the country."

E After giving some examples of different situations, he concluded as follows:

> "Accordingly, I share the view of the learned judge that the appellant's marriage did not enable her as of right, and without the grant of the relevant permit, to remain living in this country."

I share the above sentiments.

F The applicant's husband does not even seem to be living with her at the address given. The applicant does not even say that they are living together as husband and wife, probably because she is aware that he should not be in Zimbabwe.

The applicant also argues that her husband never used the names John Ali Baba but admits that on his return from Nigeria after deportation he had added G the name "John" to his names.

The first respondent has shown that John has previously travelled on a Ghanaian passport, in which he declared Ghanaian residence and used the name Ali Baba.

Secondly, it has been shown that he is indeed the person who was declared a H prohibited person and deported to Nigeria in July 1997.

Cheda JA

In view of the above, the application cannot succeed. A

The alien husband of the applicant is a prohibited person and cannot live in Zimbabwe. He has committed offences which led to him being prohibited and his status cannot be changed by the marriage.

Accordingly, the application is dismissed with costs.

Chidyausiku CJ, Sandura JA, Malaba and JA Gwaunza JA concurred B

Chinyama & Partners, applicant's legal practitioners

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

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Source:
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AIRPORT GAME PARK (PVT) LTD & ANOR v KARIDZA & ORS 2004 (1) ZLR 391 (S)

Citation	2004 (1) ZLR 391 (S)
Case No	Judgment No.S-18-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	3 February 2004
Judgment	10 May 2004
Counsel	*J B Colegrave*, for the appellants *G Chikumbirike*, for the first respondent *E Jena*, for the second respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

C**Practice and procedure** — *parties — locus standi — former owner of land acquired by State — challenge to allocation of land — no reversionary right to land — only speculative hope that Administrative Court would not confirm acquisition — no locus standi*

Property and real rights — *reversionary right — what is — requirement for a condition under which ownership would revert to previous owner on* D *occurrence of a prescribed event*

Headnote

The applicant companies owned a farm near Harare. The farm was compulsorily acquired by the respondent Minister (the second respondent) under the land reform programme and allocated to an individual, the first respondent. The applicants sought the ejectment of the first respondent, arguing that E the allocation to him was improper for various reasons.

Held, that the applicants had no *locus standi*. The land had been lawfully acquired and ownership now vested in the Minister. The applicants had no possessory or contractual rights against the first respondent. Nor did they have a reversionary right, based on a condition which provided that, on the happening of a prescribed event, ownership of property would F revert to the previous owner. For such a right to give *locus standi*, it was necessary that it should be certain and determined, not speculative or conjectural, for then it would not be a right but a mere hope. *In casu*, all the applicants had was the hope that the Administrative Court would find in their favour and that the land would revert to them. This did not give G them *locus standi*.

Cases cited

Mgwaco Farm (Pvt) Ltd v Pasi & Ors 2003 (2) ZLR 478 (H)

Pretoria Stadsraad v Ebrahim 1979 (4) SA 193 (T)

S A National Parks v Ras 2002 (2) SA 537 (C)

H*Steenkamp v Mienies en Andere* 1987 (4) SA 186 (NC)

Ziyambi JA

Case information

J B Colegrave, for the appellants A

G Chikumbirike, for the first respondent

E Jena, for the second respondent

Judgment

ZIYAMBI JA: This is an appeal against an order of the High Court dismissing an application brought by the appellants for the ejectment of the first B respondent from the premises known as Mbizi Game Park and Lodges.

In support of the application, which was brought on a certificate of urgency, the first appellant alleged that it was the current registered owner of "piece of land situate in the District of Salisbury called remainder of Rocky Farm A of Arlington Estate measuring 394 2123 hectares held under Deed of Transfer 7611/90" ("the property") which is bonded to Zimbabwe Banking Corporation. C In addition, the first appellant leases from the City of Harare an adjacent piece of land known as "Portions and Environs of the Northern Spur of Harare Dam" measuring 30 hectares. The two properties are known as Mbizi Game Park and Lodges (Mbizi) and are managed by the second appellant.

The first respondent is Kenneth Karidza to whom the property was offered by D the second respondent in accordance with theland reform and resettlement programme. The second respondent is the Minister of Lands, Agriculture and Rural Resettlement who was at the time the Minister responsible for the administration of the Land Acquisition Act [*Chapter 20:10*] ("the Act") and the Agricultural Land Settlement Act [*Chapter 20:01*].

Sometime in the year 2002, a notice to acquire the property in terms of s 8 of E the Act was served on the first appellant. Thereafter, by letter dated 28 June 2002, the property was offered to the first respondent by the second respondent. It is common cause that the notice lapsed and a further notice dated 26 September 2003 was issued and served on the first appellant. The first respondent, who had vacated the property because of the lapse of the notice, then reoccupied the property in accordance with the terms of the letter of offer. F

The appellants alleged, firstly, that the offer letter was invalid in that it was an offer of a lease which the second respondent had no power to grant since the Board, which must consider and recommend applicants for leases of land in terms of the Agricultural Land Settlement Act, had not been appointed and therefore no lease could have been offered to the first respondent by the second G respondent. Secondly, that the first respondent was already a beneficiary of the land resettlement programme, having been allocated certain land in Goromonzi. Thirdly, following service of the notice in terms of s 8 of the Act on the first appellant, a new offer should have been made to the first respondent, since the first letter of offer was no longer valid by reason of the lapse of the initial s 8 notice; and fourthly, that contrary to the provisions of H

A s 8(1)(b) of the Act, they had been evicted by the first respondent before the 45 days allowed by the notice had expired.

The High Court found against the appellants on all issues.

In the High Court, it was conceded by the appellants' legal practitioners that the property was properly acquired in terms of the Act. With reference to the B offer of land, the court found that the original letter of offer dated June 2002 had not been revoked. In his judgment at pp 82-83 of the record, the learned judge said:

> "I am of the position that the first respondent did not need a second new offer letter. There is nothing which showed me that the original letter of 28 June 2002 had been revoked. Besides, I am of the view that the process C of allocation of the land by the second respondent is an administrative matter, which should be resolved administratively guided by some administrative policy. Further, I notice there is no dispute on the allocation *per se.* What applicants want to see is a 'second' new letter."

The two issues raised in the notice of appeal and advanced by Mr *Colegrave* on behalf of the appellant are the validity of the offer of the property to the first D respondent and the entitlement of the appellants' directors and shareholders to be in occupation of the property until 26 December

2003. It was common cause at the hearing before us that the determination of the second issue was academic but it was persisted in as, in Mr *Colegrave*'s submission, it would have a bearing on costs.

E The point was taken, *in limine*, by the respondents that the appellants had no *locus standi* to make this application. On behalf of the first respondent, it was submitted by Mr *Chikumbirike* that the appellants, being neither the owners of the property nor the holders of a possessory claim in respect thereof, have no *locus standi* to seek the first respondent's eviction or to raise the issues contained in the notice of appeal.

F On behalf of the second respondent, it was submitted that since it was common cause that the property was properly acquired in accordance with the Act, the consequence of acquisition in terms of s 8(3) of the Act is that ownership of the land vests in the second respondent. This being so, the appellants have no *locus standi* to challenge the allocation of property.

G Mr *Colegrave* submitted that the appellants had a reversionary right in the property since there was a possibility that the Administrative Court, before whom an application for confirmation of the acquisition order must be brought if the acquisition is contested (which presumably it was in this case), might give a decision in favour of the appellants by refusing to confirm the H acquisition. In that event, he submitted, the land would revert to the owner.

Ziyambi JA

Ejectment of an occupier of land can be obtained by the registered owner of A the property (*rei vindicatio*) and by an action based on a possessory claim: see *Pretoria Stadsraad* v *Ebrahim* 1979 (4) SA 193 (T); *Steenkamp* v *Mienies en Andere* 1987 (4) SA 186 (NC); *South African National Parks* v *Ras* 2002 (2) SA 537 (C).

The appellants do not claim *locus standi* to sue for the ejectment of the first B respondent on any of the above grounds – they have agreed that the land was properly acquired and its ownership vests in the acquiring authority. It is common cause that as between the appellants and the first respondent, there is no contractual relationship by virtue of which the appellants can claim the eviction of the first respondent on the basis of a possessory claim. Their claim is based on what Mr *Colegrave* terms a reversionary interest in the land. A C reversionary right has been defined as:

> "… a condition which provides that, on the happening of a prescribed event, ownership of property shall revert to a previous owner or, if so expressed, to the heirs of the previous owner if since deceased, or their successors in title … Local authorities (as well as the state) often sell property subject to a condition that, if it is not used for certain stated D purposes, ownership shall revert to that local authority, or to the state, as the case may be. Here again, the implications are clear cut. Failure to use the property for the purposes stated by any of the successive owners brings about the reversion. Such a condition is usually imposed, however, in conjunction with another restraining alienation without the consent of the holder of the reversionary right." E

(See Jones *Conveyancing in South Africa* 3 ed at p 161.)

Such a condition usually occurs in donations of property, or in agreements for sale of land by local authorities or the State. In the latter case, failure to use the property for the purpose stated in the agreement brings about a reversion. In *Black's Law Dictionary* 3ed, a reversionary interest is described as: F

> "The interest which a person has in the reversion of land or other property. A right to the future enjoyment of property, at present in the possession or occupation of another."

Thus, the interest is the right to future enjoyment of the property presently occupied by another. The right must be certain and determined. It cannot be speculative or conjectural, for then it is not a right but a mere hope. The hope G of the appellants that, should the Administrative Court find in their favour, the land would revert to them, is merely speculative and does not in my view constitute a reversionary right or interest as this concept is understood.

Further, when in terms of s 8(3) of the Act, upon acquisition, ownership vested in the second respondent as the acquiring authority, no right in respect of the H

Ziyambi JA

property remained with the appellants. It follows that the appellants cannot dictate the manner in which the second respondent chooses to utilise, or exercise its rights of ownership in respect of, the property. I would therefore uphold the point raised *in limine,* that the appellants have no *locus standi* to bring this application.

The appeal ought to be dismissed on that ground alone. However, even if the appellants had been found to have *locus standi*, there is no merit in the appeal as will be seen from the reasons set out hereunder.

With regard to the first issue, namely, the validity of the offer of the property to the first respondent, the argument was twofold. Firstly, it was submitted that since the letter of offer was issued after the service of the first order which had lapsed, a second letter was required after the new s 8 notice was served on the first appellant. Secondly, the letter of offer constituted a lease to the first respondent, which lease was invalid for non-compliance with s 9 of the Agricultural Land Settlement Act.

The learned judge found that the property having been properly acquired in terms of the Act, a second letter of offer was not necessary since the first one was still valid; that there was no evidence that someone other than the first respondent has been allocated the property; and accordingly, that the first respondent was in occupation of the property in terms of a valid letter of occupation.

I agree with the conclusion of the learned judge. It seems to me the letter remains valid until it is withdrawn by the second respondent, and this has not happened.

With regard to the second contention, the learned judge found that the letter of offer did not constitute a lease. At p 83 of the record, he said:

> "What the second respondent did was to offer land to first respondent by way of a letter dated 28 June 2003. The letter clearly says so. It does not offer a lease over the property. In fact part of the letter reads:
>
> 'A lease agreement will only be entered into once the Minister is satisfied that all conditions have been met.'
>
> The applicants have also not shown that first respondent is a lessee. My interpretation of the conditions on which the offer of land was made to the respondent is that first respondent will be a lessee only after some conditions were met and upon entering into such an agreement of lease. As of now, the first respondent may not be regarded as a lease holder."

The learned judge was, in my view, correct in his conclusion. As will be seen from the following passages from Kerr *Law of Lease* 2 ed, payment of rent is an essential component of a lease.

2004 (1) ZLR p396

Ziyambi JA

> "A contract of lease is entered into when parties who have the requisite intention agree together that the one party, called the lesser, shall give the use and enjoyment of immovable property … to the other, called the lessee in return for the payment of rent" (p 1).
>
> "If a contract of lease is to be formed the parties' intention must be directed towards an agreement which the law characterises as a lease, namely one relating to the use and enjoyment of property in return for the payment of rent" (p 1).
>
> "Agreement on the rent to be paid is a requirement of all contracts of lease" (p 18).

Not only is this basic requirement of a lease lacking in the letter of offer, but the contents of the letter do not admit of the interpretation sought to be placed thereon by the appellants, namely, that the first respondent was constituted a lessee by the letter.

In support of his argument, Mr *Colegrave* referred us to the judgment of Chinhengo J in *Mgwaco Farm (Pvt) Ltd* v *Pasi & Ors* 2003 (2) ZLR 478. In that judgment, dealing with a similarly worded letter of offer the learned judge said at 491-2:

> "Although Clause 6 of the offer letter provides that –
>
> 'A lease agreement will only be entered into once the Minister is satisfied that all conditions have been met';
>
> the conditions attached to the letter require the first respondent to take up 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 established that the applicant has occupied and is developing the land offered. In clause (2) (c) it is provided that – F

' … 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.'

In my view, the first respondent is in effect constituted into a lessee by the offer letter." G

I respectfully disagree with the conclusion of the learned judge. The letter clearly indicates that it is only if the Minister was satisfied that the conditions stated therein had been met that he would enter into a lease agreement with the first respondent. The duration of the lease and the rent payable were not set out in the letter. Although the duration of the lease need not be specified for a lease to be constituted, the same cannot be said of the quantum of the rental H

Ziyambi JA

A and when it should be paid. In the absence of any provision setting out the rental, the letter cannot be said to constitute a lease.

Accordingly, no lease having been granted, the provisions of s 9 of the Agricultural Land Settlement Act did not apply and cannot avail the appellants as a basis on which to impugn the validity of the letter of offer.

B With regard to the second issue raised on the notice of appeal, the appellant urged this court to find that, having regard to s 9(b) of the Act, the appellants' directors were entitled to remain in occupation of the property until 26 December 2003.

The learned judge in the *court a quo,* dealt with the matter thus:

"Section 4(b) of the Land Acquisition Amendment Act (No. 2) (Act No. 10 C of 2002) provides as follows:

'Where an order made in terms of subsection (1) of s 8 in relation to any agricultural land required for resettlement purposes is or becomes invalid by reason of the failure –

(a) … D

(b) to apply to the Administrative Court for an order confirming the acquisition within thirty days after coming into force of the order.

or for any other reason whatsoever, the service on the owner or occupier of the land of a subsequent order in substitution for the invalid order –

(i) before the expiry of ninety days from the date of service of the invalid order shall constitute notice in writing to the owner or E occupier to cease to occupy, hold or use that land or his living quarters in that land, or both such land and living quarters, as the case may be, before the expiry of the unexpired period of notice that would have applied if the invalid order were still in force; or

(ii) after the expiry of ninety days from the date of service of the invalid order shall constitute notice in writing to the owner or occupier to F cease to occupy, hold or use that land and his living quarters on that land seven days after the date of service of the subsequent order on the owner or occupier …'

In this case, the applicant was served with the subsequent s 8 order on 27 September 2003. The initial invalid s 8 order had been served on the applicants on 21 October 2002. It would be clear therefore that when the G subsequent order was served on the applicants on 27 September 2003, the ninety days had expired. This means that s 4(b)(ii) of Act 10 of 2002 applies. This means that the owner or occupier should have ceased to occupy, hold or use the land in question and his living quarters on the land seven days after 27 September 2003, that is by 4 October 2003.

H As a result, I do not find merit in the application."

Ziyambi JA

Once again, I find myself in agreement with the learned judge. Mr *Colegrave*A submitted that the subsequent order (dated 26 September 2003) was not in substitution for the invalid order. It is quite clear that he is wrong in this regard. The import and intendment of s 4(b) of the Land Acquisition Amendment (No. 2) Act (Act 10 of 2002) is that the service of the subsequent order will be in substitution for the invalid order. The service of the order on 27 B September 2003 therefore fell within the provision of s 4(b).

Accordingly, in terms of the mandatory requirement that appellants vacate the property within seven days after the date of service of the subsequent order, the appellants were obliged to vacate

the property on or before 4 October 2003.

The appeal is therefore dismissed with costs. C

Chidyausiku CJ & Malaba JA concurred.

Stumbles & Rowe, appellants' legal practitioners

Chikumbirike & Associates, first respondent's legal practitioners

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

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Source:
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MATAMBANADZO v GOVEN 2004 (1) ZLR 399 (S)

Citation	2004 (1) ZLR 399 (S)
Case No	Judgment No. S-23-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Cheda JA
Heard	22 March 2004
Judgment	10 May 2004
Counsel	*J B Colegrave*, for the applicant *I A Ahmed,* for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Landlord and tenant — *tenant — statutory tenant — ejectment — grounds* C *for — premises required for personal residential use by owner of property — eviction not permissible unless Rent Board has first determined that eviction fair and reasonable in circumstances*

Practice and procedure — *parties — locus standi — applicant for rescission — what applicant must show to establish locus standi*

D**Practice and procedure** — *rescission — application for — who may apply for rescission of judgment or order — any party affected by order erroneously granted in party's absence — when party can be said to be affected*

Headnote

E The respondent bought a flat of which the appellant was tenant. Her lease was due to expire a few months later but when it did she refused to vacate, although the respondent wanted the flat for his personal use. The respondent wrote to the Chairman of the Rent Board, seeking a certificate in terms of s 30(4) of the Rent Regulations 1982, to the effect that the requirement that the

lessee vacate the dwelling was fair and reasonable, F and the date specified in the certificate for the vacation of the dwelling had passed. After some considerable time the respondent was informed by the responsible Ministry that the Chairman had retired and that he would be informed when a replacement had been appointed. The respondent then obtained an order from the High Court, directing the Chairman to consider the matt er within seven days, failing which the G court would grant relief. The court subsequently issued an ejectment order. An application by the appellant for rescission of the first order was dismissed. The appellant's *locus standi* to apply for rescission was challenged.

Held, that the certificate was a prerequisite to the granting of the eviction order. Without it, the High Court did not have the power to grant an H eviction order.

Held, further, that a party affected by a judgment or order that was erroneously A sought or granted in his absence may apply for the rescission of the judgment or order. To show *locus standi*, the applicant must show that he has an interest in the subject-matter of the order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the order was granted. The appellant had such an interest B because the effect of the order was the removal of the protection granted to her as a statutory tenant by s 30(4) of the Regulations. She would have been entitled to intervene in the original application for that reason.

Cases cited

Fletcher v Three Edmunds (Pvt) Ltd 1998 (1) ZLR 257 (S)

Theron NO v United Democratic Front & Ors 1984 (2) SA 532 (C)C

United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 449(1)(a) D

Rent Regulations 1982 (SI 626 of 1982), s 30(2) and (4)

Uniform Rules of Court in South Africa, r 42(1)(a)

Case information

J B Colegrave, for the applicant

I A Ahmed, for the respondent E

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the appellant and all persons claiming the right of occupation through her were ordered to vacate Flat No. 6, Belgrave House, Aberdeen Road, Avondale, Harare ("the property").

The relevant facts are as follows. In February 1999, the respondent ("Goven") F purchased the property from the estate of the late John Harold West ("the deceased"). At the time of the purchase the appellant ("Matambanadzo") was in occupation of the property as a lessee in terms of an oral lease agreement concluded with the deceased prior to his death. The lease agreement was to expire on 30 June 1999.

Subsequently, on 26 March 1999, Goven's legal practitioner gave G Matambanadzo written notice to vacate the property by the end of June 1999, but Matambanadzo refused to comply. As a result, Goven's legal practitioner instituted a civil action in the High Court against Matambanadzo claiming, *inter alia*, her eviction from the property.

However, after Matambanadzo's legal practitioner had filed a special plea, H

Sandura JA

A alleging that the High Court did not have the jurisdiction to grant the eviction order sought because no certificate had been issued by the Rent Board, as required by s 30(4) of the Rent Regulations

1982 (SI 626 of 1982) ("the Regulations"), the civil action was withdrawn on 5 May 2000.

Thereafter, Goven's legal practitioner submitted a written application for the B requisite certificate to the Rent Board on 19 September 2000. Having received no reply, the legal practitioner submitted another application on 6 December 2000. Again, he received no reply. In both applications, it was made clear that the property was required for Goven's personal use.

However, about a year later, on 7 November 2001, Goven's legal practitioner received a letter from the Ministry of Local Government, Public Works and C National Housing, the Ministry responsible for the appointment and functioning of the Rent Board, informing him that the Chairman of the Rent Board had retired and that as soon as a new Chairman was appointed he (the legal practitioner) would be informed.

Nevertheless, Goven's legal practitioner subsequently filed a court application in the High Court against the Chairman of the Rent Board and the Minister of D Local Government, Public Works and National Housing, seeking, *inter alia*, an order directing the Chairman of the Rent Board to determine Goven's application for a certificate of ejectment filed with the Rent Board in September 2000. However, there is nothing in the papers before this court indicating whether or not when the court application was filed a new Chairman E of the Rent Board had been appointed.

The court application was not opposed, and on 19 December 2001, Goven was granted the following order:

> "1. The first respondent is hereby directed to determine the applicant's application for a certificate of ejectment filed on 19 September 2000, within seven (7) days of service of this order.
>
> 2. F Should the first respondent fail to comply with paragraph 1 of this Order, the applicant is granted leave to approach this Honourable Court for relief without further notice or recourse to the Rent Board.
>
> 3. …"

When the Rent Board did not comply with the order set out above, Goven's G legal practitioner, acting on behalf of his client, filed a court application in the High Court against Matambanadzo seeking her eviction from the property. Matambanadzo opposed that application and filed a counter-application in which she sought the rescission of the order granted on 19 December 2001, directing the Rent Board to determine Goven's application for a certificate of ejectment within seven days, and providing that if the Rent Board failed to do H that Goven would be entitled to approach the High Court for relief.

Sandura JA

On 2 October 2002, the learned judge in the court *a quo* granted Goven's A application for Matambanadzo's eviction, but dismissed Matambanadzo's counter-application. Aggrieved by that result, Matambanadzo appealed to this court.

Two main issues arise for determination in this appeal. The first is whether Goven's application for Matambanadzo's eviction was properly granted, and B the second is whether Matambanadzo had the requisite *locus standi in judicio* to seek the rescission of the order granted on 19 December 2001. I shall deal with the two issues in turn.

Before determining the first issue, I would like to set out the relevant provisions of subs (2) and (4) of s 30 of the Regulations. They read as follows:

> "(2) Subject to the provisions of this section, *no order for thecrecovery of possession of a dwelling or for the ejectment of a lessee therefrom*, which is based on the fact of the lease having expired, either by effluxion of time or in consequence of notice duly given by the lessor, *shall be made by any court* so long as the lessee continues to pay the rent due within seven days of due date and performs the other conditions of the D lease, unless, in addition –
>
> (a) – (b) …; or
>
> (c) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is required —
>
> (i) by the owner; or E
>
> (ii) where the lessee is a sublessee, by the person letting the dwelling to the sublessee;
>
> for his personal residential occupation or the personal occupation of his parent, child or employee; or

(d) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is F required for the purpose of a reconstruction or rebuilding scheme, and the nature of such reconstruction or rebuilding would preclude human habitation; or

(e) …

(3)… G

(4) *No order for the ejectment of a lessee from a dwelling shall be made on the grounds referred to in paragraph (c) or (d) of subsection (2) unless the appropriate board has*, on the application of the lessor, issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable, and the date specified in the certificate for the vacation of the dwelling has passed" (my emphasis). H

Sandura JA

A I now wish to deal with the first issue, which is whether the eviction order was properly granted. I have no doubt in my mind that in granting the eviction order the learned judge erred. I say so because in order to succeed in his application for Matambanadzo's eviction, Goven ought to have produced a certificate from the Rent Board to the effect that the requirement that Matambanadzo vacate the property was fair and reasonable. As Goven did not produce such B a certificate, that should have been the end of the matter.

It is clear from the provisions of s 30(4) of the Regulations set out above that the certificate is a prerequisite to the granting of the eviction order.

Thus, in *Fletcher* v *Three Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (S), at 261G-262A, Gubbay CJ commented on subs (4) of s 30 of the Regulations as C follows:

> "… subs (4) prohibits in express wording an order for ejectment on the grounds referred to in para (c) or (d) unless the appropriate board issues a certificate."

In the circumstances, the order sought by Goven and subsequently granted on 19 December 2001, to the effect that if the Rent Board failed to determine D Goven's application within seven days Goven could approach the High Court for relief without further recourse to the Rent Board, was misconceived. That is so because when considering an application for the eviction of a statutory tenant, which Matambanadzo is, on the grounds set out in s 30(2)(c) or (d) of the Regulations, the High Court does not have the power to grant an eviction E order unless the Rent Board has issued the requisite certificate.

I now turn to the second issue, which is whether Matambanadzo had the *locus standi in judicio* to seek the rescission of the order granted on 19 December 2001. I think she had.

Her counter-application for the rescission of the said order was based on the F provisions of r 449(1)(a) of the High Court Rules 1971 ("the Rules") which reads as follows:

> "The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgment or order –
>
> (a) that was erroneously sought or erroneously granted in he absence of G any party affected thereby;".

It is interesting to note that this rule is identical to r 42(1)(a) of the Uniform Rules of Court in South Africa which reads as follows:

> "The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) H an order or judgment erroneously sought or erroneously granted in

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Sandura JA

> the absence of any party affected thereby …" A

Commenting on the purpose of r 42(1) in *Theron NO* v *United Democratic Front & Ors* 1984 (2) SA 532 (C) at 536D-F, Vivier J said the following:

> "Rule 42(1) entitles any party affected by a judgment or order erroneously sought or granted in his absence, to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to restore the B parties to the position they were in before the order was granted. The court's concern at this stage is with the existence of an order or judgment granted in error in the applicant's absence and, in my

> view, it certainly cannot be said that the question whether such an order should be allowed to stand is of academic interest only."

I entirely agree with these comments. In my view, they apply to r 449(1)(a) of C the High Court Rules with equal force.

The issue which I now wish to consider is what the applicant for an order rescinding a judgment or court order ought to show in order to establish that he has the requisite *locus standi in judicio*. That question was answered by Corbett J, as he then was, in *s* D *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415A-C, as follows:

> "In my opinion, an applicant for an order setting aside or varying a judgment or order of court must show, in order to establish *locus standi*, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted." E

I entirely agree with the learned judge, and that is the test which I shall apply in considering whether Matambanadzo had the requisite *locus standi* to seek the rescission of the order granted on 19 December 2001.

Applying that test, I am satisfied that she had the requisite *locus standi*. In my view, she had a direct and substantial interest in the subject-matter of the order which would have entitled her to intervene in the original application in which F the order was granted.

I say so because the order sought by Goven and later granted on 19 December 2001 provided that if the Rent Board did not determine his application within seven days, Goven could approach the High Court for relief (i.e. Matambanadzo's eviction) without further recourse to the Rent Board. The G effect of that order, as averred by Matambanadzo in her affidavit, was the removal of the protection granted to her as a statutory tenant by s 30(4) of the Regulations. She is undoubtedly correct, and she would have been entitled to intervene in the original application for that reason.

In my view, it follows that the order in question was erroneously sought and granted in Matambanadzo's absence, and that the learned judge in the court H

Sandura JA

A*a quo* ought to have granted the counter-application.

In the circumstances, the following order is made:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and the following is substituted:
   "(a) The application is dismissed with costs.
   (b) B The counter-application is granted with costs."

Chidyausiku CJ & Cheda JA concurred.

Hussein Ranchod & Co, appellant's legal practitioners

C*Ahmed & Ziyambi*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/FOKOSENI v LOBELS BAKERY 2004 (1) ZLR 406 (S)

FOKOSENI v LOBELS BAKERY 2004 (1) ZLR 406 (S)

Citation 2004 (1) ZLR 406 (S)

Case No	Judgment No. S-20-04
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA and Gwaunza JA Malaba J
Heard	24 February 2004
Judgment	11 May 2004
Counsel	Appellant in person Miss *E Mushore,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *contract— termination — wrongful dismissal — damages* C *in lieu of reinstatement — calculation of — failure to mitigate loss by seeking alternative employment — extent and limit of obligation*

Headnote

The appellant was an elderly man, wrongfully dismissed from his job as a "tea-maker". He was awarded damages, but one year's salary was deducted from his award because he "failed to mitigate his damages". D

Held, that the position is now settled that a person who has been wrongfully dismissed from his employment must mitigate his loss without delay, by seeking alternative employment. Once it is accepted that the person attempted to find employment, it should therefore be accepted that he did not "sit around and do nothing". There is a difference between looking for employment and securing it. Cognisance should be taken of the fact E that prospects of actually securing employment differ from one person to the other, being influenced by such considerations as the prevailing economic climate, the skills (if any) of the person concerned, experience, age and so on. The appellant had tried and failed and should not have been penalised. F

Cases cited

Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S)

Gauntlet Security Svcs (Pvt) Ltd v Leonard 1997 (1) ZLR 583 (S)

Case information

Appellant in person G

Miss *E Mushore,* for the respondent

Judgment

GWAUNZA JA: The appellant was formerly employed by the respondent as a "tea maker". He was dismissed from his employment some eight years ago, for misconduct. H

Gwaunza JA

A The Labour Relations Tribunal (now the Labour Court) found that his dismissal was unlawful, and ordered that he be reinstated, failing which the respondent was to pay him damages *in lieu* of reinstatement. The parties thereafter failed to agree on the quantum of damages to be paid, and the

matter went back to the Labour Court, for quantification of such damages. The court determined that the appellant, despite his somewhat advanced age, had not put B enough effort into mitigating his loss, for instance, through engagement in informal income generating activities. The learned President of the Labour Court, who heard the application, then ruled as follows:

> "He (the appellant) thus failed to mitigate his damages and the law says he ought to be penalised. I will therefore deduct one year's salary from what C he would have been entitled to. I therefore, order that he be paid damages equivalent to his salary and benefits from the day of suspension 8 July 1996 to 26 February 2001 which is one year prior to the date of the determination."

The appellant was aggrieved by this ruling and has now appealed to this court.

In his heads of argument, the appellant submits that he did attempt to mitigate D his loss by looking for another job. He was, however, unsuccessful, partly due to the fact that he possessed no special skills and also because of the current harsh economic environment.

He added in evidence that he did at one time secure a casual job cultivating and working in other people's urban fields. He had, however, been forced to stop E due to the long distances to be travelled between his house and the fields in question. He averred he had submitted this evidence in the court *a quo*.

Miss *Mushore*, for the respondent, submitted she had no meaningful submissions to make in the light of the appellant's evidence regarding the efforts he had taken to mitigate his loss. She conceded that if such evidence had indeed been placed before the court *a quo*, that court should properly have F awarded the appellant damages in the form of salary and benefits for the entire six year period that he had been out of employment. She added that this court could "invoke its discretion" in the light of this evidence, and award him the six years salary and benefits. I am persuaded by these submissions.

The position is now settled that a person who has been wrongfully dismissed G from his employment must mitigate his loss without delay. McNally JA expanded on this principle in *Ambali* v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S) as follows at 418G-419A:

> "I think it is important that this court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has H been unjustly dismissed, is not entitled to sit around and do nothing. He

---

> must look for alternative employment. If he does not, his damages will be A reduced."

See also *Gauntlet Security Services (Pvt) Ltd* v *Leonard* 1997 (1) ZLR 583 (S).

When this principle is applied to the circumstances of this case, it is evident, as the court *a quo* itself noted, that the appellant tried to get employment but B was unsuccessful due to the current economic woes. Once it is accepted that the appellant attempted to find employment, it should therefore be accepted that he did not "sit around and do nothing". There is, in my view, a difference between looking for employment, and securing it. The principle enunciated in the *Ambali* case *supra* refers to "looking" for employment. In adopting this approach, which I am satisfied is the correct one, cognisance should be taken C of the fact that prospects of securing employment differ from one person to the other, being influenced by such considerations as the prevailing economic climate, the skills (if any) of the person concerned, experience, age and so on. The appellant was, at the time of the appeal, sixty-five years old. He was also unskilled. He attempted to engage in the "informal" activity of working other D people's fields. I doubt that, given his age and lack of any professional skills, he could have done more than this to mitigate his loss.

In my view, the appellant does not fit into the category where, on the basis of the principle enunciated in the *Ambali* and *Gauntlet* cases *supra*, he should be penalised in the manner suggested in those cases.

I find against this background that Miss *Mushore's* concession is properly E made. The appeal must therefore succeed. It is in the premises ordered as follows:

1. The appeal be and is allowed with costs.
2. The order of the court *a quo* is set aside and is substituted with the following: F

   "(a) The respondent shall pay to the appellant damages equivalent to his salary and benefits from the date of his suspension, 8 July 1996 to 26 February 2002.

(b) The respondent shall pay the appellant's costs." G

Sandura JA & Ziyambi JA concurred.

Atherstone & Cook, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/S v KURUNERI 2004 (1) ZLR 409 (H)

S v KURUNERI 2004 (1) ZLR 409 (H)

Citation	2004 (1) ZLR 409 (H)
Case No	Judgment No. HH-111-04
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	11 May 2004
Judgment	11 May 2004
Counsel	*DP Drury,* for the applicant *J Jagada,* for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Criminal procedure — *bail — principles for considering admission to bail — whether onus on the accused — presumption of innocence applies*

C**Criminal procedure** — *bail — onus — whether onus falls on accused to prove bail should be awarded or on the state to prove it should not*

Headnote

The accused was a government minister charged with holding a foreign passport and illegally externalizing large amounts of foreign currency. D He applied for bail after initially being remanded in custody. The principles on which a bail application is assessed are clear, but the debate centred around whether the onus falls on the accused to show on a balance of probabilities that is in the interest of justice that he be freed.

Held, that s 13(4) of the Constitution requires that any person who is arrested or detained should be tried within a reasonable time, failing which he or she should be released from custody. In other words, the discretionary power of a judge or magistrate to deny bail may not be exercised in violation of the accused's constitutional right to be brought to trial within a reasonable time or be freed from custody. The general principles about whether bail should be granted or not are well established. What is in dispute is whether there is an onus on the accused person to show on a

balance of probabilities why it is in the interest of justice that he should be freed on bail. Decisions of the superior courts of Zimbabwe have followed decisions of the South African courts, but the South African provisions are not worded the same as the Zimbabwean ones. The notion of the accused having an onus to discharge to enable him or her to be admitted to bail is not part of our law as legislated. The G constitutional presumption of innocence in bail application operates fully and at the general level. It is because of the presumption of innocence that the courts are expected, and indeed required, to lean in favour of the liberty of the accused. If the state's fears of abscondment or interference with witnesses and the applicant's assurances to the contrary are equally balanced, then the presumption of innocence would H require the court to lean in favour of the liberty of the accused person and

grant bail. In other words, if the State opposes bail, it must prove that A justice will be served by denying bail. In *casu,* the State's case was strong and the applicant's weak in three of the five counts, hence bail was denied.

Cases cited

Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S)B

S v Hudson 1980 (4) SA 145 (D)

S v Makamba (3) 2004 (1) ZLR 367 (S)

Legislation considered

Constitution of Zimbabwe 1980, s 13(4) C

Criminal Procedure and Evidence Act [*Chapter9:07*], s 116(7)

Case information

DP Drury, for the applicant

J Jagada, for the respondent

Judgment

HLATSHWAYO J: The applicant, Dr Christopher Tichaona Kuruneri, is the D Minister of Finance, a sitting Member of Parliament for Mazowe West Constituency and is also a businessman and a commercial farmer. He ordinarily resides at Ascot Vale Farm, Mazowe, an unencumbered property registered in his name held under Deed of Transfer 0006802/97 measuring 984.6446 hectares. He is also the owner of an urban residence known as 56 Mount E Pleasant Drive, Mount Pleasant, Harare, which address is reflected in the Form 242 in which the charges preferred against him are detailed. The applicant appeared on initial remand on 26 April 2004, has been remanded in custody to 11 May 2004 and is currently detained at Harare Central remand prison pending the outcome of this application for bail and further pending an application for his referral to a suitable place for purposes of medical F examination and a second medical report as requested by the State.

THE CHARGES

The applicant faces five counts. The first count pertains to the contravention of s 21(3) of the Citizenship of Zimbabwe Act [*Chapter 4:01*]. It is common cause that the applicant, being a citizen of Zimbabwe and a holder of a Zimbabwean diplomatic passport, is also a holder of a Canadian passport. It G is alleged that during the period extending from 19 September 2003 to January 2004 and on various specified dates, the applicant, still being a holder of a Zimbabwean passport and without the prior permission of the Minister of Home Affairs, used a Canadian passport to travel back and forth from Zimbabwe to South Africa. If convicted under this charge, the applicant is H liable to a fine or to imprisonment for a period of up to two years.

Hlatshwayo J

A The other four charges relate to the violation of the provisions of the Exchange Control Act[*Chapter 22:05*]. The State alleges that during the period extending from March 2002 to date, the

applicant acquired foreign currency amounting to US$582 611.99, British pounds 34 371 and Euro 30 000 from unauthorized dealers in Zimbabwe. The applicant thereafter exported the funds to South Africa where he gave it to Christopher Heyman, the Director of Venture B Projects and Associates, a company he contracted to manage his businesses in South Africa, including the reconstruction of one of his properties. Part of the money, which was illegally exported to South Africa, was used to purchase the following properties: a Mercedes Benz motor vehicle valued at R547 734 which is still in South Africa, three residential properties, one, 38 Sunset Avenue, Llandudno, Cape Town, valued at R2.7 million and the other two, C comprising a house and a flat, valued at R2.5 million each. It is further alleged that on 6 March 2002, the applicant, being a Zimbabwean resident unlawfully caused a Zimbabwean bank, the Jewel Bank, to transfer R5.2 million to CB Niland and Partners, who are the applicant's lawyers in South Africa, as payment for the purchase by the applicant of a property, number 17 Apostle Road, Llandudno, Cape Town. All the immovable properties were registered D in the name of a company known as Choice Decisions 113 (Pty) Ltd, in which he is the sole director.

BAIL PRINCIPLES

Section 116(7) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] sets out the principles which ought be followed in considering admissions to E bail:

> "(7) Subject to subsection (4) of section 13 of the Constitution, in any case in which the judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person to bail if he considers it likely that if such person were admitted to bail he would –
>
> (a) not stand his trial or appear to undergo the preparatory examination F or to receive sentence; or
>
> (b) interfere with the evidence against him; or
>
> (c) commit an offence;
>
> but nothing in this subsection shall be construed as limiting in any way the power of the judge or magistrate to refuse to admit an accused person G to bail for any other reason which to him seems good and sufficient."

Section 13(4) of the Constitution requires that any person who is arrested or detained should be tried within a reasonable time, failing which he or E she should be released from custody. In other words, the discretionary power of a judge or magistrate to deny bail may not be exercised in violation of the accused's constitutional right to be brought to trial within a reasonable time H or be freed from custody.

Hlatshwayo J

The above considerations have been aptly summarized by Ziyambi JA in A*S* v *Makamba (3)* S-30-048 * thus:

"The primary considerations in assessing evidence and submissions in a bail application are:

1) whether the applicant will stand trial in due course;
2) whether the applicant will interfere with the investigations of the case B against him or tamper with the prosecution witnesses;
3) whether the applicant will commit offences when on bail;
4) other considerations the court may deem good and sufficient."

The above principles in themselves are quite clear and relatively easy to apply. What is controversial, however, is the concept that the onus is on the accused C person to show F on a balance of probabilities why it is in the interest of justice that he should be freed on bail. It is argued that this approach, repeatedly articulated with approval in our Supreme Court decisions *S* v *Makamba (supra) Aitken & Anor* v *Attorney-General* 1992 (1) ZLR 249 (S) is a misstatement of the law as legislated and also contradicts the constitutionally guaranteed presumption of innocence of the accused person D .

On the question of misstatement of the law as legislated, a writer in the Legal Forum vol no. 6 number 4, December 1994, Peter Proptokin (presumably a pseudonym), "*The question of onus in bail applications*", persuasively observes that the notion of there being an onus that must be discharged by the accused appears to have arrived via the South African judiciary whose Criminal Procedure and Evidence Act is differently formulated from ours: E

> "Taken together, the sections (106(1) and 106(3) of the Zimbabwe Criminal Code) provide not that a judicial officer has the power to grant bail, as in the South African legislation, but that they have a power

to *refuse* bail in certain circumstances only. The negative formulation is important, and the more so because the judicial officer's power to refuse to admit an F individual to bail is fettered. Unlike the South African legislation, the Zimbabwean judicial officer may refuse bail only where he or she considers that there is a likelihood of abscondment, tampering with witnesses, the commission of an offence or any other reason which seems to him or her to be "good and sufficient"."(emphasis in original)

Section 18(3)(a) of our Constitution states that every person who is charged G with a criminal offence "shall be presumed to be innocent until he is proved or has pleaded guilty". After referring to this constitutional presumption of innocence, Gubbay CJ, then tried to reconcile it with the onus being on the accused notion and remarked: H

2004 (1) ZLR p413

Hlatshwayo J

A "But though the presumption of innocence operates in favour of an accused even where the case against him appears strong, too much emphasis should not be placed on it."(*Aitken, supra* at p 253)

In my respectful view Gubbay CJ'S gallant attempt fails completely to reconcile the notion that the accused has an onus to discharge, on the one hand, and that he or she is presumed innocent, on the other. The writer in the *Legal*B*Forum* quoted above highlights this incongruity:

"The courts have recognized this difficulty. Gubbay CJ went on to comment that "too much emphasis must not be placed upon the presumption of innocence" (*Aitken's* case, *supra*). Reynolds J indicates that the presumption of innocence must not "be over emphasized" (*Attorney-General* v *Phiri* HH-487/87 pp.5-6), and Blackie J that bail may be C refused notwithstanding this presumption. If there is a presumption of innocence, it is difficult to see how "emphasis" enters into the equation. Guilt or innocence is not a question of degree. One is either innocent or not. In law one cannot be a little bit innocent or slightly innocent. Either it does or it does not apply."

D In my humble view, therefore, the notion of the accused having an onus to discharge to enable him or her to be admitted to bail is not part of our law as legislated. Having cleared this legal debris, then the place of the constitutional presumption of innocence in a bail application becomes clearer. The presumption operates fully and at the general level. It is because of the presumption of innocence that the courts are expected, and indeed required, E to lean in favour of the liberty of the accused. In its request for remand (Form 242) the state puts across its reasons for opposing the granting of bail. In his or her application for bail, the applicant addresses the concerns of the state and makes any other averments which tend to favour his admission to bail. The state then responds. Finally, the judge or magistrate assesses all this information with a view to "strike a balance between the interests of the prosecutor in F obtaining justice for the state, as one party in the accusatorial process, interests of the accused in obtaining justice for himself"(*Legal Forum, op.cit.,* p26). If the finding is that, to use the words of Gubbay CJ in *Aitken's* case, "the case against the applicant is neither obviously strong nor obviously weak", that the state's fears of abscondment or interference with witnesses and the applicant's assurances to the contrary are equally balanced, then the presumption G of innocence would require the court to lean in favour of the liberty of the accused person and grant bail.

WHETHER THE APPLICANT WILL STAND TRIAL IN DUE COURSE

When dealing with the factor of whether the accused will appear and stand trial in due course, it was held in *Aitken's* case that the court should consider the H following:

2004 (1) ZLR p414

Hlatshwayo J

1. the nature of the charges and the severity of punishment likely to be A imposed for them upon conviction;
2. the apparent strength or weakness of the State case;
3. the accused's ability to reach another country and the absence of extradition facilities from that country;
4. the accused's previous behaviour when previously released on bail; and B
5. the credibility of the accused's own assurance of his intention and motivation to remain and stand trial.

NATURE OF THE CHARGES AND THE STRENGTH OF THE STATE CASE

The first charge of violation of the provisions of the Zimbabwe Citizenship C Act, as pointed out above appears to be a well-founded charge, and, at any rate, the major averments forming the basis of the charge are common cause. Mr *Drury* submitted on behalf of the applicant, strong as the State case was on the charge, the likely punishment for the offence if proved was just a fine, which is unlikely to induce the applicant to abscond. It is inadvisable for the court to speculate at this stage on the likely sentence to be imposed for an D offence still to be proved. Suffice it though to point out that there is a provision for the imposition of a two year imprisonment term as an alternate or in addition to a fine. The applicant has offered to surrender all his travel documents and to deposit a substantial amount of bail and to abide by any other bail conditions deemed necessary and appropriate. The State has countered these assurances by pointing out that the applicant has family E connections, friends and abundant means of survival outside the country to entice him to abscond. On this one charge and the above considerations, I am of the view that the fears of the State regarding the likelihood of abscondment are adequately balanced by the applicant's assurances to the contrary, and the presumption of innocence should entitle the applicant to his liberty.

On the charges pertaining to violations of the Exchange Control Act, it is my F view that these charges are very serious, the amounts involved are enormous and the punishment upon conviction, which might entail forfeiture, is likely to be so severe as to induce the applicant to abscond. As was held in *Makamba's* case *supra* upon conviction on such charges the applicant "would be required to repatriate those amounts within three months, failing which the mandatory provisions of s 5(7)(a) & (b) of the Act would take effect resulting G in the imposition, on the (applicant), of an additional sentence of imprisonment over and above any fine required by s 5(4) of the Act." What is really at issue here is the assessment of the relative strengths of the State case and the accused's explanation.

The State's allegations as already detailed above are that the money used to H purchase the properties was obtained by the applicant from illegal foreign

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Hlatshwayo J

A currency dealers and was subsequently exported to South Africa by him and that these transactions were made in 2003 and 2004. There is documentary evidence that the applicant did make the purchases in question, but the applicant's explanation is that the money used for the purpose was part of "free funds" he earned as a consultant while residing in Canada during the years 1976 to 1981. In his submissions, the applicant filed a letter from Filipe B Solano, S.L., a consultancy firm, signed by its president, Felipe Solano, and addressed to the applicant's South African projects manager, to show that he had access to free funds. The letter reads as follows:

> "This serves to confirm that Dr C Kuruneri has worked for us as a consultant and has received substantial sums of foreign exchange in return for his services. This consultancy work has taken place outside C Zimbabwen and South African territory (*sic*) and is not in contravention of any national or International laws. Dr C Kuruneri is entitled to use these funds as he wishes in any country he may choose."

Now, this letter does not state when the applicant worked for the alleged consultancy firm, when payment was made and is what form and amount. For in our law even if consultancy work carried out in a foreign country, the source D of such funds may still be deemed to be Zimbabwean on the basis that the consultancy activities in a foreign country constitute an extension of a Zimbabwean business. (See, for example s 12(1)(b) of the Income Tax Act, [*Chapter 23:06]*. But even more importantly, no explanation has been forthcoming, despite prodding from the court, as to why if the consultancy fees were earned (and presumably paid) as far back as 1981, more than 20 years ago, E they were only utilized (or paid) in 2003 and 2004. If the funds had been kept as an investment, then the applicant could have filed bank statements from which payment was effected. As Mr *Jagada*, for the respondent observed it is inconceivable that in this day and age, the alleged consultancy firm could have paid the applicant in hard cash an amount in excess of US$500 000 when it F must have at its disposal all the modern methods of transferring funds which include cheques, wire, telegraphic and electronic transfers. All in all, therefore, the State's case is more probable than the applicant's explanation.

There is a charge relating to "unlawfully causing Jewel Bank Zimbabwe to transfer R2.5 million" to South Africa. The applicant's explanation and the State's response in this regard are of equal

weight, and the benefit of the doubt G must inure to the applicant. However, this is but one count out of four.

CREDIBILITY OF APPLICANT'S ASSURANCES TO STAND TRIAL

The applicant's assurance to stand trial must be assessed objectively. The court will not base its decision on his or her mere say-so, "since an accused who harbours an intention to abscond is hardly likely to admit it" Thirion J in H*S* v *Hudson* 1980 (4) SA 145 (D). The objective indications of the applicant's

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Hlatshwayo J

intentions to stand trial include the accused's ability to reach another country A and the absence of extradition facilities from that country, the accused's previous behaviour when previously released on bail or when he or she became aware of an impending arrest, and the bail conditions that he or she proposes. In this case the applicant has shown a willingness to abide by fairly stringent bail conditions, including the surrender of unencumbered title deeds to both his farm and urban residential properties. He has also indicated a willingness B to cooperate with the local authorities to have his foreign accounts frozen should they wish to do so. All this must count in his favour. However, it must be borne in mind that the process of having any account frozen involves not only the local authorities and the applicant, but the foreign authorities, their financial institutions and their requirements. What is clear from the submissions is that the applicant commands substantial resources and properties outside C the country which he can easily mobilize to reach another country and to live very well indeed for even the rest of his life. On this basis alone, and in respect of relatively less resources, it was held in *Makamba's* case that the risk of abscondment was real. In this case, there is even a further capacity and incentive to abscond. The applicant, by his own admission, has a family in Canada. He is a holder of a Canadian passport. Although the passport itself D may be surrendered, it is not known what residency or citizenship status he holds in Canada. To all intents and purposes, Mr *Jagada* submitted, the applicant may enjoy such a status as would entitle him to immediate replacement of any travel document and assistance to reach Canada. There is no extradition treaty between Zimbabwe and Canada. E

CONCLUSION

On the basis of what I have found above, it is not necessary for me to examine the issue of whether the applicant is likely to interfere with State witnesses or any other basis upon which I may deny bail. Out of the five counts, on the two counts I have found that the applicant is likely to stand trial either because the possible punishment may not be that severe or that the State's case is not much F stronger than the applicant's explanation and the benefit of the doubt must be given to the accused. On the other three charges I have found that the State's case is quite strong, the applicant's explanation very weak or even improbable, that the charges are very serious and the punishment upon conviction is likely to be so severe as to induce the applicant who has both substantial means, family, friends and connections abroad to abscond. Accordingly, I hereby G dismiss this application for bail.

Gollop and Blank, applicant's legal practitioners

Criminal Division, Attorney-General's Office, respondent's legal practitioners H

* See p 371 of this volume — *Editor*

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Source:

ST GEORGE'S COLLEGE PARENT TEACHERS ASSOCIATION v MINISTER OF EDUCATION & ORS 2004 (1) ZLR 417 (H)

Citation	2004 (1) ZLR 417 (H)
Case No	Judgment No. HH-112-04
Court	High Court, Harare
Judge	Kamocha J
Heard	11 May 2004
Judgment	11 May 2004
Counsel	*G M Crosland*, with him *I Chagonda*, for the applicants *Ruzive*, for the first and second respondent Third respondent in person
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

C **Education** — *non-governmental school — fees charged by— fees in excess of amount approved by Secretary of Education — courses open to Ministry — no power given to Minister or Secretary to close school*

Headnote

The Parent-Teachers' Association of a private school mandated the school's Board of Governors to charge whatever fees were necessary to ensure that D educational standards were maintained. The fees charged were above the maximum approved by the Secretary of Education in terms of s 21 of the Education Act [*Chapter 25:04*]. The Minister of Education caused police to prevent the school (and 45 other private schools) from opening and the school's 760 students from attending, notwithstanding the fundamental right to education protected by s 4 of the Act.

E *Held*, that if fees above the maximum were charged, it was for the Secretary to take action, which included reporting the matter to the police for prosecution. The Minister was not responsible for approving fees. Neither the Secretary nor the Minister had the legal power to close a school. Because the Minister had earlier conceded that the closure of F another school (the junior school to the private school in question) was unlawful, costs on the higher scale would be awarded.

Legislation considered

Education Act [*Chapter 25:04*], s 21

Case information

G *G M Crosland*, with him *I Chagonda*, for the applicants

** *Ruzive*, for the first and second respondent

Third respondent in person

Judgment

KAMOCHA J: After hearing arguments from counsel representing the parties, H I issued the following order.

2004 (1) ZLR p418

Kamocha J

"It is ordered that: A

(1) the third respondent be and is hereby directed to open St George's College;

(2) the purported closure of St George's College by the first respondent with the assistance of the second respondent be and is hereby declared null and void; B

(3) the first and second respondents pay the costs of this application jointly and severally on a legal practitioner and client scale; and

(4) this order shall remain effective notwithstanding the noting of an appeal on the part of the respondents."

I indicated that my detailed reasons leading to the issuing of the above order would follow later. These are they. C

On 4 May 2004, the Minister of Education, Sports and Culture ("the Minister) closed some 46 private schools in Zimbabwe, including St George's College. Members of the police force were placed at the entrances of the affected schools to prevent pupils from entering the schools to commence the second term of 2004. D

It had been widely reported in *The Herald* newspaper and also on the radio and television that the Minister had closed down the private schools for allegedly charging exorbitant school fees. The Minister had made it clear that such schools would remain closed until they had complied with a directive not to increase fees until they have been granted approval to do so and in the E meantime, they had to accept levels of fees stipulated by him.

Concerned by this turn of events the applicant ("the PTA") held a meeting on 4 May 2004 and authorised Mudiwa Ashley Mundawarara, who is also a parent, to represent it. Mundawarara averred that there were approximately 760 pupils at St George's College who were sitting at their homes and not receiving school education following the forced closure of the school, F notwithstanding their fundamental rights to such education as set out in Part II of the Education Act [*Chapter 25:04*] the Act. I shall pause here and quote the relevant provisions of the Act.

"PART II

FUNDAMENTAL RIGHTS AND OBJECTIVES OF EDUCATIONGIN ZIMBABWE

4 **Children's fundamental right to education in Zimbabwe**

(1) Notwithstanding anything to the contrary contained in any other enactment, but subject to this Act, every child in Zimbabwe shall have the right to school education." H

2004 (1) ZLR p419

Kamocha J

A Mundawarara further averred that the second term of the school year was a very important term particularly to those pupils who were preparing for public examinations. The school had been contracted by the parents to teach their children and the forced closure of the school by the Minister, with the assistance of the police, was prejudicial to such pupils.

It was also his assertion that the ongoing dispute pertaining to the school fees B charged by St George's College was a matter between the Minister and the Board of Governors of the school. He however, stated the PTA had, at its Annual General Meeting held on 3 March 2004, mandated the Board of Governors for fees to be set at the requisite levels to maintain educational standards. Mr Mundawarara attached a copy of St George's College Parents C Teachers Association Constitution, indicating that the PTA is a body corporate with perpetual succession, capable of suing and being sued in its corporate name.

Attached also was an order by this court issued by consent five days ago. Its terms are identical, but the order relates to Hartmann House Preparatory School, which is the junior school of St George's College, situate next to it D along Borrowdale Road. Apart from the headmaster, the first and second respondents also appear in the Hartmann House Parents Teachers Association matter.

In that case, the respondents had conceded that the purported closure of Hartmann House Preparatory School by the Minister be declared null and E void. The applicant *in casu* therefore

submitted that the Minister still had no lawful authority to close down St George's College and to require the police force under the control of the Commissioner of Police to assist him to do so and to ensure that the school remained closed pending the resolution of the dispute over the school fees. The Act does not give the Minister the right to close the school.

F This time round, the respondents opposed the application on the basis that the PTA should not be recognised in law as it was performing the functions of the School Development Committee, a body recognised in law since 1992. They contended that the closure of the school was a direct result of the school's failure to comply with s 21(1) of the Act. Hence the Minister was obliged to G close the school in order to compel it to comply with the Act, so their argument went. They concluded that the PTA was approaching this court with dirty hands because it was party to the school's failure to abide by the Act. It was their submission, therefore, that the PTA should not be heard by the court until H it complies with the Act.

2004 (1) ZLR p420

Kamocha J

The relevant provisions of the Act are found in Part V thereof, in s 21, which A reads:

> **"21 Fees payable at Non-Government Schools**
>
> (1) No responsible authority shall –
>
> (a) charge any fee or levy; or
>
> (b) increase any fee or levy by more than the prescribed amount or B percentage in any period of twelve months;
>
> in respect of any pupil attending a non-governmental school, unless the fee or levy or increase therein, as the case may be, has been approved by the Secretary."

The Act imposes criminal sanctions in s 21(6), as read with s 67, in the event C of any responsible authority failing to comply with the above provisions. Section 21(6) reads as follows:

> "(6) Any person who contravenes or fails to comply with any notice in terms of subsection (5) shall be guilty of an offence."

The penalty is stipulated in s 67 in the following terms:

> **"67 Penalties**D
>
> (1) Any person who is guilty of an offence in terms of this Act shall be liable to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.
>
> (2) A conviction for an offence in terms of this Act shall not, in the E case of a continuing offence, be a bar to further prosecution for that offence."

Part V of the Act enjoins the Secretary with powers of registration of non-government schools, the issuance of certificate of registration, cancellation of provisional registration or registration and approval of fees payable at non-government schools. These functions are not carried out by the Minister. F

Where a responsible authority contravenes the provisions of s 21(1) or 21(5) the Secretary should report the matter to the police so that such a responsible authority is prosecuted. In the event that the responsible authority continues to break the law, the Secretary ought to continue to have the responsible authority prosecuted as empowered by s 67(2) *supra.* He, however, may not G decide to close down the school as that would be *ultra vires* the powers given him by the Act. Put in another way, the Act does not give him the power to close down a non-governmental school. If he purports to do so, his actions would clearly be unlawful.

Similarly, the Act does not empower the Minister to close down a non-governmental school. He therefore would have no lawful authority to do so. H

2004 (1) ZLR p421

Kamocha J

A*In casu* the Minister's actions were unlawful since there was no legal basis for closing the school. This illegality was going to be perpetrated until the school complied with a directive not to increase fees until it has been granted approval.

In the light of the foregoing, I find the submission that the parents, whose children are being unlawfully denied their rights to school education, have B approached this court with dirty hands and should not be heard to be untenable. The ongoing dispute relating to the school fees charged by the school is a matter between the Minister and the Board of Governors of the school. The PTA is not responsible for increasing the fees or levies. The fact that it gave a mandate to the Board of Governors to set the fees at appropriate C levels to maintain education standard does not make its hands dirty. The decision that of a particular level still remains that of the Board of Governors.

At the hearing, it was submitted on behalf of the applicants that the first and second respondents should be ordered to pay punitive costs. I am inclined to accede to that request. Here is why. The respondents knew that they had no legal basis for closing down the school. They conceded that point some five D days ago in the Hartmann House case but decided *in casu* to oppose the matter on spurious grounds. This is a proper case where the court should express its displeasure by an award of costs on an attorney and client scale against the first and second respondents.

A further request was made by the applicants that the order to make effective E notwithstanding any noting of an appeal by the first and second respondents. I accede to that request too as it seems to me that any appeal that may be noted in this case would just be frivolous and vexatious and would clearly further prejudice the pupils of the school.

In the result of the foregoing, I granted the order sought in terms of the F amended draft.

Atherstone & Cook, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first and second respondent's G legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/KAUFMAN BROTHERS' TRUSTEES v GRUER 2004 (1) ZLR 422 (H)

KAUFMAN BROTHERS' TRUSTEES v GRUER 2004 (1) ZLR 422 (H)

Citation	2004 (1) ZLR 422 (H)
Case No	Judgment No. HH-116-04
Court	High Court, Harare
Judge	Malaba J
Heard	12 May 2004
Judgment	12 May 2004
Counsel	*A N B Masterson*, for the applicant
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *set-down — application — respondent barred for failing to file heads of argument — whether application to be set-down* C *on opposed roll*

Headnote

Where a respondent in a court application is barred under r 238(2b) of the High Court Rules, 1971, for failing to file heads of argument, the correct way of proceeding is for the matter to be set down on the opposed roll.

Quaere, whether, if the respondent is given notice of set-down, it may be set- D down on the unopposed roll.

Cases cited

Founders Building Society v Dalib (Pvt) Ltd & Ors 1998 (1) ZLR 526 (H)

HPP Studios (Pvt) Ltd v Associated Newspapers of Zimbabwe (Pvt) Ltd 2000 (1) ZLR 318 (H)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 238

Case information

A N B Masterson, for the applicant F

Judgment

MAKARAU J: The issue that falls for determination in this matter is whether an opposed application in which one party is barred for failing to file heads of argument in terms of r 238(2b) may be set down on the unopposed roll in terms of r 223(1). G

The applicant herein filed an application for summary judgment on or about 15 January 2004. The application was timeously opposed. The applicant filed an answering affidavit, leave for which was sought in the application before me. I shall deal with this aspect of the application in due course.

On 23 March 2004, the applicant filed heads of argument in the matter in terms H of r 238(1). This rule provides that:

Makarau J

A "If at the hearing of an application, exception or application to strike out the applicant or excipient, as the case may be, is to be represented by a legal practitioner –

(a) before the matter is set down for hearing, the legal practitioner shall file with the registrar heads of argument clearly outlining the submissions he intends to rely on and setting out the authorities, if B any, which he intends to cite;

(b) …"

It is not clear on the papers before me when the heads were served upon the respondent in terms of r 238(1) (b). Mr *Masterson* has submitted that the time allowed the respondent to file heads has lapsed. I have no reason to disbelieve him although, procedurally, I should have requested proof of service to be C furnished. Despite the absence of proof of service of the heads upon the respondent, I shall proceed to express my views on the issue raised by Mr *Masterson*, as I consider it an important aspect of the practice of this court.

On 5 May 2004, the applicant requested that the matter be set down on the unopposed roll in terms of r 223. No notice of the set-down was given to the D defaulting respondent. At that time, the application had not been set down on the opposed roll.

At the hearing of the application, Mr *Masterson* made submission for the unusual step that he had taken of setting down the matter on the unopposed roll. His argument was quite forceful and compelling and should induce the E Rules Committee to reconsider the provisions of the High Court rules as they relate to the set-down of opposed applications.

Mr *Masterson* submitted that the respondent is barred for want of filing heads of argument. He went on to suggest that since the respondent is automatically barred in terms of the rules, the matter is

now unopposed and there is no rule barring the applicant from having it enrolled on the unopposed roll. I shall deal F with each of his submissions.

A Respondent Who Does Not File Heads Of Argument In Terms Of R 238(2) Is Automatically Barred

This is trite, as it is specifically provided for under r 238(2b) for all to see in the following terms:

> " G Where heads of argument that are required to be filed in terms of subrule (2) are not filed within the period specified in subrule (2a), the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll."

H The effect of the bar is the same as where a party has been barred in terms of

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the rules for failing to comply with any dictate of the rules. As r 83 provides, A where a party has been barred, the registrar shall not accept for filing any pleading or document from the barred party, and the party may not appear in any subsequent proceedings except for the purpose of applying for the removal of the bar.

Viewed from this standpoint, Mr *Masterson* is correct when he submits that B there is nothing unprocedural in setting the matter down on the unopposed roll as the respondent has no right of audience to move for the dismissal of the application until the bar against him is uplifted.

Where a party has been barred for want of heads, does the application become unopposed?

Mr *Masterson* submitted that it does. I agree with him, to the extent that the C respondent has no right of audience to move against the granting of the application. It, however, appears to me that the application is different from an application where no opposing affidavit has been filed as no competing facts or conclusions at law are placed before the court or judge in such a case. In the case where the respondent is simply barred, his opposing affidavit is D before the court and it does constitute evidence before the court. It is on this basis that the court may resolve the matter on merit as provided for in r 238(2b). The matter cannot be resolved on the merits in the case of an application to which no opposing papers have been filed.

However, this is a distinction whose net effect is diminished by the inherent E power of the court or judge determining the application on the unopposed roll to refuse the application if he or she is not satisfied on the applicant's claim notwithstanding the default of the respondent.

It is, therefore, strictly not correct to say that in an opposed application where the respondent has not filed heads, the application becomes unopposed. I prefer to hold that the application remains opposed but the respondent has lost F the right to appear and move the court in his or her favour. This on its own will, however, in my view, not constitute a bar from setting the matter down on the unopposed roll as the respondent will not prejudiced by so doing since the court will exercise the same powers that it will exercise when it sits as a court determining opposed applications.

There is no rule barring the applicant from setting down an opposed g application on the unopposed roll

Again, Mr *Masterson* is correct in this submission. There is no specific rule that provides that an applicant may not set down an opposed application on the unopposed roll. The rules provide for the setting down of unopposed H

A applications in r 223(1)(e). The rules further provide for the setting down of other uncontested matters. Rule 238 provides for the set-down of opposed matters upon receipt of the heads of argument by the applicant. It does not preclude the setting down of such matters on the unopposed roll in the event that the respondent is barred before the matter is set down on the opposed roll, a situation that confronts me in this matter. The argument by Mr *Masterson*B that such matters should

be capable of being set down on the unopposed roll becomes compelling when one has regard to the delays experienced in setting down opposed matters as opposed to unopposed matters. The argument is strengthened by the fact that the power of the court to determine the matter is not enhanced by sitting in the opposed applications' court as opposed to sitting in the motion court. It is therefore time and cost saving that matters C where the respondent has been barred for want of heads be dealt with in the motion court. It is this aspect that the Rules Committee may want to address and provide for the manner in which such matters may be speedily resolved.

As authority for all his submissions, Mr *Masterson* relied on the decision of this court in D *HPP Studios (Pvt) Ltd v Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 (1) ZLR 318 (H). E In that matter, Adam J was faced with a situation where the defendant had entered appearance to defend the plaintiff's claim outside the 10-day period allowed in the rules. In granting an application for default judgment in the face of a clear indication that the defendant intended to defend the claim, the learned judge held that where a defendant has been automatically barred in terms of r 50, there is no obligation on the E plaintiff to make any other application before he obtains judgment . In making this ruling, the judge was overruling a decision by Gillspie J (with the concurrence of the Judge President), in *Founders Building Society* v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 that before taking judgment in such circumstances, the plaintiff has to apply to court through the chamber book for F the irregular pleading to be struck off the record.

It is not necessary that I debate the above decisions. Whether the decision of one judge can upset the decision of two judges of this court is an issue that arises from these two cases but that I need not deal with.

The issue that has exercised my mind in this application is the fact that by practice of this court, matters set down on the opposed roll are always set down G on notice to the respondent whether or not that respondent has been barred. By adopting this procedure, this court has granted respondents in the position of the respondent before me a chance to be heard before the matter is determined on the merits or is referred to the unopposed roll in terms of r 238(2b). This practice may have arisen when set-down of opposed matters H were the duty of the registrar upon receipt of the applicant's heads, or it may

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Makarau J

have had some other origin. Whatever that origin was, it has given respondents A who are barred a procedural advantage to be served with a notice setting that matter down that I am reluctant to take away from the respondent before me. He was not served with a notice of set down and is therefore prejudiced by the enrolment of this matter on the unopposed roll. My ruling might have been different had he been served with a notice setting the matter down on the B unopposed roll. I do not read anything in the rules barring such a procedure from being adopted.

On the basis of the foregoing, it does appear to me that the correct way of proceeding is for the matter to be set down on the opposed roll.

In view of the conclusion, I have reached in this matter, there is no need for me to deal with the application for leave to file an answering affidavit by the C applicant. The court seized with the application in due course will deal with this aspect of the application.

In the result, I make the following order:

It is ordered that the application for summary judgment be set down with D notice to the respondent.

Coghlan, Welsh & Guest, applicant's legal practitioners E

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Source:

MUDYANDUNA v MUKOMBERO & ORS 2004 (1) ZLR 427 (S)

Citation	2004 (1) ZLR 427 (S)
Case No	Judgment No. S-63-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Malaba JA & Gwaunza JA
Heard	6 November 2003
Judgment	13 May 2004
Counsel	*C Chinyama*, for the applicant *C R Mudenda*, for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C**Constitutional law** — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 22(1) — right of freedom of movement and to reside in any part of Zimbabwe — right of citizen to have spouse reside with her in Zimbabwe — right must be balanced against State interests — need for State to show that some State interest affected*

D**Immigration** — *marriage of convenience — proof that marriage is one of convenience – factors to consider – purpose of the marriage — speed with which marriage arranged – relative ages of spouses – fact that a child born of the marriage*

Headnote

The applicant, a Zimbabwean woman, married a Nigerian man in Zimbabwe, E both under customary law and in a civil ceremony. He had previously unsuccessfully applied for a residence permit but at the time of the marriage was in Zimbabwe on a visitor's permit. The couple subsequently had a child. The immigration authorities sought to deport him. They argued that the marriage was one of convenience because it was not possible for all the customary law formalities to have been completed in F the limited time available and because the husband was younger than the applicant. The applicant sought an order declaring that her constitutional right to reside freely in Zimbabwe would be affected if the man were to be deported. It was contended for the respondents that the right of a State to regulate the entry and residence of aliens within its borders was a G principle of international law and that at times the interests of the State in protecting its citizens take precedence over individual constitutional rights.

Held, that the *onus* of showing that the marriage was one of convenience lay on the respondents.

Held, further, that the period within which a marriage is arranged and H contracted is not decisive. What is decisive is the purpose for which the

marriage is contracted, and what happens thereafter. The presumption in A favour of a valid marriage is strengthened where a child has been born to the parties concerned, for then an additional consideration comes into play: the legitimacy of the child. The fact that the applicant was some five years older than her husband was not an indication of the marriage having been one of convenience. The argument to the contrary was premised B only on the societal perception

and attitude that a man must be older than his wife, not the other way round. On the facts, the marriage was not one of convenience.

Held, further, that the applicant's rights under s 22 could be restricted in the interests of defence, public safety, public order, public morality or public health. This meant that her entitlement must be balanced against these C State interests. There was, however, no evidence that the refusal by the respondents to grant the husband a residence permit was linked to the need to protect any State interest.

Cases cited

Hambly v Chief Immigration Officer (2) 1995 (2) ZLR 431 (H)D

Jesse v Chief Immigration Officer & Ors 1996 (2) ZLR 720 (H)

Kohlhaas v Chief Immigration Officer & Anor 1997 (2) ZLR 441 (S), 1998 (6) BCLR 757 (ZS)

Maluleke v Min of Internal Affairs 1981 (1) SA 707 (BSC)

Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S)E

Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S)

Legislation considered

Constitution of Zimbabwe 1980, s 22 (1), (3)(a) and (d)

Constitution of Zimbabwe Amendment (No 14) Act 1996, s 8(1)

Immigration Act [*Chapter 4:02*], ss 14(3), (4) and (6) and 22(2)(3)(a) F

Case information

C Chinyama, for the applicant

C R Mudenda, for the respondents

Judgment

GWAUNZA JA: The applicant alleges that her right to freedom of movement, guaranteed under s 22 of the Constitution of Zimbabwe has been violated by G the first, second and third respondents' refusal to grant her husband a permanent residence permit. The husband is a Nigerian national. The applicant therefore seeks an order:

(a) declaring that her rights under s 22 (1) of the Constitution of Zimbabwe, to freedom of movement, have been contravened by the actions of the first H and second respondents;

Gwaunza JA A

(b) compelling the first respondent to issue her husband, within thirty days hereof, such written authority as is necessary to enable him to remain and work in Zimbabwe on the same standing as any permanent resident; and

(c) that the costs of the application be borne by the first respondent.

The application is opposed by the respondents, who charge that the applicant's B marriage to her alien husband was one of convenience, entered into solely for the purpose of ensuring that the said husband evaded immigration laws in terms of which he had already been denied an employment permit. They also aver that the interests of the State (in denying the applicant's husband a residence permit) take precedence over the applicant's rights and that, in any case, a 1996 amendment to the Constitution had "disapproved" court C judgments that had granted the same relief as that being sought *in casu.*

The following facts are either common cause or not disputed. The applicant was born in Shurugwi and is a citizen of Zimbabwe. On 3 August 2001, she contracted a civil marriage with Kingsley Madueke, ("Kingsley") a Nigerian national, at Harare. Prior to this marriage Kingsley had, in 2000, visited Zimbabwe for the first time and unsuccessfully applied for an employment D permit. He went back to Nigeria but, before doing so, had met and befriended the applicant. According to the applicant, the two maintained contact through the telephone while Kingsley was in Nigeria. In this

way, their contact developed into a love relationship, which culminated in Kingsley's return to Zimbabwe on 26 July 2001, on a visitor's permit. The applicant avers that E during their telephonic communication, the two agreed to marry and proceeded to make plans for this eventuality. As a result, within days of Kingsley's arrival in Zimbabwe he paid *lobola* to the applicant's parents, thereby marrying her according to custom. The two then solemnised their marriage according to civil rites, as already indicated, on 3 August 2001.

On 20 August 2001, Kingsley submitted an application for a residence permit. F On 12 November 2001, he received notification from the Department of Immigration that his application had been turned down.

He was advised in the same letter that the relevant immigration regulations did not oblige the immigration office to give reasons for its refusal to grant the residence permit. He could, however, within twenty-one days, appeal against G such refusal to the Chief Immigration Officer. He did not do this, however, but left it to the applicant to take up the matter on his behalf. She wrote a letter dated 4 October 2002 to the second respondent "appealing" against his office's refusal to grant her husband the residence permit in question. She stated in that letter that as a Zimbabwean citizen it was her right to be allowed to live with her husband in Zimbabwe. By letter addressed to the applicant and H dated 9 May 2003, the Secretary for Home Affairs advised her that the appeal

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to the Minister had been unsuccessful. No reasons for the Minister's decision A were given, nor did the Minister declare Kingsley a prohibited immigrant.

The applicant was aggrieved by the decision and decided to take the matter first to the High Court and then having withdrawn that application, to this court. Another application filed on an urgent basis in the High Court, in which the applicant sought to bar the respondents from deporting her husband pending B the decision of this court *in casu*, was ruled not to be urgent. It would appear this matter was, at the time this application was argued before this court, still pending.

It is not disputed that the applicant bore a child on 22 April 2003. The respondents initially disputed that the child was fathered by Kingsley but as C indicated below, later withdrew the allegation.

The applicant denies her marriage was one of convenience and avers that at the time she married her husband, she had no knowledge of him having previously and unsuccessfully applied for an employment permit. She took offence at the respondents' allegation that Kingsley was not the father of the child that she bore on 22 April 2003. She avers she had not been able to obtain a birth D certificate for the child, due to the fact that its father, Kingsley's passport, had been impounded by the second respondent. With the consent of the respondents, the applicant's counsel, Mr *Chinyama* submitted to the court a birth confirmation record issued by the Harare Central Hospital, which showed that the applicant had indeed given birth to a baby boy on the date in question. The certificate also gives the applicant's married name as "Madueke". In the light E of this evidence, the respondents' counsel withdrew the allegation concerning the paternity of the child.

It is argued on behalf of the applicant that, contrary to the respondents' assertions, the marriage between her and Kingsley was entered into with the parties' mutual intention to stay together as husband and wife. The marriage, F it is also contended, was in any case valid at law and could only be set aside through divorce. The applicant contends in addition that the child born of the marriage was further proof of the parties' intention to contract a valid marriage, also, that the courts generally lean in favour of a marriage from which a child has been born. Lastly, the applicant contends in response to the respondents' assertion that the rights of an alien are not absolute, that her application was G not premised on the rights of an alien, but on her fundamental right as a citizen wife, to freedom of movement.

In this respect, Mr *Chinyama* for the applicant, contends as follows in his heads of argument:

> "The point made by the applicant here is that the refusal by the respondents H

> A to give a permanent residence permit to Kingsley Madueke, her husband, circumscribe (*sic*) her fundamental right as a citizen to freedom of movement. If her husband is ordered to leave the country, the applicant's right to live in Zimbabwe will be directly affected in that in order for her to maintain the

marriage, she has to follow her alien husband. Her husband's fate in the country has a bearing on her freedom of movement. Applicant and her husband share the common desire to establish B matrimonial [a] bode in Zimbabwe … "

Apart from the allegation, now withdrawn, that Kingsley was not the father of the applicant's child, the respondents advanced three grounds for the argument that the marriage between the applicant and Kingsley was one of convenience, *viz*.:

(i) C that the applicant's husband was of no fixed abode and that the parties did not live together as husband and wife;

(ii) that it was "impossible" for all customary rites and a marriage to be solemnised within a period of eight days; and

(iii) that the applicant is far older than her husband.

D The respondents also allege that the applicant's husband has gone underground and that there is no document to explain his presence in Zimbabwe.

The applicant disputes the first two grounds, and puts the respondents to the proof thereof. The ground concerning the difference in the applicant's and Kingsley's ages (the applicant being five years older) was raised for the first E time in the respondents' heads of argument. The applicant thus did not have an opportunity to respond to it.

It is an established principle of our law that a marriage will be regarded as one of convenience if:

(i) it was entered into primarily for a purpose extraneous to marriage, for F instance to evade immigration laws; and

(ii) there was no intention on the part of the couple concerned to live together as man and wife.

(See *Jesse* v *Chief Immigration Officer & Ors* 1996 (2) ZLR 720 (H), *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S), and *Hambly* v *Chief Immigration Officer (2)* 1995 (2) ZLR 431 (H)). The court held in G*Jesse* v *Chief Immigration Officer & Ors supra* that the second ingredient is as important as the first and both must be proved. This court re-stated this position in *Kohlhaas* v *Chief Immigration Officer & Anor* 1997 (2) ZLR 441 (S) at 445F-G, 1998 (6) BCLR 757 (ZS) where it was stated:

"Each ingredient is of equal importance. Proof of the first alone will not H suffice [to establish that the marriage is one of convenience]."

Gwaunza JA

It is also trite that the onus of proving, on a balance of probabilities, that a A marriage is one of convenience lies on the party who so alleges. *In casu*, such onus rests on the respondents. The applicant avers the respondents have not discharged this burden.

I will now turn to the evidence placed before the court and determine whether or not the respondents have discharged this burden and proved their case on B a balance of probabilities.

The applicant's evidence is that she entered into the marriage with Kingsley, fully intending to live with him as husband and wife. On the evidence before the court, she did cohabit with Kingsley, and proceeded to bear him a child. This would tend to disprove the respondents' allegation that Kingsley is of no fixed abode and that therefore the parties do not live together as husband and C wife. The respondents have not revealed the nature of the investigations that they allege established this fact, save for a registered envelope addressed to the applicant's husband, which was returned undelivered and with the notation "unclaimed" on it. The respondents have not indicated what the contents of the returned envelope were. The applicant denies knowledge of the "unclaimed" item and avers she was never approached by immigration officials over her D husband's whereabouts. Her evidence is simply that he has not gone underground.

I take the view that Kingsley's disappearing act, if such it was, was related more to his expired visitor's visa (and therefore fear of discovery), than the fact that his marriage to the applicant was one of convenience. That he may not have E been found at home by immigration officers, and that he did not claim a registered article, do not of themselves suggest that he and the applicant did not live together as husband and wife.

The other ground cited by the respondents for their assertion that the marriage was one of convenience was that it was simply "impossible" for the two to have F attended to all the

preliminary details related to the marriage ceremonies – one customary, one civil – that were conducted within a space of eight days after Kingsley's return to Zimbabwe. I am not persuaded there is merit in this argument. The applicant's assertion that these details were negotiated over the telephone while Kingsley was still in Nigeria is not, in my view, farfetched. In this era of advanced communication technology, it is quite possible, with G speed and ease, to communicate and even exchange documents with someone in another country. While it may be the norm that marriages, especially where they entail the observance of customary rites, take time to arrange, there is nothing unusual in parties intending to marry but separated geographically, attending to these arrangements through the telephone or other means of H

2004 (1) ZLR p433

Gwaunza JA

A modern communication. Nor is it a requirement that these matters be attended to physically by one or the other of the parties.

Whatever the respondents' view of this arrangement, there is *in casu* a marriage certificate attesting to the fact that a marriage was indeed solemnised between the applicant and Kingsley. There is a supporting affidavit from her brother to the effect that *lobola* was charged and paid by Kingsley as part of B the customary marriage ceremony. I do not understand the respondents to say the marriage certificate itself is a forgery. The assumption therefore is that the respondents accept that the applicant and her husband did go through the motions that are requisite for the solemnisation of a valid civil marriage. That they did so in my view negates the argument that it was not possible to arrange C for such a ceremony in the space of eight days. In any case, the period within which a marriage is arranged and contracted is not the decisive factor in the determination of whether or not such a marriage was one of convenience. It is rather, the purpose for which it is contracted, and what happens thereafter. There is evidence *in casu* in the person of the child born to the two that the parties thereafter lived together as husband and wife.

D There is authority to the effect that the presumption in favour of a valid marriage (*semper praesumitur pro matrimonio*) is strengthened where a child has been born to the parties concerned, for then an additional consideration comes into play, and that is the legitimacy of the child. In *Jesse* v *Chief Immigration Officer supra*, the learned judge observed that the courts will not E lightly assume that a marriage is one of convenience, especially where there is a child of the marriage and a consequence of declaring the marriage invalid would be to make the child illegitimate.

Although only raised in the respondents' heads of argument, the fact that the applicant is some five years older than her husband is contended by the respondents to be a further indication of the marriage having been one of F convenience. This argument I find has no merit, since it is premised only on the societal perception and attitude that a man must be older than his wife, not the other way round. Although admittedly not the norm, there are likely to be many marriages in Zimbabwe, and elsewhere, in which the man is younger than his wife. That *per se* does not suggest that the marriage was entered into for reasons other than those for which marriages are normally contracted. G Conversely, the fact that a man marries a woman who is younger than him does not by that fact alone establish that such marriage is not one of convenience. It is conceivable that some such marriages may indeed be marriages of convenience.

When all is told, I find that the respondents have failed to discharge the *onus*H of proving that the two ingredients of a marriage of convenience exist *in casu*.

2004 (1) ZLR p434

Gwaunza JA

I am satisfied the marriage was not contracted for a purpose extraneous to A marriage, and that the parties went into it with the full intention of living together as husband and wife.

Does this then entitle the applicant to the relief sought?

The respondent's counsel correctly acknowledges the fact that our courts have in a number of decisions recognised and upheld the constitutional right of a B female citizen of Zimbabwe to have her husband reside with her in Zimbabwe, unless the marriage is one of pure convenience. See among others*, Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S), *Hambly* v *Chief Immigration Officer (2)* 1995 (2) ZLR 431 (H), *Salem* v *Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S). I have already found that the marriage *in casu* was not one of

convenience, a finding which, on the C authority of the cases cited, would entitle the applicant to the relief sought.

The respondents, however, give two other grounds for opposing the relief sought by the applicant. It is contended for the respondents firstly, that the legal status of the applicant's husband has not changed by virtue of his marriage to the applicant, and that therefore he is an alien subject to the D restrictions imposed on such people. Secondly, it is contended that even if the marriage in question was not one of convenience, the *Rattigan* and *Salem* decisions *supra* have been "disapproved" by s 8(1) of the Constitution of Zimbabwe Amendment Act No. 14 of 1996. This amendment, it is argued, is couched in such a way as to deny both men and women citizens the right to confer residency on their foreign spouses. E

I will consider these arguments separately.

It is not in dispute that the applicant's husband was denied the residence permit that he applied for after his marriage to the applicant. It is also not in dispute that the reasons for such a denial were not disclosed to him. Apart from the *declarator* concerning the infringement of her constitutional right to F freedom of movement, the applicant now petitions this court for the same relief that was denied her husband, but she does so on a different basis altogether.

The applicant's entitlement under s 22(1) of the Constitution is, in terms of subs (3) (a) of the same section, not absolute. Her enjoyment of the right in question can be restricted in the interests of defence, public safety, public G order, public morality or public health. This means that her entitlement must be balanced against these State interests. It is contended for the respondents that the right of a State to regulate the entry and residence of aliens within its borders is a principle of international law and that at times the interests of the State in protecting its citizens take precedence over individual constitutional rights. H

Gwaunza JA

A The question therefore is whether the interests of the State *in casu* are such as to take precedence over the applicant's right to freedom of movement.

There is nothing in the papers before the court to indicate that the applicant and her husband were advised that the refusal by the respondents to grant the latter a residence permit was linked to the need to protect any State interest. The issue was raised for the first time in the respondents' opposing affidavit. B The only communication received by the applicant directly from the Minister's office, before then, was a letter from the Secretary of Home Affairs, which read as follows:

> "Please be advised that the appeal for resident (*sic*) for Kingsley Madueke has been unsuccessful. The Minister of Home Affairs has not approved C the appeal. By this letter the Chief Immigration Officer is being informed of this decision."

Subsection (3) of s 14 of the Immigration Act [*Chapter 4:02*] confers on an immigration officer the power to apply to the third respondent, who is the responsible Minister, for a declaration that an alien is a prohibited person. This he does where in his opinion the alien in question is likely to become a " D public charge" by reason of infirmity or lack of means to support himself. In terms of subs (4) of the same section, the immigration officer is obliged to notify the alien concerned of his intention to apply to the Minister and to give him an opportunity to make any representations. Neither the applicant nor the respondents assert any of this was done in respect of Kingsley. As a result, there is no evidence to suggest that the Minister declared Kingsley a prohibited E immigrant, nor that he caused written notice of this fact to be transmitted to Kingsley, as required by subs (6) of s 14 of the Act. Such a certificate from the Minister would have given an indication of the basis upon which Kingsley was considered to be an undesirable visitor to the country.

Further to the letter from his office, the Minister did not, as required in terms F of s 22(2) of the Act, issue a certificate stating that the disclosure of his reasons for dismissing the appeal for a residence permit would not be in the public interest.

The sum effect of all this was to leave it to the applicant, her husband, and ultimately this court, to speculate as to what the interest was that the State G sought to protect by denying the applicant's husband a residence permit.

It is trite, as contended for the respondents, that a sovereign State can exclude aliens for any or for no reason at all – see *Maluleke* v *Min of Internal Affairs* 1981 (1) SA 707 (BSC). I am, however,

satisfied, on a proper interpretation of s 22(3)(a), that where such exclusion has the direct consequence of H interfering with a constitutional right enjoyed by one of the State's own

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citizens, such denial must be shown to have been justified in the interests of A defence, public safety, public order, public morality or public health.

As long as the interest that the State seeks to protect by excluding the applicant's husband has not been disclosed, the court is not in a position to be able to balance such interest against a constitutional right, properly proven as the applicant's has been *in casu*, in order to arrive at an informed B determination on the matter.

The respondent has therefore not persuaded this court that the State's interest, whatever its nature, should take precedence over the applicant's individual right to freedom of movement.

The respondents contend finally that the *Rattigan* and *Salem* cases *supra* have C been "disapproved" by s 8(1) of the Constitution of Zimbabwe Amendment (No. 14) Act 1996, which came into force on 6 December 1996. It amended 22(3)(d) of the Constitution, which now reads as follows:

> "… Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) (i.e. the right to freedom of movement) to the extent that the law in question makes provision for … D
>
> (i) the imposition of restrictions on the movement or residence within Zimbabwe of any person who is neither a citizen of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe; or
>
> (ii) excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe; E
>
> whether or not he is married or related to another person who is a citizen of or permanently resident in Zimbabwe."

The amendment does not affect those who got married before December 1996.

This court has had occasion to consider the meaning and effect of this amendment in *Kohlhaas* v *Chief Immigration Officer & Anor supra*. Whatever F the intention of the legislature had been, Gubbay CJ ruled that the new s 22(3)(d) did not nullify the *Rattigan* and *Salem* decisions *supra*. The learned author of the LRF publication "*Constitutional Law of Zimbabwe*", G Linington, in my view, correctly summarises the court's reasons for such a finding as follows at p 380:

> "This was because both of those cases [i.e. *Rattigan* and *Salem*] were G concerned with the right to freedom of movement of the citizen spouses. It was *their* rights that were being threatened. *They* had a right to live in Zimbabwe and this would be contravened if they were forced to leave Zimbabwe in order to be with their foreign spouses. The foreign spouses did not themselves have a constitutional right to live in Zimbabwe. That they were able to do so was entirely due to the fact that their expulsion G

> A would effectively interfere with the mobility rights of their Zimbabwean marriage partners. In the *Kohlhaas* case, Gubbay CJ said 'the effect of the amendment is merely to re-state the law in relation to the rights of non-citizens. It leaves untouched the rights of a citizen spouse'."

On the authority of the above and by the same token, the rights of the applicant *in casu* to freedom of movement which is represented in one respect by the B right to have her alien husband stay with her in Zimbabwe, have not been affected by the constitutional amendment in question.

It is pertinent at this juncture to mention that some of the respondents' averments suggest a failure to separate the applicant's rights from those of her husband. It is, for instance, argued that the applicant has come to this court C with dirty hands, since she knew that her husband had been denied residence and was therefore a prohibited immigrant. Marrying and co-habiting with a prohibited immigrant is not in itself an offence. The applicant has not been shown, on the one hand, to have committed an offence or otherwise fallen foul of the law, and on the other, to have attempted to seek the protection of the law. What the applicant seeks to do *in casu* is to assert her constitutional right to D freedom of movement. That the assertion of such a right has the effect of granting to the husband the same relief that he had, on his own endeavour, failed to secure does not, in my view, make her hands dirty. She can thus not be said to have "dirty hands" in the sense that it is generally understood.

In all the circumstances, therefore, I am satisfied the applicant has proved her E case and is entitled to the relief sought. It is accordingly ordered as follows:

1. The rights of the applicant under s 22(1) of the Constitution of Zimbabwe to freedom of movement, that is to say, the right to reside in any part of Zimbabwe has been contravened by the actions of the first and second respondents.
2. By virtue of the applicant's right under the aforementioned s 22(1) to have F her husband residing with her in any part of Zimbabwe, it is hereby ordered that –
   (a) The first respondent issue to Kingsley Madueke, within thirty days hereof, such written authority as is necessary to enable him to remain in Zimbabwe on the same standing as any permanent resident;
   (b) G The said Kingsley be accorded the same rights as are enjoyed by all permanent residents of Zimbabwe, including the right to engage in employment or other gainful activity in any part of Zimbabwe and that the first respondent impose no restriction upon such right; and
   (c) The costs of this application shall be paid by the respondents jointly H and severally, the one paying the others to be absolved.

2004 (1) ZLR p438

Gwaunza JA

Chidyausiku CJ, Sandura JA, Cheda JA & Malaba JA concurred. A

Chinyama & Partners, applicant's legal practitioners

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

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MWAYIPAIDA FAMILY TRUST v MADOROBA & ORS 2004 (1) ZLR 439 (S)

2004 (1) ZLR p439

Citation	2004 (1) ZLR 439 (S)
Case No	Judgment No. S-22-04
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA and Gwaunza JA
Heard	27 January 2004
Judgment	13 May 2004
Counsel	*R M Fitches,* for the appellant No appearance for the respondents
Case Type	Civil Appeal
Annotations	Link to case annotations

Flynote

Contract — *sale — double sale of immovable property — when second sale* C *will be upheld — general preference to uphold sanctity of contract by giving effect to first sale*

Headnote

The appellant was the innocent second purchaser of an immovable property in Bluff Hill, Harare. The first purchaser had obtained an interdict against the seller, restraining her from transferring the property to anyone D else, and had served a copy of the order on the Registrar of Deeds who was instructed to endorse a caveat upon the deeds of the property. He failed to do so. A search of register revealing no caveat, the property was transferred to the appellant. The aggrieved first purchaser obtained a High Court order setting aside the transfer with costs. On appeal:

E*Held*, that the traditional approach to double sales such as this is that when the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. However, when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer, his real right can and normally will be overturned, subject to considerations of practicality.

Held, further, that the circumstances of this case placed it somewhere in between the two extremes mentioned because, even though the appellant was ignorant of the respondents' prior claim to the property at the time transfer into its name was effected, such ignorance was due solely to the oversight or incompetence of a public official. It would not be fair and G just to rule that the failure by the Deeds Office to register the caveat had the effect of nullifying the respondents' prior claim to the property.

Held, further, that the policy of the law to uphold the sanctity of contracts is usually best served by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract.

H*Held,* further, that both the parties were equally diligent in their efforts to

protect their interests and both were victims of the incompetence of the A Deeds Office. However, the first two respondents' contract was the first one, and but for the omission to register the caveat, it would have been the only one. Accordingly, it would be upheld.

Cases cited

BP Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd & Another 1964 *RLR* 7 (G); 1964 (2) SA 21 (SR) B

Crundall Brothers(Pvt)Ltd v Lazarus NO & Anor 1991 (2) ZLR 125 (S)

Case information

R M Fitches, for the appellant

No appearance for the respondents C

Judgment

GWAUNZA JA: This appeal was determined without benefit of argument from the respondents, who were all in default.

The appellant appeals against an order of the High Court, in terms of which the transfer of certain immovable property in Bluff Hill, Harare, to the appellant, was set aside. The court also ordered the Registrar of Deeds to D cancel the Deed of Transfer in question and the appellant to pay the respondents' costs.

The facts of the matter are as follows:

On 11 January 2000, the first and second respondents ("the respondents") concluded an agreement of sale in terms of which they bought the immovable E property in question, from the fourth

respondent ("Parirenyatwa"). On 8 March 2000, the respondents obtained a provisional order in the form of an interim interdict against Parirenyatwa, whose effect was to restrain her from transferring the property in question to any other people except themselves. A copy of the interdict was served on the Registrar of Deeds, who was F supposed to then endorse a caveat on the title deeds of the property in question. The caveat would have served as a further barrier to any attempt to transfer the property from the name of Parirenyatwa to any person other than the respondents.

In defiance of the interim interdict against her, Parirenyatwa proceeded on 22 March 2000 to enter into another written agreement of sale with the appellant *in casu*, for the same property. Consequent upon this second sale, G and notwithstanding the copy of the provisional order that had been served on the Registrar of Deeds, the property was transferred to and registered in the name of the appellant.

Despite the respondents' claims to the contrary, there is no evidence before the court to conclusively establish that a caveat had indeed been endorsed against H

Gwaunza JA

A the title deeds of the property, nor that such caveat had then been mysteriously uplifted, to enable the transfer into the appellant's name to take place. No supporting affidavit by the Registrar of Deeds was filed in order to shed light on the matter. Be that as it may, the respondents then successfully applied for the order now being appealed against.

The appellant contends in the main that the court *a quo* ought not have granted B the relief sought by the respondent especially considering;

(a) that the appellant was an innocent purchaser, having bought and taken transfer of the property in good faith;

(b) that even if the appellant had or ought to have, known of the prior sale of the property to the respondents, that did not entitle them to the relief C sought; and

(c) that in any case the transfer of the property to the appellant constituted special circumstances.

The facts of the case clearly reveal a situation where a *mala fide* seller sold the same property to a second purchaser well knowing she was not supposed to D do so. While noting initially in her judgment that the appellant may not have been "entirely ignorant" of the respondents' prior claim to the property, the learned trial judge later concluded as follows:

> "… in the matter before me, it is not in dispute that the applicants sought to give notice to the first respondent and to the world at large of their prior rights over the property. This they did by obtaining any interim restraining E order from this court. The order was duly served upon second respondent, the Registrar of Deeds, who was thereby restrained from transferring the property other than to the applicants, pending determination of certain proceedings. Thus, notice was served upon the first respondent but due to an error on the part of the public official, was not received.
>
> *We thus have a situation where we have an innocent second purchaser*F*but whose innocence is as a result of the mistake of a public official tasked with bringing the notice to the attention of the first respondent and the world at large*" (my emphasis).

The appellant denied it had any knowledge of the first sale, either before its own purchase of the same property, or at the time the property was registered in its name.

G I have found no basis for the learned judge's finding that the appellant was not "entirely ignorant" of the respondents' claim, or that notice of the respondents' claims was served on the appellant. The first "notice" could only have been that pertaining to the interdict that the respondents obtained against Parirenyatwa. The provisional order in question was prompted by the latter's H attempt to cancel the agreement of sale, and not by any known (to the

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Gwaunza JA

respondents) attempt by her to sell the same property to a third party. If at the A time the provisional order was granted, Parirenyatwa and the appellant had started negotiations over the sale of the property, there is no indication that the respondents had knowledge of any such negotiations. The appellant would therefore not have received any notice of the application for an interdict against Parirenyatwa.

The other "notice" related to proceedings that took place after the transfer of B the property to the appellant had taken place. The appellant did receive notice of the proceedings since it was cited as a party, and the order applied for sought to interdict Parirenyatwa and the appellant, respectively, from disposing of the property in question or carrying out any construction thereon. The appellant thus only had formal notice of the respondents' prior claim to the property C after the transfer to it had already been effected. The respondents' averments that because a caveat had been endorsed against the title deed, and then been mysteriously uplifted, it followed that the appellant had gained prior knowledge of the sale of the property to the respondents, have not been substantiated. There is a strong indication from the evidence before the court, that the caveat in question was never registered. This in my view lends credence to the D appellant's assertion that a Deeds Office search conducted before the transfer into its name took place, had "picked up" no caveats or mortgage bonds registered against the title deeds of the property in question.

The sum total of all this is to cast serious doubt on the submission that the appellant did have knowledge, before the transfer into its name took place, that E the same property had already been sold to the respondents. The learned trial judge appears to have accepted this circumstance, as evidenced by her conclusion that the appellant was an "innocent' second purchaser. I am satisfied this was the correct conclusion.

What emerges from the evidence before the court is a situation where the first F purchasers (i.e. the respondents) took every precaution to protect their interest in the property in question. They were careful, in their petition for an interdict against Parirenyatwa, to include a prayer restraining the Registrar of Deeds from transferring the property to any other person but themselves. As the learned trial judge correctly noted, it was not the respondents' fault that the office of the Registrar of Deeds had then, for reasons not clear from the papers G before the court, neglected to endorse the caveat against the relevant title deed.

To be balanced against this situation is that of the appellant, an innocent second purchaser which, on the evidence before the court, was equally diligent in seeking to protect its interest. In addition to requesting sight of Parirenyatwa's copy of the title deed (which showed no encumbrances registered against the property), the appellant instructed its lawyers to carry out a Deeds Office H

A search, which was duly done. The search yielded no impediments against the intended transfer of the property to the appellant. Transfer thus proceeded.

The circumstances of this case establish a double sale of the property in question. In *Crundall Brothers (Pvt) Ltd* v *Lazarus NO & Anor*,1 a case that the learned trial judge cited with approval, the court referred to a "traditional approach"2 to the matter. It summarised such approach as follows at p 131E-F: B

> "…When the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. *Per contra* when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer, his real right can and normally will be overturned subject to considerations of C practicality."

The court in *Crundall*'s case, however, found that cases of double sales do not always fall neatly into one or the other of the two categories indicated above, since some cases, *Crundall*'s included, fall in between.

I am satisfied that, *in casu,* the learned trial judge correctly found (albeit for D different reasons) that the circumstances of the case placed it somewhere in between the two extremes noted above. This is because, even though the appellant was ignorant of the respondents' prior claim to the property at the time transfer into its name was effected, such ignorance was due solely to the oversight – if not incompetence – of a public official in the Deeds Office. The official failed to register the caveat in circumstances where such registration E would have warned the appellant that the property in question was not available for transfer to it. It would not be fair and just, in my view, to rule that the failure by the Deeds Office to register the caveat in question had the effect of nullifying the respondents' prior claim to the property. Indeed, the general approach of the courts is to give preference, except in special circumstances, F to the first contract. The approach is derived from the policy of the law in upholding the sanctity of contracts. Mcdonald J (as he then was) elaborated on this policy as follows in *BP Southern Africa (Pty) Ltd* v *Desden Properties (Pvt) Ltd & Anor*: 3

"… in my view, the policy of the law to uphold the sanctity of contracts will best be served in the ordinary run of cases by giving effect to the first G contract and leaving the second purchaser to pursue his claim for damages

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2004 (1) ZLR p444

Gwaunza JA

for breach of contract. I do not suggest that this should be the invariable A rule, but I agree with the view of Professor McKerron, that save in special circumstances, the first purchaser is to be preferred."

Earlier in the same judgment and in a passage cited with approval by the learned trial judge, Mcdonald J had this to say at 11E-F:

"It is the policy of the law to uphold, within reason, the sanctity of B contracts. It follows that the courts of law should, as far as possible, in matters of this kind, adopt an approach which will discourage sellers from entering into contracts the performance of which will necessarily involve a breach of an earlier contract, and by adopting such an approach produce a potential cause of hardship. The concern of the courts should primarily be with the removal of the cause of these cases of hardship rather than with C the result in a particular case."

Both parties were in my view equally diligent in their efforts to protect their respective interests under the contracts they had signed with Parirenyatwa. They both fell victims to the neglect by the Deeds Office to register the caveat in question. Their prospects for success are, in my view, almost evenly balanced. However, what should and does tilt the scale in favour of the D respondents is the fact that theirs was the first contract, and that but for the omission to register the caveat, it would have been the only contract. I am satisfied this is a proper case for the adoption of an approach which will discourage sellers from entering into contracts the performance of which will necessarily involve the breach of an earlier contract.

I am persuaded there are, thus, no special circumstances to warrant a supersession E of the respondents' contract by that of the appellant. The appeal must therefore fail.

It is in the result ordered as follows:

The appeal is dismissed with costs. F

Sandura JA & Cheda JA concurred.

Costa & Madzonga, appellant's legal practitioners H

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Source:
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MUKWEREZA v MIN OF HOME AFFAIRS & ANOR 2004 (1) ZLR 445 (S)

2004 (1) ZLR p445

Citation	2004 (1) ZLR 445 (S)
Case No	Judgment No. S-27-04
Court	Supreme Court, Harare
Judge	Sandura J, Cheda JA & Gwaunza JA
Heard	27 January 2004
Judgment	13 May 2004

Counsel Mrs *J Zindi,* for the appellant
C Muchenga, for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Interpretation of statutes — *intention of legislature — how to be ascertained — speculative opinion as to what legislature probably would have meant* C — *factors to consider in arriving at such opinion*

Police — *police officer — discipline — officer convicted and sentenced in a magistrates court — sentence consisting of fine plus suspended period of imprisonment — subsequent discharge of member by Commissioner — whether Commissioner entitled to discharge member*

D**Statutes** — *Police Act [Chapter 11:10] — s 48 (1) — member convicted and sentenced in a magistrates court — sentence consisting of fine plus suspended period of imprisonment — subsequent discharge of member by Commissioner — whether Commissioner entitled to discharge member*

Headnote

E The appellant, a police constable, had been convicted in the magistrates court of assaulting a member of the public. He was sentenced to a fine and in addition a suspended term of imprisonment. The Commissioner of Police discharged the appellant from the Police Force, relying on the provisions of s 48 of the Police Act. It was argued for the appellant that F the Commissioner had no such power, as discharge was not permissible where only a fine was imposed and the section would not apply where a sentence was made partly of a penalty which entitled the Commissioner to discharge and partly of a penalty which did not entitle him to do so.

Held, that the "intention of the Legislature" may signify anything from intention embodied in positive enactment to speculative opinion as to G what the legislature probably would have meant, although there has been an omission to enact it. What was at issue is what Parliament might have intended to happen in cases where one part of a sentence fell within the ambit of the section in question, while the other did not. The court could resort to speculative opinion as to what the legislature probably would H have meant.

Held, further, that in such speculation, the court must consider a number of A factors: (a) one of the main purposes of the Police Act is to provide for the *control* of the Police force; (b) the question of police discipline; and (c) what the legislature has actually enacted, expressly or impliedly.

Held, further, that the police's main responsibility is to maintain law and order. A member who commits an offence that attracts imprisonment acts B against such responsibility. The intention of the legislature is that such a member be dealt with severely. The legislature must have intended that a member who has been sentenced to a term of imprisonment without the option of a fine, irrespective of other dimensions of the same sentence which may not be applicable, be visited with any of the penalties set out in s 48. C

Cases cited

Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor 1996 (1) ZLR 378 (H)

Legislation considered D

Police Act [*Chapter 11:10*] s 48

Case information

Mrs *J Zindi,* for the appellant

C Muchenga, for the respondent

Judgment

GWAUNZA JA: This is an appeal against a judgment of the High Court, E in terms of which an application by the appellant for reinstatement to his employment with the Zimbabwe Republic Police, was dismissed.

The facts of the matter are not in dispute. The appellant was employed as a constable in the Zimbabwe Republic Police. He was based at Sanyati. On F 12 July 2001, the appellant was convicted by the Magistrates' Court, of assault with intent to cause grievous bodily harm. It was alleged that he had assaulted the complainant, a woman, within the police station at Sanyati, causing her certain injuries. He was sentenced to pay a fine of $3000 or in default thereof, nine months' imprisonment with labour. He was also sentenced to a further nine months' imprisonment with labour, which was wholly suspended for five G years on condition of good behaviour.

Eight months after exhausting, without success, the domestic remedies in terms of appeal, the appellant took his grievance to the High Court. The court found that the appellant's application, if it was to be taken as one for review, was "hopelessly out of time." H

Gwaunza JA

A However, in view of the fact that the appellant was, in the court *a quo*, a self-actor, the learned trial judge decided to determine the matter on the merits. He then dismissed the application, a circumstance that prompted the appellant to appeal to this Court.

The appellant's grounds of appeal, having evidently been prepared by him, are not only very detailed, but also inelegantly formulated. What stands out from B the grounds of appeal however, is the appellant's disgruntlement with the decision of the court *a quo* generally, and in particular, its interpretation of s 48 of the Police Act [*Chapter 11:10*]. The second respondent invoked this provision in order to dismiss the appellant from his employment. The section reads as follows:

> C "If a member, other than an officer, is convicted of any offence and sentenced therefor to imprisonment without the option of a fine, whether or not the execution of such sentence is suspended, the Commissioner may –
>
> (a) discharge the member, in which case the discharge may take effect from the date of his conviction; or D
>
> (b) impose any one or more of the following penalties —
>
> (i) reduction in rank;
>
> (ii) loss of seniority;
>
> (iii) withholding of an increment of salary; or
>
> (c) reprimand the member."

E The learned trial judge considered the appellant's sentence in the light of this provision. He concluded that the first part of the sentence did not entitle the Commissioner of Police to discharge the appellant. The learned judge found differently in relation to the second part, and noted as follows in respect thereof:

> F "But the second portion of the sentence which was imposed on the applicant, which was nine months' imprisonment wholly suspended for five years' does allow the Commissioner of Police in my view to discharge the applicant and in these circumstances the Commissioner of Police was not obliged to convene a Board of Inquiry. He was entitled in terms of s 48 to summarily dismiss the applicant and I am satisfied that he acted lawfully in the circumstances."

G The learned trial judge then went on to dismiss the application, with costs.

Mrs *Zindi* for the appellant contends that in enacting s 48 of the Police Act the legislature did not envisage a situation where a sentence would have one part falling within the ambit of the section while the other fell outside it, as has happened H in this case. She contends further that as this has created an

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Gwaunza JA

ambiguity, such ambiguity must be resolved in favour of the accused, i.e. the A appellant. Mrs *Zindi* seeks to distinguish between the first part of the appellant's sentence, and the second. She refers to the former as the "main" part, and the latter as the "additional" part. She suggests in effect that

the "main" part be considered to the exclusion of the latter part, a situation which would have obliged the Commissioner of Police to act, not in terms of s 48, B but s 50 of the Police Act. Section 50 obliges the Commissioner of Police to cause a board of inquiry to be set up, in order to inquire into the suitability of a Regular Force member to remain in the Regular Force, or retain his rank, seniority or salary.

For the respondents, the contention is made that since the last portion of the appellant's sentence constituted a sentence of imprisonment without the C option of a fine, the Police Commissioner was entitled to and did properly, invoke s 48. In other words, the argument is that the latter portion, in as much as it fell within the ambit of s 48 should so eclipse the first part of the sentence, as to attract the penalty imposed in the section. The parties therefore have put interpretations on s 48 that seek to give primacy to the part of the sentence that best served their different interests. Neither party cited any authorities to D support their respective propositions. I am of the view that the only way to resolve the dispute is to determine what the intention of the legislature was. E A Kellaway, the learned author of *Principles of Legal Interpretation of Statutes, Contracts & Wills,* looked at a number of British and South African authorities on what is meant by "legislative *intention*" and concluded as E follows at p 175:

> "In summary, the purpose of the rules of construction is to discover the intention of the law-giver, and such *intention* should be deduced from the actual words used by the legislating body, its general plan and its objects" (*Lion Match Co Ltd* v *Wessels* 1946 OPD 376 at 380; *S v Takaendesa* 1972 (4) SA 72 (RA); *Van Heerden* v *Queen's Hotel (Pty)*F*Limited* 1973 (2) SA 14 (RA) 16; *S* v *Robinson* 1975 (4) SA 438 (RA) 442; *S* v *Hotel & Liquor Trade Association (Tvl*) 1978 (1) SA 188 W 192).

GM Cockram expanded on this theory at p 45 of his *Interpretation of Statues* 3 ed and stated that such objects must be gathered from "a comparison of its (the law's) several parts, as well as from the history of the law and from the circumstances applicable to its subject matter." G

Kellaway went on to say at 177:

> "However, Lord Watson said (*Salomon* v *A Salomon & Co* [1897] *op cit* AC 23 at 38; 75 LR 426; 14 TLR 46):
>
> 'The "intention of the legislature" is a common but slippery phrase, which popularly understood, *may signify anything from intention*H

2004 (1) ZLR p449

Gwaunza JA

> A*embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it* … What the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication'" (my emphasis).

B This *dictum,* I find, can aptly be applied to the circumstances of this case in order to ascertain the intention of the legislature in enacting s 48 of the Police Act.

Firstly, there can be no doubt that the wording of s 48 is clear and unambiguous. There is no need to give the words other than their natural or popular meaning. Secondly, it is evident that what is at issue *in casu* is what Parliament might C have intended to happen in cases where one part of a sentence fell within the ambit of the section in question, while the other did not.

On the authority of the *dictum* cited above, the court can resort to "speculative opinion" as to "what the legislature probably would have meant, although there has been an omission to enact it," in its endeavour to establish the D intention of the legislature.

It appears to me, *in casu*, that in such speculation, the court must consider a number of factors. The first such factor in my view is one of the main purposes of the Police Act, which is to provide for the *control* of the police force. Subsumed under such control is the question of police discipline. The whole E of Part V of the Act, under which s 48 falls, is concerned with discipline. That, therefore, should be the second factor to be considered. The third factor (and drawing from the *dictum* cited above) should be what the legislature has actually enacted, expressly or impliedly.

The police's main responsibility is to maintain law and order. It follows that a member who commits an offence that attracts imprisonment acts against such F responsibility. The intention of the legislature is that such a member be dealt with severely.

I am satisfied these considerations together lead to the safe assumption that the legislature must have intended that a member who has been sentenced to a term of imprisonment without the option

of a fine, irrespective of other dimensions G of the same sentence which may not be applicable, be visited with any of the penalties set out in s 48.

This interpretation in my view accords with the main purpose of the Police Act, the Part under which s 48 falls, and the words that were used in the same section.

H Mrs *Zindi* contends that even if the Commissioner of Police was correct in

invoking s 48, the circumstances of the case did not justify the imposition of A the harshest penalty provided.

I am not persuaded there is merit in this argument. The provision in question clearly gives a discretion to the Commissioner to choose whichever of the penalties outlined he deems appropriate. In this respect I am persuaded by the argument advanced for the respondents that the court can only interfere with B an administrative decision on the grounds of unreasonableness if such unreasonableness is gross. See *Zambezi Proteins (Pvt) Limited & Ors* v *Minister of Environment and Tourism & Anor* 1996 (1) ZLR 378 (H).The court in the same respect was referred to Feltoe, *Guide to Zimbabwean Administrative Law* 2 ed (1991) at p 31 where the following is said:

> "it would seem to follow that on review the court has no power to overturn C a decision simply because it considers it to be unreasonable. If it was to do so, it would in effect be substituting its own decision in place of the decision of the body empowered to make this decision."

The appellant assaulted a member of the public and was convicted of assault with intent to do grievous bodily harm. The public trust and look to the police for protection. The appellant's actions in my view not only constituted a D breach of such trust but must also have offended against the rules governing the conduct of the police force.

I am satisfied the decision to dismiss the appellant, given such conduct, was not grossly unreasonable.

During the hearing of the appeal, the court enquired as to whether the appellant E had noted an appeal against his conviction and sentence. The information was not immediately at hand, and was communicated to the court later. Mrs *Zindi* in a letter informed the court that the appellant had advised her that he had filed the appeal in August 2002. No documentary evidence of this fact was tendered. It appears to me, even if he did note the appeal, that the appellant might have been out of time, since his conviction had taken place almost a year F earlier in July 2001. The appeal was also noted some eight or so months after the appellant received notice of his discharge from the police force. The appeal, if indeed it was noted, therefore has no effect on these proceedings.

I find in the result that the appeal lacks merit and must be dismissed.

It is accordingly ordered as follows:

> "The appeal is dismissed with costs." G

Sandura JA and Cheda JA concurred.

Kantor & Immerman, appellant's legal practitioners

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

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Source:
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ATTORNEY-GENERAL v FUNDIRA 2004 (1) ZLR 451 (S)

Citation	2004 (1) ZLR 451 (S)
Case No	Judgment No. S-33-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)
Heard	13 May 2004
Judgment	17 May 2004
Counsel	*F Chimbaru*, for the applicant *G C Chikumbirike*, for the respondent
Case Type	Appeal against grant of bail
Annotations	No case annotations to date

Flynote

Criminal procedure — *bail — appeal by Attorney-General against grant of — leave to appeal required — application made for leave to appeal* C *within 7 days of bail being granted — sufficient compliance with requirement to note appeal within 7 days*

Criminal procedure — *bail — decision made by High Court following appeal from magistrates court — when appeal against High Court's decision may be made*

Headnote

D The respondent, who was charged with currency offences, had been granted bail in the High Court. The Attorney-General immediately announced his intention of appealing and applied for leave to appeal. The judge refused leave, and within two days the Attorney-General applied to the Supreme Court for leave to appeal. The respondent argued that as the E Attorney-General had not noted an appeal within seven days, there was no appeal before the court and the respondent should be released.

Held, that no appeal lies to the Supreme Court from an order of a High Court judge sitting as an appeal judge in a bail application.

Held, further, however, that there is an exception in respect of persons charged with currency offences: applications for bail in respect of those F offences can commence in the magistrate's court, then proceed to the High Court and thereafter to the Supreme Court.

Held, further, that no party is relieved of the requirement to obtain leave to appeal in a bail application, where the appeal is against the decision of a judge of the High Court.

G*Held*, further, that the Attorney-General's application, within seven days, for leave to appeal constituted compliance with s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It could not have been the intention of the legislature to require the Attorney-General to file the notice of appeal at a time when it was legally not possible to file such a notice of appeal, by reason of awaiting the outcome of his application for H leave to appeal.

Chidyausiku CJ

Cases cited A

Chiyangwa v A-G & Ors 2004 (1) ZLR 57 (S)

S v Dzawo 1998 (1) ZLR 536 (S)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 121(1), (3) & (8); B Third Schedule, paras 10 & 11

Case information

F Chimbaru, for the applicant

G C Chikumbirike, for the respondent

Judgment

CHIDYAUSIKU CJ: in chambers, in terms of s 44(5) of the High Court Act C [*Chapter 7:06*]

The facts of this case are largely common cause. The respondent is charged with contravening, firstly, s 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*] ("the Act"), as read with s 11(1)(a) of the Exchange Control Regulations ("the Regulations"), SI 109 of 1996, and secondly, s 5(1)(b) of the Act as read with s 5(2)(9a)(ii) of the Regulations. He was placed on remand D in custody.

The respondent applied for bail in the High Court. The bail application was opposed by the Attorney-General. I am advised by both counsel that during the bail application the learned presiding judge indicated that he was inclined to grant bail and invited both counsel to work out what would be appropriate E conditions for bail. After a tentative agreement on conditions for bail, the Attorney-General reconsidered his position and would not consent to bail.

The learned judge thereafter granted bail on 3 May 2004. Mr Jagada, for the Attorney-General, immediately notified the court that the Attorney-General intended to appeal against the order in terms of s 121 of the Criminal F Procedure and Evidence Act [*Chapter 9:05*]. The Attorney-General then applied for leave to appeal, which leave was refused by the court *a quo*. On 5 May 2004, two days later, this application for leave to appeal was filed with the Supreme Court.

The grounds of appeal are set out in paras 4-7 of Mr Jagada's founding affidavit and read as follows: G

> "4. I respectfully submit that the Honourable Court misdirected itself and failed to appreciate the following –
>
> (i) That the respondent had sufficient funds in foreign accounts that in the event of him absconding he can afford to sustain himself in [a] foreign land and [the] police may never be able to trace him again. Thus, the court failed to appreciate that the temptation to H

> A the [respondent] to abscond is … great in view of the wealth possessed by him outside the country;
>
> (ii) That the investigations involve travelling by the police to countries such as South Africa and the United States and for [the] police to access the foreign bank accounts they need to first obtain authority whereas the respondent, if released, can simply give an B instruction to his bankers without authority. Thus there is a real likelihood that he may interfere with investigations if released on bail.
>
> 5. Finally, it is respectfully submitted that the Honourable Court erred in that there were no reasons given for the admission of the [respondent] to bail. The record of proceedings does not show why the court found C the [respondent] to be a suitable candidate for bail.
>
> 6. The prospects of succeeding on appeal in the Supreme Court are fairly bright in these circumstances.
>
> 7. This Honourable Court is being urged to grant the applicant the leave [to appeal]."

Mr *Chikumbirike*, for the respondent, did not file any opposing papers. He D made oral submissions in support of his contention, set out in some detail in a letter to the registrar dated 11 May 2004. The relevant part of the letter reads as follows:

> "The Attorney-General then invoked s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. An application for leave to appeal was then E made and it was dismissed by the learned judge. It is from this dismissal of the application for leave to appeal that the present application is before the Supreme Court. In terms of s 121, the Attorney-General or his representative can only appeal against the decision of a judge granting bail within seven days of the granting of the decision. During the seven day period with which the Attorney-General can appeal, the decision granting F bail shall be suspended, if immediately after the decision the judge is notified that the Attorney-General or his representative wishes to appeal against the

decision. Thereafter, the decision shall remain suspended and the person who had been granted bail shall remain in custody until the expiry of seven days. Consequently, it follows that if the seven days have lapsed and no appeal has been noted, the order of the judge granting bail becomes operative and the person granted bail, the respondent in this G matter, shall, upon fulfilling the conditions of the grant of bail (Annexure 'A'), be released from custody.

As you will note, Annexure 'A' was granted on 3 May 2004. The seven day period within which the Attorney-General may appeal in terms of H s 121(1)(b) expired as at the close of business yesterday, 10 May 2004.

2004 (1) ZLR p454

Chidyausiku CJ

The Attorney-General has therefore not complied with the provisions A of s 121(1)(a). The fact of seeking leave is clear evidence that no appeal has yet been noted to this Honourable Court. Consequently, I request that your office give confirmation of the fact of the Attorney-General not having complied with s 121(1)(a) so as to pave the way for the operation of the order of Hlatshwayo J, and for the release of the respondent, who had on 3 May 2004, immediately after the granting of bail, fulfilled all the B conditions for his release.

It should be emphasised that appealing against the decision refusing leave to appeal against the decision of Hlatshwayo J's judgment is not the same as noting an appeal, as is contemplated by s 121(1)(a). I should, however, point out that the Attorney-General has misread the law relating to appeals in relation to bail. The procedure [he] followed is predicated upon C s 121(8) of *Chapter 9:07*, discussed in the case of *S* v *Dzawo* 1998 (1) ZLR 536 (S). In terms of that section, it was necessary to seek leave of the High Court consequent upon the provisions of s 44(5) of the High Court Act. However, the Attorney-General's representative, in seeking leave before Hlatshwayo J and in making this application before this court, overlooked or is ignorant of the fact that s 121 ('Appeal against decisions regarding D bail') of the Criminal Procedure and Evidence Act [*Chapter 9:07*] was amended by the repeal of subs (8) (the one upon which [he] relied) and the substitution of –

'(8) There shall be no appeal to a judge of the Supreme Court from a decision or order of a judge of the High Court in terms of paragraph (b) of subsection (2), unless the decision or order relates to the admission E or refusal to admit to bail of a person charged with any offence referred to in paragraph 10 or 11 of the Third Schedule, in which event subsections (3) to (7) shall apply to such appeal.'

(SI 37 of 2004).

The effect of this amendment is that in relation to offences referred to in para 10 or 11 of the Third Schedule, there is an automatic right of appeal F for which no leave of a judge of the High Court is required before the noting of such appeal is noted by either the Attorney-General or the [respondent].

In this matter, the respondent, Emmanuel Anesu Fundira, was charged with contravening s 5(1)(a) and (b) of the Exchange Control Act as read with para 11(a) and (b) of subs (1) of s 11 of the Exchange Control G Regulations SI 109 of 1996. As is clearly shown by Annexure 'B', the request for remand, which was Annexure 'C' to his application before Hlatshwayo J to be admitted to bail before the High Court, the offences with which the respondent is being charged were added to the Third Schedule as para 11 by SI 37 of 2004. Clearly, therefore, the Attorney-General did not follow the relevant current enactment and is therefore H

2004 (1) ZLR p455

Chidyausiku CJ

A clearly out of time in noting the appeal. The decision in *S* v *Dzawo supra* is therefore no longer applicable.

I therefore seek that your office urgently gives a direction to the Registrar of the High Court that, as there is no appeal noted, …there be an instruction by the registrar's office to the Officer-in-Charge, Harare Remand Prison, for the release of the respondent. It is not an excuse on B the part of the Attorney-General that [he] overlooked or [was] ignorant of the amendment in SI 37 of 2004. Ignorance of the law has never been an excuse, more so when it comes from a person like the Attorney-General, who drafted and caused the gazetting of the [Statutory] Instrument. Furthermore, in any event there is not before the Supreme Court an application for leave to note an appeal out of time. Even if such leave is C sought by the filing of an application, that does not detract from the fact that as of midnight yesterday, the respondent was entitled to his freedom by operation of the provisions of the Criminal Procedure and Evidence Act. Furthermore, even if such extension of time to note an appeal is granted, that does not in turn suspend the order of Hlatshwayo J, which can only be suspended within the seven days after the notification to him of the desire to appeal, unless an appeal is noted within that time. An D appeal noted outside the seven day period after, for instance, the granting of an extension is not an appeal within seven days contemplated by the Act."

Mr *Chikumbirike*'s contention that the Attorney-General does not need the leave of the High Court judge concerned to appeal against the granting of bail E to anyone charged with an offence referred to in paras 10 or 11 of the Third Schedule cannot be correct.

Section 121(1) of the Criminal Procedure and Evidence Act explicitly provides that appeals against decisions granting bail are subject to s 44(5) of the High Court Act [*Chapter 7:06*], which clearly provides for the requirement of such leave.

F Mr *Chikumbirike* has clearly misinterpreted the amendment to s 121(8) of the Criminal Procedure and Evidence Act. The amendment to the subsection does no more than make it permissible to appeal in bail matters from the magistrates court to the High Court and thereafter to the Supreme Court, which was not possible before the amendment. Indeed, the history of the amendment clearly G demonstrates that.

In *S* v *Dzawo* 1998 (1) ZLR 536 (S), the applicant was convicted of a criminal offence in the magistrates court. The magistrate refused the applicant's request to be admitted to bail pending appeal against conviction and sentence. He then appealed to the High Court against the refusal to admit him to bail, H but the judge dismissed the appeal. He sought leave from the judge to appeal

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Chidyausiku CJ

to the Supreme Court against the judge's refusal to admit him to bail. The A judge declined to grant such leave because he decided that in terms of s 121(8) of the Criminal Procedure and Evidence Act no appeal lay against his decision to the Supreme Court. This court upheld that decision. This court held that where a person applies for bail in the magistrates court and the application is refused he is only entitled to a single appeal against that decision to the High B Court. Section 121(8) (before the amendment) of the Act had removed the right of the person concerned who had appealed to a judge of the High Court against a bail decision of a magistrate to take the judge's decision, subject to leave, on appeal to a judge of the Supreme Court. On the other hand, where a person convicted in the magistrates court makes his initial application for bail, not to the magistrate, but to a judge of the High Court an appeal still lies, C with leave, to a judge of the Supreme Court.

Dzawo's case *supra* was silent on whether or not the Attorney-General could appeal in similar circumstances. That issue was addressed in the recent case of *Chiyangwa* v *Attorney-General & Ors* 2004 (1) ZLR 57 (S). In that case, the applicant was charged with defeating or obstructing the course of justice, contempt of court and perjury. He was placed on remand. He requested to be D admitted to bail pending his trial. This was refused by the magistrate. He appealed to the High Court. The High Court granted him bail. The Attorney-General sought to appeal against the granting of bail by the High Court. This court held that the Attorney-General could not do that because of the provisions of s 121(8). At p 61 Chidyausiku CJ had this to say:

> "Subsection (8) provides that: 'There shall be no appeal from a decision E or order of a judge in terms of this section' (my emphasis).
>
> I have no doubt in my mind that subs (8) of s 121 deprives any party – both the accused person and the Attorney-General – of any right of appeal against any order made by a judge in terms of subs (5) of s 121 of the Act. Thus, when a judge of the High Court hears a bail application in the first instance he is exercising his power in terms of s 121(1) and whatever decision he makes is appealable. However, when he hears a bail application as an appeal judge he does so in terms of s 121(5) of the Act and any order he makes when sitting as such is not appealable because of the provisions of subs (8) of s 121.
>
> This, in essence, was the contention of Mr *Zhou* and I find myself in G agreement with him."

At p 8 of the judgment, the court concluded:

> "In conclusion, I am satisfied that the Attorney-General cannot appeal against the order of Karwi J because of s 121(8) of the Act. His intention to appeal, communicated to the judge, is devoid of any legal force or effect H

Chidyausiku CJ

> A and certainly does not activate the consequence envisaged in s 121(3) as contended for by the respondents."

In my view, the amendment to subs (8) does two things:

(a) the amendment asserts the position as set out in both *Dzawo*'s and *Chiyangwa*'s cases *supra*, namely, that no appeal lies to the Supreme Court from an order of a High Court judge sitting as an appeal judge in B a bail application; and

(b) creates an exception to the above rule in respect of persons charged with an offence referred to in paras 10 or 11 of the Third Schedule. In other words, applications for bail in respect of those offences can commence in the magistrates court, then proceed to the High Court and thereafter to the C Supreme Court.

The amendment to subs (8) does not exempt any party from the requirement to obtain leave to appeal in a bail application in terms of s 44(5) of the High Court Act.

The Attorney-General applied for leave to appeal to the judge in the court *a*D*quo* and such leave was refused. He then applied for such leave from this court within the stipulated seven days. That, in my view, is sufficient compliance with the requirements of s 121 of the Criminal Procedure and Evidence Act. The submission by the respondent that no notice of appeal has been filed and therefore the respondent should be released is not tenable.

Section 121(1), which is subject to subs (5) of s 44 of the High Court Act, m E stipulates that leave to appeal against the granting or refusal of bail is necessary. Thus, where the Attorney-General has been refused such leave by a judge of the High Court he can only obtain such leave from a judge of the Supreme Court upon application if such leave is merited. Until such leave has been granted by a judge of the Supreme Court, a notice of appeal cannot be F filed. It is quite clear from a reading of s 121 as a whole that the Attorney-General is required to apply for leave to appeal to a judge of this court within the stipulated seven days if a High Court judge has refused such leave. Failure to apply for such leave within the seven days entitles the accused person to his release. In my view, it cannot have been the intention of the legislature to require the Attorney-General to file the notice of appeal at a time when it was G legally not possible to file such a notice of appeal, by reason of awaiting the outcome of his application for leave to appeal from this court.

On this basis, I am satisfied that an application for leave to appeal to this court within seven days of the order of the court *a quo* constitutes compliance with s 121(3)(b).

H Finally, I have to determine whether or not leave to appeal should be granted.

2004 (1) ZLR p458

Chidyausiku CJ

Unfortunately, all I have before me is the court order without reasons for A judgment. It would appear that no such reasons for judgment were given.

Mr *Chikumbirike*'s main submission was that the time within which the Attorney-General should have noted an appeal has lapsed and therefore the respondent should be released. He did not advance any argument that leave to appeal should be refused on the merits. B

As I have said, I am not privy to the reasons why the application for leave was dismissed in the High Court.

Faced with this situation, two options seem open to me. I can either postpone this application and request the reasons for judgment for the refusal to grant leave and thereafter invite counsel to make submissions; or decide the matter C on the basis of the uncontested averments by the Attorney-General that he has good prospects of success on the merits. The former entails some delay, which could be considerable before finalising this application. This is a bail application and as such needs to be disposed of on an urgent basis. The latter option would facilitate a speedy resolution of this matter. I have opted for the latter option in order to speed up the resolution of the matter. D

In the result, the application is granted in terms of the draft.

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

Chikumbirike & Associates, respondent's legal practitioners E

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S v MAKUVATSINE 2004 (1) ZLR 459 (H)

Citation	2004 (1) ZLR 459 (H)
Case No	Judgment No. HH-102-04
Court	High Court, Harare
Judge	Uchena J
Heard	19 May 2004
Judgment	19 May 2004
Counsel	Details not supplied
Case Type	Criminal review
Annotations	Link to case annotations

Flynote

Criminal procedure — *plea of guilty — explanation of charge and essential elements — importance of — change of plea if doubt arises as to* C *correctness of plea of guilty — need to change plea even if doubt arises after conviction*

Headnote

Magistrates must constantly remind themselves to exercise care in canvassing the essential elements of the offence with an accused person who has pleaded guilty; they must be alert to s 272 of the Criminal Procedure and D Evidence Act [*Chapter 9:07*] (which requires magistrates to alter a plea of guilty to not guilty in cases where the magistrate is not satisfied that the plea was properly entered) and remember that if they do not diligently apply the provisions of the section, innocent persons may be convicted and sentenced. The provisions of s 272 extend to what an accused person E may say in mitigation: if at that stage he says something that causes the magistrate to doubt that the plea was properly tendered, he should alter the plea to one of not guilty and require the prosecution to prove the element, act or omission causing doubt or dissatisfaction.

Cases cited F

S v Matimba 1989 (3) ZLR 173 (S)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 272

Judgment

G**UCHENA J:** This matter first came to this court as an appeal. The appeal was presided over by Garwe JP and Chinhengo J.

At the hearing the Attorney-General's representative made certain concessions in terms of s 35 of the High Court Act [*Chapter 7:06*], as a result of which a decision was taken to invoke the general

review jurisdiction of the High Court H to deal with the matter.

2004 (1) ZLR p460

Uchena J

The facts of this case are these. The accused was involved in an accident whilst A driving on the wrong side of the road, leading to the death of the deceased. He was charged with culpable homicide. He pleaded guilty and was duly convicted. When asked to address the court on the question of special circumstances he remarked:

> "I am not a motor mechanic but I suspect there was a problem with my B steering wheel. I tried to swerve to the left lane from the right lane where it was to no avail."

In the light of this statement Mr *Shava,* for the respondent, made a concession that the respondent did not support the applicant's conviction. It was then decided to deal with this matter by way of review.

On 5February 2004 a minute was sent to the magistrate on the instructions of C Garwe JP and Chinhengo J with the following comments:

> "We have decided to deal with the matter as a review for reasons made known to Mr Shava of the Attorney-General's Office. One of the reasons was the concession by the State that the sentence was not supportable.
>
> Having perused the record we are concerned that the conviction may not D have been justified. When special circumstances were canvassed with the accused, he stated that the motor vehicle may have developed a fault which resulted in him failing to exercise proper control of the motor vehicle – see p 4 of the attached copy of the record of proceedings.
>
> Having regard to the provisions of Section 272 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] was there no basis for altering the plea E of guilty to not guilty and to hold a full trial?"

In response the trial magistrate remarked:

> "This is a matter in which accused admitted that he was driving on the incorrect side of the road prior to the accident when essential elements were being canvassed. The accused never told the court that he ended up driving on the wrong side of the road because of any mechanical fault F which means that he wilfully drove his motor vehicle on the incorrect lane along the Harare/Nyamapanda highway. That was during the day along a very busy road.
>
> The court referred to the matter of *S v Mtizwa* 1984(1) ZLR 230 at 232H to 233C which appears almost on fours with this matter factually…"

On 10 March 2004 Garwe JP again wrote to the trial magistrate commenting G as follows:

> "I attach hereto a certified copy of the record of proceedings in this matter.
>
> Contrary to your response the appellant, who was unrepresented, stated at p 4: H

2004 (1) ZLR p461

Uchena J

> A 'I am not a motor mechanic but I suspect there was a problem with my steering wheel. I tried to swerve to the left lane from the right lane where it was but it was to no avail.'"

The trial magistrate responded on 29 March 2004 as follows:

> "May I be allowed to adopt para 3 to 4 of my earlier response to the observations made by his Lordship which I respectfully thought B substantially addressed the same issue. This is a matter in which accused wilfully drove on the wrongside of the road prior to the accident… He never suggested that he ended up driving on the wrong side of the road due to a mechanical fault with his steering wheel. *S* v *Mtizwa* 1984 (1) ZLR 230 (H) at 232H to 233C is authority that such conduct amounts to negligence.
>
> C In light of the cited quotation at para 4, *the court interpreted it to be an admission that the accused observed the on coming truck.* When it was too late for him to take evasive action which resulted in the accident visibility was clear since it was during the day which should have enabled accused to observe the oncoming truck when it was still far away thereby avoiding the imminent danger" (emphasis added).

D Chinhengo J has since resigned from the High Court bench. In the light of this development I was asked to write this judgment in place of Chinhengo J.

It seems to me the trial magistrate does not understand the implications of s 272 of the Criminal Procedure and Evidence Act. That section provides as E follows:

"If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed —

(a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or

(b) F*is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all* the acts or omissions on which the charge is based; or

(c) is not satisfied that the accused has no valid defence to the charge;

the court shall record a plea of not guilty and require the prosecution to proceed with the trial:

G Provided that any element or act or omission correctly admitted by the accused up to the stage at which the court records a plea of not guilty and which has been recorded in terms of subsection (3) of section *two hundred and seventy-one* shall be sufficient proof in any court of that H element or act or omission" (emphasis added).

2004 (1) ZLR p462

Uchena J

It is important for magistrates to remind themselves constantly of the need to A exercise care in canvassing essential elements after a guilty plea. Magistrates must be alert to the provisions of s 272 to enable them to guard against the conviction of persons whose answers to questions raise doubt, or do not satisfy them of the accused's guilt or whose answers reveal that the accused may have a defence.

Section 272 is aimed at ensuring that only genuine and legally valid pleas of B guilty result in convictions while those with possible defences or are apparently doubtful are altered to not guilty, particularly in the case of persons who are not legally represented.

Magistrates should always remember that if they do not diligently apply the provisions of s 272, innocent persons may be convicted and sentenced. The C provisions of s 272 extend to what the accused person may say in mitigation. If he at that stage says something that causes a judicial officer to doubt the legal validity of the plea or to be not satisfied with the accused's admission of essential elements, acts or omissions, or to believe that the accused may have a valid defence to the charge, he should alter the guilty plea to one of not guilty D and require the prosecution to prove the element, act or omission causing doubt or dissatisfaction.

In *S* v *Matimba* 1989 (3) ZLR 173 (S) Dumbutshena CJ at p 177E-F said:
"It is trite that when a court proceeds in terms of s 255 of the Code *care must be taken that the accused understands the elements of the offence to which he is pleading guilty. If the court is in doubt of the genuineness of*E*the plea the provisions of s 255A of the Code should be applied."* (emphasis added)

Section 255(2)(b) is now s 271(2)(b) and s 255A is now s 272. If the magistrate in this case was alive to the need for the accused to understand the elements of negligence he would immediately, on being told of the mechanical fault, F have realised that the accused might have a valid defence to the charge or was proffering a defence. He should then have invoked the provision of s 272(c) of the Code.

In the present case the trial magistrate did not realise the accused was raising a defence that the act complained of, i.e. driving on the wrong side of the road, was not intentional but was due to a mechanical fault. He should have *mero*G*motu* altered the accused's plea to one of not guilty.

He was asked to comment on this in the first minute addressed to him but he did not appreciate what the judges were saying.

Garwe JP in his second minute specifically drew the magistrate's attention to the accused's actual words on p 4. The magistrate still did not appreciate the H

2004 (1) ZLR p463

Uchena J

A fact that he had failed to act in terms of s 272 of the Criminal Procedure and Evidence Act.

The magistrate's failure to appreciate what should be an obvious procedural requirement raises concern as to the extent of this problem among magistrates. For that reason this review judgment will be forwarded to the Chief Magistrate for him to take corrective action to ensure magistrates fully understand s 272 B of the Criminal Procedure and Evidence Act.

I am satisfied the accused's plea should have been altered to one of not guilty the moment he raised the issue of mechanical fault on the steering wheel.

The conviction and sentence must be set aside and the case remitted to the trial magistrate for him to conduct a trial on whether or not the accident and C deceased's death were due to a mechanical fault or the accused's negligence.

Accordingly the accused's conviction and sentence are set aside and the case is remitted to the same magistrate for trial *de novo*.

D Garwe JP concurred.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/S v WILSON & ORS 2004 (1) ZLR 464 (H)

S v WILSON & ORS 2004 (1) ZLR 464 (H)

Citation	2004 (1) ZLR 464 (H)
Case No	Judgment No. HH-114-04
Court	High Court, Harare
Judge	Kamocha J & Karwi J
Heard	7 July 2003
Judgment	19 May 2004
Counsel	*J James*, for the applicant *P Dube*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law — *common law offences — criminal defamation — defamation of a group — group not a body corporate or universitas — need for* C *defamatory matter to refer to a definite individual*

Criminal procedure — *charge — company — need to cite company as accused — not sufficient to charge director in representative capacity*

Headnote

The first appellant was managing director of a company which published a newspaper and the second appellant was the editor. They were both, D along with a reporter, convicted of criminal defamation. An article had been published in the newspaper which stated that the Draft Constitution that the Executive Committee of the Constitutional Commission of Inquiry said had been printed on 29 November 1999 had in fact been printed in September of that year. This, it was alleged, implied that the E general populace's views on the constitutional review taking place

in 1999 had not been taken into account and that the Executive Committee misled the people of Zimbabwe. No evidence was led to show that the Commission was a body corporate or *universitas* which was independent from its members and had succession.

The first accused was purportedly charged as representative of the company F although the company was not itself cited as an accused.

Held, that for the Executive Committee to be defamed, reference must have been to its named or ascertained member or members. The defamatory matter must not just refer to the Executive Committee itself without reference to a certain definite person or definite persons who are its members. As the Committee came into existence only after the original G draft was allegedly printed, the defamatory words were written about an unnamed entity comprising anonymous individuals.

Held, further, that a director or employee can only be cited as a representative of a company where the company itself is facing criminal charges. It was therefore improper to cite the first appellant as a representative of the H company.

2004 (1) ZLR p465

Kamocha J

Cases cited A

S v Modus Publications (Pvt) Ltd & Anor 1996 (2) ZLR 553 (S)

SA Associated Newspapers Ltd & Anor v Est Pelser 1975 (4) SA 797 (A)

Legislation considered

Commissions of Inquiry Act [*Chapter 10:07*], s 2

B Criminal Procedure & Evidence Act [*Chapter 9:07*], s 385(3)

Case information

E W W Morris, for the appellants

R K Tokwe, for the respondent

Judgment

KAMOCHA J: The three appellants were jointly charged with criminal C defamation. The allegations were that on 30 January 2000 they or one or more of them unlawfully and with intent to defame the Executive Committee of the Constitutional Commission of Inquiry of Zimbabwe, published in their *Standard Weekly* newspaper issue of 30 January to 5 February 2000, an article headed "Draft Printed Ahead of Report". The report averred that the *Standard*D newspaper had established that the Draft Constitution that the Executive Committee said had been printed on 29 November 1999, had in fact been printed way back in September 1999. That meant the general populace's views on the constitutional review had not been taken into account and the Executive Committee would have misled the people of Zimbabwe. As a result, the accused committed the offence of criminal defamation against the Executive E Committee of the Commission.

All three accused tendered pleas of not guilty but were nevertheless convicted at the end of the trial. They were sentenced as follows. The first accused was sentenced to pay a fine of $4 000 or in default of payment two months' imprisonment. The second accused was sentenced to pay a fine of $8 000 or F in default of payment four months' imprisonment while the third accused was sentenced to pay a fine of $6 000 or in default of payment three months' imprisonment. Aggrieved by the magistrate's decision they lodged this appeal against both conviction and sentence. The appeal against sentence was, however, abandoned when the appeal was argued.

In relation to the conviction, the appellants complained that the judgment of G the trial court amounted to a total abandonment of the judicial process in that:

(a) the magistrate misdirected herself in failing to consider the question of reference to a named or ascertainable complainant and should have found that there was no reference in the article to any ascertainable person or H persons;

Kamocha J

(b) the magistrate misdirected herself in finding that the first appellant A appeared in a representative capacity;

(c) the magistrate erred in finding that the first and the third appellants had the requisite *actus reus* for the offence;

(d) the magistrate erred in finding that the first and third appellants had the requisite *mens rea* for the offence; B

(e) the magistrate misdirected herself in taking into account events that occurred after the alleged offence had been committed; and

(f) the magistrate erred in taking into account evidence that was hearsay.

The relevant facts of the case are these. A company known as Standard Press (Pvt) Ltd is a publisher which publishes *The Standard Weekly* newspaper – C "the *Standard*". The three appellants held different positions in the company. The first appellant, Clive Wilson, was the managing director. Andrew Joylon Moyse, the second appellant, was the editor of *The Standard* while Zvouya Chengetai was its reporter.

It was common cause that as the managing director the first appellant's sole D responsibilities were to ensure the smooth and efficient administration and financial security of the company. It was his duty to appoint and employ the editor of the *Standard*. He, however, had no say in the content of the paper, which was strictly left to the editor who at the relevant time was the second appellant. This accords with the tradition in newspaper publishing as stated by Gubbay CJ in *S* v *Modus Publications (Pvt) Ltd & Anor* 1996 (2) ZLR 553 E (S) at 555C-D where he said:

> "Modus Publications (Pvt) Ltd publishes and distributes extensively throughout the country a weekly newspaper known as the *Financial Gazette*. Its chief executive is Mr Elias Rusike. At all material times, his function was to determine the policy of the newspaper, to ensure that it was financially viable and to recommend the appointment of editors to the F members of the board. He did not concern himself with the editorial content or articles appearing in each individual issue of this newspaper. For, in accordance with tradition in newspaper publishing, the editor is to be allowed complete latitude in deciding, on a day to day basis, what is worthy of print."

In casu, Clive Wilson testified to the same effect. He did not concern himself G with the editorial content or articles appearing in each individual issue of the *Standard* newspaper. Such matters are the responsibility of the editor. He therefore, cannot be held liable for what the editor decides is worthy of print.

The State purported to cite Clive Wilson in his representative capacity. The State's view was that he was representing the Standard Press (Pvt) Ltd – "the H

Kamocha J

A company". The company itself was, however, not charged with criminal defamation. Citing Clive Wilson in his representative capacity would be contrary to the provisions of s 385(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides:

> "In any *criminal proceedings against a corporate body, a director or employee of that corporate body shall be cited, as representative of that*B*corporate body*, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question" (my emphasis).

It is quite clear that a director or employee can only be cited as a representative of a company where the company itself is facing criminal charges. It was C therefore, improper to cite Clive Wilson as a representative of the company.

The trial magistrate laboured under the mistaken belief that Clive Wilson was the owner and the publisher of the *Standard* newspaper. She referred to him as such in her judgment. That is clearly erroneous. He in fact held the position of managing director.

A further difficulty is that even if the corporate body itself had been charged D and Clive Wilson had been cited in his representative capacity, no evidence was adduced in court to show that he knew or ought to have known of the falsity of the offending article. On the contrary, he was advised by the

editor that the offending story had been confirmed and it was only after its publication that he began to take a personal interest. He therefore could not E be held liable for what the editor did.

I now turn to deal with the liability or otherwise of the third appellant Chengetai Zvauya, the reporter. He was assigned to write the article in question by the assistant editor. He wrote the story and took it to the editor for discussion. He advised the editor that the story was not ready for publication as there was still checking to be done. It was his evidence that the editor agreed F with him and said he too felt the same. Zvauya said it was not his wish that the story be published at the time it was published in the light of the checking which had still to be done. Nevertheless, the editor decided to print the story before the checking was done, as the decision to publish or not to publish any story was solely his. It therefore admits of no doubt that the reporter had no hand in the decision-making process which culminated in the publication of G the offending story. It, therefore seems to me that he cannot be held liable for the publication of the article published against his wish which he had made known to the editor who appeared to agree with him. In the result, I make a specific finding that he cannot be held liable for the publication of the said article.

H While counsel for the respondent could not advance any meaningful

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Kamocha J

submissions relating to the liability or otherwise of the first and third A appellants, he argued that the second appellant should be held liable for the publication of the offending article since he was the editor of the *Standard*. He tendered an apology for doing so and finally resigned over the story in question. This in fact is common cause.

It was however argued on behalf of the second appellant that the respondent B had failed to prove that the article complained of contained a defamatory reference to any individual. This was a case of class or group defamation in which the appellants were alleged to have criminally defamed the Executive Committee of the Constitutional Commission of Inquiry of Zimbabwe. No evidence was led to show that the Commission was a body corporate or *universitates*C which is independent from its members and has succession. Section 2 of the Commissions of Inquiry Act [*Chapter 10:07*], which endows the Present with the powers to appoint commissions of inquiry into matters of public nature, does not make such commissions corporate bodies or *universitas* with powers to sue or be sued. For the Executive Committee to be defamed, reference must have been to its named or ascertained member or members. The defamatory matter must not just refer to the Executive Committee itself D without reference to a certain definite person or definite persons who are its members.

When dealing with this type of class or group defamation Wessels JA said in *SA Associated Newspapers Ltd & Anor* v *Estate Pelser* 1975 (4) SA 797 (A) at 810C-D: E

> "In every defamation action, the plaintiff must allege, and prove, that the defamatory words were published of and concerning him. So too, in a case of so-called class or group libel, the plaintiff can only succeed if it is proved at the trial that the matter complained of, though expressed to be in respect of the class or group of which he is a member, is in fact a publication thereof of and concerning him personally." F

In light of the current status of the law on that subject, it was submitted on behalf of the appellants that there was nowhere in the offending article where the person who gave the order to Government Printers was identified; it could not have been the Executive Committee which, at any event, only came into being after November 1999, when the re-print of the earlier document was said G in the article to have taken place. According to Mr Moyo's evidence, the Executive Committee came into existence on 11 December 1999 and he remained as its spokesperson.

It is common ground that there was no reference in the article to the Executive Committee, neither was it said, as alleged in the indictment, that the Executive Committee had said that the draft constitution was published on 29 November H 1999.

Kamocha J

A The appellants further submitted that Mr Moyo had not named any of the Executive Committee members except for himself and there was no evidence that the names of the committee members were generally known to the public. Indeed, there was no evidence that the general public knew that Moyo was on the committee. For that reason, the appellants submitted that the defamatory words were written about an unnamed entity comprising anonymous individuals. B Such an entity

could not possibly have been identified with sufficient clarity to have made it a complainant, the case especially when regard is had to the passage that appears in para 10 of the article, which reads:

> "Many individuals, including *commissioners* and civic organisations, have denounced the draft constitution, saying it misrepresents the views canvassed by the commissioners."

C It was their assertion that that could only mean to the average reader that there was dissension in the ranks of the commissioners themselves with some actually attacking the draft constitution. Those who attacked the draft could hardly, in the minds of the average reader, have had any hand in faking it.

It is significant to note that the Executive Committee could not have been D defamed because it only came into being after the activity complained of had already taken place. I find that there is no evidence indicating that the general public knew that Moyo was on the Executive Committee. The Executive Committee members were not identified. There was no evidence to indicate there was reference to ascertainable members of the Executive Committee. I am therefore inclined to agree with the submission that the defamatory words E were written about an unnamed entity comprising anonymous individuals. Consequently, there is no evidence showing that there was reference in the article to any ascertainable person or persons.

The appeal succeeds in respect of all the appellants and both the conviction and sentence are hereby set aside. F

Karwi J concurred.

Atherstone & Cook, appellants' legal practitioners

Criminal Division, Attorney-General's Office, respondent's legal G practitioners

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Source:
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TIRIBOYI v JANI & ANOR 2004 (1) ZLR 470 (H)

Citation	2004 (1) ZLR 470 (H)
Case No	Judgment No. HH-117-04
Court	High Court, Harare
Judge	Makarau J
Heard	22 April 2004
Judgment	26 May 2004
Counsel	*G Mandizha,* for the applicant *T Hussein,* for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Practice and procedure — *judgment — setting aside of judgment erroneously granted — nature of error justifying court in setting aside* C *judgment — error limited to error made by court*

Headnote

The applicant was the second purchaser of certain immovable property in Greendale, Harare. The respondents were the first purchasers, to whom the property had been transferred after the respondents had obtained a D High Court Order restraining the seller from transferring the property to anyone else. The applicant had not been cited in these proceedings. She now sought to have these proceedings set aside, and also to have the transfer set aside, on the grounds that the failure to cite her was an error warranting the rescission of the judgment in terms of r 449 of the High Court Rules 1971. E

Held, that the purpose of r 449 is to enable the court to revisit its orders and judgments to correct or set aside its orders and judgments given in error, in situations where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and would destroy the very basis upon which the justice system rests. It is an exception to the general rule, and must be resorted to only for the purposes of correcting an F injustice that cannot be corrected in any other way. The rule goes beyond the ambit of mere formal, technical, and clerical errors and may include the substance of the order or judgment. The rule is designed to correct errors made by the court itself and is not a vehicle through which new issues and new parties are brought before the court for trial. The three G requisites that have to be satisfied for relief under the rule are:

(1) that the judgment was erroneously sought or granted;

(2) that the judgment was granted in the absence of the applicant; and

(3) that the applicant's rights or interests are affected by the judgment.

Misjoinder, where the court is unaware of the interested party who has not been cited, is not an error on the part of the court granting the order and H cannot be corrected in terms of r 449.

2004 (1) ZLR p471

Makarau J

Cases considered A

Banda v Pitluk 1993 (2) ZLR 60 (H)

Grantully (Pvt) Ltd v UDC Ltd 2000 (1) ZLR 361 (S)

Mutebwa v Mutebwa 2001 (2) SA 193 (Tk)

Case information

G Mandizha, for the applicant

B*T Hussein,* for the respondents

Judgment

MAKARAU J: The "villain" in this double sale saga is one John Tasengera Sithole ("Sithole"). He, being the owner of certain immovable property in Greendale, Harare, commonly known as Number 89 Harare Drive, sold the C property to the respondents in November 2001 for the sum of $5 000 000. Two months later he sold the same property to the applicant for the sum of $6 000 000. The respondents did not take occupation of the property after the sale. The applicant did. Although the agreement of sale between her and Sithole provided that occupation would be given to her in May 2002, she alleges in her application that she took occupation of the property in August D 2002.

In April 2002, the respondents obtained a provisional order from this court, calling upon Sithole to show cause why he should not be ordered to transfer the property to the respondents. At the same time, the provisional order acted as interim protection to the respondents, restraining Sithole from transferring the property other than to them pending confirmation or discharge of the E provisional order. A caveat was duly noted against the title to the property as a result of this provisional order. The applicant was not cited in these proceedings.

In default of appearance by Sithole, the provisional order was confirmed and the property was transferred to the respondents by virtue of the order F confirming the provisional order. Sithole applied to have the default judgment against him set aside. He was unsuccessful and his application for rescission was dismissed on 2 March 2003.

In the meanwhile, the applicant remained in occupation of the property. She in turn had issued out of this court, an application, seeking an order compelling Sithole to transfer the property to her. Before this application G could be set down for hearing, in February 2003, she became aware of the transfer of the property to the respondents when she intercepted mail meant for Sithole. She then filed this application in which she prays for an order rescinding the default judgment against Sithole and for an order setting aside H the transfer in favour of the respondents. The application was opposed.

2004 (1) ZLR p472

Makarau J

Mr *Mandizha* for the applicant argued that the application was brought in A terms of r 449 (1) of the High Court Rules1971. The rule provides in part:

> "(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgment or order —
>
> (a) that was erroneously sought or erroneously granted in the absence of B any party affected thereby; or
>
> (b) …"

The issue that falls for my determination is whether the default judgment given against Sithole was erroneously sought or erroneously granted for the purposes of the rule.

Mr *Mandizha*'s argument was to the effect that because the applicant was not C joined as a party to the proceedings between the respondents and Sithole, the default judgment granted against Sithole was erroneously granted as another interested party was not before the court.

The purpose of R 449 appears to me to be to enable the court to revisit its orders and judgments to correct or set aside its orders and judgments given in error D and where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and will destroy the very basis upon which the justice system rests. It is an exception to the general rule, and must be resorted to only for the purposes of correcting an injustice that cannot be corrected in any other way.

The rule goes beyond the ambit of mere formal, technical, and clerical errors E and may include the substance of the order or judgment: see *Grantully (Pvt) Ltd* v *UDC Ltd* 2000 (1) ZLR 361 (S).

Rule 449 is a procedural step to correct an obviously wrong judgment or order.

The power given the court under the rule is discretionary and, like all such powers, must be exercised judiciously. F

In this matter, the error that the applicant complains of is that she was not cited in the proceedings between Sithole and the respondents. Clearly, this was not an error of the court. It is not the duty of the court to go looking for all potential respondents in suits brought before it.

A review of the authorities would appear to suggest that the rule is designed G to correct errors made by the court itself and is not an omnibus through which new issues and new parties are brought before the court for trial.

In *Grantully (Pvt) Ltd* v *UDC Ltd supra*, the default judgment was granted at a time when the judge was unaware of a relevant fact. The amount claimed was not yet due and payable. To that extent the judgment was entered erroneously H

2004 (1) ZLR p473

Makarau J

A and the Supreme Court might have had the judgment set aside had the applicant not delayed in bringing his application.

In *Banda* v *Pitluk* 1993 (2) ZLR 60, default judgment was granted against an applicant who had filed a notice of appearance to defend that was not brought to the attention of the judge entering the

default judgment. This was a B procedural irregularity on the part of the court.

In the South African case of *Mutebwa* v *Mutebwa* 2001 (2) SA 193 (TkH), the ambit of the equivalent rule in South Africa was discussed and it was held that the three requisites that had to be satisfied for relief under the rule were:

1. that the judgment was erroneously sought or granted;
2. that the judgment was granted in the absence of the applicant; and
3. C that the applicant's rights or interests are affected by the judgment.

Once these three factors are satisfied, the applicant is entitled to succeed and the court should not inquire into the merits of the matter to find "good cause" upon which to set aside the order or judgment in issue.

The issue that falls for determination in this application is whether the order D against Sithole was erroneously granted. In my view, it was not. It appears to me that misjoinder, where the court is unaware of the interested party who has not been cited is not an error on the part of the court granting the order and cannot be corrected in terms of r 449. It could only be an error on the part of the court if the court, having been made aware of the interests of the non-cited E party, proceeds notwithstanding the absence of that party to pass a judgment that will affect the rights of that party. There is no indication that the rights of the applicant were brought before the court that granted the order against Sithole. I would distinguish between the lack of knowledge on the part of the court in this instance from the lack of knowledge on the part of the court in the three authorities cited above. In the *Grantully* case, the court was unaware of F the provisions of a document that had been placed before it as evidence. In the *Banda* case, the court was unaware of the appearance to defend that the defendant had filed with the court. In *Mutebwa*'s case, the situation was slightly different. The Deputy Sheriff, a court official, had filed a false return with the court upon which the divorce was granted. When the court became aware of the correct position, it set aside its judgment as it had granted it in G error. The applicant herein has not shown the error committed by the court in this instance. The court could not have been aware of the correct position.

On the basis of the foregoing, the applicant cannot succeed. In the result I make the following order: H

1. The application is dismissed.

2004 (1) ZLR p474

Makarau J

2. The applicant shall pay the respondent's costs. A

Madzivanzira & Partners, applicant's legal practitioners

Hussein Ranchod & Company, respondent's legal practitioners B

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Source:
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FERGUSON & PARTNERS v ZIMBABWE FEDERATION OF TRADE UNIONS & ORS 2004 (1) ZLR 475 (H)

2004 (1) ZLR p475

Citation	2004 (1) ZLR 475 (H)
Case No	Judgment No. HB-57-04
Court	High Court, Bulawayo

Judge	Ndou J
Heard	2 February 2004
Judgment	27 May 2004
Counsel	*J Tshuma,* for the applicants *S Mazibisa,* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C**Contract** — *validity — lack of consent— contract induced by fear — when pressure may be sufficient to make contract voidable — onus of proving coercion — on person alleging it*

Employment — *contract — termination — suspension pending application to terminate employment — when suspension valid — when legislative* D *requirements complied with — letter of suspension issued 4 days after act of misconduct complained of — exact compliance not required*

Legal practitioner — *conduct and ethics — use of intemperate language in statements and pleadings — to be discourage, particularly in labour relations matters*

E**Practice and procedure** — *interdict — grant of — interdict affecting employees' rights under labour legislation — need to balance such rights against rights of employers not to have business interfered with*

Headnote

The applicant was a partnership of doctors in a medical practice, while the respondents were their employees, the Zimbabwe Federation of Trade F Unions and the union officials. The employees fell into two categories, clerical and general staff, and nursing sisters. The applicant sought an order confirming an interim order which (i) cancelled an agreement signed between themselves and the respondents, (ii) authorised them to proceed with disciplinary hearings, and (iii) barred the officials of the ZFTU from interfering with their practice.

G The clerical and general staff had engaged in a strike action without giving notice. A labour officer then mediated a settlement in which the workers' union representative accepted that the action was illegal and agreed that the strikers would write letters of apology by the following day. On that day, the nursing sisters gave an unsigned written ultimatum that they H would also strike if all the workers were not reinstated, and demanded a

review of their salaries. None of the striking workers wrote the letters as A agreed. On the following day, the nurses joined the strike. The applicant then wrote all categories of workers letters suspending them on the grounds that they had not complied with the agreement reached by their union on their behalf.

On 6 November, several days later, a meeting was held between the parties at B the instance of the Zimbabwe Federation of Trade Unions. During this meeting the applicant's lawyer was caused to leave by the respondents, leaving the applicant without legal representation, but as a result of the meeting, an agreement was signed re-instating the workers. The applicant later argued that it was not signed voluntarily but under duress, and hence was voidable. The applicant sought and obtained the interim order. All C the respondents filed opposing papers. A counter-application by those respondents who were employees sought a declaration that the agreement was binding, that their suspensions were null and void, and that they be re-instated in employment. On the issue of the suspensions, they argued that the letters of suspension did not comply with the requirements of the Regulations as no reason was given. D

Counsel for the respondent complained about some of the language used in the papers prepared by one of the applicants' legal practitioners. It contained such phrases to describe the respondents

and their actions as "lawlessness, thuggery and terror", "unionism by terror", "not through terrorist tactics and intimidation" and "from thugs in our midst."

Held, that compliance with the requirements for suspension in the Labour E Regulations Act need not be exact; the letters written to the clerical and general workers stated the reason for suspension adequately, hence the application of those workers for re-instatement was dismissed, and disciplinary proceedings against them could continue. However, the suspension of the nursing sisters was not valid as they had not been F included in the agreement to apologise. The nursing sisters were therefore declared re-instated.

Held, further, that a contract signed under duress (*metus*) is is not void *ab initio* but it is voidable at the instance of the coerced party. The pressure may be that of the other party or of a third party or both. The coerced party bears the onus of proving that the improper pressure is of the kind and G severity recognised by law. The applicants alleged pressure from the respondents and the trade union. The removal of the legal practitioner was simply one of the factors to be taken into account in deciding whether the agreement was tainted by duress, but the overall atmosphere was not conducive to free and fair contractual negotiations. The agreement H would be set aside.

A*Held*, further, that the use of strong language in pleadings and affidavits, especially in the field of labour relations when emotions are usually high, should be discouraged. Although we live in an egalitarian age and modes of speech in court proceedings which are less than refined are to be expected, there are limits to what should be tolerated in a court of law. If public respect for courts of law, which is vital to the functioning of a B free and constitutional state, is to exist the use of coarse and lavatorial language in court proceedings would contribute nothing towards earning and preserving that respect.

Held, further, that the interdict sought would place limitations on all the respondents' freedom of association and the right to organisation as acquired by the rules of international labour law and the national labour C legislation. Nonetheless, the applicants had established the right to an interdict which would prevent their business from being interfered with.

Cases cited

Broodryk v Smuts NO 1942 TPD 47

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

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

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

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

Savvides v Savvides & Ors 1986 (2) SA 325 (T)

Setlogelo v Setlogelo 1914 AD 221 E

Smith v Smith 1948 (4) SA 61 (N)

Sterling Products International Ltd v Zulu 1988 (2) ZLR 293 (S)

Union Govt (Min of Finance) v Gowar 1915 AD 426

Zulu v Sterling Products International Ltd 1988 (2) ZLR 110 (H)

Legislation considered F

Labour Relations Act [*Chapter 28:01*], s 12B

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 2003 (SI 130 of 2003), s 3(1)(2)

Case information

G*J Tshuma,* for the applicants

S Mazibisa, for the respondents

Judgment

NDOU J: This is a matter concerning the employees and employers of Galen H House. A labour dispute has been going on for some time with various

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meetings held which culminated in a meeting that secured "an agreement" on A exit packages or mutual termination of services for the employees from the applicants. The applicants, thereafter, filed an application which became case HC 2518/03 in which they sought a final order;

(a) setting aside the "agreement" in which applicants and respondents purportedly agreed that the fifth to thirty-fourth respondents be paid exit B packages as set out in a memorandum of agreement (annexed to the application) dated 7 November 2003.

(b) authorising applicants to proceed with disciplinary hearings against the fifth to thirty-fourth respondents, and

(c) interdicting second, third and fourth respondents from entering or coming C within 30 metres of applicants' business premises known at Galen House.

The interim relief sought and granted barred the first, second, third and fourth respondents and any other officers and employees of first respondent from entering or intruding upon the premises of applicants or from contacting by any means the applicants' staff or employees.

On 26 November 2003 all the respondents filed papers opposing the application. D Subsequently, on 9 November 2003 the fifth to thirty-fourth respondents filed an urgent chamber application under case number HB 2734/03, in which they sought a declaration that the applicants be bound by the same agreement which the applicants had sought to be set aside in case number HC 2518/03, and in the alternative they sought a declaration that their suspension of 1 November E 2003 were null and void and that consequently they be declared reinstated to their employment.

On 12 December 2003 this court directed that the two matters be combined and argued together. From the papers filed by the parties the issues for determination can be conveniently summarised as follows-

(a) Whether or not the fifth to thirty-fourth respondents' suspension is valid F and in terms of the law namely, the Labour Relations Act [*Chapter 28:01*] and all subsidiary legislation.

(b) Whether or not the agreement signed on 7 November 2003 is binding on the parties.

(c) Whether the peace order application by the applicants against the G respondents should be confirmed.

I will deal with these matters in turn.

Validity of the suspension and authority to proceed with hearing

The affected respondents have alleged that their suspensions are unlawful on the grounds that the suspensions "did not comply with the Labour Relations H

A Act, as amended, and the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations as published in SI 130 of 2003. The latter regulations were the applicable legislation at the time of the suspension. Section 3 of the Regulations deals with summary suspension without pay. It provides, *inter alia*:

> "3(1) Where an employer has good cause to believe that an employee is B guilty of any of the conduct mentioned in paragraph (b) of subsection (2) of section 12B of the Act, the employer may suspend such employee without pay and other benefits and shall forthwith serve the employee with a letter of suspension with reasons and grounds for the suspension.
>
> (2) Upon serving the employee with the suspension letter in terms of subsection (1) the employer shall, within fourteen days before terminating C the contract of employment, investigate the matter and conduct a hearing into the alleged misconduct of the employee and, may, according to the circumstances of the case -—
>
> (a) serve a notice, in writing, on the employee concerned terminating his or her contract of employment, if the grounds for his or her suspension are proved to his or her satisfaction; or

(b) D serve a notice, in writing, on the employee concerned removing the suspension and reinstating such employee if the grounds for suspension are not proved."

The respondents' suspension is based on an act of misconduct mentioned in s 12B of the Labour Relations Act, which includes *inter alia*, "any act, E conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract" and " wilful disobedience to a lawful order given by the employer". It is submitted by the applicants that the fifth to thirty-fourth respondents went on an unlawful strike on 27 October 2003. This was accepted to be the case by their union representatives before the Labour Officer and hence the consent determination of 30 October 2003. It is averred F that by engaging in an illegal strike they committed an act which is undoubtedly within the terms of conduct inconsistent with the fulfilment of employment terms and conditions. It is further submitted that the respondents accepted, through their union representatives, the illegality of their strike and agreed to write letters of apology so that they could return to work. The respondents clearly disobeyed the order of the Labour Officer as evinced by what G Nokukhanya Dube (first respondent) said in the founding affidavit (in the counter application) –

"The union representatives reported the matter to the Ministry of Labour. On 30 October 2003 a conciliatory hearing was convened by the Labour Officer and it was agreed among the doctors, union representatives and H the Labour Officer that the workers should write letters of apology and the

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Ndou J

employer would consider whether to reinstate them or not. The workers, A feeling they had done nothing wrong, decided not to write the letters and in any event the Labour Officer wrongly entertained the matter because she had no legal jurisdiction to deal with the case."

Relying on the above grounds, the applicants suspended the respondents by letters dated 1 November 2003. In short, the fifth to thirty-fourth respondents B were suspended for persisting with the unlawful collective job action notwithstanding the consent determination of the Labour Officer. The operative part of the letters of suspension reads:

"Dear …

This is to inform you that you have been suspended from duty at Galen House with immediate effect*, following your failure to comply with the agreement signed on your behalf at the offices of the Ministry of Labour on October 30th 2003 by the representative of your trades (sic) union.*

An application for your dismissal has been dispatched to the Ministry of Labour.

Yours sincerely D

(Signed) Dr N Ndebele" (emphasis added)

The highlighted portion serves as "reasons and grounds for the suspension".

In the circumstances the reason was given; whether such reason suffices is another matter which I will deal with later. E

Mr *Mazibisa*, for the respondents, referred me to the judgment of Greenland J in *Zulu* v *Sterling Products International Ltd* 1988 (2) ZLR 110 (H). In this case Greenland J held, that for the suspension to be valid, there must be compliance with the Regulations. The enquiry is not so much whether there has been "substantial" compliance with the Regulations but rather whether F there has been compliance. What Mr *Mazibisa's* submission fails to take into account is that this decision, in particular the point relied upon by the respondents, was overruled on appeal in *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S). In this case Gubbay JA (as he then was) held at 301B–

"The categorisation of an enactment as 'peremptory' or 'directory' with G the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour. As was pertinently observed by Van Den Heever J (as he then was) in *Lion Match Co Ltd* v *Wessels* 1946 OPD 376 at 380, the criterion is not the quality of the command but the intention of the legislator, which can only be derived from the words H

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A of the enactment, its general plan and objects. The same sentiment was expressed by Milne J in *JEM Motors Ltd* v *Boutle & Anor* 1961 (2) SA 320 (N) at 327 *in fine* – 328B. This approach received the *imprimatur* of the South African Appellate Division in *Maharaj & Ors* v *Rampersad* 1964 (4) SA 638 (A)

where, after concluding that the provision with which he was concerned was imperative, Van Winsen AJA went on to enquire whether the failure in strict compliance therewith was fatal. He B propounded the following test at 646C-E:

'The enquiry, I suggest, is not so much whether there has been "exact", "adequate" or "substantial" compliance with this injunction, but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of C the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importence.'

D See also *Shalala* v *Klerksdorp Town Council & Anor* 1969 (1) SA 582 (T) at 587H-588B; *Nkisimane & Ors* v *Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434E; and more recently, *Ex parte Dow* 1987 (3) SA 829 (D) at 831B-D.

Judges in this country also have not been slow to move away from the E traditionally strict approach. See *Swift Transport Services (Pvt) Ltd* v *Pittman NO & Ors* 1975 (2) RLR 226 (GD) at 228C-229C; 1976 (1) SA 827 at 828; *Macara* v *Minister of Information, Immigration and Toursim & Anor* 1977 (1) RLR (GD) at 70H; *Ex parte Ndlovu* 1981 ZLR 216 (GD) at 217F-G."

Testing the matter in the manner approved by these authorities, I am constrained F to discover the object of s 3(1) of the Regulations to determine whether that object is fundamental to the policy of the enactment and, if it is, to decide whether it is defeated or frustrated by the non-compliance complained of. The degree of observance and non-compliance is another relevant consideration.

The object behind the requirement of s 3(1), that upon summary suspension of an employee without pay and other benefits the employer shall forthwith G serve the employee with a letter of suspension, is predominantly the protection of the interests of the employee. The common law remedy of summary dismissal on the ground of misconduct is no longer permissible, save in the few prescribed situations. In terms of s 3(1) of the Regulations summary suspension is a remedy available to the employer, but the determination of whether the H employee has been guilty of misconduct is placed in the hands of ahearing

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constituted in terms of an employment code which is registered in terms of A section 101 of the Act. Upon serving the employee with a summary suspension letter, the employer shall, within fourteen days, before terminating the contract of employment, investigate the matter and conduct a hearing into the alleged misconduct – s 3(2) of the regulations.

An investigation and the conducting of a hearing and coming up with a B decision must be done with the minimum delay, thereby achieving certainty for the parties and involving as little disruption of their lives as possible. Otherwise the employee is prejudiced by remaining without payment of salary during the period of suspension and unable to assume other employment. And the employer is prejudiced by being obliged not to fill the employee's position until such time as a favourable determination has been made – *Sterling*C*Products International Ltd* v *Zulu, supra*, at 302C-E. That this object is fundamental to the policy of this particular provision is beyond question. In this case there is no merit in the respondents' contention that no reasons and grounds for the suspension were given. The highlighted portion of the letter of suspension, *supra,* clearly gives the reason. The next contention is whether the letter of suspension embodying the reasons and grounds for suspension D was issued "forthwith" or timeously. On 27 October 2003, the entire clerical and general staff of the applicant stopped working. The respondents stopped working without giving notice. It is beyond dispute that a representative of the applicant advised the respondents to go back and that those who were not prepared to do so, had to leave the premises. The entire staff left the building. E The same afternoon a team from, Commercial Workers' Union arrived at the applicant's premises and said that they were representing the striking employees. The matter was referred to the Ministry of Labour for mediation. The dispute was discussed. The respondents were advised that their strike was illegal. The matter was resolved on the basis that the respondents were to write letters of apology and commitment by 31 October 2003 and that the applicants were to F respond to these letters the same day they were received and also that the applicants were to consider reinstating the respondents. No letter was received from the respondents by 31 October 2003, instead, the applicants received an unsigned letter from the nursing sisters giving an ultimatum that unless the applicants re-instated the clerical staff, they would join the strike. They

also sought a review of their own salaries. On 1 November 2003 at around 0800 G hours the nursing sisters walked out of work without giving the statutory notice. As regards the clerical and general staff, the respondents' case is that they were suspended on 27 October 2003, so, it is argued the letters do not comply with the requirement of "forthwith" in s 3(1). Do these suspension letters served two or so days later, defeat or obstruct the object of that policy? H

Ndou J

A In my view, the degree of non-compliance was by no means great. I am, however, not making a finding that there was such a two day delay because it seems to me that the papers before me show that although the clerical and administration staff downed tools on 27 October 2003 the applicant only suspended them, in writing, on 1 November 2003. Whichever way one looks at the facts the object of the Regulations was not frustrated or materially B impaired by the applicants proceeding in the manner they did against the clerical and administrative staff.

The nursing sisters' case is different. They were obviously not part of the mediation of 30 October 2003. So it is fundamentally wrong to suspend them on the basis of failure to comply with the determination reached at the said C mediation process. There was obviously no need for them to write letters of apology and commitment on "by 3 October 2003" as they were not on strike by then.

The reasons given for suspension are not applicable to them. In their case they were supposed to be given the correct reasons and grounds for the suspension, i.e. that they engaged in an illegal strike. In their case the object of s 3 (1) was D frustrated and materially impaired as they were, strictly speaking, not served with letters of suspension which embody reasons and grounds of suspension.

VALIDITY OF THE AGREEMENT

The applicants in their founding affidavit state that the agreement reached on 7 November 2003 was signed whilst they were under duress. It is trite that an E agreement which is tainted by duress is liable to be set aside at the instance of the coerced party to such agreement. The principle of law is that a contract which has been entered into as a result of absolute force, *vis absoluta*, is void *ab initio* – Voet 4.2.1 and R H Christie, *The Law of Contract in South Africa* 2 ed page 367. This means that where a person is physically forced to sign a F contract or to affix his signature to a contract he has in reality not given his consent and hence the contract he signed is a legal nullity. *In casu,* the applicants are not relying on absolute force, *vis absoluta,* since they have not alleged that they were physically forced to affix their signatures to the contract. What they have alleged is that they were subjected to duress, *metus*, inducing such fear as was sufficient to negative their "apparent" consent to the G contract. The law is that a contract which is induced by duress of this kind is not void *ab initio* but it is voidable at the option of the coerced party – *Voet* 4.2.2, R H Christie *op cit* at page 367; *Smith* v *Smith* 1948 (4) SA 61 (N) at 67-8 and AJ Kerr, *The Principles of the Law of Contract* 4 ed pp 238-9. The onus is on the applicants to prove that the improper pressure is of the kind and H severity recognised by law in this context: *Savvides* v *Savvides & Ors* 1986

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(2) SA 325 (T) at 330A-B. The pressure may be that of the other party to the A contract or of a third party or both the other party and a third person – *Voet* 4.2.4, Van Leewen *Censura Forensis* 1.4.41.9, *Broodryk* v *Smuts NO* 1942 TPD 47 at 53 and *Smith* v *Smith, supra*. In this case the applicants are alleging the latter, i.e. pressure from the trade union and the employees themselves. By and large there is dispute of facts on what preceded the signing of the disputed B agreement. For a contract to be set aside on the ground of duress it must be shown that the following existed:

(a) actual violence or reasonable fear;

(b) the fear must be caused by the threat of some harm to the party;

(c) The threat or intimidation must be unlawful or unjustified or *contra bonos*B*mores;*

(d) The threat must be of an immediate or imminent harm or evil; and

(e) The pressure or means used must have resulted in prejudice or damage of some kind – *Broodryk* v *Smuts NO supra*, at page 52 and R H Christie *op cit*, at pages 368-377.

Further, the pressure must be directed towards the formation of the contract. D There is no doubt that most facts in connection with alleged improper pressure are highly contentious and cannot be resolved on the papers. The applicants filed a detailed affidavit of their erstwhile legal practitioner who was present immediately prior to the signing of the disputed agreement. The applicants averred that he was subjected "to appalling insults and threatened with E violence and he had to leave the premises". He confirmed this in his own affidavit. It seems to me that the dispute of fact centres around what led to his departure just before the signing of the disputed agreement. That he did not leave voluntarily is beyond dispute. It is common cause that the 6 November 2003 meeting was held at the instance of the Zimbabwe Federation of Trade Unions. The case of the respondents on the circumstances of the departure of F the applicants' legal practitioner is captured in paragraph 10 of the opposing affidavit filed by the second respondent. He states:

> "… I would however, like to point out that the lawyer was present on the meeting of 6 November 2003 and professed ignorance of the labour laws and the whole issue claiming that he had only been briefed that morning. *It was then that we asked him to leave* if he had no meaningful contribution G to make to the meeting." (emphasis added)

It is clear from this averment that while it is not clear what "asked him to leave" entailed, it is common cause that the respondents were responsible for the removal of the applicants' legal practitioner from the meeting at which the disputed agreement was concluded. Legal representation, which the applicants H

A had sought, was denied by actions of the respondents. In the circumstances, would this fact itself amount to improper pressure? Or would it simply be one of the factors to be taken into account in deciding whether the agreement is tainted by duress? In my view, the latter obtains. This factor plus the general circumstances under which the meeting was held will be the determining factor on the existence of the *metus*. The meeting was attended by a large group B inclusive of the respondents. The overall atmosphere, irrespective of what was said, was not conducive for free and fair contractual negotiations. The parties to the agreement were not on an equal footing in circumstances where the respondents removed the other contracting party's chosen legal advisor. In my view, the applicants have proven on a balance of probability, as required by law, that their consent to the disputed agreement was obtained by improper C pressure, *metus*, of the kind and severity as to render the contract voidable: H R Hahlo and E Kahn, *South Africa: The Union of South Africa: The Development of its Laws and Constitution* at 472 and *Union Government* v *Gowar* 1915 AD 426 at 452. The surrounding circumstances of this case justify that I set aside the disputed agreement for lack of volition on the part D of the applicants. This agreement was not voluntary – it was not freely entered into by the applicants.

INTERDICT

The target of the provisional order is the first respondent, the Zimbabwe Federation of Trade Unions, together with its officers and employees, second, E third and fourth respondents. In the draft order the interdict effectively means that the first respondent, as a trade union and second, third and fourth respondents as its unionists are barred from representing their members at their place of employment. It is trite that labour law balances the various rights and interests existing in or arising from the relations between the tripartite parties. Since all rights are relative, the rights and interests of one or more of F the tripartite parties are restrained or restricted by the rights, interests and well-being of each of the other of the tripartite parties. Labour law seeks to adjust those conflicting interests – T Poolman, *Principles of Unfair Labour Practice* (1985) at p 71. If I confirm the order in its present form I will have placed limitations on all 34 respondents' freedom of association and the right to organisation as provided for in the *International Labour Organisation*G*Conventions and Recommendations* and the subjective public law rights of labour relations acquired by the rules of international labour law and the national labour legislation – see *Convection Concerning Freedom of Association and Protection of the Right to Organise* of 1948 and the Labour H Relations Act, *supra*. Our labour law and labour relations have their roots in

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the principles of international labour law as manifested in international A custom and practice.

Mr *Mazibisa* rightly concedes that there is merit in the confirmation of the part of the provisional order that requires the respondents "to keep their peace and not disturb operations." The applicants in essence seek an interdict barring first, second, third and fourth respondents from interfering with the proper B running of their medical practice. In this regard the applicants' papers show a clear right on their part, a well founded fear or apprehension that their practice will be harmed by these respondents and that there is no other adequate remedy open to them - *Setlogelo* v *Setlogelo* 1914 AD 221; *Knox D'Arcy Ltd and Others v Jamieson and Others* 1995 (2) SA 579 (WLD); *Sanachem (Pty) Ltd* v *Farmers Agri-Care (Pty) Ltd & Ors* 1995 (2) SA 781 (A); *Bull* v C*Minister of State Security & Ors* 1987 (1) SA 422 (ZH) and *Gosschalk* v *Rossouw* 1966 (2) SA 476 (C). I will confirm the provisional order in such a way that there is a balance of the competing interests at play in this matter.

Before I conclude the matter I propose to deal with a complaint raised by Mr *Mazibisa* on behalf of his clients. He said that the respondents are not happy D with "some of the words used to describe the respondents and their actions". The words complained of were not detailed. The words complained of are seemingly the following: "lawlessness, thuggery and terror", "unionism by terror", "not through terrorist tactics and intimidation", "from thugs in our midst." Counsel who was instructed by Mr *Tshuma*, for the applicants, authored these words. He did not appear before me. This is very strong E language. Without detailed submissions I can only discourage the use of such strong language especially in the field of labour relations when emotions are usually high. Although we are not dealing here with obscene language, I think what Marais JA said in *Shoprite Checkers (Pty) Ltd* v *Bumpers Schwarmas CC & Ors* 2003 (5) SA 354 (SCA) is helpful. The learned judge stated unequivocally that freedom of speech was a valuable constitutional right but F that it did not extend to the use of obscene language in courts of law. If public respect for courts of law, which is vital to the functioning of a free and constitutional state, was to exist the use of coarse and lavatorial language in court proceedings would contribute nothing towards earning and preserving that respect. The learned judge of appeal further stated that we live in an G egalitarian age and modes of speech in court proceedings which are less than refined are to be expected, but there are limits to what should be tolerated in a court of law. All I can say, (in the absence of submissions in this regard) is that officers of the court need to tone down their language.

I, therefore, order that:

1. The provisional order granted in case number HC 2518/2003 be and is H

Ndou J

A hereby confirmed with costs in the following terms – "The first respondent and its officers and employees together with second , third and fourth respondents be and are hereby interdicted and prohibited from in any way, at Galen House, 93 Josiah Tongogara Street, Bulawayo, carrying on any activity of a nature likely to disturb peace or interfere with the proper running of the applicants' medical practice.

2. B The purported agreement between the applicants and the respondents, annexure "E" to the applicants' founding affidavit, be and is hereby declared to be null and void and of no legal effect, with respondents bearing the costs.
3. The counter application in case number 2734/2003 is granted in favour of C all the applicants who are nursing sisters as follows:

The suspension of the applicants by the respondents on the first November 2003 be and is hereby declared, with costs, to be null and void and of no legal force and effect. These applicants are individually declared to be re-instated as the respondents' employees with full pay and benefits until their contracts of employment are lawfully terminated.

D The application by clerical and general staff be and is hereby dismissed with costs.

Webb, Low & Barry, applicants' legal practitioners

E*Cheda & Partners*, respondents' legal practitioners

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MUTANGA v MUTANGA 2004 (1) ZLR 488 (H)

Citation	2004 (1) ZLR 488 (H)
Case No	Judgment No. HB-67-04
Court	High Court, Bulawayo
Judge	Cheda J
Heard	27 May 2004
Judgment	27 May 2004
Counsel	*G Nyathi*, for the applicant *T Hara*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Legal practitioner — *conduct and ethics — conflict of interest — what is —* C *practitioner acting first for one party, then the other, in litigation — need for court to discourage such conduct*

Headnote

In a divorce action between the parties, the respondent's legal practitioner took instructions from the defendant (the applicant in the present proceedings) then abandoned her and represented the plaintiff (the D present respondent) instead. Moreover, he then permitted the plaintiff to mislead the court as to the extent of the matrimonial property.

Held, that a legal practitioner must at all costs avoid acting against a former client where there is a likelihood or danger of him disclosing confidential information to the prejudice of the former client. It is a question of justice not only being done but being seen to be done. E

Held, further, that the legal practitioner should not have acted as he did, and conduct such as his will not receive any sympathy from the courts.

Case information

G Nyathi, for the applicant

T Hara, for the respondent F

Judgment

CHEDA J: The applicant filed an application against the respondent seeking the following interim relief:

> "Interim Relief Granted
>
> That pending the confirmation or discharge of this provisional order, the applicant is granted the following relief: G

1. That the respondent be and is hereby interdicted or prohibited from ejecting or attempting to procure the applicant's removal from stand No. 14774, Selbourne Park, Bulawayo or in any other manner interfering or attempting to interfere with her use and occupation of the said house without a court order.

2 The respondent be and is hereby prohibited from either assaulting, G

2004 (1) ZLR p489

Cheda J

A intimidating, verbally abusing or threatening the applicant in any manner.

3. In the event that the respondent violates any of the provisions of para (i) and (ii), then he be committed to prison for contempt of court for a period of 30 days.
4. That the applicant be and is hereby granted custody of the four minor B children of the parties."

The facts of this matter, which are largely common cause, are that the parties were married to each other on 20 January 1995 and the said marriage was dissolved on 12 December 2002, when the parties signed a consent paper regulating their affairs after the dissolution of their marriage.

C It is noteworthy that the respondent, who was the plaintiff in the divorce matter, stated in his declaration that there was no matrimonial property for distribution upon divorce. It is also noteworthy that the applicant, who was then the defendant in the said action, signed the consent paper awarding the respondent custody of the minor children. At the hearing, Mr *Nyathi* for the applicant raised an issue which touches on the possible unethical conduct of D Mr *Hara*, who is the respondent's legal practitioner. It is alleged that Mr *Hara* initially took instructions from the applicant and thereafter abandoned her and took instruction from the respondent instead. This allegation was uncontroverted by either Mr *Hara* or the respondent.

It is a fact that the respondent, through his legal practitioner, deliberately E misled the court into believing that there was no matrimonial property, yet in fact and in truth there was. This in my view, must have been known to his legal practitioner when he drafted both the summons and consent paper, because Mr *Hara* is a legal practitioner of considerable experience such that the non-mention of matrimonial property in a marriage of that period would have triggered him to query that aspect. The whole scheme was obviously designed F to dupe the applicant. The applicant stated in her affidavit that she did not query the exclusion of the distribution of property as she was made to believe that the issue would be dealt with separately.

The applicant is now challenging both the custody and distribution of property. She proposes that she be awarded a 45 per cent share of the net G proceeds of the matrimonial home while the respondent insists that she be awarded 15 per cent instead. As a way of resolving this matter I ordered that a round-table conference be held by the parties, but this resulted in an impasse.

While the application was for the restriction of the respondent's activities towards the applicant, as pointed out *supra,* the issue of the matrimonial H property and custody of the minor children took a centre stage.

2004 (1) ZLR p490

Cheda J

The issue which can be resolved on the papers is for the matrimonial home. The A respondent concedes that the applicant indeed made contributions towards the purchase and/or upkeep of the matrimonial home, hence his reason for offering her a 10 per cent share in the house. That admission in my view is very important as it shows that he acknowledges that she played a role in the matrimonial home and therefore there was absolutely no reason why she B should not be awarded a share. The question then is how much share she should get? She is asking for a 45 per cent, this in my view is rather on the higher scale, bearing in mind that her contribution is minimal. In my view, it is only fair and just that she be awarded a 35 per cent share in the matrimonial property in view of her contribution in the circumstances.

With regards to the custody of the minor children, the applicant signed a C consent paper awarding the respondent custody and I granted that order on 12 December 2002. In view of that fact, I cannot make a determination on it as this amounts to an attempt to rescind my own judgment. It is therefore entirely up to the applicant to make the relevant application to court for that remedy. The issue of movable property also requires to be determined, together with the issue of custody of the children. The applicant is therefore advised to pursue D it separately if she so wishes.

This matter would not have reached this stage had Mr *Hara* handled it in a professional manner. His decision in representing and/or taking instructions from both litigants is, to say the least, reprehensible. Such conduct should be discouraged and I therefore totally agree with Mr *Nyathi* that it is not clear E what role he played before he jumped over to represent the respondent.

Most professions in general, and legal practitioners in particular, walk a tightrope in their daily practices in as far as their ethical conduct in relation to their clients is concerned. As a general rule, a legal practitioner is entitled to accept or refuse work except where he feels that there will be a conflict of interest. The definition of "conflict of interest" is ably laid down in Chapter F V of the Code of Professional Conduct published by the Canadian Bar Association (25 August 1974), which states:

> "A conflicting interest is one which would likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of G the client or prospective client."

A lawyer must therefore at all costs avoid acting against a former client, whether the matter at hand is contentious or not, where there is a likelihood or a danger of leaking information obtained in confidence to the prejudice of the former client. E A L Lewis in his book *Legal Ethics* deals with this principle extensively and at pp 291-292, the learned author states: H

Cheda J

> A "The confidence of the client is absolute and must be preserved by his attorney except to the extent that disclosure may be rendered necessary or permissible… This confidence embraces all oral and documentary information respecting the client's affairs gained in acting for him whether from the client himself or from any other source whatever. This preservation of confidence is so important that it becomes a part of the B management of the attorney's practice and requires him to do his best to curb breach of confidence on the part of staff who must in the course of their work inevitably receive confidential information."

I should add, however, that there are exceptions to this general rule, being that an attorney is obliged to disclose confidential information upon request by an executor or administrator of his deceased client's estate, or by his client's C curator or trustee, provided that such information is essential in the proper administration of justice and nothing else. Such information, it should be noted, is received by them as successors to the client in the furtherance of his interests. The question of conflict of interest will therefore be non-existent.

I therefore find that Mr *Hara* should not have acted for the respondent at the expense of the applicant from whom he had initially obtained instructions. In D as much as a legal practitioner is trained to be impartial, it is difficult to envisage a situation where he would overcome the temptation to use his prior knowledge of the circumstances of his former client's affairs to the advantage of his present client. It is a question of justice not only being done but being seen to be done.

E Mr *Nyathi*, when addressing the issue of costs, raised the issue of possible misconduct on the part of Mr *Hara*. This was quite proper, for it is this type of conduct which attracts punitive costs on the part of the legal practitioner. However, in the exercise of my discretion I have decided against visiting him with such costs, but should warn legal practitioners that such conduct in future will not receive any sympathy from these courts. The respondent's behaviour F has been that of dishonesty and deceit not only to the applicant but to the court as well. Had he made a full disclosure of his intentions at the filing of the divorce proceedings, this matter would have probably been resolved without wasting time and putting the apllicant to unnecessary expense in exposing the respondent's conduct. The respondent obtained a court order through G fraudulent means. Such behaviour, in my view, can suitably be punished by awarding costs on the superior scale against the respondent. It would be improper for the applicant to be financially prejudiced as a result of the respondent's wrongful and unlawful conduct.

In conclusion, the following order is made:

1 H The immovable property (matrimonial house) being stand No. 14774

Cheda J

> Selbourne Park, Bulawayo, be and is hereby to be valued by a respectable A valuer and the costs of such value be shared in terms of shares in para 2 and 3 below.

2. The applicant be and is hereby awarded a 35 per cent share in the matrimonial house.

3. The respondent be and is awarded a 65 per cent share of the matrimonial B house.
4. The applicant to be paid her a 35 per cent share within three months of the valuation failing which the matrimonial house is to be sold to best advantage.
5. That the respondent be and is hereby prohibited from assaulting, C intimidating, verbally abusing or threatening the applicant in any manner.
6. In the event that the respondent violates any of the provisions of para 5 he be committed to prison for contempt of court for a period of 30 days.
7. That the respondent bears the costs of these proceedings on an attorney and client scale. D

Sibusiso Ndlovu, applicant's legal practitioners

Moyo Hara & Partners, respondent's legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/S v BANDA 2004 (1) ZLR 493 (H)

S v BANDA 2004 (1) ZLR 493 (H)

Citation	2004 (1) ZLR 493 (H)
Case No	Judgment No. HB-72-04
Court	High Court, Bulawayo
Judge	Cheda J
Heard	27 May 2004
Judgment	27 May 2004
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — *general principles — community service* C — *community service officers — recommendations of — need for court to consider such recommendations — if recommendation not accepted, need for court to state reasons*

Headnote

Community service officers are trained officers of the court whose main function is to assess the suitability of a candidate for community service. D Their recommendations should not be disregarded without good cause. If a recommendation is not accepted, it is essential that the trial court show that it considered the recommendation and why it ignored it. Failure to do so is a misdirection.

Judgment

E**CHEDA J:** This is a review case referred to me by the scrutinising regional magistrate after he had noticed the apparently lenient sentence imposed on the accused.

The relevant facts in brief are that the accused, who was 34 years of age, is related to the complainant and they used to stay together at Lwendulu Village, Hwange. On 15 December 2001, the complainant left his residence for his F rural home leaving the accused behind. The accused subsequently stole the complainant's property valued at $2 991 and nothing was recovered. He was arrested and appeared before the court where he pleaded guilty to theft of a stove only. The State accepted a limited plea for the stove valued at $2 600.

The accused was sentenced as follows:

> " G Five months' imprisonment of which three months' imprisonment is suspended for three years on condition the accused does not within that period commit any offence involving dishonesty for which upon conviction he is sentenced to a prison term without the option of a fine. The remaining two months' imprisonment is suspended on condition the accused completes 70 hours of community service at Ndangababe Primary School H in Cross Dete. The community service starts on 7 January 2002 and must

> be completed within two weeks of the date. It will be performed from A 8 a.m. to 1 p.m. then 2 p.m. to 4 p.m. every Monday to Friday which is not a public holiday to the satisfaction of the person in charge who may on good cause grant you leave of absence which shall not count as community service completed."

Before sentence was passed, the court sought the views of the community service officer who recommended that accused was not a suitable candidate for B community service in view of his previous conviction. However, the trial court ignored this recommendation and relevant previous convictions and went further to impose a sentence of community service. It has been brought to my attention that the accused did not submit himself for community service and was not arrested for his breach of the conditions of sentence. C

A trial court has a discretion in sentencing an accused. This power is indeed great, and if not judiciously exercised it can result in injustice as has happened in this case.

Community service is an alternative non-custodial form of punishment. community service officers are trained officers of this court whose main D function is to assess the suitability of a candidate for community service. Therefore, their recommendations cannot be ignored without good cause. If it is to be ignored, it is essential that the trial court show that it considered it and further state why it ignored it. Failure to do so, as was the case in this matter, leaves one with the only irresistible conclusion that the trial court did not even consider it. Failure to consider it is a misdirection. E

The community service officer's fears have indeed come to pass, as the accused did not perform community service.

There has been a clear miscarriage of justice in this matter and therefore, I find myself being unable to certify these proceedings as being in accordance with real and substantial justice and I accordingly withhold my 6certificate. F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/TENDERE v MUNICIPALITY OF HARARE 2004 (1) ZLR 495 (S)

TENDERE v MUNICIPALITY OF HARARE 2004 (1) ZLR 495 (S)

Citation 2004 (1) ZLR 495 (S)

Case No	Judgment No. S-66-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	3 March 2003
Judgment	3 June 2004
Counsel	*F M Katsande*, for the appellant *L T Biti*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Court — *officers of — messenger of court and sheriff — not agents of parties* C *to litigation — liability of messenger or sheriff for wrongful attachment — when judgment creditor may be liable*

Delict — *actio injuriarum — wrongful attachment — liability of deputy sheriff or messenger — liability of judgment creditor and attorney*

Headnote

D The respondent had obtained judgment against a debtor and a warrant of execution was issued. The messenger of court went to the address given as the address for service and seized property found there. The property belonged to the appellant, who now resided there, the debtor having moved elsewhere. The appellant sued the respondent for the loss and expenses caused, claiming that the respondent had been negligent. He E did not sue the messenger of court. Negligence was not established on the part of either the respondent or the messenger.

Held, that the messenger of court is appointed by the Minister of Justice in terms of the Magistrates Court Act [*Chapter 7:10*]. He is the executing arm of the court and performs the functions given to him under the Act. He is thus the messenger of the court and not the messenger of the F judgment creditor. Apart from the statutory provision, the proposition that a messenger of court is not an agent for the judgment creditor is well settled. Even if the messenger of court is strictly liable in delict for wrongful attachment, the judgment creditor is not vicariously liable for the actions of the messenger of court. It is only where the judgment creditor or his attorney plays an active role in the unlawful attachment of G the property by the messenger of court and makes the messenger's actions his own that he or his attorney can be held liable on the same basis H as the messenger of court.

2004 (1) ZLR p496

Chidyausiku CJ

Cases cited

Doelcam (Pvt) Ltd v Pichanick & Ors 1999 (1) ZLR 390 (H)

Sedibe & Anor v United Building Society & Anor 1993 (3) SA 671 (T)

Smith NO & Anor v Wonesayi 1972 (1) RLR 262 (A)

Weeks & Anor v Amalgamated Agencies Ltd 1920 AD 218

Legislation considered

Magistrates Court Act [*Chapter 7:10*], ss 10, 20 and 22

Case information

F M Katsande, for the appellant

L T Biti, for the respondent

Judgment

CHIDYAUSIKU CJ: The facts of this matter are simple and largely not in C dispute. The respondent sued one O Chirawu in the magistrates court and upon obtaining a judgment in its favour, issued a warrant of execution against the property of Chirawu. The messenger of court, who is not a party to these proceedings, attached, in pursuance of the warrant of attachment, and removed property that he found at No. 6 Jessop Road, Cranborne Park, Harare. No. 6 D Jessop Road was the address of service and the warrant directed the messenger of court to attach the property of Chirawu who, in terms of the court summons, resided at that address. Unbeknown to the respondent and the messenger of court, Mr Chirawu no longer lived at the address of service at the time of the execution of the warrant. The appellant was then resident at the address and E his property was attached and removed by the messenger of court. The appellant was aggrieved by this and sued the respondent, the judgment creditor of that case. He did not sue or join the messenger of court in this case.

The appellant's cause of action is set out in paras 3-6 of the declaration which reads as follows:

> "3. On 20 July 1994, during day time at No. 6 Jessop Road, Cranborne F Park, Harare, at the defendant's instance, the Messenger of the Court, Harare, acting in terms of a judgment issued by the magistrate, Harare, in case No. 4100/94 where the defendant sued one T O Chirawu, placed under judicial attachment and removed for sale in execution household furniture belonging to the plaintiff.
>
> 4. For a period of four days, The plaintiff and defendant argued before G the plaintiff finally convinced the defendant that he was the lawful owner of the property and at no time did he incur the debt either personally or as represented by T O Chirawu.
>
> 5. In the process of his interaction with the defendant, the plaintiff incurred loss of earnings and travelling expenses in order to vindicate his rights over the property H .

> 6. A The defendant's whole conduct gravely humiliated the plaintiff, hurt and impaired him and his family's fair name and reputation in the estimation of members of society."

The declaration was subsequently amended. The amendment reads as follows:

> "By the insertion after paragraph 3 of:
>
> '*3 bis*: At the time the instruction to attach was given by the defendant to B the Messenger of Court as aforesaid the defendant knew or must have known and by necessary inference knew that the property to be attached was not the property of the judgment debtor but that of the plaintiff and in giving the instruction the defendant acted with the intention to injure the plaintiff.
>
> In the alternative to paragraph *3 bis* and in the event that it be held that the C defendant did not know of the plaintiff's ownership of the property at the time of attachment:
>
> *3 ter*
>
> The defendant ought reasonably to have foreseen that the property so attached belonged to the plaintiff but negligently failed to do so'."

D The respondent admitted the attachment but maintained that it had good reason to believe that Mr Chirawu resided at the address known as 6 Jessop Road, Cranborne Park, Harare. The basis of such belief was that according to their records Mr Chirawu was the registered owner of the property and that all correspondence, statements and court process that were forwarded to that address were never returned as unclaimed. In other words, the respondent E denied that it was negligent as alleged or at all.

The court *a quo,* after assessing the evidence, concluded that neither the respondent nor the messenger of court was negligent. That conclusion is not seriously challenged. The appellant argued that the respondent was liable on the basis of strict liability. On the evidence on the record, the conclusion of F the court, that there was no negligence, cannot be faulted. The court also concluded that as neither the messenger of court nor the respondent was negligent the appellant had failed to establish the *animus injuriandi* and the claim must fail.

The court also dismissed the appellant's claim because he failed to establish that the messenger of court was an agent of the respondent in respect of whom G it was vicariously liable. In this regard, the court had this to say:

> "There was no evidence at all to indicate that the defendant through its agent wrongfully removed, with the requisite *animus injuriandi*, the goods belonging to the plaintiff. Therefore, the plaintiff has not established that it was the conduct of the defendant that gravely humiliated him. The H plaintiff's declaration did not plead that it was the conduct of the

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Chidyausiku CJ

> Messenger of Court (acting as the defendant's agent) upon which it was A relying.
>
> In fact, the plaintiff himself did not testify to the effect that the Messenger of Court was an agent of the defendant. This court is asked to find the defendant liable for the act of the Messenger of Court when it has not been established that he was either the employee or an authorised official of the defendant." B

The learned judge further went on to state:

> "I am not satisfied that there is a relationship of agent and principal between the Messenger of Court and the defendant Municipality of Harare and that has not been established by the plaintiff.
>
> Accordingly, the plaintiff has not discharged the *onus* placed upon him C as far as establishing vicarious liability is concerned."

The appellant now appeals against the judgment of the court *a quo* upon the following grounds as set out in the notice of appeal:

> "The learned Judge misconceived the law and its application to an action for defamation *in rem* in determining the implication of a Messenger of D Court acting *bona fide* but mistaken on the facts.
>
> The learned Judge erred in finding that such Messenger of Court's initiative in attaching goods while enforcing a writ against a stranger to the injured party incurs no liability for the principal who instructed him.
>
> The learned Judge at any rate erred when he fortified himself in this conclusion by finding against the appellant on grounds that he had a E positive duty to extricate himself from the outstanding debtor."

It is common cause that it is the messenger of court who attached the appellant's goods. There is no evidence of, nor do the pleadings attempt to establish, any causal connection between the actions of the messenger of court and those of the respondent as the judgment creditor. Consequently, the court *a quo* concluded that the respondent, as the judgment creditor, was not F vicariously liable for the actions of the messenger of court. I agree with this conclusion and on this basis alone the appeal should fail. I find Mr *Biti*'s argument in support of the court *a quo*'s conclusion unanswerable. The messenger of court is appointed by the Minister of Justice in terms of s 10 of the Magistrates Court Act [*Chapter 7:10*]. He is the executing arm of the court G and performs the functions given to him under section 20 and 22 of that Act. The messenger is thus the messenger of the court and not the messenger of the judgment creditor. Apart from the statutory provision, the position that a messenger of court is not an agent for the judgment creditor is well settled. In the leading case of *Weeks & Anor* v *Amalgamated Agencies Ltd* 1920 AD 218 at 225, De Villiers AJA (as he then was) had this to say: H

Chidyausiku CJ

> A "Now the Messenger is an officer of the court who executes the orders of the court. *V Leeuwen ad Peckium*: Deel XXIV 2, says of the Deurwaerders, the Messengers of the Higher Courts (but the principles also apply to Messengers of the Lower Courts): '*sunt enim executores, manus regis et ministeriales judicis.*' And *Voet* (V i 62), speaks of them while discharging their functions as representing the Judge '*cujus mandato instructi sunt*'.B But he points out they are not protected and may be resisted when they either have no mandate or go outside the limits of their authority (*mandati fines)*. The duties of the Deurwaerders were very carefully circumscribed in various Placaats. In the *Instructie v/d Hove van Holland,* etc of 20 August 1531 (*Groot Placaatboek II* art 91) they were enjoined '*de brieven die aan hen gedirigeerd worden … terstond ten versoeke van partije, ter executie stellen na heur vorm en inhouden."* And that still applies today. C The writ is the authority of the Messenger for the Attachment, and as all arrests are odious he must at his peril remain strictly within the four corners of the writ (*V Leeuwen R-D Law V* vi 12)."

Similarly in *Sedibe & Anor* v *United Building Society & Anor* 1993 (3) SA 671 (T), Eloff JP stated as follows at page 676A-C:

> " D In several decisions it was held that, in performing his functions, the messenger or sheriff does not act as the agent of anybody but as an executive of the law. Reference might in this regard be made to the following: *Hill* v *van der Byl* 1869 Buch 126 at 132; *Cyster* v *Du Toit* 1932 CPD 345 at 348; *Weeks & Anor* v *Amalgamated Agencies Ltd* 1920 AD 218 at 225 and 226; *Kathrada Brothers* v *Findlay & Sullivan* 1938 E NPD 321 at 329 and 330; *Paizes* v *Phitides* 1940 WLD 189 at 191; and, lastly, *Phillips* v *Hughes; Hughes* v *Maphumulo* 1979 (1) SA 225 (N) at 229 J-H.
>
> That, in my view, applies with equal force where the messenger disposes of property in pursuance of a sale in execution. When, as part of the process, he commits himself to contractual terms, he does so *suo nomine*F by virtue of his statutory authority; he becomes bound to the terms of the contract in his own name and he may enforce it on his own."

Mr *Katsande* for the appellant cited the case of *Smith NO & Anor* v *Wonesayi* 1972 (1) RLR 262 (A) in support of his contention that the messenger of court was strictly liable in delict for wrongful attachment. While this case indeed does support Mr *Katsande*'s contention that in an *actio injuriarum* the G liability of the messenger of court is based on strict liability it does not support his further contention that the judgment creditor is vicariously liable for the actions of the messenger of court. In that case, Beadle CJ at p 286C-E had this to say:

> "So far as the wrongful arrest of property or persons is concerned, there H appears to be no doubt what the law is. No matter how *bona fide* may be

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Chidyausiku CJ

> a messenger of the court in executing an invalid warrant, his *bona fides*A will not protect him from a claim for damages for *injuria* if, unbeknown to him, the warrant was in fact invalid. See such cases as *Weeks & Anor* v *Amalgamated Agencies Ltd* 1920 AD 218; *Cohen Lazar & Co* v *Gibbs,* 1922 TPD 142, *per* Wessels JP at pp 144-145; *Sliom* v *Wallach's Printing & Publishing Co Ltd* 1925 TPD 650 *per* Curlewis JP at p 657; and *Wade & Co* v *Union Government* 1938 CPD 84, *per* Davis J at pp 86-89. Both B*Weeks*' case *supra* and the *Cohen Lazar & Co* case *supra* were quoted with approval by van den Heever JA in *Foulds* v *Smith* 1950 (1) SA 1 (AD) at p 11."

Thus, the authorities clearly establish that a messenger of court is not an agent of the judgment creditor. However, where the judgment creditor or his attorney plays an active role in the unlawful attachment of the property by the C messenger of court and makes the messenger's actions his own he or his attorney can be held liable on the same basis as the messenger of court – see *Doelcam (Pvt) Ltd* v *Pichanick & Ors* 1999 (1) ZLR 390 (H).

In view of the conclusion, I have reached that the judgment creditor is not vicariously liable for the actions of the messenger of court, this appeal can be D disposed of on that basis. It is not necessary, for the purpose of determining this appeal, to determine the basis of liability of a messenger of court. In particular, it is not necessary to determine whether such liability is strict liability or is based on fault. Mr *Biti* had invited the court to resolve the controversy surrounding this issue. If the messenger of the court had been cited as the defendant or co-defendant in this case, that issue would be fairly E and squarely before us. As things stand, whatever the court might say on that issue would be *obiter*. The resolution of that controversy will have to await another day. I would, however, like to commend Mr *Biti* for his very well researched and presented argument on the controversial issue of *animus injuriandi.*

The appeal is dismissed with costs. F

Sandura JA, Cheda JA, Ziyambi JA & Malaba JA concurred.

F M Katsande, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners G

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Source:

NGARU v CHIEF IMMIGRATION OFFICER & ANOR 2004 (1) ZLR 501 (S)

Citation	2004 (1) ZLR 501 (S)
Case No	Judgment No. S-26-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Ziyambi JA, Malaba JA and Gwaunza JA
Heard	9 March 2004
Judgment	3 June 2004
Counsel	*G Mitha-Valla*, for the applicant *C A Mudenda*, for the respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

C**Constitutional law** — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 18 — right to protection of the law — s 18(12) — hearing to be in public — issue of Ministerial certificate that disclosure of any matter not in public interest — duty of court to make provision for disclosure in camera — Minister declining to disclose reasons for declaring person to be prohibited immigrant — Minister's certificate* D *not a bar to disclosure of reasons to the court*

Immigration — *declaration by Minister that person is a prohibited immigrant — reasons for declaration — certificate by Minister under s 22(2) of Immigration Act [Chapter 4:02] that it is not in public interest to disclose reasons — conflict with s 18(12) of Constitution — reasons to be* E *disclosed in camera to the court*

Headnote

The Zimbabwean applicant's husband was a citizen of Cameroon, resident in Zimbabwe under a temporary employment permit whose renewal was refused. The Minister (the second respondent) sought to deport him, but was provisionally restrained. He declared the husband an undesirable F inhabitant of or visitor to Zimbabwe, but certified in terms of s 22(2) of the Immigration Act [*Chapter 4:02*] that it was not in the public interest for him to disclose his reasons. He claimed that the section entitled him to decline to disclose the reasons, on the grounds that it was not in the public interest for him to do so. There was no averment that the marriage was one of convenience. It was argued for the applicant that it was G impossible for her to discharge the onus of showing the interference with her rights was not reasonably justifiable in a democratic society and that the Minister could and should disclose the reasons in court.

Held, that unless the court was made privy to the Minister's reasons and had the opportunity to hear the applicant's submissions in light of those H reasons, it would not be able to determine whether the interference with

Gwaunza JA

the applicant's right to freedom of movement was reasonably justifiable A in a democratic society. Section 22(2) of the Act was thus variance with s 18(12) of the Constitution. Because of the provisions of s 18(12), the Minister's certificate could not lawfully bar the disclosure of the reasons to the court. *Ordered*, accordingly, that the Minister give evidence *in camera*. B

Cases cited

Bhatti & Anor v Chief Immigration Officer & Anor 2001 (2) ZLR 114 (H)

Hambly v Chief Immigration Officer (1) 1995 (2) ZLR 264 (H)

Kenderjian v Chief Immigration Officer 2000 (1) ZLR 697 (S)C

Legislation considered

Constitution of Zimbabwe, ss 18(12) & 22

Immigration Act [*Chapter 4:02*], ss 14 & 22

Case information

G Mitha-Valla, for the applicant

C A Mudenda, for the respondents D

Judgment

GWAUNZA JA: The applicant alleges that her constitutional right to freedom of movement, guaranteed in terms of s 22(1) of the Constitution, has been violated by the respondents' denial to her husband, an alien, of a residence permit. She accordingly, prays for an order:

(i) that her right to reside in Zimbabwe with her non-citizen husband be E recognised;

(ii) that the respondents be restrained from unduly interfering with her right; and

(iii) that the respondents pay the costs of the application.

The facts of the case are common cause. The applicant is a citizen of F Zimbabwe. She married one Leopold Alain Sitchet-Njanko ("Leopold") a citizen of Cameroon, on 28 December 2001, at Bulawayo. At the time of the marriage, Leopold was attached to Zimrights, Bulawayo Branch, as a Project Advisor, and was under the employ of a German organisation called Weltfriedensdienst e.V. ("WFD"). He was then on a temporary employment G permit which was due to expire on 16 March 2002. On 27 December 2001, the Regional Representative of WFD – Southern African Office addressed a letter to the first respondent seeking, on behalf of Leopold, an extension of his temporary employment permit. On 9 April 2002, a letter turning down the application for a temporary employment permit was received from the first respondent. In the letter, the first respondent directed that Leopold should "go H

A with this letter to his nearest Immigration Office so that departure arrangements may be made." Thereafter, several appeals were made, without success, to the first respondent to reverse his decision not to extend Leopold's work permit. In one of the appeals, the applicant added her entreaties to those of WFD and her husband. Following the last of the letters of rejection received from the first respondent, the applicant consulted a legal practitioner who, on 9 August B 2002, wrote a letter to the first respondent, demanding that the latter allow Leopold to reside and work in Zimbabwe, failing which recourse would be had to legal action. In the letter, the legal practitioner stressed the applicant's entitlement to reside in the country with her spouse.

Having received no response to this letter, the applicant and her husband C jointly and successfully sought a provisional order restraining the respondents from deporting Leopold from Zimbabwe. The order, which was granted on 9 August 2002 was later extended pending the outcome of this application. This was on 24 September 2003. In the meantime, on 8 October 2002, a child was born to the applicant and her husband.

The application is opposed by the respondents. They argue, firstly, that the D applicant's husband was declared a prohibited immigrant in terms of s 14(1)(g) of the Immigration Act, [*Chapter 4:02*], and secondly, that the applicant's rights to reside with her husband in Zimbabwe have to be weighed against those of State Security and that "in these circumstances" the applicant's rights cannot be deemed to be absolute. The respondents have attached to their E opposing affidavit the order signed by the second respondent on 11 September 2002 declaring Leopold an undesirable inhabitant of or F visitor to Zimbabwe. They have also attached a certificate signed on the same date, by the second respondent in terms of s 22(2) of the Immigration Act [*Chapter 4:02*], to the effect that it was not in

the public interest for him (the Minister) to disclose the reasons why he deemed Leopold to be an undesirable inhabitant of or visitor to Zimbabwe.

The applicant takes issue with the second respondent's failure to disclose the reasons why her husband was deemed to be an undesirable inhabitant of or visitor to Zimbabwe. She asserts that without knowledge of those reasons, this court will not be able to determine "whether to uphold my right to reside in this country with my husband, or not to uphold it on the basis that my husband is m G a threat to good order or security." She then prays for an order compelling the respondents to disclose to the court the evidence they relied on for the decision to declare him an undesirable inhabitant of or visitor to Zimbabwe. She contends as follows in paragraph 6 of her answering affidavit:

> "… I am advised and verily believe that whilst the ministerial certificate H bars the disclosure of the reasons to the public, it does not bar the

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Gwaunza JA

> disclosure of the reasons in court. I respectfully aver that this Honourable A Court may make arrangements for the evidence upon which the Minister relied in coming up with his decision to be adduced *in camera* and all necessary measures may be taken to ensure that that evidence remain undisclosed to members of the public."

Section 14 of the Immigration Act, [*Chapter 4:02*] deals with the circumstances B under which a person will be deemed to be a prohibited person.

Section 22(2) of the Immigration Act [*Chapter 4:02*] upon which the second respondent relied for not disclosing the reasons for deeming Leopold an undesirable immigrant or visitor to Zimbabwe provides as follows:

> " (2) No information or reasons on which a decision in terms of s 14 or a decision to withdraw or cancel a permit was made may be disclosed in any C court if the Minister certifies that its disclosure is not in the public interest, and no court may question the adequacy of the grounds for any such decision."

The latter part of the subsection cited above is at variance with s 18(12) of the Constitution, which reads as follows:

> " (12) Notwithstanding anything contained in subsection (4), (10) or (11), D if in any proceedings before such court or other adjudicating authority as is referred to in subsection (2) or (9), including any proceedings by virtue of section 24, a certificate in writing is produced to the court or other authority signed by a Minister that it would not be in the public interest for any matter to be publicly disclosed, the court or other authority shall make arrangements for evidence relating to that matter to be heard *in*E*camera* and shall take such other action as may be necessary or expedient to prevent the disclosure of that matter."

In *Hambly* v *Chief Immigration Officer (1)* 1995 (2) ZLR 264 (H), the court considered these two provisions and held that because of s 18(12) of the constitution, the Minister's certificate could not lawfully bar the disclosure of F the reasons to the court.

Ms *Mitha-Valla,* for the applicant, submits that the applicant is unable, because of the non-disclosure of the reasons for denying her husband a residence permit, to discharge the *onus* that she bears, of proving that the interference with her rights was not reasonably justifiable in a democratic society. The fact that such *onus* lies on an applicant in matters such as these G was stressed by this court in *Kenderjian* v *Chief Immigration Officer* 2000 (1) ZLR 697 where Gubbay CJ said at 700B-C:

> "It follows that the crucial question to be decided is whether the applicant has been able to show that such interference, under the authority of s 17(a) of the Act, is not reasonably justifiable in a democratic society." H

Gwaunza JA

A This *dictum* is cited with approval in the recent case of *Bhatti & Anor* v *Chief Immigration Officer & Anor* 2001 (2) ZLR 114 (H). In that case, Hlatshwayo J suggests the proper approach to be adopted involves two stages of enquiry, the first being the "rights (to freedom of movement) as defined in the *Rattigan* line of cases, taking into account whether the marriage is one of convenience or not." The second stage of the inquiry, according to the learned judge, is the B qualification of such a right.

If this principle is applied to the circumstances of this case, it is evident that *in casu* the first stage of the enquiry does not come into play. This is because at no time was it alleged by the respondent against the applicant that her marriage to Leopold was one of convenience. What is relevant here is the C second stage, which is the determination of whether or not the applicant's right should be qualified by the public interest limitations outlined in para (a) of s 22(3) of the Constitution.

There is, in my view, merit in the applicant's contention that unless the court is made privy to the Minister's reasons for declaring the applicant's husband an undesirable inhabitant of or visitor to Zimbabwe, and has the opportunity D to hear the applicant's submissions in light of such reasons, it will not be able to determine whether the interference with the applicant's right to freedom of movement has a constitutional basis; in other words, whether such interference is reasonably justifiable in a democratic society.

I am therefore, satisfied this is a proper case for this court to invoke s 18(12) E of the Constitution.

It is in the premises ordered as follows:

That the Registrar of this court shall make arrangements for the second respondent to appear before this court on a suitable date and give evidence *in camera* on why the applicant's husband, Leopold Alain Sitchet-Njanko, was F deemed to be an undesirable inhabitant of or visitor to Zimbabwe.

Chidyausiku CJ, Sandura JA, Ziyambi JA & Malaba JA concurred.

Kantor & Immerman, applicant's legal practitioners

G*Civil Division of the Attorney-General's Office*, respondents' legal practitioner

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Source:
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SUNFRESH ENTERPRISES (PVT) LTD T/A BULEMBI SAFARIS v ZIMBABWE REVENUE AUTHORITY 2004 (1) ZLR 506 (H)

Citation	2004 (1) ZLR 506 (H)
Case No	Judgment No. HB-78-04
Court	High Court, Bulawayo
Judge	Cheda J
Heard	24 November 2003
Judgment	3 June 2004
Counsel	*J C Andersen SC,* for the applicant *A B C Chinake,* for the respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Interpretation of statutes — *intention of the legislature — expressio est* C *exclusio alterius — what is not expressed is not intended*

Revenue and public finance — *income tax — fees paid to non-resident — withholding tax on — commission paid to independent operators outside Zimbabwe who sourced clients for safari operator in Zimbabwe — commission paid outside Zimbabwe — not "fees" as defined —* D *Zimbabwean operator not a "payer" as defined*

Statutes — *Income Tax Act [Chapter 23:06] — Seventeenth schedule — "fees" — meaning of*

Headnote

The applicant was a safari operator in Zimbabwe which engaged a foreign E agent to market its services; the agent received a commission on its sales from the client. Payments of the commission were made to the agent outside Zimbabwe by the client outside Zimbabwe. The respondent, which collected tax in Zimbabwe, claimed that tax must be paid on the commissions and had sought an order to freeze the applicant's account in Zimbabwe for failing to withhold the tax. The applicant then sought F an order barring the respondent from doing this. It argued that "fees" in the schedule to the Income Tax Act referred only to funds whose source is from within Zimbabwe, and that the definition of "payer" in terms of the schedule excluded the applicant.

Held, that the intention of the legislature is revealed in what it includes, and G where one or more things of a class are mentioned, by implication that is which not mentioned is excluded

Held, further, that the definition of "fees" limited the meaning to an amount whose source is within Zimbabwe. In this case, the source was foreign and was paid by the client directly to the agent and not to the safari operator who conducted his business in Zimbabwe. H

2004 (1) ZLR p507

Cheda J

A*Held*, further, that the person paying commission was a non-resident, so the applicant could not be a "payer" as defined.

Held, further, that there was no mechanism provided to allow the respondent to make an assessment in respect of taxes not held by the applicant. The commission withheld was outside the country and as such could not be legally assessed by the respondent.

Cases cited B

CoT v Shein 1958 R & N 384 (S)

Farrar's Estate v CIR 1926 TPD (2) 501

Federated Employers' Insurance Co Ltd v Magubane 1982 (2) SA 710 (A) C

S v Gampel Bros & Barnett (Pty) Ltd 1978 (3) SA 772 (A)

S v Moroney 1978 (4) SA 389 (A)

S v Ngwenya 1979 (2) SA 96 (A)

Williams v Singer & Ors, Pool v Royal Exchange Assurance [1921] 1 AC 65

Legislation considered D

Income Tax Act [*Chapter23:06*], ss 30 & 95 and Seventeenth Schedule

Case information

J C Andersen SC, for the applicant

E*A B C Chinake,* for the respondent

Judgment

CHEDA J: On 16 January 2003 the applicant filed an urgent chamber application seeking an interdict against the respondent from freezing its accounts at National Merchant Bank as it believed that it had a right to withhold tax on commission from the applicant's accounts. The provisional F order was granted by this court on 17 January 2003 and argued before me on 24 November 2003.

The facts which are common cause are that the applicant runs a safari operation as Bulembi Safaris in Bulawayo while the respondent is a body corporate established in terms of the Revenue Authority Act [*Chapter 23:11*].

G In May 2002 the respondent was conducting an audit into the tourism industry. During the audit it found that all taxes due and all amounts earned in foreign currency had been declared, save for a withholding tax on commission paid to a foreign independent operator.

The respondent then calculated the commission purportedly in terms of s 30 H as read with the seventeenth Schedule of the Income Tax Act [*Chapter 23:06*].

Cheda J

Section 30 reads: A

> "*Non Residents' Tax on fees*
>
> There shall be charged, levied and collected throughout Zimbabwe for the benefit of the Consolidated Revenue Fund a non-residents' tax on fees in accordance with the provisions of the Seventeenth Schedule at the rate of tax fixed from time to time in the charging Act." B

The Seventeenth Schedule deals with tax on fees and defines what a non-resident is and what the term "fees" means under the said Act. It reads:

> "SEVENTEENTH SCHEDULE (Sections 30 and 95)
>
> NON-RESIDENTS' TAX ON FEES
>
> *Interpretation*C
>
> 1.(1) In this schedule, subject to subparagraph (2) –
>
> "fees" means any amount from a source within Zimbabwe payable in respect of any services of a technical, managerial, administrative or consultative nature …"

The respondent, after its calculation of the withholding tax, arrived at the amount of $6 957 054,03 which amount it sought to garnish in the above D named bank. The applicant through Adv *C Andersen* argued that the respondent had no authority to garnish the applicant's account for fees whose source is outside Zimbabwe. He further argued that the applicant is not a payer as described in the Seventeenth Schedule *supra* which in s 1defines "non-resident person" as – E

> "(a) a person, other than a company, who; or
>
> (b) a partnership or foreign company which;
>
> is not ordinarily resident in Zimbabwe;
>
> "payer" means any person who or partnership which pays or is responsible for the payment of fees, including the State or a statutory corporation or F any person who or partnership which pays or is responsible for the payment of fees for or on behalf of the State or any statutory corporation."

It is further his argument that the commission on which tax is to be deducted is not included in the definition of "fees" as defined in the Act.

Mr *Chinake* for the respondent argued that the applicant has clearly stated in paragraph 13 that its relationship with the independent operators is that it G engages them to market their operations and the particular animals on offer for hunting. And it further stated that whatever they pay to the independent operator is part of the operating expenses not as a commission but as marketing services.

It is for this marketing service that Mr *Chinake* argued that such payment H brings them within the ambit of "payer" as defined in s 30 as read with the

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Cheda J

A Seventeenth Schedule. He further argued that the originating cause is in Zimbabwe. It is for these reasons that he firmly submits that the applicant is obliged to pay tax and it is on that basis that the

respondent is entitled to withhold tax on commission.

Whereas it is a legal obligation for individuals, companies etc to pay tax, there has to be a clear legal basis for so doing. The respondent is a creature of statute B and is therefore obliged to act within the four corners of the said statute at all times.

The issues in my view are:

(1) whether or not the applicant is a payer as defined in the Act; or

(2) whether "fees" as defined in the Act includes commission.

C The two words referred to above are capable of various meanings. It is therefore essential to link the relevant meaning to the use of the words in question in relation to the intention of the legislature.

The intention theory was defined in *Farrar's Estate* v *Commissioner for*D*Inland Revenue* 1926 TPD (2) 501 at 508 where Stratford J stated:

> "The governing rule of interpretation – overriding the so called "golden rule" – is to endeavour to ascertain the intention of the law-maker from a study of the provisions of the enactment in question and there is no doubt that the literal grammatical meaning of the words must give way to that rule. (See *Venter* v *Rex* 1907, TS, page 910 and cases there cited.)"

E The intention of the legislature theory has been followed over a long time as evidenced by the following cases: *S* v *Gampel Brothers & Barnett (Pty) Ltd* 1978 (3) SA 772 (A) at 784-785; *S* v *Moroney* 1978 (4) SA 389 (A) at 399-400 and 405-406; *S* v *Ngwenya* 1979 (2) SA 96 (A) at 100-01; *Federated Employers' Insurance Co. Ltd* v *Magubane* 1981 (2) SA 710 (A) at 716.

The definition of "fees" in the Act in my view limits the meaning to an amount F whose source is within Zimbabwe, see *Commissioner of Taxes* v *Shein* 1958 R & N 384 (S) and *Williams* v *Singer & Ors, Pool* v *Royal Exchange Assurance* [1921] 1 AC 65.

It has been argued that the agent's work on behalf of the applicant is that of an administrative nature which brings it within the ambit of fees. I do not agree G with this argument for the reason that first and foremost they must be from a source within Zimbabwe, but in this case, the source is foreign and is paid by the client directly to the agent and not to the Safari Operator who conducts his business in Zimbabwe. I am of the respectful view that if the legislature intended it to be so it would have so expressed in order to avoid doubt.

H This is where the maximum *expressio unius est exclusio alterius* at times

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Cheda J

stated *expressum facit cessare tacitum* (that which is expressed puts an end A to that which is unspoken). The mention of one or more things of a particular class may be regarded as by implication excluding all other members of the class. The definition of "payer" as stated in my view completely excludes the applicant from the legal obligation to pay "fees" Both definitions exclude the applicant.

In addition to that there is no mechanism provided to allow the respondent to B make an assessment in respect of taxes not held by the applicant. *In casu*, the commission withheld is outside the country and as such cannot be legally assessed by the respondent. The respondent in my view has no right to freeze the applicant's accounts

In conclusion the following order is made:

1. That the respondent be and is hereby interdicted from garnishing, freezing or interfering with the applicant's accounts with the National Merchant Bank (account number 0210005897) and Stanbic Commercial Bank (account number 014003707970).
2. That the respondent acted *ultra vires* its proviso in terms of s 30 as read D with Schedule 17 of the Income Tax Act [*Chapter 23:11*] in ruling that the withholding tax is due and collectable by the applicant for commissions paid by non-resident hunters to non-resident operators.
3. That in terms of s 30 as read with Schedule 17 of the Income Tax Act [*Chapter 23:11*] there is no statutory obligation on the part of the E applicant to collect withholding tax on commissions paid directly to a non-resident independent operator by a non-resident hunter.
4. That the respondent be and is hereby ordered to pay the costs of this application.

Lazarus & Sarif, applicant's legal practitioners F

Kantor & Immerman, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 1/AIRFIELD INVESTMENTS (PVT) LTD v MINISTER OF LANDS & ORS 2004 (1) ZLR 511 (S)

AIRFIELD INVESTMENTS (PVT) LTD v MINISTER OF LANDS & ORS 2004 (1) ZLR 511 (S)

Citation	2004 (1) ZLR 511 (S)
Case No	Judgment No. S-36-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Malaba JA
Heard	4 May 2004
Judgment	3 June 2004
Counsel	*E T Matinenga*, for the appellant *D D Chirindo*, for the first to fourth respondents No appearance for the fifth respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

C**Land** — *acquisition — acquisition order issued under s 8 of Land Acquisition Act [Chapter 20:10] — effect — acquiring authority becomes owner of land even though application pending before Administrative Court for confirmation of order*

Practice and procedure — *interdict — application — requirements for —* D *need for applicant to be acting lawfully — cannot be granted to protect unlawful activities even pending constitutional application*

Practice and procedure — *interdict — application — purpose for which interdict sought — interdict sought to protect rights in property — property already taken from applicant by operation of law — interdict* E *may not be granted for such purpose*

Headnote

The appellant owned a farm. The Minister of Lands issued a notice for the compulsory acquisition of the farm for resettlement purposes. Although the appellant lodged an objection, the Minister then issued a notice under s 8(1) of the Land Acquisition Act [*Chapter 20:10*], acquiring the F farm, and allocated the farm to an individual, the fifth respondent. The appellant refused to vacate the farm and hand it to the fifth respondent. It sought an interdict preventing the Minister from proceeding with the acquisition pending the determination of the constitutionality of the relevant sections of the Act.

G*Held*, that when the Minister issued the notice under s 8 of the Act, the acquiring authority became of owner of the land. All the appellant had left was the right granted by s 9 to remain on the farm for a limited period.

Held, further, that the acquiring authority became the owner of the land even though an application was pending before the Administrative Court for confirmation of the acquisition order.

H*Held*, further, that an interim interdict is not a remedy for past invasions of

rights and will not be granted to a person whose rights in a thing have A already been taken from him by operation of law at the time he makes an application for interim relief. At the time the appellant applied for the interim relief all the rights of ownership it had in the land had been taken by means of the order of acquisition and vested in the acquiring authority. The acquisition of the land by the State was a *fait accompli,* all rights of B ownership having been extinguished on the appellant's part. The appellant was in contravention of s 9 of the Act when it applied for the interdict. An interim interdict could not be granted for the protection of the illegal activities of the appellant.

Cases cited C

Associated Newspapers of Zimbabwe (Pvt) Ltd v Min of State for Information S-20-03

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

Boshoff, LF, Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C)D

Rudolph & Anor v CIR & Ors 1994 (3) SA 771 (W)

Stauffer Chemicals v Monsanto Co 1988 (1) SA 805 (T)

Legislation considered

Land Acquisition Act [*Chapter 20:10*], ss 7(5), 8, 9 and 10A E

Case information

E T Matinenga, for the appellant

D D Chirindo, for the first to fourth respondents

No appearance for the fifth respondent

Judgment

MALABA JA: This appeal is directed against the judgment of the High Court F dated 25 September 2002. What is in issue is the correctness of the decision by the court *a quo* in refusing an application by the appellant for an interim interdict prohibiting the State from proceeding with the compulsory acquisition of agricultural land for resettlement purposes pending the determination of the constitutionality of ss 8, 9 and 10 of the Land Acquisition Act [*Chapter 20:10*] ("the Act"). G

The interim relief sought by the appellant was couched in these terms:

> "1. That the first respondent be and is hereby interdicted from further proceeding with the acquisition in terms of the Land Acquisition Act [*Chapter 20:10*] of the property known as Hallingbury House, Hallingbury, situate in the District of Chegutu, measuring 68 950 hectares pending determination of this matter. H

Malaba JA

> 2. A Further, the effect of any acquisition order issued in respect of the property known as Hallingbury House, Hallingbury, situate in the District of Chegutu, measuring 68 950 hectares purportedly acquired for resettlement purposes in terms of section 8 of the Land Acquisition Act [*Chapter 20:10*] is hereby suspended pending the resolution of this matter and such order shall not preclude the applicant (now the B appellant) or any other occupier of such land from occupying, holding or using the land including all improvements thereon and from continuing all farming operations until finalisation of this matter.

3. It therefore follows that the applicant may continue cultivating, harvesting and selling all farm produce on and from the aforementioned C property during the currency of this order and shall not be liable to be prevented from doing so in any way whatsoever.
4. The third respondent is hereby ordered to render any and all lawful assistance to the applicant in ensuring its continued occupation, use and enjoyment of the aforementioned property."

The appellant is the former owner of the agricultural land known as Hallingbury D House, Hallingbury ("the land") which the State compulsorily acquired for resettlement purposes in terms of the Act. The first respondent is the "acquiring authority" as defined in s 2 of the Act and made the order by which the appellant's land was compulsorily acquired for resettlement purposes. The second respondent was cited because he was said to have introduced in Parliament the Land Acquisition Amendment Bill which became the Land E Acquisition Amendment Act, No. 6 of 2002, some of the provisions of which amended ss 8, 9 and 10 of the Act allegedly rendering them unconstitutional. The third respondent was cited because the appellant wanted to ensure that police under his command enforced the interim order should the court grant it. The Attorney-General was cited in compliance with s 24(6) of the Constitution F of Zimbabwe ("the Constitution"), which requires that if in any proceedings it falls to be determined whether any law is in contravention of the Declaration of Rights, the Attorney-General shall be entitled to be heard by the court on that question. The fifth respondent was cited because he is the person to whom the acquiring authority allocated the land it expropriated from the appellant. The object of the interim relief was to prevent him from taking occupation or G possession of the land pending determination of the constitutionality of the impugned sections of the Act.

It is common cause that on 22 June 2001 the first respondent, exercising the power given to the acquiring authority in s 5(1) of the Act, caused to be published in the *Government Gazette* a preliminary notice (GN 313B of H 2001) of the intention of the State to compulsorily acquire the appellant's

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agricultural land for resettlement purposes. The appellant, as the then owner A or occupier of the land, had the right to submit to the first respondent a written objection to the proposed acquisition within thirty days from the date of publication of the preliminary notice. In exercising its rights, the appellant objected to the proposed acquisition of the land. After consideration of the grounds for the objections, the first respondent nonetheless made an order B compulsorily acquiring the land in terms of subs (1) of s 8 of the Act.

Subsection (1) of s 8 of the Act gives power to the acquiring authority to make an order not less than thirty days after the date of publication of the preliminary notice acquiring the land the nature and extent of which would be described therein. For the acquisition to be valid, the agricultural land in question must have been taken for resettlement purposes on payment of fair compensation C within a reasonable time. Upon service of the order of acquisition, upon the owner or occupier of the land the rights of ownership are immediately taken and vested in the acquiring authority.

To that extent, subs (3) of s 8 of the Act provides that:

> "(3) Subject to section *ten A,* the effect of an order made in terms of D subsection (1) shall be that the ownership of the land specified therein shall, subject to subsection (5) of section *seven*, immediately vest in the acquiring authority whether or not compensation has been agreed upon, fixed or paid in terms of Part V or VA and, subject to section *nine,* shall be free of all rights and encumbrances."

Section 10A, referred to in subs (3) of s 8, gives the acquiring authority the E right to revoke the order of acquisition not later than six months after making the order in terms of subs (1) of s 8. It is important to note that the right to revoke or withdraw an order of acquisition is given to the acquiring authority and as such cannot be revoked by a person who is not an acquiring authority as defined in s 2 of the Act. A revocation of an order of acquisition which is made after six months from the date the order was made, would be invalid. F

When the acquiring authority has made an order of acquisition in terms of subs (1) of s 8, it is obliged to make an application to the Administrative Court not later than thirty days after the service of the order for confirmation of the acquisition.

Subsection (5) of s 7, referred to in subs (3) of s 8, provides that where the G Administrative Court refuses to confirm the acquisition, it shall order the acquiring authority to return the land acquired

to the previous owner or occupier even where the acquiring authority had already acted in terms of ss 8 or 9. Subsection (2) of s 8 gives the acquiring authority a discretion to exercise the rights of ownership in the acquired land such as demarcating or allocating it after the expiry of ninety days from the date of service of the order H

Malaba JA

A of acquisition upon the owner or occupier especially where the owner or occupier is in possession of and exercises the residual rights reserved for his enjoyment under s 9 and for the duration of the period prescribed therein.

Section 9, referred to in subs (3) of s 8, provides in para (b) of subs (1) for the eviction of the owner or occupier of the acquired land. It reads:

B "(b) in relation to any agricultural land required for resettlement purposes, the making of an order in terms of subsection (1) of section 8 shall constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land forty-five days after the date of service of the order upon the owner or occupier, and if he fails to do so, he shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or imprisonment for a period not exceeding C two years or to both such fine and such imprisonment:

Provided that –

(i) the owner or occupier of that land may remain in occupation of his living quarters on that land for a period of not more than ninety days after the date of service of the order;

(ii) D the owner or occupier shall cease to occupy his living quarters after the period referred to in proviso (i), and if he fails to do so he shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

The provisions of subs (1) of s 9 are subject to subs (3) of s 8, showing that E the rights embodied therein are a limitation to the exercise of rights of ownership by the acquiring authority and are reserved for the former owner or occupier of the expropriated land to the extent that the owner or occupier is there on the land to occupy, hold or use it and the living quarters thereon for the duration of the time prescribed. At the end of the maximum period of ninety days from the date of service of the order of acquisition, the rights of the former F owner or occupier cease to exist and by operation of law he must leave the land or be evicted by order of court. Should the acquiring authority withdraw a letter of offer of the land to another person, the land reverts to the acquiring authority and not the former owner or occupier unless, of course, the acquiring authority also revokes the order of acquisition.

G It is also clear from the provisions of subs (5) of s 7 that the acquisition of land required for resettlement purposes can take place and the acquiring authority can exercise all the rights of ownership such as the allocation of it notwithstanding the fact that the application is pending before the Administrative Court. The obligation imposed on the acquiring authority is to H make the application for confirmation of the acquisition to the Administrative

Malaba JA

Court not later than thirty days from the date of service of the order of A acquisition and to bear in mind that should the Administrative Court refuse to confirm the acquisition it will be ordered to return the land to the former owner or occupier.

Once the acquiring authority submits its decision to compulsorily acquire the land for resettlement purposes to the process of judicial review by the B Administrative Court, it cannot be prohibited by a court from exercising rights of ownership in the acquired land on the ground that confirmation proceedings are still pending before the Administrative Court.

The order of acquisition of the appellant's land was made by the first respondent on 4 April 2002 and served on its managing director on 9 April 2002. As such, the appellant had notice of the duty to cease to occupy, hold C or use the land at the end of forty-five days from the date of service upon it of the order and to cease to occupy, hold or use the living quarters on the land at the end of ninety days from the same date of service of the order of acquisition. The appellant did not do any of the things it was obliged to do at the end of the prescribed periods. D

In the founding affidavit deposed to on its behalf, it is disclosed that a deliberate decision was taken to defy the law and remain in occupation of the land and continue with farming operations after the period at the end of which it had to cease operations on the land had expired. It is said the appellant made "a conscious decision to continue farming operations on the property."

On 19 August 2003, the first respondent made an offer of the land to the fifth E respondent, who accepted it on condition the parties entered into a lease agreement. The appellant's managing director and workers on the farm refused to make way for the fifth respondent to take occupation of the land.

On 16 November 2003, an urgent chamber application was made to the High Court by the appellant for an order declaring ss 8, 9 and 10 of the Act F unconstitutional, thereby paving the way for it to retain ownership of the land. To ensure that it remained on the land and continued carrying out farming operations, the appellant applied to the court *a quo* for the interim relief, the correctness of the refusal of which is the issue on appeal. The claim advanced by the appellant was that the acquisition of its land was unlawful because the sections of the Act under which it was effected were unconstitutional. G

The learned judge held that the first respondent was authorised by law to acquire the land for resettlement purposes. He could not be interdicted from doing what was a legal duty to do. The fact that the appellant acted on its belief that the law was unconstitutional and ignored the provisions of the Act showed that it was determined to act in open defiance of the law. On para (2) H

Malaba JA

A of the interim relief sought, the learned judge said that there was no allegation on the papers to the effect that the acquisition order was not lawfully made by the first respondent. It was his opinion that para (3) of the interim relief could not be granted because doing so would give the appellant protection for acting in contravention of the law. As the continued occupation and use of the land by the appellant was in contravention of para (b) of subs (1) of s 9 of the Act, B the learned judge declined to order the police to protect the illegal activities.

The question is whether the court *a quo* was correct in refusing to grant the interim relief sought by the appellant.

It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application C for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *Boshoff, LF, Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A-F, Corbett J (as he then was) said an applicant for such temporary relief must show:

> "(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, D is *prima facie* established though open to some doubt;
>
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; E
>
> (c) that the balance of convenience favours the granting of interim relief; and
>
> (d) that the applicant has no other satisfactory remedy."

The threshold the appellant had to cross was the production of evidence which established the existence in it of *prima facie* rights of ownership in the land at the time the application for interim relief was made. An interim interdict is F not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken from him by operation of law at the time he or she makes an application for interim relief.

In *Stauffer Chemicals* v *Monsanto Co* 1988 (1) SA 805 (T) at 809F-G, Harms J said:

> G "… the basis of an interdict is the threat, actual or implied, on the part of a defendant that he is about to do an act which is in violation of the plaintiff's right and that actual infringement is merely evidence upon which the court implies an intention to continue in the same course. I would have thought it axiomatic that an interdict is not a remedy for past invasions of rights. It is for the protection of an existing right. Cf *Meyer*H v *Meyer* 1948 (1) SA 484 (T)."

Malaba JA

The appellant was not in a position to show the existence of *prima facie* rights A of ownership in the land which the first respondent was about to infringe because at the time it applied for the interim relief all the rights of ownership it had in the land had been taken by means of the order of acquisition and vested in the acquiring authority. When the appellant lodged the application for the interim relief before the court *a quo* the acquisition of the land by the B State was a *fait accompli,* all rights of ownership having been extinguished on its part. The acquiring authority having done everything it was obliged by the law to do to acquire the land for resettlement purposes, there was no outstanding act against the performance of which the acquiring authority could be temporarily interdicted.

An interim interdict is not a remedy for prohibiting lawful conduct. At the time C the first respondent made the order by which the appellant was deprived of ownership of the land, he acted lawfully in the exercise of the power conferred upon him. Subsection (1) of s 8 of the Act gave him the power to make the order and its effect reflected the legal consequences of that lawful act.

To suspend the effects of the order of acquisition lawfully made and intended D by the legislature, would amount to striking down the Act of Parliament or rendering it completely ineffective, thereby creating a vacuum pending determination of the constitutionality of the impugned sections of the Act. That would be improper for the court to do because the clear intention of the legislature was that an order of acquisition, properly made in terms of subs (1) of s 8 of the Act, should have the effect of depriving the owner or occupier of F the rights of ownership in the land and vesting them in the acquiring authority.

The appellant was acting in contravention of para (b) of subs (1) of s 9 of the Act at the time it applied for the interim relief. It had not ceased to occupy, hold or use the land at the end of forty-five days from the date of service of the order of acquisition, nor had it ceased to occupy, hold or use the living quarters on the land at the end of ninety days from the date of service of the order of acquisition on it. An interim interdict as a remedy for the prohibition of unlawful conduct could not be granted for the protection of the illegal activities of the appellant. In other words, the appellant wanted the court to grant an order stopping the acquiring authority from acting lawfully so that it could continue to commit an offence in carrying on farming operations G illegally.

In *Rudolph & Anor* v *Commissioner for Inland Revenue & Ors* 1994 (3) SA 771 (W), the applicants had had their premises searched and documents seized by persons duly authorised so to act in terms of s 74(3) of the Income Tax Act, 58 of 1962. They sought an interim relief prohibiting the respondents from carrying out the searches of their premises and seizure of their documents H

Malaba JA

A pending determination of the constitutionality of s 74(3) of the Income Tax Act of South Africa. Dismissing the application, Goldblatt J at 775C-D said:

> "… it is a trite principle of our law that before an interim interdict can be granted the applicant must establish that he has at the very least a *prima facie* right which requires protection (*Setlogelo* v *Setlogelo* 1914 AD 221). In my view, the applicants have failed to establish the existence of B such a *prima facie* right. At present the respondents have acted lawfully in terms of the powers granted to them by an existing Act of Parliament. They have rights in terms of the Income Tax Act and are properly and lawfully exercising those rights. The only right the applicants have is the right to approach the constitutional court to declare section 74(3) of the Income Tax Act unconstitutional. This right has not been threatened or C violated."

The learned judge in the court *a quo* also determined the question whether the appellant was entitled to the relief sought on the basis that he had to presume that the impugned provisions of the Act, and the executive acts done in the exercise of the powers conferred upon the acquiring authority thereunder, were constitutionally valid in the absence of patent repugnancy on the face of D the statutory provisions. The learned judge was entitled to assume that Parliament understood the Constitution and the limitations it imposed on the exercise of its legislative powers. On the principle of the presumption of the constitutionality of ss 8, 9 and 10 of the Act until the contrary was established on the return day, the appellant was legally bound to have ceased farming E operations on the land and vacated the living quarters thereon by the time it made the application for the interim interdict. To the extent that the appellant was acting in open defiance of the law, the court *a*

quo correctly refused to give a stamp of approval to such illegality. See *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity & Ors* 2003 (2) ZLR … (S) at …

F In *Batista* v *Commanding Officer SANAB, SA Police, Port Elizabeth & Ors* 1995 (4) SA 717 (E), the applicant had been found in possession of pornographic material in contravention of the Publications Act 42 of 1974 and of the Indecent or Obscene Photographic Matter Act 37 of 1967. The South African police had seized the offending material. He instituted proceedings in the South Eastern Cape Local Division of South Africa seeking interim relief G interdicting the police from arresting him or seizing any offending material found in his possession in future or in any way interfering with his unlawful activities pending a declaration on the constitutionality of certain provisions of the two statutes.

Dismissing the application, Mullins J said at 727B-G:

> H "Unfortunately, there is a rapidly increasing tendency on the part of

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Malaba JA

> litigants to invoke the provisions of the Constitution in order to seek A protection for conduct which, in terms of existing laws, statutory or otherwise, would be unlawful or even criminal.
>
> The courts are almost daily being faced with claims by such persons that otherwise lawful conduct, whether by private individuals or State officials, is 'unconstitutional'.
>
> … I am of the view that the applicant cannot rely, in order to establish a B present *prima facie* right, on the probability that existing legislation which he has contravened may be altered at some undetermined future time or on the possibility that such existing legislation would be held to be unconstitutional. … The court is therefore being asked to sanction uncontrolled possession by the applicant of any pornographic material C similar to that presently confiscated despite the existence of the Act."

Similarly, the court *a quo* was being asked by the appellant to sanction the continued illegal farming operations and occupation of the living quarters on the land despite the clear and unambiguous language of the Act to the effect that failure to cease occupation or use of the land at the end of forty-five days from the date of service of the order of acquisition and of the living quarters D at the end of ninety days from the date of service of the order of acquisition constituted a criminal offence.

Mr *Matinenga* argued that the appellant had a contingent right of ownership in the land which required protection against infringement by the interim relief sought. A contingent right is a right the existence of which is made dependent upon an event in future which may or may not happen. The contention was that E a proper construction of s 7(5) of the Act revealed the existence of such a right in the appellant.

Such a right would only vest in the appellant by an order made by the Administrative Court if it refused to confirm the acquisition of the land. The fortuitous right had no substantive existence at the time the application for the F interim relief was made. Subsection (5) of s 7 does not guarantee such a right to the former owner or occupier of the acquired land. The law imposed no duty on the Administrative Court to refuse confirmation of the acquisition. In any case, the interim relief was not sought in order to interdict the acquiring authority from proceeding with acquisition of the land pending finalisation of the confirmation proceedings by the Administrative Court. As pointed out G above, such an order would have no legal basis as the law clearly gives the acquiring authority the right to acquire ownership in the land notwithstanding the pendency of confirmation proceedings before the Administrative Court.

Mr *Matinenga* argued further that in constituting the order of acquisition of the land as a notice to the owner or occupier to cease to occupy, hold or use H

Malaba JA

A the land at the end of forty-five days from the date of service of the order and cease to occupy, hold or use the living quarters on the land at the end of ninety days from the date of service of the order, Parliament recognised the existence of a right in the owner or occupier to occupy, hold or use the land and living quarters. The right is made subject to the exercise of ownership by the acquiring authority, suggesting that it is a residual right reserved for an owner B or occupier who is on the land and has an interest in physically occupying, holding or using the land for forty-five days from

the date of service of the order of acquisition and is interested in and does occupy, hold or use the living quarters for ninety days after the date of service of the order. It is not a general right available to anyone whose land has been acquired as such a construction C would unnecessarily restrict the exercise of discretion conferred on the acquiring authority by subs (2) of s 8 in that it *may* demarcate or allocate the acquired land.

The argument advanced by Mr *Matinenga* does not help the appellant because at the time it made the application for interim relief the statutory periods marking the duration of the existence of the rights it could have claimed had D long expired. The appellant was no longer a member of the class of people intended by Parliament to benefit from the provisions of s 9(1)(b) of the Act.

There is, therefore, no merit in the appeal. It is accordingly dismissed with costs.

E Chidyausiku CJ & Cheda JA concurred.

Coghlan, Welsh & Guest, appellant's legal practitioners

Civil Division of the Attorney-General's Office, first, second, third and F fourth respondents' legal practitioners

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Source:
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GREEBE & ANOR v FAMAPS INVESTMENTS (PVT) LTD 2004 (1) ZLR 522 (H)

Citation	2004 (1) ZLR 522 (H)
Case No	Judgment No. HH-124-04
Court	High Court, Harare
Judge	Mavangira J
Heard	6 May 2004
Judgment	9 June 2004
Counsel	*J Samkange,* for the applicants *F G Gijima*, for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Contract — *illegality — agreements to make payment in contravention of* C *exchange control laws — par delictum rule — applicability — whether rule should be relaxed*

Headnote

The parties had entered into agreements whereby the first respondent purchased the shares in a company through which the applicants ran a business, and purchased assets relating to the business. Payment was to D be made in South Africa, from funds which the second respondent warranted he held lawfully outside Zimbabwe. The respondents were duly given possession of the business premises and the assets, but they failed to pay for them in terms of the agreement. When the applicants sought the eviction of the respondents, the respondents argued that the agreements were illegal since they had not been authorised by the E Reserve Bank as required by s 11 of the Exchange Control Regulations, 1996.

Held, that even though the agreements were illegal, a refusal to grant the application would unjustly enrich the respondents. Public policy would not be foreseeably affected by the grant or refusal of the relief claimed, F and the case called out for the court to do justice between the individuals concerned. This was a case therefore in which the *par delictum* rule should be relaxed.

Cases cited

Barker v African Homesteads Touring & Safaris (Pvt) Ltd & Anor 2003 (2) ZLR 6 (S) G

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

Hattingh & Ors v Van Kleek 1997 (2) ZLR 240 (S)

Murphy v Tengende 1983 (2) ZLR 292 (H)

Young v Van Rensburg 1991 (2) ZLR 149 (S)H

Zuvaradoka v Franck 1980 ZLR 402 (A)

Mavangira J

Legislation considered A

Exchange Control Regulations, 1996 (SI 109 of 1996), s 11

Case information

J Samkange, for the applicants

F G Gijima, for the respondents

Judgment

B**MAVANGIRA J:** [The learned judge first dealt with the admissibility of an affidavit irregularly filed by the second respondent, then continued:]

C The applicants are the registered and beneficial owners of all the shares in Turnpike Service Station (Pvt) Ltd, a company which carries on a service station business from Lot 1 of subdivision A of Porta in the district of Salisbury. The second respondent is the managing director of the first respondent.

D During the second half of 2002, the second respondent offered to buy the applicant's shares in the company claiming, *inter alia*, to have external funds in the United Kingdom from trading operations in the DRC and in Mozambique with which to make payment. On 23 September 2002, a written offer was received from the second respondent's legal practitioners to purchase the applicants' shares for R3 000 000.00, such price to cover the business as a E going concern including the fixed assets, fixtures, fittings, stock-in-trade, debtors and creditors. The offer was attractive to the applicants, who were proposing to retire to South Africa.

The applicants also own a house on stand 42 Sublime Township, Norton. In October 2002, the second respondent requested to purchase the property held under Deed of Transfer 7228/09 dated 7 May 1998, together with its contents F and two motor vehicles, an Isuzu 280D Twincab registration number 785-755 F and a Honda registration number 721-856 G for a purchase price of R1 140 000.00 from funds held externally.

Agreements of sale were prepared and signed by the parties. Both agreements incorporate a clause that reads:

" G That this agreement shall be conditional upon the deposit by the purchaser with and in favour of the seller's agent Dykes Van Heerden at Roodepoort of a cheque, drawn by a bank in the Republic of South Africa, acceptable to the sellers, by not later than the 30th September 2002 in the sum of three million rand (and one million one hundred and forty thousand rand respectively), which monies the purchaser warrants are lawfully held by H it outside Zimbabwe.

2004 (1) ZLR p524

Mavangira J

Should the purchaser fail to deposit the cheque as aforesaid, this agreement A shall be of no further force or effect."

Prior to 30 November 2002 the second respondent stated that he would make payment to the applicants by means of a cheque drawn by Lloyds Bank in London in favour of Dykes Van Heerden for £600 000.00 which exceeded the amount of the purchase price on the basis that the surplus was to be used to B pay for petrol that the second respondent was to import from South Africa. On the strength of the undertaking from the second respondent that payment would be made as promised, he was given possession of the service station and all Turnpike's assets together with the house, its contents and the vehicles already referred to above.

On or about 3 December 2002 the second respondent handed to the second C applicant a Lloyds Bank cheque in favour of Dykes van Heerden drawn not by Lloyds but on Lloyds Bank by unknown signatories for $600 000.00. The cheque was dishonoured.

Various promises were thereafter made by the second respondent for payment to be made but this did not materialise. Subsequently, payment of R24 000.00 D has been made towards the purchase price and Z$150 000.00 has been paid towards the applicants' expenses in travelling to and staying in Zimbabwe to try and resolve matters.

On the second applicant's instructions, Messrs Coghlan, Welsh and Guest wrote to the respondents' legal practitioners pointing out that the sale agreement were subject to conditions precedent requiring payment of the full E purchase price of R4 140 000.00 by 30 November 2002 and that unless this payment was made by 11 June 2003, the agreements would be treated as being of no further force or effect and that the respondents would be required immediately thereafter to return possession of the service station and its contents and of the house and its contents and of the two motor vehicles. The F respondents have failed to pay the purchase price payable under the said agreements.

In his opposing affidavit the second respondent avers that upon agreeing and giving him possession, the applicants transferred their rights to him and the first respondent. The applicants therefore do not have any real rights to the property. They only have personal rights which they can enforce for the value G of the purchase price against the respondents.

The second respondent also contends that these were credit sales and not cash sales; that it was agreed that possession of the properties and therefore ownership would pass to him on the date of signing the agreement. Transfer of the immovable property was however predicated on payment of the full H purchase price.

2004 (1) ZLR p525

Mavangira J

A In his heads of argument, however, the respondents' legal practitioner appears to have abandoned the argument that the sale was a credit sale.

The arguments raised in the respondents' heads of argument are issues which were raised in the supplementary opposing affidavit which has already been dealt with above. However, the argument raised by the respondents' counsel, being a legal point, can be raised at any stage and the court has to consider it. B The argument is that the agreements in question are illegal and consequently the relief sought ought not to be granted. Their illegality is said to arise from the fact that contrary to the requirements of s 11 of the Exchange Control Regulations, 1996, no prior authority was obtained by either party for payment to be made C outside Zimbabwe or toincur any obligation to make a payment outside Zimbabwe.

Section 11 of the Exchange Control Regulations, 1996 (SI 109/96) provides as follows:

"(1) Subject to subsection (2), unless otherwise authorised by an exchange control authority, no Zimbabwean resident shall —

(a) make any payment outside Zimbabwe; or

(b) D 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

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

E Free funds have been defined in the said regulations as follows:

"In these regulations —

'free funds' means 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 F carried on by him in Zimbabwe."

In both agreements of sale the respondents warranted that they could pay the R3 million and the R1.4 million respectively, from monies "lawfully held outside Zimbabwe" (see pages 10 and 14 of the record of proceedings). Furthermore the second respondent did in fact pay R24 000.00 towards the G purchase price and claimed that he had been cheated out of R10 million by somebody he had entrusted to convey the money to the applicants. In the opposing affidavit the second respondent insists that he was, and acted, *bona fide*. In my view he cannot now claim to have had no monies lawfully held outside Zimbabwe unless he means that he acted fraudulently in dealing with the applicants.

H In his oral submissions to the court, the respondents' counsel submitted that

subs (2) of s 11 of the Exchange Control Regulations cannot save these A agreements from illegality as the agreements were entered into with the first respondent, which is not an individual but a company. He cited *Barker* v *African Homesteads Touring and Safaris (Pvt) Ltd & Anor* 2003 (2) ZLR 6 (S) in support thereof. At p 9 of the cyclostyled judgement, Sandura JA said:

"However, payments and agreements to make payment outside Zimbabwe B 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 act concerned."

In *Dube* v *Khumalo*, 1986 (2) ZLR 103 (S) at 109C to 110C Gubbay JA, as C he then was, said:

"I turn then to consider whether the plaintiff's claim for relief, based as it is upon an agreement which involved a conspiracy to defraud the Municipality, should be entertained.

There are two rules which are of general application: The first is that an D illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exception. See *Mathews* v *Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Etates Ltd* v *Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi causa non oritur actio.* The second is expressed in another maxim *in pari delicto potior est conditio possidentis*, which may be translated E as meaning 'where the parties are equally in the wrong, he who is in possession will prevail.' The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts F will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy 'should properly take into account the doing of simple justice between man and man.' As was pointed out by Stratford CJ in *Jajbhay* v *Cassim* 1939 AD 537 at 544-545:

'Courts of law are free to reject or grant a prayer for restoration of G something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, H

A ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent B unjust enrichment.'

It was again emphasised by Greenberg JP in *Petersen* v *Jajbhay* 1940 TPD 182 that in determining where the justice of the matter lay, it was proper to consider that if the relief were refused to the plaintiff the defendant would be unjustly enriched at his expense."

The passage above was cited with approval in *Young* v *Van Rensburg* 1991 (2) ZLR 149 (S) C and also in *Hattingh & Ors* v *Van Kleek* 1997 (2) ZLR 240 (S) at 245 E to 256 B. In *Hattingh & Ors* v *Van Kleek (supra)* Korsah JA then proceeded to state at 246 B:

"The cases clearly show that where a contract is on the face of it legal but, by reason of a circumstance known to one party only, is forbidden by statute, it may not be declared illegal so as to debar the innocent party from D relief; for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit."

In *Zuvaradoka* v *Franck*, 1980 ZLR 402 (A) at 406C–H Baron JA said:

"In the leading case of *Jajbhay* v *Cassim*, 1939 AD 537 Stratford, CJ, after discussing the relationship between the two maxim *ex turpi causa non*E*oritur actio* and *in pari delicto potior est conditio defendentis,* said at p.543:

'…the second maxim *in pari delicto potior conditio defendentis …* is the only maxim which, in my judgement, concerns us in the present case, for the appellant is not seeking enforcement of the illegal contract but seeks release from its operation.'

F Later at p.543 he said:

'…the right of recovery of something delivered under an illegal contract (a *restitutio in intergrum)* has never been denied in all cases. In other words the maxim has not, in modern systems of law, been rigidly and universally invoked to defeat every claim by one of two delinquents to recover what he has delivered under such a contract.'

G The test applied by Stratford, CJ was whether public policy was best served by granting or refusing the plaintiff's claim, and he stressed that public policy should properly take into account the doing of simple justice between man and man.

The present case seems to me to fall squarely within the foregoing H principle. The plaintiff is not seeking to enforce the illegal contract;

Mavangira J

indeed he does not even seek release from its operation. The defendant A repudiated the contract for reasons which, had the contract been a legal one, would clearly have been in breach thereof; the plaintiff is simply seeking to recover what he had paid thereunder."

He further stated at pages 407E to 408C:

"It remains therefore to deal with Mr *Hill's* submission that the court is not B entitled to look at the agreement for any purpose and that consequently it has not been established that Weinman was the defendant's agent. This point also arose in *Jajbhay* v *Cassim (supra)* and in *Petersen* v *Jajbhay*, 1940 T.P.D 182. In the former case Stratford, CJ, said at p. 545:

'I think I should add that in my view, if either party had terminated the contract and the tenant refused to vacate, the court would probably assist C the appellant to recover his property.'

Greenberg, JP in *Petersen* v *Jajbhay (supra)*, having referred to this passage, said at p. 189:

'…it is clear that (Stratford, CJ) was referring to a termination that would have been valid by the terms of the contract, had it been legal and binding D .'

Quite obviously it was assumed by Stratford, CJ that the court could look at the agreement and Greenberg JP made the point in terms in *Petersen's* case (*supra)* when he said at p.191:

'In order that the court may decide whether or not to grant relief, it may clearly look at the agreement. If all the terms of a current lease are being complied with and there are no considerations of public policy present, E the court will not assist the lessor; but if the lessee is not performing his obligations, the rule may in a proper case be relaxed.'

Finally, the short judgment of Centlivres, JA *Jajbhay* v *Cassim (supra)* is worthy of note. He referred to an old case in the Scotch Appeal Court, *Cuthbertson* v *Lowes*, (1870) 7 Sc. L.R. 706 and cited the following from F the judgement in that case:

'It is true enough that in *turpi causa* the maxim held true *melior est conditio possidentis;* but this was a pact not so illicit that the court could not look at it. What the court could not do was, it could not enforce the contract. But to refrain from taking any notice of it, so as to let the defenders retain the potatoes without paying for them, would amount to a gross injustice. The court could, therefore, entertain the alternative plea G of the pursuer and decern against the pursuer (sic? - defenders) for the market value of the potatoes.'"

In casu, the first respondent, represented by the second respondent, gave out in both agreements that it had monies that it lawfully held outside Zimbabwe. The respondents having taken possession of the applicants' property, for H which they have not paid the agreed price, seek to benefit by having the

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2004 (1) ZLR p529

Mavangira J

A applicants' application dismissed on the basis that the agreements contravene a provision of the Exchange Control Regulations. In my view, even if it is accepted, as I think it must, that the agreements contravene s 11 of the Exchange Control Regulations, 1996, the case on the facts before the court calls for a relaxation of the *par delictum* rule. A refusal to grant the application would unjustly enrich the respondents. See *Hattingh & Ors* v *Van Kleek, supra,* and *Young* v *Van Rensburg,* B *supra*. It would, in my view, almost be akin to the situation, as expressed by *Korsah* JA in *Hattingh & Ors* v *Van Kleek,* where a premium is put on deceit.

It appears that public policy may not be foreseeably affected by the grant or refusal of the relief claimed and that this matter calls out, for the reasons C already discussed above, for the court to do justice between the individuals concerned. See also *Murphy* v *Tengende* 1983 (2) ZLR 292 (H)

At the hearing of this matter I expressed my misgivings about para 4 of the applicants' draft order. The applicants' counsel indicated that he was not persisting in seeking it. I shall not deal with that aspect of the matter any longer. In my view however, as the agreements were tainted with illegality, each party should bear its own costs D .

In the result and for the above reasons it is ordered as follows:

1. That the agreements of sale dated 22nd November 2002 between applicants and first respondent for the sale by applicants to first respondent of their shares in Turnpike Service Station (Private) Limited and between second E applicant and first respondent for the sale of stand 42, Sublime Township, Norton, are declared to be of no force or effect.
2. That the respondents are ordered to return to applicants within seven days hereof upon 24 hours' notice possession of Turnpike Service Station and its contents, stand 42 and its contents, schedules of which respective F contents are attached to applicants' application and the Honda motor vehicle registration number 721-856 G and Isuzu 280 D Twincab registration number 785-755 F failing which the Deputy Sheriff is hereby authorized to evict them from both properties and to recover the contents and motor vehicles and return them to the applicants.
3. G Each party is to bear its own costs.

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RABVUKWA v RABVUKWA 2004 (1) ZLR 530 (H)

2004 (1) ZLR p530

Citation 2004 (1) ZLR 530 (H)

Case No Judgment No. HH-127-04

Court	High Court, Harare
Judge	Karwi J
Heard	23 July 2003; 24 July 2003
Judgment	23 June 2004
Counsel	*J Mambara,* for the plaintiff *TD Muskwe,* for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Family law — *husband and wife — divorce — maintenance following* C *divorce — maintenance for working spouse — no longer justifiable*

Headnote

The plaintiff was a medical practitioner and the defendant, his wife, was a nurse. Their marriage lasted for four years. They had one child, aged six at the time of the trial. During the marriage, they built two immovable properties, one in Norton and another in Harare. Neither house was D complete. In her plea, the defendant demanded that the plaintiff pay maintenance for both the minor child and the defendant until the child attained the age of 18 years or became self-supporting, whichever occurred first, and until the defendant remarried or until she died. She offered nothing by way of maintenance to her daughter, save for the fact that she was the custodian parent. She also wanted the plaintiff to pay E medical aid, school related expenses for their daughter and her rentals. She wanted contribution by the plaintiff towards payment of her legal costs and to be assisted in completing the construction of the Norton property. The plaintiff averred that he did not wish to maintain the defendant or to keep her on his medical aid scheme, on the basis that she F was working and capable of maintaining herself.

Held, that the attitude of the courts the world over towards the award of maintenance has been changing. Cases where maintenance is awarded to the husband, while still rare, are no longer unknown. The idea that marriage ought to provide the wife with a "bread ticket for life" is on its way out. Not long ago, an "innocent" wife who obtained a divorce on the G ground of her husband's misconduct could count on being awarded maintenance until death or remarriage, almost as a matter of course. Today, the courts are longer prepared to award maintenance to a young woman who has been working before marriage, and can be expected to work again after divorce, at least if there are no young children of the marriage. At most, if she has given up her job, she will be awarded a few H

2004 (1) ZLR p531

Karwi J

A months' maintenance to tide her over until she finds a new job. *In casu,* the defendant was easily capable of working and supporting herself as a nurse. There was no reasonable justification for a request for maintenance by the defendant. However, the plaintiff should maintain his minor child.

Case cited

B*Chiomba v Chiomba* 1992 (2) ZLR 197 (S)

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*], s 7(3) and (4)

Case information

C*J Mambara,* for the plaintiff

TD Muskwe, for the defendant

Judgment

KARWI J: The parties were married in terms of the Marriage Act [*Chapter 39*] now *Chapter 5:11*. The marriage was solemnised on 30 July 1999. The parties have one minor child of the marriage, born on 18 October 1998. During the D subsistence of the marriage, the parties acquired certain movable and immovable property, namely:

(a) navy blue lounge suite	(b) Techniques radio
(c) office furniture	(d) 1 set of kitchen utensils
(e) 1 bed	(f) blue lounge suite
E (g) display cabinet	(h) coffee table
(i) deep freezer	(j) 1 desk
(k) micro wave	(l) some kitchen utensils
(m) stove	(n) 2 more beds

F and two immovable properties:

(a) Stand No. 1163 Bannock burn Township, Mt. Pleasant Heights;

(b) Stand No. 1763 Knowe Township, Norton.

On 3 April 2002, the plaintiff issued summons in this court seeking the following relief:

(a) G a decree of divorce;

(b) custody of the minor child be granted to the defendant;

(c) the plaintiff' to pay maintenance for the minor child in the sum of $10 000 per month until the child attains the age of 18 years or becomes self-supporting, whichever occurs first;

(d) H that division of matrimonial property be in accordance with paras 9 and

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Karwi J

10 of the plaintiff's distribution; i.e.: A

(i) that the plaintiff retains the following items as his sole and exclusive property:

1. navy blue lounge suite	2. Techniques Radio
3. office furniture	4. set of kitchen utensils

and that the defendant acquires the following items as her sole and B exclusive property:

(a) blue lounge suite	(b) display cabinet
(c) coffee table	(d) deep freezer

(e) 1 desk (f) microwave C

(g) kitchen utensils (h) stove

(i) 2 beds

At the pre-trial conference, the parties agreed that the plaintiff should make a contribution towards the defendant's cost of litigation but the quantum was to be decided by the trial court and the plaintiff agreed in principle to pay D maintenance *pendente lite* for the minor child but the trial court was to determine the quantum.

The plaintiff believes that the marriage had irretrievably broken down and that there were no prospects of restoration of a normal marriage relationship for the reasons that parties had not shared conjugal rights for more than three months, that the defendant had accused the plaintiff of infidelity without just cause, E and that the defendant had suicidal tendencies and on several occasions threatened to commit suicide. It was further mentioned in the declaration that the defendant was fond of consulting traditional doctors, a habit the plaintiff objected to and also that the defendant was extravagant and had failed to manage the finances of the family. He also said that he no longer loved his wife. The defendant was of a different view. She believed that the marriage had not F irretrievably broken down and that with proper marriage counseling and guidance from mature elders in the family the marriage could be salvaged. In his evidence in court, the plaintiff very strongly stated that despite his wife's views, he no longer loved her. It is clear to me that the marriage in question has irretrievably broken down. This was clear from the plaintiff's attitude, two G years after issuing summons for divorce.

The question of the custody of the minor child has been settled by mutual agreement. The defendant is to retain custody of the child, subject to the plaintiff being awarded the usual rights of access, more particularly for a weekend once every fortnight during school term and on alternate public H holidays.

2004 (1) ZLR p533

Karwi J

A The issues which are before the court for determination are:

(a) What would be a fair distribution of the matrimonial property, both movable and immovable, between the parties.

(b) Whether the plaintiff should pay maintenance for both the defendant and the minor child as particularised in the defendant's plea, and the quantum B of maintenance for the minor child and the defendant to be paid by the plaintiff.

(c) The quantum of the contribution towards litigation costs to be paid by the plaintiff to the defendant.

Dealing with the issue of the division of the movable property, it would appear to me that parties are not far apart in terms of their demands. As I mentioned C above, the plaintiff feels that it would be just and equitable if their movable property is shared in terms of para 9 and 10 of his declaration. The defendant does not seem to disagree with that approach, except that she demands the return of "one office desk, the child's piano and a sound system (technics radio)". The plaintiff opposed this mainly on the ground that he alone bought D the items in question. I have analysed the evidence adduced by both parties in this regard and also took into serious consideration the provisions of s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*] which are as follows:

> "(a) the income, earning capacity, assets and other financial resources which each spouse and child had or is likely to have in the foreseeable future;
>
> (b) E the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
>
> (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;

(d) the age, physical and mental condition of each spouse and child;

(e) F the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the house and caring for the family and any other domestic duties;

(f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity which such spouse or child will lose G as a result of the dissolution of the marriage;

(g) the duration of the marriage."

After taking the above provisions of the law into account, I am of the view that a distribution of the movable property suggested in para 9 and 10 of the plaintiff's declaration would be a just and equitable one. Over and above that, H it would meet the justice of this case, if plaintiff is ordered, as I hereby do, to

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retain the office desk and to return to defendant the child's piano and the sound A system (technics radio).

Concerning the division of the immovable property between the parties, I have taken into account the fact that the plaintiff is a medical practitioner and the defendant is a nurse. Their marriage lasted for four years. During that period, they built two immovable properties, one in Norton and another in Mt Pleasant B in Harare. Both houses are not yet complete. It is common cause that the plaintiff contributed directly to the building of the houses with very little, if anything from the defendant. The defendant said in court that she did not contribute materially at all. She put her contribution at planting three plants at the Norton property and supervision of the construction in both cases. The plaintiff has offered his wife, the defendant, the Norton property, (known as C stand No. 1763, Knowe Township). He would want to retain the Harare property, known as stand No. 1163, Bannockburn Township, Mt. Pleasant. The defendant has simply requested that both houses be sold and the proceeds be shared equally between the parties. The defendant submitted further that if the court was not persuaded by her submission, over and above the Norton home, the defendant be awarded 30 per cent of the Mt Pleasant home in order D to enable her to complete construction of the Norton property. From the evidence adduced in court, it would appear that save for a few items, the Norton property is almost complete and is habitable. Taking all the circumstances of this matter into consideration, it is just and equitable that the plaintiff be awarded as his sole and exclusive property, stand No. 1163, E Bannockburn Township, Mt. Pleasant, Harare and that the defendant be and is hereby awarded as her sole and exclusive property stand No. 1763 Knowe, Norton.

Regarding the issue of whether the plaintiff should pay maintenance for both the defendant and the minor child, I have taken into account what has been stated in the defendant's plea, that is: F

(a) the plaintiff should pay maintenance for both the minor child and the defendant in the sum of $500 000 per month until the child attains the age of 18 years or becomes self-supporting, whichever occurs first and until the defendant remarries or until she dies.

(b) the plaintiff should pay fees, and should purchases school uniforms and G attendant equipment and all school requirements for the minor child;

(c) the plaintiff should retain custody of the minor child and the plaintiff at his expense should keep the child and the defendant as beneficiaries on his medical and dental aid scheme and also pay any shortfalls for the drugs, medical and dental care associated with the minor child and H the defendant;

(d) A the plaintiff should pay rentals for the accommodation of the defendant and the minor child until her own accommodation is complete.

From the evidence adduced in court, it is clear that the defendant is a young woman aged about 31 years. She is working as a nurse and has one child. She is asking that the plaintiff on his own maintains their minor child and herself. She offers nothing by way of maintenance to her daughter, save for the fact that B she is the custodian parent. She also wants the plaintiff to pay medical aid, school related expenses for their daughter and her rentals. She also wants a contribution by the plaintiff towards payment of her legal costs in this matter. She also wants to be assisted in completing the construction of the Norton property.

C On the other hand, the plaintiff is a young man aged about 34 years. He is a medical doctor. He is amenable to maintaining his child at the rate of between $70 000 and $100 000 per month. He offers to pay crèche or school fees together with all reasonable educational expenses pertaining to his child. He also offers to pay school wear and casual wear and keep his child on his medical aid scheme. The plaintiff does not wish to maintain the defendant D neither does he wish to keep her on his medical aid scheme, on the basis that she is working and capable of maintaining herself. He also wishes to contribute between five and ten per cent of the taxed bill of costs towards her cost of litigation.

In *Chiomba* v *Chiomba* 1992 (2) ZLR 197 (S) at p 198 and 199A-E, E Manyarara JA quoted with approval Hahlo *South African Law of Husband and Wife* 5 ed. On p 363-364 where he writes:

> "It remains to be said that with the emergence of the 'working wife' and 'woman's liberation', the attitude of the courts towards the award of maintenance has been changing, the world over. Cases where maintenance is awarded to the husband, while still rare, are no longer unknown. The F idea that marriage ought to provide the wife with a 'bread ticket for life' is on its way out.
>
> Not long ago, an 'innocent' wife who obtained a divorce on the ground of her husband's misconduct could count on being awarded maintenance until death or remarriage almost as a matter of course. Today, the courts are no longer prepared to award maintenance to a young woman who has G been working before marriage, and can be expected to work again after divorce, at least if there are no young children of the marriage. At most, if she has given up her job, she will be awarded a few months' maintenance to tide her over until she finds a new one. Middle aged women who have for years devoted themselves full-time to the management of the household and care of the children of the marriage, are awarded 'rehabilitative H maintenance' for a period sufficient to enable them to be trained or

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> retrained for a job or profession. 'Permanent maintenance' is reserved for A the elderly wife who has been married to her husband for a long time and is too old to earn her own living and unlikely to remarry. As Mr Justice Moorhouse remarked in the Canadian case of *Knoll* [(1969) 2 QR 580 at 584; 6 DLR (3d) 201 at 205]:
>
> 'In this day and age, the doctrine of assured maintenance of a wife is in many instances quite out of keeping with the times … the marriage B certificate is not a guarantee of maintenance.'
>
> At present, these trends may be more pronounced in Europe and America than in South Africa, but with the replacement of the 'guilt' with the 'marriage breakdown' principle they are likely to become more marked in South Africa, too."

I agree with the above view, which is consistent with s 7(3) of the Matrimonial C Causes Act *supra*. I must also add that the trend is becoming more pronounced in Zimbabwe. The defendant is working and capable of working in the foreseeable future. She is therefore capable of supporting herself as she is young and belongs to the nursing profession. The plaintiff is also in the same position. I do not see any reasonable justification for a request for maintenance by the defendant. However, I find that the plaintiff should maintain his minor child. D He has offered to do that at the rate of between $70 000 and $100 000 per month. Because of the very high cost of living these days in our country, I am of the view that the plaintiff would adequately maintain his child at the rate of $200 000 per month.

The defendant has requested a contribution towards her legal costs by the E plaintiff in the sum of $450 000. The plaintiff says he is prepared to contribute between five and ten per cent of the final taxed bill. Given that the defendant does not earn much as compared to the plaintiff and the very high cost of litigation these days, I am of the opinion that it would be just and equitable if the plaintiff contributes 15 per cent of the final taxed bill. F

In the result, it is ordered as follows:

1. A decree of divorce is granted.
2. Custody of the minor child be and is hereby granted to the defendant with the plaintiff having reasonable access to the child.
3. The plaintiff shall: G
   (a) pay the sum of $200 000 per month for the maintenance of the minor child until the child reaches the age of 18 years or becomes self-supporting, whichever shall occur first.
   (b) pay all school fees, levies, examination fees in respect of the minor child's attendance at crèche, primary and secondary school together H with all reasonable educational

expenses;

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(c) A retain the minor child on his medical aid;

(d) provide the minor child with both school and casual wear.

4. that the parties' movable assets be shared as per para 9 and 10 of the plaintiff's declaration. Over and above that, the plaintiff shall retain the office desk and shall return to the defendant the child's piano and the B sound system (technics radio).

5. that the plaintiff shall retain as his sole and exclusive property, stand No. 1163, Bannockburn Township, Mt. Pleasant, Harare and that the defendant be and is hereby awarded stand No. 1763, Knowe Township, Norton as her sole and exclusive property.

6. the plaintiff shall pay 15 per cent of the defendant's total taxed bill as his C contribution towards the defendant's legal costs.

Musunga & Associates, plaintiff's legal practitioners

D*Muskwe & Associates,* defendant's legal practitioners

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ASSOCIATED NEWSPAPERS OF ZIMBABWE (PVT) LTD v MINISTER OF STATE FOR INFORMATION & PUBLICITY & ORS 2004 (1) ZLR 538 (S)

Citation	2004 (1) ZLR 538 (S)
Case No	Judgment No. S-20-03
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA, Ziyambi JA, Malaba JA & Gwaunza JA
Heard	3 June 2003
Judgment	11 September 2003[1]
Counsel	*A P de Bourbon SC,* for the applicant *J Tomana*, for the first and second respondents *C Mudenda*, with him *C Muchenga*, for the third respondent
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 24 — application challenging the constitutionality of a law — requirement for applicant to comply with law before bringing challenge* D

Practice and procedure — *parties — locus standi — requirement to come to court with clean hands — meaning — not limited to cases involving moral obliquity — applicant seeking to challenge constitutionality of legislative provision — need for applicant to comply with law before bringing challenge — not open to applicant to decide what law to obey* E

Headnote

The applicant, the publisher of a newspaper, sought to challenge the constitutionality of several provisions of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] and regulations made under the Act. Section 66, one of the provisions being challenged, required the applicant to register with the Media and Information Commission before F being allowed to publish. Section 79 required journalists to be accredited with the Commission. The applicant did not comply with s 66 because it contended that it could not do so in good conscience, nor did it apply for accreditation for its journalists. The applicant contended that it or any other persons affected by those provisions were not obliged to comply G with them if they should be found to be unconstitutional. It made no secret of the fact that it did not intend to register. It was argued that the applicant's conduct was not tainted with any moral turpitude such as

A fraud or dishonesty and that the applicant was, therefore, entitled to approach the court for relief.

Held, that the applicant had to obey the law first and then challenge its constitutionality. It was not for litigants to decide which laws are unconstitutional. The principle that a citizen who disputes the validity of a law must obey it first and argue afterwards is founded on sound B authority and practical common sense. The applicant's contention that it was not bound by a law it considered unconstitutional was simply untenable. A situation where citizens are bound by only those laws they consider constitutional is a recipe for chaos and a total breakdown of the rule of law. It would have been entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and C thus avoid compliance with the law it objected to, pending a determination by the court.

Held, further, that it was not correct to say that the principle of "dirty hands" only applies to those litigants whose conduct lacks probity or honesty and to those litigants whose conduct is tainted with moral obliquity, such D as fraud or other forms of dishonesty. The mere fact that the applicant had disclosed to the court its defiance of the law was totally inadequate to purge the applicant's contempt of the law. The good conscience argument also was not convincing. Firstly, s 66 of the Act was not blatantly unconstitutional. At worst its constitutionality was debatable. If the section was patently unconstitutional, the court might have been E persuaded. Indeed the licensing of the media, particularly, the electronic media has been adjudged constitutional in some jurisdictions. A perusal of the other impugned sections revealed that they were not totally repugnant and would need careful consideration to determine their constitutionality. Secondly, of all the publishing companies the applicant was the only conscientious objector. If the Act were as morally repugnant F as the applicant made out, one would have expected more than one conscientious objector.

Cases cited

Athukorale & Ors v A-G of Sri Lanka (1997) 2 BHRC 610

G *Deputy Sheriff, Harare v Mahleza & Anor* 1997 (2) ZLR 425 (H)

Growell v Benson 285 US 22 (1931)

F Hoffmann-La Roche & Co AG & Ors v Sec of State for Trade & Industry [1975] AC 295; [1974] 2 All ER 1128 (HL)

S v Neill 1982 (1) ZLR 142 (H)

H *S v Nkosi* 1963 (4) SA 87 (T)

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Sec of State for Trade & Industry v F Hoffmann-La Roche & Co AG & A Ors [1973] 3 All ER 945 (CA)

Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (S); 1984 (2) SA 778 (ZS)

Case information

A P de Bourbon SC, for the applicant

J Tomana, for the first and second respondents

C Mudenda, with him *C Muchenga*, for the third respondent B

Judgment

CHIDYAUSIKU CJ: The applicant in this matter is a company that owns and publishes the Daily News. The principal object of the applicant is to acquire, publish and circulate or otherwise deal with any newspapers or other publications. The applicant contends that it is entitled to enjoy the freedom of C expression set out in s 20 of the Constitution of Zimbabwe. It is the view of the applicant that the Access to Information and Protection of Privacy Act [*Chapter 10:27*] (hereinafter referred to as the Act) in general terms interferes with and unduly restricts the enjoyment by the citizens of Zimbabwe of their freedom of expression. In particular the applicant impugns ss 39, 40, 41, 65, 66, 70, 71, 79, 80 ,83 and 89 of the Act, and SI 169C of 2002, made thereunder. D It is contended that the above provisions are unconstitutional.

The first and second respondents have raised the point *in limine* that the applicant has dirty hands and is not entitled to approach this court for relief. This allegation of dirty hands arises from the fact that the applicant is in open defiance of the law which it is seeking to impugn. The first respondent's E contention is set out in para 3 of the opposing affidavit which reads as follows:

> "3. I have read and understood the applicant's founding papers and respond thereto in opposition as follows:
>
> 1.1 Firstly might I be permitted to state that the Act in question was law in this country at the date of the instant application.
>
> 3.1.1 I am advised that unless and until a piece of legislation is either F repealed by an Act of Parliament or declared unconstitutional and therefore nullified by this Honourable Court, such piece of legislation retains the force of law obliging all citizens to obey and respect it.
>
> 3.1.2 The applicant and its journalists are required by the Act to register and be accredited after due compliance with the regulations G promulgated as SI 169C of 2002.
>
> 3.1.3 The applicant has taken the choice not to apply for registration and the applicant's journalists have not applied for accreditation. The applicant is therefore by choice operating a media business in contravention of the Act.
>
> 3.14 In other words the applicant has taken the place of Parliament and this H

A Honourable Court, adjudged the Act unconstitutional and proceeded to ignore the same completely.

> 3.1.5 I know of no country where a citizen has the option to respect a law if it suits such citizen or ignore the same with impunity if the piece of legislation fails to meet the expectations of such citizen.
>
> 3.1.6 This, in fact, is what the applicant has done.
>
> 3.1.7 B I am however advised that this too is not acceptable in this country and in particular that this Honourable Court will not tolerate such an attitude from any of the subjects of the laws of Zimbabwe.
>
> 3.1.8 The applicant approaches this Honourable Court with dirty hands. The applicant is simply approaching this Honourable Court for a rubber-stamp of its prior decision to disrespect the Act which is an C existing Zimbabwean piece of law.
>
> 3.1.9 I accordingly urge this Honourable Court to register and restate the Zimbabwean position on this lawless attitude by refusing to entertain this application.
>
> 3.1.10 However in the event, that this Honourable Court chooses to condone the deliberate decision by the applicant to disobey the Act, D I respond, in opposition, to the merits of the application as follows."

The second respondent associates itself with the attitude of the first respondent. The Chairman of the Commission makes the following averment in para 2 of his affidavit:

> " I confirm that I have read and understood the applicant's papers. I have E also read the first respondent's opposing affidavit the contents of which I fully associate myself with."

The applicant's response to the above averments are to be found in para 3 of the answering affidavit, part of which reads as follows:

> "3.3.1 I do not accept as correct the view that the first respondent F expresses regarding the laws whose validity is being lawfully challenged. *If the applicant's view that the provisions of the Act which it is sought to have declared unconstitutional are indeed unconstitutional, then the applicant and any other persons affected by those provisions are not obliged to comply with them*. In any event the first respondent very significantly and blatantly exempted the G mass media services controlled by him from these provisions of the Act." (emphasis is mine)

Section 66 of the Act, in terms of which the applicant is required to register, provides as follows:

> **"Registration of mass media services** H
>
> (1) A mass media owner shall carry on the activities of a mass media

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> service only after registering and receiving a certificate of registration in A terms of this Act:
>
> Provided that this section shall not apply to -—
>
> (a) the activities of a person holding a licence issued in terms of the Broadcasting Services Act [*Chapter 12:06*] to the extent that such activities are permitted by such licence; or B
>
> (b) a representative office of a foreign mass media service permitted to operate in Zimbabwe in terms of section *ninety;* or
>
> (c) in-house publications of an organisation which is not a mass media service.
>
> (2) An application for the registration of a mass media service whose products are intended for dissemination in Zimbabwe shall be submitted C by its owner to the Commission in the form and manner prescribed and accompanied by the prescribed fee.
>
> (3) The Commission shall, upon receiving an application for registration, send a notification of receipt of the application to the owner or person authorised by him indicating the date when the application was received, and the Commission shall consider such application within a month of D receiving it.
>
> (4) A mass media service shall be registered when it is issued with a certificate of registration by the Commission.
>
> (5) A certificate issued in terms of subsection (4) shall be valid for a period of two years and may be renewed thereafter. E
>
> (6) The registered owner shall start circulating his mass media's products six months from the date of the issue of the registration certificate, failing which the registration certificate shall be deemed to be cancelled."

The applicant has not complied with s 66 of the Act because it contends that it cannot do so in good conscience. The applicant contends that it or any other persons affected by the above provisions are not obliged to comply with the F above provisions if they should be found to be unconstitutional.

It is not disputed, therefore, that as of now the applicant is operating contrary to the provisions of s 66 of the Act. The applicant now approaches this court seeking the relief that s 66 and other sections of the Act be declared unconstitutional.

Mr *Tomana,* for the first and second respondents, made a number of submissions G in support of the first and second respondents' point *in limine*. He submitted that the applicant is approaching this court with dirty hands and is not entitled to relief from this court. He submitted that the applicant admits that it chose not to apply for registration because, in its view, the provisions requiring registration of mass media services are not constitutional. It was Mr *Tomana's* H

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A further contention that among all the mass media services providers in Zimbabwe only the applicant chose to disrespect the law by deliberately refraining from applying for registration as prescribed because it unilaterally resolved that it cannot, in its alleged conscience, obey such a law. Mr *Tomana* argued that it was not for the applicant to judge any law of this land as unconstitutional.

That function was for the Constitutional Court. He also B argued that every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. Even in those cases where the constitutionality of the Acts are in doubt all such doubts, are resolved in favour of the validity of the Acts. Where an Act is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution in order to avoid the consequence of C unconstitutionality. For the above proposition Mr *Tomana* cited Black *The Construction and Interpretation of Laws*1. The cases of *Growell* v *Benson*2 and *Zimbabwe Township Developers (Pvt) Ltd* v *Lou's Shoes (Pvt) Ltd*3 were also cited in support of the above proposition. In *Zimbabwe Township Developers (Pvt) Ltd* v *Lou's Shoes (Pvt) Ltd, supra,* Georges CJ at 383A-E D had this to say:

> "Many neo-Nigerian constitutions permit derogation from the declared rights defined provided that these derogations 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 E 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. As Lord Frazer 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 F the Act will not provide the answer to that question. In such cases evidence has to be brought before the court of the reasons for the Act and to 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.'
>
> G In that sense the presumption represents no more than the court adopting the view that a legislature, elected by universal adult suffrage and liable

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> to be defeated in an election, must be presumed to be a good judge of what A 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."

Mr *de Bourbon*, for the applicant, on the other hand, submitted that the B respondents' contention that the applicant has come to court with dirty hands and, therefore, should not be heard is without legal foundation. He submitted that the applicant had not sought to be registered in terms of the Act because the applicant considers that the registration provisions of the Act are unconstitutional. The essence of Mr *de Bourbon's* submission is crisply set C out in para 4 of his heads of argument wherein he submits:

> "It is correct that the applicant has not sought to be registered in terms of AIPPA. The applicant considers that the registration provisions of AIPPA are unconstitutional. It considers that, despite the presumption of constitutionality, see *Zimbabwe Township Developers (Pvt) Ltd* v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S); 1984 (2) SA 778 (ZS), that it D cannot in conscience obey such a law."

In the same paragraph Mr *de Bourbon* also refers to the remarks of the Late Martin Luther King which, in my view, have no legal significance *in casu*.

Mr *de Bourbon* has also argued that even if the applicant had sought to be registered it might not have been possible for it to do so because certain administrative mechanisms were not in place to enable it to register in terms E of the Act. There might have been substance in this argument had the applicant's case been that it was unable to register because of administrative difficulties. That is not its case. He also argued that the applicant's conduct is not tainted with any moral turpitude such as fraud or dishonesty and is, therefore, entitled to approach this court for relief. F

In para 10 of his heads, Mr *de Bourbon* makes the following submission:

> "But at the end of the day the fact of the matter is that the applicant has made no secret of its attitude towards AIPPA; it has made full disclosure to this Honourable Court. It considers the legislation to be unconstitutional, and was not prepared to make an application in terms of s 66 of AIPPA for registration. It has continued operating, and *the question that has to be* G *determined by this Honourable Court is whether its attitude in that regard was correct*. It is respectfully submitted that it cannot be denied a hearing because two of the three respondents seek to enforce what might well be unconstitutional legislation." (the emphasis is mine) H

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A Mr *de Bourbon* made the further submission that the applicant has *locus standi* in terms of s 24 of the Constitution and should, therefore, be heard by this court.

I agree with Mr *de Bourbon's* contention that the applicant has *locus standi* in terms of s 24 of the Constitution. The issue to be determined, as Mr *de Bourbon* himself has submitted, is whether the applicant's attitude in refusing B to obey a law pending the determination of the constitutionality of such law is correct. Is such an applicant entitled to be heard on the merits of the challenge while in defiance of such a law?

The issue of whether a citizen should comply with a law whose validity it challenges pending the determination of the validity of such a law was C considered in *F Hoffmann-La Roche & Co AG & Ors* v *Secretary of State for Trade and Industry*4.

The facts of that case were briefly as follows. F Hoffmann-La Roche*,* a pharmaceutical company (hereinafter referred to as the company) was selling some drugs at a certain price. The Secretary for Trade, ("The Secretary") issued statutory orders reducing the selling price of the drugs sold by the D company. The company contended that the statutory orders were *ultra vires* and, therefore, invalid. The company indicated that it was not going to obey the orders. The company was going to raise the prices so as to restore them to the level obtaining before the orders were made. But it would pay the difference into a bank account to await a decision on the validity of the orders. E The Secretary applied for an injunction to restrain the company from charging in excess of the prices specified in the order. The Secretary sought an interim injunction pending the determination of the matter. The company was prepared to submit to the interim injunction, keeping the low price provided that the Secretary gave an undertaking in damages so as to recompense the company if the orders were afterwards held to be invalid. The Secretary was not willing F to give that undertaking. Walton J, in the court of first instance, dismissed the Secretary's application for the interim injunction mainly on the basis of his refusal to give an undertaking and that, in any event, the company was paying the money in a trust account to be refunded to purchasers in the event of the decision going against the company and the orders being held valid. The Secretary appealed to the Court of Appeal against the judgment of Walton J. G The appeal was upheld: see *Sec of State for Trade & Industry* v *F Hoffmann-La Roche & Co AG & Ors* [1973] 3 All ER 945 (CA).

Lord Denning MR, in allowing the appeal, had this to say at 955d-e:

> "The Secretary of State has made, under the authority of Parliament, an

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> order which compels the plaintiffs to reduce their prices greatly. That A order has been approved, after full debate, by both Houses of Parliament. So long as that order stands, it is the law of the land. When the courts are asked to enforce it, they must do so."

Lord Denning MR further observed at 955f-g:

> "They argue that the law is invalid; but unless and until these courts declare B it to be so, they must obey it. They cannot stipulate for an undertaking as the price of their obedience. They must obey first and argue afterwards.
>
> I would allow the appeal and grant the injunction as asked without requiring any undertaking from the Crown in damages."

The company appealed to the House of Lords but the appeal was dismissed. Thus the principle that a citizen who disputes the validity of a law must obey C it first and argue afterwards is founded on sound authority and practical common sense. The applicant's contention that it is not bound by a law it considers unconstitutional is simply untenable. A situation where citizens are bound by only those laws they consider constitutional is a recipe for chaos and a total breakdown of the rule of law.

I am not persuaded by Mr *de Bourbon's* submission that the principle of dirty D hands only applies to those litigants whose conduct lacks probity or honesty and those litigants whose conduct is tainted with moral obliquity such as fraud or other forms of dishonesty.

For the above submission Mr *de Bourbon* sought to rely on the case of *Deputy Sheriff, Harare* v *Mahleza & Anor* 1997 (2) ZLR 425 (H). In that case Mrs E Mahleza had purchased goods in the name of her husband's company in order to avoid the payment of sales tax. The goods were subsequently

attached at the instance of the company's creditors. Interpleader proceedings were launched. The court, *mero motu,* refused her relief until such time as she would have paid the tax. Mrs Mahleza had been candid with the court as to why she purchased F goods in the name of the company. *Mahleza's* case, *supra*, is certainly an authority for the proposition that a litigant with dirty hands will be denied relief. That case does not seek to define the extent of that principle. It certainly is not an authority for the proposition that denial of relief will be confined only to those litigants whose conduct lacks probity or honesty or is tainted with moral obliquity. In *S* v *Neill*5 and *S* v *Nkosi*6 the court refused to hear appeals G of appellants who had absconded or failed to comply with bail conditions. Such conduct does not, in any way, involve moral obliquity. Defiance of a court order does not involve dishonesty or moral obliquity, yet litigants in H

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A defiance of court orders, more often than not, are denied relief by the court until they have purged their contempt. In my view, there is no difference in principle between a litigant who is in defiance of a court order and a litigant who is in defiance of the law. The court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged*7*. In the present case Mr *de Bourbon* has advanced B two reasons why the court should exempt the applicant from the application of the dirty hands principle, namely:

1. that the applicant has made an open and candid disclosure of its conduct;
2. that the applicant is acting in response to its conscience.

I am not satisfied that these two reasons are sufficient to justify this court to C grant relief to the applicant who approaches it while in open defiance of the law for a number of reasons. The mere fact that the applicant has disclosed to the court its defiance of the law is totally inadequate to purge the applicant's contempt of the law. In many of the cases where relief was refused and, indeed, in the present case, the facts are patent and the litigant has no choice but to make such a disclosure. In the present case the applicant did not apply for D registration in terms of the Act. Its failure to do so is a matter of public record and easily ascertainable. Disclosure of what is patent and obvious is not something for which the applicant can claim credit. Indeed, in *Mahleza's* case, *supra*, the litigant disclosed in her affidavit that she had used another person's name to purchase her goods in order to avoid payment of tax. That disclosure E did not help her. If anything, it was as a result of such disclosure that the court *mero motu* raised the principle of dirty hands. In my view, it would not have helped the litigant either if she had alleged that the law imposing the tax was unconstitutional, which brings me to the next reason advanced by Mr *de Bourbon* as to why this court should grant the applicant the relief it seeks.

The applicant argues that it could not, in good conscience, apply to register in F terms of the Act because, in its view, certain provisions of the Act and, in particular, s 66, requiring such registration was unconstitutional. I am not impressed by the good conscience argument for a number of reasons. Firstly, s 66 of the Act is not blatantly unconstitutional. At worst, its constitutionality is debatable. If the impugned section was patently unconstitutional the court G might be persuaded. Indeed the licensing of the media, particularly the electronic media, has been adjudged constitutional in some jurisdictions8. A perusal of the other impugned sections reveals that they are not totally

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repugnant and would need careful consideration to determine their A constitutionality. Secondly, it would appear that of all the publishing companies the applicant was the only conscientious objector. If the Act was as morally repugnant as the applicant would have the court believe, one would have expected more than one conscientious objector.

This court is a court of law, and as such, cannot connive at or condone the B applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance C of doubt the applicant is not being

barred from approaching this court. All that the applicant is required to do is to submit itself to the law and approach this court with clean hands on the same papers.

Compliance with the law does not necessarily mean submission of an application for registration to carry on the activities of a mass media service. D It certainly means desisting from carrying on the activities of a mass media service illegally.

In the result the point taken *in limine* succeeds. The applicant is operating outside the law and this court will only hear the applicant on the merits once the applicant has submitted itself to the law.

No order as to costs has been requested and none will be made. E

Cheda JA, Ziyambi JA, Malaba JA, and Gwaunza JA concurred

Gill, Godlonton & Gerrans, applicant's legal practitioners

Muzangaza Mandaza & Tomana, first and second respondent's legal F practitioners

Civil Division of the Attorney-General's Office, third respondent's legal practitioners G

1 This judgment should have appeared in 2003 (2) ZLR but was erroneously omitted

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