
Document 1 of 47**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2

Volume 2

S v Chikunguruse	2004 (2) ZLR 1 (H)
African Tribune Newspapers (Pvt) Ltd & Ors v Media & Information Commission & Anor	2004 (2) ZLR 7 (H)
Tredgold NO v National Railways of Zimbabwe	2004 (2) ZLR 28 (H)
Gumbo & Anor v Zimbabwe Stock Exchange	2004 (2) ZLR 42 (H)
Attorney-General v Makamba	2004 (2) ZLR 63 (S)
Moyo v Chipanda	2004 (2) ZLR 67 (H)
Marimo v Mpofu	2004 (2) ZLR 73 (H)
Moyo v Moyo	2004 (2) ZLR 77 (H)
S v Masuku	2004 (2) ZLR 82 (H)
Attorney-General v Mbewe	2004 (2) ZLR 86 (H)
Standard Chartered Bank of Zimbabwe Ltd v Chipiningu	2004 (2) ZLR 94 (S)
Latif v Latif	2004 (2) ZLR 102 (S)
Commercial Union Fire Marine and General Insurance Co Ltd & Ors v Chingwaru & Anor	2004 (2) ZLR 106 (S)
Delta Operations Ltd v Mpepula	2004 (2) ZLR 113 (S)
Ex parte Ndlovu	2004 (2) ZLR 118 (H)
Evans v Snapper	2004 (2) ZLR 121 (S)
Barclays Bank Zimbabwe Ltd v Mahachi	2004 (2) ZLR 126 (S)
In re Hativagone & Anor	2004 (2) ZLR 133 (S)
S v Mupambwa & Anor	2004 (2) ZLR 143 (S)
Matanhire v BP & Shell Marketing Services (Pvt) Ltd	2004 (2) ZLR 147 (S)

Barclays Bank of Zimbabwe Limited v Zimbabwe Revenue Authority	2004 (2) ZLR 151 (H)
S v Zendere & Anor	2004 (2) ZLR 165 (H)
Mtemererwa & Anor v Tawarwisa & Anor	2004 (2) ZLR 172 (H)
Cosmos Cellular (Pvt) Ltd v Posts & Telecommunications Corporation	2004 (2) ZLR 176 (S)
Makwiro Platinum Mines v Paradzayi	2004 (2) ZLR 184 (S)
Lever Brothers v Bimha & Ors	2004 (2) ZLR 188 (S)
Lee Group of Companies v Elder	2004 (2) ZLR 193 (S)
Standard Chartered Bank v Chinyemba	2004 (2) ZLR 197 (S)
Chiwadza v Matanda & Ors	2004 (2) ZLR 203 (H)
S v Tsvangirai	2004 (2) ZLR 210 (S)
Dombodzvuku & Anor v Sithole NO & Anor	2004 (2) ZLR 242 (H)
Barclays Bank Zimbabwe Ltd v Nyahuma	2004 (2) ZLR 248 (S)
Unilever PLC & Anor v Vimco (Pvt) Ltd & Anor	2004 (2) ZLR 253 (H)
Muswere v Makanza	2004 (2) ZLR 262 (H)
Chawatama v United Touring Company	2004 (2) ZLR 268 (S)
Mvere v Tanganda Tea Co Ltd	2004 (2) ZLR 271 (S)
NMB Bank Ltd v Selemani	2004 (2) ZLR 279 (H)
Domboka v Madhamu	2004 (2) ZLR 287 (H)
Quinnell v Minister of Lands & Ors	2004 (2) ZLR 293 (S)
S v Paradza	2004 (2) ZLR 324 (S)
Phigidemac Consultants (Pvt) Ltd v Zvimba Rural District Council	2004 (2) ZLR 326 (S)
Zhakata v Mandozo NO & Anor	2004 (2) ZLR 335 (H)
Mandikonza & Anor v Cutnal Trading (Pvt) Ltd & Ors	2004 (2) ZLR 340 (H)
Mason v Timore Trading Services (Pvt) Ltd & Ors	2004 (2) ZLR 347 (H)
Polaris Zimbabwe (Pvt) Ltd v Zapchem Detergent Manufacturers CC	2004 (2) ZLR 351 (S)

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Document 2 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/S v CHIKUNGURUSE 2004 (2) ZLR 1 (H)

S v CHIKUNGURUSE 2004 (2) ZLR 1 (H)

2004 (2) ZLR p1

Citation	2004 (2) ZLR 1 (H)
Case No	Judgment No. HH-125-04
Court	High Court, Harare
Judge	Guvava J
Heard	7 July 2004
Judgment	7 July 2004
Counsel	Details not supplied
Case Type	Transferred sentence
Annotations	No case annotations to date

Flynote

c Criminal procedure (sentence) — *statutory offences* — *Sexual Offences Act [Chapter 9:21] — s 3(1)(b) — immoral or indecent act committed on or with young person — woman inducing six-year-old boy to have sexual intercourse with her — seriousness of offence — appropriate sentence*

Headnote

The accused, a young woman, induced a six-year-old boy to have sexual intercourse with her. She pleaded guilty to committing an immoral or indecent act with or upon a young person in contravention of s 3(1)(b) of the Sexual Offences Act [Chapter 9:21], and was duly convicted. In regard to sentence:

Held, that the Sexual Offences Act was promulgated in recognition of the growing problem of the abuse of young children. In view of this, and in view of Zimbabwe's obligations under the UN Convention on the Rights of the Child and the African Charter on the Rights of the Child, the judiciary would be failing in its duty if it did not punish severely persons who abuse children sexually. Sending offenders to prison for lengthy terms would not only punish them but would also deter other like-minded persons.

Held, further, that in the circumstances of this case, where the accused was a young female first offender, she should be sentenced to five years' imprisonment with two years suspended on conditions of good behaviour.

Cases cited

G S v C 1965 (3) SA 105 (N)

S v Joko HH-497-83

S v Ncube HH-96-83

G S v Ponder 1989 (1) ZLR 235 (S)

2004 (2) ZLR p2

Guvava J

Legislation considered ^A

Sexual Offences Act [*Chapter 9:21*], s 3(1)(b)

Judgment

GUVAVA J: The accused was charged with contravening s 3(1)(b) of the Sexual Offences Act [*Chapter 9:21*]. She pleaded guilty to the charge and was duly convicted of the offence. The matter was referred to this court for ^B sentence in terms of s 225(b)(i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The facts which gave rise to this matter were set out in the outline of State case and can be summarised as follows.

On 19 September 2002, at about 9 a.m. the complainant, who was six years old, was at the accused's home playing with some young boys. The accused called the complainant into her kitchen hut and locked the door. She ordered the ^C complainant to remove his shorts and she removed her pants. She thereafter inserted the complainant's penis into her vagina. After a while the accused thereafter told the complainant to remove his penis from her vagina and use his forefinger instead. She then gave him some water to wash his hand and told him not to make a report to anyone.

The complainant made a report to his mother when he went home, leading to ^D the arrest of the accused.

A medical report was produced by the State in respect of the complainant. The doctor observed that there was some bruising on the complainant's penis and that he complained of dysuria.

In mitigation the accused stated that she was 23 years old, single and had no ^E children. She stated that she was residing with an aunt at the time of the commission of the offence. When questioned by the court on why she committed the offence she indicated that she was seeking satisfaction.

In aggravation the State called Dr Jonathan Brakash. He stated that he is a psychologist and has a doctorate in Clinical Psychology specialising in child ^F psychology. He stated that he has been working as a child psychologist for 23 years. He explained that he had not had an opportunity to examine the complainant in this matter but would give evidence relating to studies that they had conducted in Zimbabwe with sexually abused children. He said they had conducted a study of over 3 000 children (boys and girls) and found that the following short-term effects occurred to children who had been sexually ^G abused:

- (a) There was increased aggression
- (b) Fear of women
- (c) Increased headaches and stomach aches ^H

2004 (2) ZLR p3

Guvava J

- (d) ^A A decrease in academic performance
- (e) Increased masturbation
- (f) Abnormal sexual practices.

He stated that they had generally observed the following long-term effects:

- (a) Depression
- (b) ^B Inability to have stable relationships
- (c) Sexually very aggressive.

He stated that they also found a small number of children who were not affected by the sexual abuse. In this category of cases, it was found that sex had been introduced as a game and the parents of the children had been very c supportive when the matter came to light and not laid any blame on the children.

He also testified that in his experience the effects of sexual molestation would be the same for both boys and girls although he was of the opinion that abuse such as the one described in this case affected boys more than girls because d they are not used to being forced to have sexual intercourse as society views them as the aggressor in sexual relationships.

He further stated that the injuries observed on the complainant by the doctor who examined him shows that intercourse must have gone on for a long period such that it caused physical injury to the complainant's genitalia. He stated that that this was likely to distress the child. He was, however, of the view that e it was unlikely that the complainant in this cause suffered excessive trauma as there was no evidence that he was threatened with violence and the offence had only occurred once.

He further stated that research had shown that the fact that the complainant immediately made a report to his mother leading to the arrest of the accused f would mitigate the trauma on the complainant.

This witness was not cross-examined by the accused. The witness gave his evidence well and it cannot be faulted, as he was a professional witness who merely told the court the findings which they have made in cases of a similar nature. His evidence was of importance to the court, however, as it illustrated the findings which have been made by research on the trauma which children g go through when they are sexually abused.

The Sexual Offences Act [Chapter 9:21] under which the accused was charged and convicted came into operation in March 2001. Prior to the promulgation of this Act persons who had committed such crimes were h charged with the common law offence of indecent assault. A review

2004 (2) ZLR p4

GUVAVA J

of the sentences imposed for such cases shows that they generally a attracted sentences of between six months' imprisonment and three years' imprisonment, depending on the circumstances of each case. In the case of *S v Ncube* HH-96-83, the accused dragged the complainant who was ten years old into the bush, removed her pants and attempted to remove his own, when he was disturbed. He was sentenced to 14 months' imprisonment with five b months suspended on condition of good behaviour. The court took into account that the accused had been drinking and no physical harm was occasioned to the girl.

In the case of *S v Joko* HH-497-83 the accused, who was found lying beside a five-year-old-girl with his trousers rolled down and his limp member pressed against the genitals of the complainant, was sentenced to six months' c imprisonment of which three months were suspended. The court took into account that there was no injury to the complainant and the accused was drunk.

In *S v Ponder* 1989 (1) ZLR 235 (S), the appellant, an 18-year-old youth, fondled the private parts of two young girls aged seven and nine respectively while d playing with them in a swimming pool. He was convicted and sentenced to eight months' imprisonment. On appeal the court reduced the sentence to one month's imprisonment which was wholly suspended on the usual conditions of good behaviour. The court found that the sentence was manifestly excessive in view of the fact that the appellant was only 18 years old and a first offender who should be e kept out of prison. The court also found that the complainant suffered no physical or psychological traumas.

In *S v C* 1965 (3) SA 105 (N) a 37-year-old man was convicted of indecent assault on a young boy after threatening him with a weapon. He was sentenced to five months' imprisonment.

It seems to me that the legislature in promulgating the Sexual Offences Act, f and providing a penalty section which provides for a sentence of up to 10 years' imprisonment, had recognised the growing problem of the abuse of young children. This was also an acceptance that the common-law offence of indecent assault was not effectively dealing with the problem.

In my view it was also in recognition that Zimbabwe is also a party to the United Nations Convention on the Rights of the Child (CRC) and a party to the African g Charter on the Rights of the Child that the legislation was enacted. Article 19 of the CRC provides as follows:

- "1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of

2004 (2) ZLR p5

GUVAVA J

- a of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. (emphasis is my own)
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide b necessary support for the child..., as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

And article 20.1 provides:

- "1. A child temporarily or permanently deprived of his or her family c environment, or in whose own best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance by the State"

The corresponding provision in the African Charter on the Rights of the Child is couched in a similar manner

d Both conventions require State Parties to protect the rights of children by putting in place administrative, legislative and other structures to ensure the full protection of children from all forms of abuse, including sexual abuse.

The conventions, as can be seen in Article 19(2) of the CRC, require State Parties to provide support for the child who has been abused. Sadly, in most developing countries, and Zimbabwe is no exception, very little is done in e terms of counselling and other forms of support due to financial constraints.

It seems to me that in these circumstances, the judiciary would be failing in its duty if it did not impose severe punishment on person who abuse children sexually. As the evidence of Dr Brakash illustrated, the fact that the offender is punished for the offence assists the healing process of the child. The f judiciary would thus play a role in the rehabilitation of the child.

Sending the offenders to prison for lengthy terms would not only, in my view, have the effect of punishing the offender but would also act as a deterrent for other like-minded persons.

Severe penalties are also necessary, as with the advent of HIV and AIDS, g victims of sexual abuse are placed at risk.

In this case it must have been very traumatic for the complainant, who was only a six-year-old boy, as he was being asked to perform a sexual act on an adult woman. When he failed to satisfy her he was asked to use his finger instead.

h It was also aggravating in my view that the complainant suffered some injuries

2004 (2) ZLR p6

GUVAVA J

from the sexual intercourse. It was Dr Brakash's opinion that the sexual act a must have gone on for a long time in order for it to have caused the injuries reflected on the medical report.

In assessing sentence in this matter, however, this court did not lose sight of the fact that the accused was a young girl of 23 years of age who had pleaded guilty to the offence, thus exhibiting some measure of contrition. I also took b into account, in her favour, that female offenders rarely re-offend. In mitigation I took into account that the complainant was not threatened in any way by the accused. And that the abuse was only committed once and therefore must have been less traumatic for the complainant than if the sexual act had been committed on more than one occasion. I was thus satisfied that a fairly lengthy term of imprisonment with a portion suspended on condition of good c behaviour would meet the justice of this case.

It was for these reasons that I imposed the following sentence:

Five years' imprisonment of which two years are suspended for five years on condition that the accused does not, within that period commit any offence involving a contravention of s 3 of the

Sexual Offences Act [*Chapter 9:21*] [ⓓ] and for which upon conviction the accused is sentenced to a term of imprisonment without the option of a fine.

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Document 3 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/AFRICAN TRIBUNE NEWSPAPERS (PVT) LTD & ORS v MEDIA & INFORMATION COMMISSION & ANOR 2004 (2) ZLR 7 (H)

AFRICAN TRIBUNE NEWSPAPERS (PVT) LTD & ORS v MEDIA & INFORMATION COMMISSION & ANOR 2004 (2) ZLR 7 (H)

2004 (2) ZLR p7

Citation	2004 (2) ZLR 7 (H)
Case No	Judgment No HH-139-04
Court	High Court, Harare
Judge	Uchena J
Heard	21 June 2004
Judgment	21 July 2004
Counsel	<i>S V Hwacha</i> , for the applicants <i>J Tomana</i> , for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Ⓒ Administrative law — review — grounds for — unreasonableness of decision being reviewed — limitations to such ground

Media — control of — registration of mass media — cancellation of registration — grounds for — non-disclosure of material facts — failure to notify Media and Information Commission of change to ownership of [ⓓ] registered newspaper — procedure to be followed before cancellation — need for Commission to follow procedure — cancellation on grounds of misrepresentation made during hearing — may not be relied on unless further hearing held

Practice and procedure — application — urgent application — when may [Ⓔ] be made — urgency of commercial nature — may found an urgent application

Headnote

The first applicant owned a newspaper and was registered with the Media and Information Commission under the Access to Information and Protection of Privacy Act [*Chapter 10:27*]. All the shares in the first [Ⓕ] applicant were sold to another company, the second respondent, of which the remaining respondents were directors. The Commission was not notified of the change of ownership, nor of the change of name of the first applicant, nor of the changes to the name, form or frequency of the newspapers published by the first applicant. The Commission also alleged that the applicant had used an unaccredited journalist, contrary [Ⓖ] to s 79(6) of the Act.

The Commission gave notice of a meeting at which the applicants would be required to show cause why their registration should not be cancelled. After the hearing, the Commission, purporting to act under s 71(1)(a) of the Act, cancelled the first applicant's licence for a year. It based its

2004 (2) ZLR p8

decision in part on an alleged misrepresentation made during the hearing. ^A The applicants sought an urgent review of the decision, on the grounds (1) that the Commission did not have the powers it claimed under s 71(1)(a); (2) that its decision was grossly unreasonable on various grounds, among which was that the Commission, whose duty is to promote, develop and grow the media, had summarily closed a newspaper ^B for the mere offence of failure to notify it of structural changes; and (3) that the chairman was biased, because he indicated the Commission's decision in advance.

Held, that unreasonableness has an extremely limited, even an insignificant, role as a ground of review in our law. Judicial review is concerned not with the correctness of the decision but with the decision-making process. A ^C review court can only set aside a decision if it is satisfied that the decision was so grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion.

Held, further, that s 71(1)(a) provided for the cancellation of registration if, among other things, there had been a misrepresentation or non-disclosure of a material fact by the mass media owners concerned. The ^D misrepresentation or non-disclosure need not be one linked to the issuing of the registration certificate; it could be one occurring during the existence of the registration certificate. If the misrepresentation or the non-disclosure were limited to those occurring before registration then it would be very easy for mass media owners to avoid the local ownership ^E requirement by complying at registration and then changing ownership and not disclosing the change introducing non-local ownership.

Held, further, that before registration may be cancelled, the Commission is obliged to notify the affected party of its intention to cancel, give notice of a hearing and allow the party to make representations. As it had not done this in respect of the alleged representations made at the hearing, ^F it could not rely on those misrepresentations as a ground for cancellation. In respect of the other charges, the correct procedures had been followed.

Held, further, that in assessing whether the Commission acted grossly unreasonably, it was necessary to look at the Commission's role under the Act. This was not merely to promote and develop the media, but also ^G to monitor mass media services, enforce ethics standards and professionalism, control mass media services, act upon comments by the public on mass media services and ensure that mass media services comply with provisions of the Act. Non-disclosure of change of ^H

2004 (2) ZLR p9

Uchena J

^A ownership is material, to ensure that Zimbabweans have control of the media. While the Commission need not have cancelled the applicant's registration and could instead have acted under s 71(6), this did not make its decision grossly unreasonable.

Held, further, that the chairman had acted under s 71(4) of the Act by notifying the applicant of the Commission's intention to cancel the registration ^B unless the applicant showed cause to the contrary. This was not an indication of bias.

Held, further, that the fact that urgency is based on commercial losses does not mean that a case cannot be treated as urgent.

Cases cited ^C

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

Charumbira v Comm of Taxes & Ors 1998 (1) ZLR 584 (S)

Dube v Mandioma NO & Anor S-173-93

Keyter v Min of Agriculture 1908 NLR 522

^D *Muringi v Air Zimbabwe Corporation & Anor* 1997 (2) ZLR 488 (S)

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

Silver's Trucks (Pvt) Ltd & Anor v Dir of C & E 1999 (1) ZLR 490 (H)

Ex p Miss X 1993 (1) ZLR 233 (H)

Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor 1996 (1) ZLR 378 (H)^Ε

Legislation considered

Access to Information and Protection of Privacy Act [*Chapter 10:27*], ss 39(1)(a)(b)(e) and (o), 67, 71(1)(a)(b) and (c), 71(4) and 79(6)

Case information

^Ε *S V Hwacha*, for the applicants

J Tomana, for the respondents

Judgment

UCHENA J: The first applicant is a duly registered company which publishes a weekly newspaper called the Tribune. Until 10 June 2004 it was a registered ^Γ media company.

The second applicant is a duly incorporated company. It owns all the 100 issued shares in the first applicant. These shares were previously owned by UKI (Pvt) Ltd. UKI (Pvt) Ltd sold the 100 issued shares of the first applicant ^Η to the second applicant.

2004 (2) ZLR p10

Uchena J

The second applicant was created by the third, fourth, fifth, sixth and seventh ^Α applicants for the purpose of buying the first applicant. The second applicant is therefore the Mass Media owner.

The third, fourth, fifth, sixth and seventh applicants have interests in the second applicant. They were in the management of the first applicant before it was taken over by the second applicant. ^Β

The first respondent, the Media and Information Commission, is a body corporate charged with the responsibility of monitoring and controlling mass media services in Zimbabwe.

The second respondent is the chairman of the first respondent.

Factual Background ^Γ

After the second applicant had acquired the first applicant, the first respondent wrote to the third applicant on 5 May 2004. In that letter the first respondent informed the first applicant through the third applicant, its group operations director, that the first applicant's operations were in contravention of s 67 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] hereinafter referred to as the Act. The particulars of the contravention were ^Δ as follows:

- "(a) That the ownership has changed from UKI Limited to what you refer to as the management.
- (b) That the trade name has been changed from Media Africa Group to Africa Tribune Newspapers (Pvt) Ltd. ^Ε
- (c) That the name form and frequency of the registered papers, the Business Tribune and the Weekend Tribune have been altered to just one called the Tribune."

The first respondent's letter also notified the first applicant that:

"In terms of s 67 of the Act, you have a mandatory obligation to notify the ^Ε Commission of such substantial and material changes.

The Commission has not been notified and in terms of s 71(4) you are hereby notified of the Commission's intention to suspend or cancel ATN (Pvt) Ltd's registration certificate.

You are accordingly hereby called upon, within seven days of the date hereof, to show cause why your registration certificate should not be ^Γ suspended or cancelled.

The notice has accordingly been given."

The first applicant promptly responded to the first respondent's letter on 5 May 2004. In its letter the first applicant states: ^Η

Uchena J

- "(a) ^A The the first respondent's letter was of 4 May 2004 but was erroneously dated 5 May 2004.
- (b) That the second respondent had met the first applicant's management on 4 May 2004.
- (c) That ATN's management was grateful that all potential misunderstandings have been fully explained and resolved.
- (d) ^B That the first respondent had corrected its earlier public statement as quoted in the media.
- (e) That ATN was in the process of finalising the management buyout
- (f) That ATN is properly registered in terms of AIPPA."

The letter was concluded in the following words:

" ^C Pursuant to the requirements of section 67 we notify the Commission as follows:

- (a) The founding management team of ATN have acquired ownership of ATN which traded as Media Africa Group (please see the attached presser).
- (b) ^D There are no other owners save as aforesaid.
- (c) Due to the recent theft of over 20 computers in the newsroom, we have merged the two titles – Business Tribune and Weekend Tribune into one publication simply called the Tribune published weekly on Friday.
- (d) There is no change in the area of circulation.
- (e) ^E The editorial office and place of location and form remain the same."

On 7 May 2004 the first respondent required the first applicant to submit to it the following:

1. Original share certificates for each of the new owners.
2. An original of the CR 14 form.
3. ^F Original copy of any other agreement between UKI and Mayzone together with a photocopy for certification.

By letter dated 10 May 2004 the first applicant submitted the required documents.

By letter dated 15 May 2004 the first respondent inquired about the 19 900 un- ^G issued shares of the first applicant.

On 17 May 2004 the first applicant advised the first respondent that ATN has 20 000 authorised shares of which only 100 shares were issued. The shares were all bought by the second applicant resulting in one share certificate being issued to Mayzone Investments (Pvt) Ltd which is owned by the third to the ^H seventh applicants.

Uchena J

On 13 May 2004 the first respondent informed the first applicant of a hearing ^A which was to be held on 18 May 2004 in the first respondent's boardroom at 4.00 p.m. That hearing was however postponed.

On 27 May 2004 the first respondent wrote to the first applicant advising it that its current operations were in contravention of ss 67 and 79 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*]. ^B

The charge of contravening s 67 had already been preferred against the first applicant. The s 79(6) charge was based on the first applicant having employed unaccredited journalists. The employment of Bekithemba Mhlana was cited.

In that letter the first applicant was advised that the hearing that had been set for 18 May 2004 was now going to be on 2 June 2004.

On 31 May 2004 the first applicant wrote to the first respondent advising it of ^C the following:

1. That it was not its intention not to inform the first respondent of the changes on which the s 67 charge is founded.
2. That the buyout arrangements were still in progress and the management ^D buy out was still in progress.
3. That they intended to advise the first respondent when everything had been finalised.

4. That s 67 does not provide a time frame within which the Commission should be notified.
5. That Mhlanga was employed by UKI as a consultant just like the other E managers who subsequently bought ATN and it did not know of others employed without being accredited.

The first respondent held the hearing on 2 June 2004 and determined the charges as follows on the relevant issues.

1. That the first applicant's argument that notification was sent to the wrong F address was not backed by evidence. It was contradicted by the fact that the same people representing ATN at the hearing had correctly directed journalists and some newspaper copies to the Commission's correct physical address.
2. That the claim that the directors did not report changes because they G needed to wait until everything had been finalised is contradicted by their earlier claim that the notice was sent to a wrong address or the newspaper claim of 4 May 2004 that the MIC had been informed of the changes. H

2004 (2) ZLR p13

Uchena J

3. A That there was no precise and decisive board resolution on the ownership of ATN or the distribution and ranking of the 100 shares out of a total of 20 000 until towards the end of the hearing.
4. That there was no convincing explanation for not informing the Commission of the changes.
5. B That ATN has not changed but only its ownership has changed. That the management of its previous owner were the new owners.
6. That Bekithemba Mhlanga was employed without accreditation.
7. That the applicant made gross misrepresentations by presenting anonymous articles allegedly written by Mhlanga while ignoring the articles bearing the journalist's name. The hard news articles prove that C Mhlanga served ATN as a business reporter. The applicant's various replies to the charge of failure to report material changes were also equally misleading and inconsistent.
8. That the Commission unanimously found that the applicant contravened section 67.
9. D That the Commission unanimously found the applicant guilty of contravening section 71(1)(a) on the basis that it made misrepresentations on the employment of Bekithemba Mhlanga.

In the result the first respondent in terms of s 71(1)(a) of the Act cancelled the applicant's licence and the licence is to remain cancelled for one year.

E The Application for Review

The applicant applied for an urgent review of the first respondent's decision on the following grounds:

1. That the Commission purported to exercise powers which it does not have under the Access to Information & Protection of Privacy Act F [Chapter 10:27];
2. That the Commission's decision is grossly unreasonable and irrational and;
3. That the Commission was biased, especially the chairperson, the second respondent.

G I will return to these later in the judgment.

Urgency

The applicant urged this court to find that its application was urgent and could not wait because the applicant employed 60 permanent employees who are H immediately affected. The applicant has nine students on attachment and over

2004 (2) ZLR p14

Uchena J

200 vendors and agents who rely on the first applicant for their livelihood. The A applicant has obligations and debts to hundreds of innocent third parties. As at 11 June 2004 ATN had debts in the sum of \$1 734 338 067.

Mr *Tomana* for the respondents argued that the applicants' application is not urgent as the applicant waited until 17 June to apply for the urgent review when the cause of action arose on 10 June 2004. He also said the fact that employees ^B will be affected is not relevant to the urgency of the matter.

Mr *Hwacha* for the applicants pointed out that the notice of cancellation was served on the first applicant on 10 June 2004. The following Friday the applicants were under shock. Then there was a weekend in between. From Monday to Wednesday 16 June there was consultation and preparation of the ^C voluminous documents for the application which was filed on 17 June 2004.

I am of the view that the explanation given is satisfactory. I am also of the view that the fact that the urgency is based on commercial losses does not mean the case can not be treated as urgent.

In *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* 1999 (1) ZLR 490 (H) at 492 G-H Smith J said: ^D

"Having regard to the probable consequences to the applicants and their employees if the application is not dealt with without further delay, I consider that the certificate of urgency is justified."

The case involved urgency of a commercial nature. The respondent in that ^E case had attached the applicant's goods. The application was for the release of the goods held by customs. If the goods were not released the applicant would be forced into liquidation and their 67 employees would lose their jobs. The goods had been purchased using a bank overdraft facility which was attracting interest at 45 percent per annum compounded monthly and the overdraft could not be settled until the goods were released and sold. ^F

In the present case the debts of one billion plus cannot be paid if the applicant is not allowed to continue publishing. Its 60 permanent employees, nine students on attachment and 200 vendors or agents would be adversely affected. I am satisfied there is urgency in this application.

I have already indicated that the review is based on the first respondent's ^G decision being outside the powers given to the Commission by the Act, that the decision is grossly unreasonable and irrational, and bias.

Ultra Vires

Mr *Hwacha* for the applicants submitted that the respondents acted outside ^H

2004 (2) ZLR p15

Uchena J

^A the powers conferred on the Commission by the Act. He said the Commission can only cancel the licence for situations covered by ss 65, 75 and 89. He submitted that since the first applicant was charged under ss 67 and 79(6), the Commission did not have a right to cancel the first applicant's licence. He also submitted that the finding that the applicant contravened s 71(1)(a) by misrepresenting at the hearing was not based on a charge in terms of s 71(4).

^B Mr *Tomana* on the other hand submitted that a contravention of ss 67 and 79(6) are included in s 71(1)(a) which authorises the Commission to cancel registration. He also submitted that s 71(6) does not limit the Commission's powers under s 71(1)(a) and (b) but it can also use its powers under s 71(6). Mr *Tomana* however conceded that the Commission's finding that the first applicant was guilty of contravening s 71(1)(a) due to its having misrepresented ^C facts on *Mhlanga's* employment during the hearing was irregular.

I will first determine whether or not a contravention of ss 67 or 79(6) of the Act warrants cancellation in terms of s 71(1)(a) of the Act.

Section 71(1)(a) provides as follows:

"Subject to this section, the Commission may, whether on its own initiative ^D or upon the investigation of a complaint made by any interested person against the mass media service, suspend or cancel the registration certificate of a mass media service if it has reasonable grounds for believing that —

(a) the registration certificate was issued in error or through fraud or *there has been a misrepresentation or non-disclosure of a material fact by ^E the mass media owner concerned*; or." (emphasis added)

Mr *Tomana* for the respondents submitted that the non-disclosure charged under s 67 is included in s 71(1)(a) therefore the cancellation was justified for not disclosing the change of ownership.

Mr *Hwacha* for the applicants did not specifically deal with this aspect but ^F he submitted that a contravention of ss 67 and 79(6) does not warrant the cancellation of a licence as it is not covered under section 71(1)(c). It is true that ss 67 and 79(6) are not covered under s 71(1)(c) but the

respondent's position is that a s 67 non-disclosure can found a cancellation under s 71(1)(a) of the Act.

The dispute can be resolved by interpreting s 71(1)(a). In my view the section 6 provides for the cancellation of a registration certificate if:

- (a) the registration certificate was issued in error; or
- (b) the registration certificate was issued as a result of fraud; or
- (c) there has been a misrepresentation or non-disclosure of a material fact by ^h the mass media owners concerned.

2004 (2) ZLR p16

Uchena J

In my view the misrepresentation or non-disclosure need not be one linked ^a to the issuing of the registration certificate. It covers misrepresentation or non-disclosure occurring during the existence of the registration certificate. All the Commission need to prove is that there has been a misrepresentation, then it may cancel or suspend the licence.

The legislature could not have been only concerned with misrepresentation ^b occurring during or prior to the registration process. The intention of the legislature from a reading of the whole Act is to enable the Commission to regulate the mass media. In particular the legislature intended to control the ownership of mass media services. If the misrepresentation or the non-disclosure referred to in s 71(1)(a) of the Act is limited to those occurring before registration then it would be very easy for mass media owners to avoid the local ^c ownership requirement by complying at registration and then changing ownership and not disclosing the change introducing non-local ownership.

In my view the use of the word "or" after every envisaged contravention was intended to present different situations which may lead to the cancellation of a licence. The use of the word "or" means each situation stands on its own ^d and is not limited by the preceeding words.

The use of the words "*there has been* a misrepresentation or non-disclosure of a material fact" signifies misrepresentation taking place after registration. If the legislature intended to confine the meaning to misrepresentation occurring during or prior to registration it would have used the words "*there ^e had been*". If every word in s 71(1)(a) is interpreted it becomes clear that the misrepresentation and non-disclosure is not limited to the time of registration. In fact it is a requirement of the interpretation of statutes ^f that a statute should be interpreted as a whole and every part, section or word must be given a meaning in ascertaining the intention of the legislature. I refer to *Keyter v Min of Agriculture* 1908 NLR 522 at 253 where the learned judge said: ^f

"It is the duty of the court to give effect to every word which is used in a statute unless necessity or the absolute intractability of the language employed compels the court to treat the words as not written."

In this case the words fit well into the statute and they should be given their ordinary grammatical meaning. ^g

I am therefore satisfied that a non-disclosure referred to in s 67 can found the suspension or cancellation of a mass media service's registration certificate.

I have already said, Mr *Tomana* for the respondents conceded that the conviction of the first applicant on a contravention of s 71(1)(a) due to the ^h

2004 (2) ZLR p17

Uchena J

A misrepresentation by the third applicant during the hearing of 2 June 2004 is irregular. The concession was properly made as s 71(4) of the Act provides as follows:

"Before taking any action in terms of subsection (1) the Commission shall notify the mass media service in writing of its intention to suspend or cancel the registration certificate of the mass media service and the ^b reasons for doing so, and shall call upon the mass media service to show cause, within such reasonable period as may be specified in the notice, why the registration certificate should not be suspended or cancelled as the case maybe." (emphasis added)

My understanding of s 71(4) of the Act is:

- (a) ^c No action can be taken against a mass media service in terms of s 71(1)(a) (b) and (c)

- (b) Unless the Commission has notified the mass media service
- (c) Of its intention to suspend or cancel
- (d) Giving reasons for its intended suspension and cancellation
- (e) ^d And calling upon the mass media service to show cause why its registration certificate should not be cancelled,
- (f) Giving the mass media service a reasonable period within which it should do so.

In the present case the alleged misrepresentation took place during the ^e hearing. The first applicant was not given any notice of cancellation based on such misrepresentation. No opportunity for the first applicant to show cause why its registration certificate should not be cancelled for the alleged misrepresentation was given. No period for the applicant to show cause was allowed.

In conceding this irregularity Mr *Tomana* said the first respondent merely ^f used the misrepresentation as an aggravating factor in deciding on the cancellation. That is, however, not what the first respondent did. In its findings the first respondent said under 4.0 to 4.1.

"In terms of s 71(1)(a) all six commissioners attending the hearing find respondent guilty of misrepresentation in that while clear evidence reveals that during the material period, that is during the currency of ^g ATN's registration certificate, respondent employed an unaccredited journalist called Bekithemba Mhlanga, the controlling shareholder the Honourable Kindness Paradza feebly sought to mislead the Commission ^h into believing that:

2004 (2) ZLR p18

Uchena J

- (a) The practice should be ignored because it is common in most mass ^a media services.
 - (b) Mhlanga was not a reporter but a consultant.
 - (c) Mhlanga was employed by UKI Nominees Private Limited and not by ATN.
 - (d) Mhlanga wrote only sponsored advertorials and other anonymous ^b public relations materials.
- 4.1. In terms of s 71(1)(a) therefore, respondent's licence to publish has been cancelled and remains cancelled for one year."

According to annexure M the first respondent did not use the misrepresentation as an aggravating factor. It used the misrepresentation to find the first applicant guilty of contravening s 71(1)(a) of the Act. It is the conviction and ^c not the aggravating effect which led to the cancellation of first applicant's licence.

The first respondent clearly acted outside the provisions of s 71 of the Act. It therefore acted outside the powers granted it by the Act. It did not follow the procedure prescribed by s 71(4) of the Act. The conviction for contravening ^d s 71(1)(a) due to third applicant's misrepresentation at the hearing was premature. The first applicant was entitled to being heard before it could be found guilty leading to the cancellation of its licence.

In conclusion I therefore find that the convictions for contravening ss 67 and 79(6) of the Act were based on the procedure laid down in s 71(4) of the Act. They therefore cannot be said to have been made by the first respondent while ^e acting outside the powers granted it by the Act.

The punishment meted out considered all the convictions. In view of the admitted irregularity I will consider the effect of the irregularity on the cancellation of the first applicant's licence after considering the applicant's second ground of review i.e. that first respondent's decision was grossly ^f unreasonable and irrational.

Gross Unreasonableness and Irrationality

In the applicants' supporting affidavit deposed to by the third applicant, the respondents' decision is alleged to be unreasonable because:

1. The respondent whose duty is to promote, develop and grow the media ^g has summarily closed a newspaper for the mere offence of failure to notify it of structural changes.
2. The determination fails to grasp basic tenets of company law and company law procedures as the first respondent suspects that there are undisclosed shareholders. ^h

2004 (2) ZLR p19

Uchena J

3. A The first respondent failed to understand what issued and unissued shares are.

In *Nyoni v Sec for Public Service, Labour and Social Welfare & Anor* 1997 (2) ZLR 516 (H) at 525F Gillespie J, after reviewing authorities on when gross unreasonableness can succeed as a ground of review said:

" B These formulations and the authorities cited, are such as lend weight to the notion that unreasonableness as a ground for review is no more than a restatement of other grounds in a different way. *They tend to suggest that unreasonableness has an extremely limited, even an insignificant role as a ground of review in our law.*" (emphasis added)

On p 527A-B the learned judge said:

" C It is therefore my endeavour to discover whether this is in our law a sufficient ground for review and if so to determine *the extent to which such a ground may be investigated in the light of the undoubtedly correct dicta showing that a review does not and should not address the merits of a decision.*" (emphasis added)

In *Muringi v Air Zimbabwe Corp & Anor* 1997 (2) ZLR 488 (S) at 490 F-G D Gubbay CJ said:

"The application before him was one of review. What was claimed was the impeachment of a decision of an administrative official, exercising a quasi-judicial function on the grounds of procedural irregularity and bias. He was obliged to determine that issue alone and not to delve into the merits of the matter. Judicial review, as the phrase implies, is concerned not with E the correctness of the decision but with the decision-making process".

In *Charumbira v CoT & Ors* 1998 (1) ZLR 584 (S) at 585D-E McNally JA said "Judicial review" as Gubbay CJ said in *Muringi v Air Zimbabwe Corp & Anor* 1997 (2) ZLR 488 (S) at 490F "is concerned not with the correctness of the decision, but with the decision making process," or again in *Dube v Mandioma* F NO & Anor S-173-93 at p 4:

"In order for the review to succeed, it was incumbent upon the appellant to *show, not that the determination was wrong, but that it was 'irrational', in the sense of being 'so outrageous in its defiance of logic or of any accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it'*: per Lord Diplock in G CCSU v Min of the Public Service [1984] 3 All ER 935 (HL) at 951a-b." (emphasis added)

The learned judge of appeal in *Charumbira (supra)* at 586A, describing the kind of decision that can be upset on review for gross unreasonableness or H irrationality, said:

2004 (2) ZLR p20

Uchena J

"*Their conclusions cannot possibly be described as 'irrational' A 'outrageous' or 'absurd' — to use the words often used by judges in indicating the kind of decisions that maybe upset on review.*" (emphasis added)

In Ex p Miss X 1993 (1) ZLR 233 (H) at 239C Chidyausiku J (as he then was) dealing with a review of a magistrate's refusal to authorise the termination of B a pregnancy said:

"The magistrate exercised that discretion and refused to authorise such termination. This court sitting as a review court can only set aside that decision *if it were satisfied that it was so grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion.* That cannot be said of the magistrate's decision C in this case.

While I accept that the learned provincial magistrate's decision *was within his discretion, I am not entirely satisfied that he was correct in refusing the permission to terminate the pregnancy*". (my emphasis)

The learned judge at p 240E, explaining the remedy in a situation where the decision is not grossly unreasonable but wrong, said: D

"In the result, *if I were sitting as an appeal court, I would have reversed the decision of the provincial magistrate but, because I am sitting as a review court, I cannot interfere with the exercise of the magistrate's discretion.*" (emphasis added)

In *Zambezi Proteins (Pvt) Ltd & Ors v Min of Environment & Tourism & Anor* E 1996 (1) ZLR 378 (H) at 387G and 388A-D Garwe J (as he then was) dealing with when a decision can be interfered with on the ground of unreasonableness after analysing authorities on this matter said:

"That the above is the law in this country is without doubt. Professor Feltoe in his book *A Guide to Zimbabwe Administrative Law* remarks at p31:

'As the function of the court is not to delve into the substantive F correctness of an administrative decision, but only to ascertain whether there have been any procedural irregularities or action of an *ultra vires*

nature, it would seem to follow that on review the court has no power to overturn 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.’^g

The learned author remarks further:

‘In certain circumstances, however, the courts will set aside decisions of a grossly unreasonable nature. A well-recognised ground for doing this is where the decision is not only grossly unreasonable but is so grossly^h

2004 (2) ZLR p21

Uchena J

A unreasonable that it is only explicable on the basis of mala fides, ulterior motive or failure of the decision-maker to apply its mind to the decision it has to make’

Similar remarks have been made in cases cited by the respondent. *These cases stress that for a decision to be interfered with on the ground of unreasonableness the unreasonableness must be gross.* See for example *Union Govt v Union Steel Corp* 1923 AD 220 at 237; *Assd Provincial Picture Houses v Wednesbury Corp* [1947] 2 All ER 680; *Clan Transport Co v Swift Transport Services & Ors*; *Clan Transport Co v Rhodesia Rlys & Anor* 1956 (3) SA 480 (FS)''' (emphasis added)

An analysis of the authorities I have referred to which I respectively agree with clearly sets out the court’s position on reviews based on unreasonableness. ^cI must now decide whether the first respondent’s decision is so unreasonable as to warrant interference by this court.

The applicant’s criticism of the first respondent’s decision is that since the first respondent’s duty is to promote, develop and grow the media, it should not have closed the applicant’s newspaper for a mere failure to notify it of ^d structural changes.

Section 39 of the Act provides for the powers and functions of the Commission. It provides as follows:

“(1) Subject to this Act, the powers and functions of the Commission shall be –

- (a) to ensure that Zimbabweans have access to information and ^e effective control of mass media services; and
- (b) *to receive and act upon comments from the public about the administration and performance of the mass media in Zimbabwe; and*
- (c) ...
- (d) ^f ...
- (e) ...
- (f) ...
- (g) *to conduct investigations in terms of Part IX to ensure compliance with the provisions of this Act; and*
- (h) ^g to advise the minister on the adoption and establishment of standards and codes relating to the operation of mass

2004 (2) ZLR p22

Uchena J

- (i) media; and ^a
- (j) to receive, evaluate for accreditation and consider applications for accreditation as a journalist; and
- (k) *to enforce professional and ethical standards in the mass media; and*
- (l) ...
- (m) ...
- (n) *to accredit journalists; and ...*
- (o) *to monitor the mass media and raise user awareness of the mass ^b media; and*
- (p) to register mass media in Zimbabwe; and
- (q) *to investigate and resolve complaints against any mass media service* in terms of the provisions of this Act.

(2) in the exercise of its functions, the Commission shall have regard to ^c the desirability of securing the following objects –

- (a) to foster freedom of expression in Zimbabwe;
- (b) to make information easily accessible to persons requiring it;

- (c) to ensure accurate, balanced and unbiased reporting by the mass media in Zimbabwe;
- (d) *the development of mass media that uphold professional and ethical codes of conduct;*
- (e) *to promote the preservation of national security and integrity of Zimbabwe;*
- (f) *to foster a Zimbabwean national identity and integrity” (emphasis added).*

In my view the functions of the first respondent include the monitoring of mass media services, enforcing ethics standards and professionalism; controlling mass media services, acting upon comments by the public on mass media services and ensuring that mass media services comply with provisions of the Act. It is therefore not true that the functions of the first respondent are to merely promote, develop and grow the media. The first respondent’s functions, while including those mentioned by the applicants, also includes monitoring and controlling the media, investigating non-compliance by media services and ensuring that media services comply with the provisions of the Act, and enforcing compliance with professional and ethical standards in the mass media services. The first respondent can, where appropriate, take the disciplinary action it has taken against the first applicant. It can therefore not be said that the action taken by the first respondent is grossly unreasonable because it has a duty to develop, promote and grow the mass media. It is expected to do so if the mass media is in compliance with the Act but is also expected to punish and control those who contravene provisions of the Act.

2004 (2) ZLR p23

Uchena J

It was further argued that the first respondent’s decision is unreasonable because the offence committed is a mere failure to notify it of structural changes. I have already said the provisions of s 71(1)(a) include non-disclosure provided for under s 67. In my view the non-disclosure is material as one of the duties and functions of the Commission is to ensure that Zimbabweans have control of the mass media services (s 39(1)(a) of the Act). That objective cannot be achieved if ownership of media services can change without the first respondent being informed.

The applicants also alleged that the first respondent misunderstood company law and company law procedures. It is therefore being alleged the first respondent made an error in law. A reading of the first respondent’s decision indicates that when it made the final decision it had correctly appreciated the law. The fact that the first respondent could have made a mistake in law, if it had, is not necessarily a ground for review.

In *Bridges & Hulme (Pvt) Ltd v Magistrate, Byo & Anor* 1996 (1) ZLR 542 (H) it was held at 543 G to 544B:

“That a mistake in law is not necessarily an irregularity, entitling the proceedings to be reviewed; it is not unknown for a court to misread a statutory provision or overlook one not brought to its notice. But such a mistake could amount to an irregularity:

- (a) where a wrong question of law is asked, so that the lower court misunderstands the nature of the enquiry and misdirects its mind to wrong matters;
- (b) where an error of law caused the lower court to fail to appreciate the nature of the discretionary powers vested in it;
- (c) where the misconstruction of the provisions of an enactment causes in the lower court a misconstruction of the extent of its jurisdiction, for example, by declining to hear a case which it should properly hear;
- (d) where the decision was dependent on the error of law or was substantially or manifestly influenced by it.”

In the present case, if the first respondent’s misconception of issued and un-issued shares had persisted and its decision was substantially or manifestly influenced by that misconception, its decision could have been reviewable under (d) above. The first respondent’s decision in Annexure M at 2.5 clearly states that:

“Even the distribution and ranking of the 100 shares out of a total of 20 000 was not revealed until towards the end of the hearing. And this was done with great reluctance.”

2004 (2) ZLR p24

Uchena J

My understanding of this paragraph is that the first respondent finally understood the distribution and ranking of the shareholding. Therefore no issue arises from that criticism as its decision was

not dependent on the error of law nor was it substantially or manifestly influenced by it.

In a review the court is not to concern itself with the merits of the case or the correctness of the decision, but with the decision-making process. All I am ^a required to do is satisfy myself that the decision is not so grossly unreasonable as to be outrageous and to be explicable on the basis of *mala fides*, ulterior motive or a failure by the first respondent to apply itself to the decision it had to make (see *Zambezi Proteins (Pvt) Ltd & Ors v Min of Environment supra*).

Mr *Hwacha* for the applicants submitted that s 71(6) of the Act provides for other penalties and that it was grossly unreasonable for first respondent to ^c cancel the first applicant's licence. Mr *Tomana* submitted that s 71(6) does not take away the Commission's powers to cancel or suspend under s 71(1) because s 71(6) specifically states that "without derogation from its powers in terms of subsection (1)..." I agree with Mr *Tomana's* submission that the use of the words "without derogation from its powers in terms of subsection ^d (1)" means the Commission can in situations where it could resort to its powers under subs (6) use its powers under subs (1). It therefore cannot be said the first respondent's decision to cancel is grossly unreasonable, even if it could have resorted to its powers under subs (6) it remains entitled to use its powers under s 71(1)(a) to (c). The question of the severity of punishment is not for the review court. It can properly be dealt with by the appeal court. I refer to ^e the case of *Ex p Miss X (supra)* where Chidyausiku J (as he then was) clearly indicated that a review court cannot interfere with a decision within the tribunal's discretion even though it thinks the decision is not correct. The learned judge said at p 239D:

"While I accept that the learned provincial magistrate's decision was within his discretion, I am not entirely satisfied that he was correct in ^f refusing the permission to terminate the pregnancy."

The learned judge on page 240 at E went on to say:

"In the result if I were sitting as an appeal court I would have reversed the decision of the provincial magistrate, but because I am sitting as a review court I cannot interfere with the exercise of the provincial magistrate's ^g discretion".

He, in spite of his views, confirmed the provincial magistrate's decision because the decision was within the provincial magistrate's discretion.

In the present case, in view of the provisions of s 39(1), 71(1)(a) and 71(6) of ^h

2004 (2) ZLR p25

Uchena J

A the Act and the fact that it is not in dispute that the first applicant contravened s 67 and 79(6) of the Act, I am of the view that the first respondent's decision to cancel the first applicant's licence is within its discretion. It can therefore not be interfered with on review even though an appeal court might find the cancellation to be a severe sentence for a contravention of s 67 of the Act.

The effect of the admitted irregularity

^b It is common cause that the first respondent convicted the first applicant on one of the counts without first inviting it to show cause why its licence should not be cancelled as provided by s 71(4) of the Act.

The punishment imposed was therefore for the contraventions of s 67, 79(6) and 71(1)(a) of the Act. I have already found that a contravention of s 67 can ^c on its own found a cancellation in terms of s 71(1)(a). Even if s 71(6) was applicable it also leaves the first respondent with the option to resort to its powers under section 71(1). This means the first applicant committed two offences for which the penalty of cancellation could be imposed. The fact that one of the convictions has to be set aside does not take the penalty of cancellation out of the first respondent's discretion. To borrow an example ^d from criminal law the situation can be explained as follows:

If A commits two offences for which a particular punishment can be imposed for each offence, the fact that one of the convictions is set aside does not take that sentence out of the court's discretion. For example, if A is convicted of two counts of murder with actual intent and is sentenced to death, both counts ^e being treated as one for sentence, the setting aside of one of the convictions on appeal does not mean A can now escape the death sentence as the death sentence remains the appropriate sentence for the remaining count.

In the circumstances, while I have to set aside the first applicant's conviction for contravening s 71(1)(a) for the third applicant's misrepresentation during the hearing because the first applicant

was not afforded the notice required by s 71(4) of the Act, I still cannot interfere with the penalty imposed by the first respondent as it remains within its discretion to cancel the first applicant's licence for the contravention of s 67 of the Act.

Bias

The last ground of review was that the first respondent's letters to the first applicant exhibited intention to cancel and that the second respondent in Annexures M1 and M2 announced the Commission's intention to cancel.

It is trite that a judicial officer or official in a quasi-judicial position should not announce the result of a trial still to be held. If he does that would reveal his bias. The decision of a court or tribunal can only be announced after all the

2004 (2) ZLR p26

Uchena J

evidence has been heard and properly considered. The decision should be announced in an appropriate manner to the parties by way of a written judgment or in court. It is clearly an irregularity to tell the world of a decision one will arrive at before hearing the case. The announcement will in fact be evidence of the official's bias.

I now have to determine whether this is what happened in this case. The applicants base their allegations on the letters written by the first respondent and annexures M1 & M2.

As regards the letters notifying the first applicant of the first respondent's intended cancellation for contravening ss 67 and 79(6), I am of the view that these were in terms of s 71(4) of the Act and are therefore not indicative of bias. Section 71(4) requires the Commission to:

"notify the mass media service in writing of its intention to suspend or cancel the registration certificate of the mass media service and the reasons for doing so, and shall call upon the mass media service to show cause, within such reasonable period as may be specified in the notice, why the registration certificate should not be suspended or cancelled, as the case may be."

The Commission can therefore not be said to have been biased because it complied with s 71(4) of the Act. It merely complied with the procedure set down for it in the Act. This procedure is akin to a show cause summons. It simply informs the media service of the allegations it is to face and that if it fails to show cause why its licence should not be cancelled then its licence will be cancelled.

I now proceed to consider the effect of annexures M1 and M2. In annexure M1 the second respondent was dealing with a situation he believed was the correct position. If those facts which he believed to be correct were correct he would have been simply stating the correct legal position and was requiring the first applicant to apply for registration to remove the perceived illegality. The second respondent who is first respondent's chairman was reacting to the first applicant's editorial comment in its issue of 30 April 2004. To demonstrate that the second respondent was merely doing his job in terms of s 39(1)(b)(o), and (q) he on realising that the first applicant was a registered mass media services, two days later issued a press statement, annexure C, correcting his mistake in annexure M1. He, as provided by s 39(1)(e) and (o), appealed to all owners and managers of mass media services to take all provisions of AIPPA seriously.

On realising that the first applicant had a registration certificate he then invoked the provisions of s 71(4) for the contravention of section 67 of the Act.

2004 (2) ZLR p27

Uchena J

^A The provisions of s 71(4) were not appropriate if the first applicant was not registered, as the second respondent believed in annexure M1. The only course then open was to advise the appropriate authorities as the second respondent had done plus raising the media services, awareness of the need to comply with provisions of AIPPA, as he is entitled to do in terms of s 39(1) of the Act.

^B As regards annexure M2 it is simply a narration of the steps the first respondent had taken by another media service. It is not the first respondent's statement. It is a statement by a third party narrating the steps the first respondent had taken against the first applicant. I have already said the

steps the first respondent took were lawful and cannot found bias. I am c therefore of the view that no bias has been established against the first and the second respondent.

In conclusion I find that the first respondent committed an irregularity in finding the first applicant guilty of contravening s 71(1)(a) without first complying with s 71(4) of the Act. I further find that the irregularity being one affecting only one of the contraventions warranting cancellation does not on D review affect the first respondent's final decision which still remains within its discretion.

As the applicants' were successful in setting aside the conviction on the contravention of s 71(1)(a) of the Act each party shall bear its own costs.

In the result the first respondent's finding that the first applicant contravened E s 71(1)(a) by misrepresenting during the hearing is set aside.

The applicant's application in respect of the contravention of ss 67 and 79(6) is dismissed with no order as to costs.

Dube, Manikai & Hwacha, applicants' legal practitioners

F *Muzangaza, Mandaza & Tomana*, respondent's legal practitioners

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Document 4 of 47

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TREDGOLD NO v NATIONAL RAILWAYS OF ZIMBABWE 2004 (2) ZLR 28 (H)

2004 (2) ZLR p28

Citation	2004 (2) ZLR 28 (H)
Case No	Judgment No. HH-142-04
Court	High Court, Harare
Judge	Mungwira J
Heard	2 July 2001; 6 July 2001; 5 November 2001; 9 September 2003
Judgment	28 July 2004
Counsel	<i>Miss E Mushore</i> , for the plaintiff <i>E T Matinenga</i> , for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Railways — negligence — public road crossing railway line — rights and duties of public and train driver — precedence given to train — speed at which train should approach crossing

Headnote

A young woman, who was represented by the plaintiff, her *curator bonis*, [Ⓓ] was seriously injured when her car was struck by a railway train. Due to traffic congestion, the car had stopped part of the way across the railway line. The driver of the train applied brakes but was unable to stop the train in time. The crossing was not protected by booms but there were various warning signs. The defendant applied for absolution from the instance.

Held, that a level crossing is common both to the railway and to the public. [Ⓔ] Each has the right to pass over it, and to expect that due care will be exercised by the other to avoid mishaps; but a train cannot in the ordinary course be expected to pull up at a crossing to allow passengers by the public road to get over the crossing. The train must necessarily have the preference over passengers by road. It is the duty of the traveller to look [Ⓕ] out for and wait for the train. At the same time, the train ought to give due warning of its approach when it is nearing a level crossing of this nature, so that persons might stop and allow the train to pass. The train should not be travelling at such an excessive rate of speed that the warning it might give should be of no avail, but it is not expected to approach a level crossing at a speed which enables it to pull up short of the crossing. [Ⓖ] As no negligence had been established, absolution would be granted.

Cases cited

Dyer v SAR 1933 AD 10

Fortman v SAR&H 1948 (3) SA 595 (N) [Ⓗ]

2004 (2) ZLR p29

Mungwira J

A Pretoria City Council v SAR&H 1957 (4) SA 333 (T)

R v Herbst 1948 (2) SA 201 (N)

Worthington & Ors v CSAR 1905 TS 149

Case information

Miss *E Mushore*, for the plaintiff

[Ⓑ] *E T Matinenga*, for the defendant

Judgment

MUNGWIRA J: The plaintiff is the *curator bonis* of the estate of Amanda Visser who, on 15 July 1998, sustained severe injuries when a motor vehicle which she was driving across a rail crossing on Mardon Road, Msasa, Harare, was struck by a train. The plaintiff claimed damages against the defendant on the grounds that the defendant is vicariously liable for the negligent acts and/ [Ⓒ] or omissions of its driver who is alleged to have caused the collision, more particularly in that:

- (a) he drove too fast in the circumstances prevailing; and/or
- (b) he breached a special duty of care which he owed Amanda Visser in the circumstances prevailing as he had a very clear view of the traffic jam in [Ⓓ] front of him and a clear view that a collision was imminent, but failed to prevent the same; and/or
- (c) he failed to keep a proper lookout; and/or
- (d) he failed to sound his whistle sufficiently to warn persons at the vehicular crossing that he was approaching; and/or
- (e) [Ⓔ] he failed to brake sufficiently to prevent a collision occurring when it was imminent; and/or
- (f) he failed to avoid a collision when, by the exercise of reasonable care, he could and should have done so.

The plaintiff, additionally or in the alternative, pleaded that in any event, the [Ⓕ] collision was caused by the negligence of the defendant in one or more of the following respects, namely its failure:

- (a) to erect a preventive boom at a rail crossing at a busy industrial crossing;
- (b) to erect flashing lights to warn the public when there is a likelihood of a train passing through the rail crossing;
- (c) [Ⓖ] to provide sufficient whistle boards at sufficient intervals to warn vehicles using the crossing that a train passing is imminent;

(d) to mark the vehicular crossing adequately to warn the public that it is a ^H rail crossing;

2004 (2) ZLR p30

Mungwira J

(e) to regulate for these safety measures at a crossing which clearly requires ^A that adequate preventive measures be taken.

At the close of the plaintiff's case, the defendant sought an order of absolution from the instance on the ground that the plaintiff had failed to establish a case on the issue of liability such as would require an answer from the defendant.

The plaintiff's case on the issue of liability is founded upon the testimony of ^B four witnesses namely, Pindayi, Kwambana, van Rooyen and Schoeman.

The first two witnesses were employees of a company, Earth and Fire, situate on the northern side of the rail crossing. They both claim to have been, on the date in question, assigned the task of loading a lorry which was outside the premises of their employer. ^C

The evidence of Pindayi was that he was on the back of the lorry at about 3:30 p.m. His observations were that the road which traverses the rail crossing was at that time very busy. There were, according to him, vehicles on the southern side of the crossing proceeding in the northerly direction and traffic on the northern side of the crossing was at the time stationary, as it was giving way to other traffic which was proceeding into another road which is adjacent ^D to the crossing. He described what appears to have been a bottleneck of traffic at the rail crossing. From his evidence, it was as this traffic came to a halt that the train came into view. He himself had seen the train when it was a distance of about 10 metres from Ms Visser's vehicle which was then in the path of the oncoming train.

The witness had difficulty in describing the exact sequence of events which ^E led to the collision in that he was unable to give details as to how the accident occurred or how or at what point in time Ms Visser's vehicle came to be on the railway track. He however, seemed to suggest that there were other vehicles in front of and behind Ms Visser's vehicle and that these vehicles attempted to make room for her vehicle to move when the driver's of the ^F vehicles observed the train bearing down on the crossing. The picture which emerged was that at the time of the collision there were vehicles backed up along the crossing and onto the tracks as the foremost southbound vehicle was giving way to a vehicle or vehicles which were turning into a subsidiary road.

The witness stated that the first time he heard the train whistle was at almost ^G the exact time of impact. He commented that as the road was busy, it had become a practice for vehicles to enter the crossing without taking any precautions. ^H

2004 (2) ZLR p31

Mungwira J

^A The witness was unable to comment on the presence of another witness, van Rooyen, at the scene. He was unable to comment on the position of van Rooyen's vehicle before or after the collision. The reason he gave for this was that he was only concerned about the accident. From this, and given that it is common cause that van Rooyen was at the scene and rendered assistance, the witness' powers of observation become questionable as van Rooyen ^B states that the accident occurred shortly after he had negotiated the same crossing. In his view, van Rooyen was probably mistaken when he testified to having heard the train whistle when the train was about 80 to 90 metres from the crossing. He, in fact, went so far as to state that van Rooyen was probably been lying in that respect, because if he had heard the whistle at that distance he would not have made the decision to cross the railway line at that stage.

^C The witness was asked by the defence to comment on another aspect of van Rooyen's evidence which was to the effect that when van Rooyen crossed the railway line to the southern side of the track there was a queue of several stationary northbound vehicles at a distance of about 17 metres from the outer subsidiary track on the southern side of the railway line. Again, his response ^D was that van Rooyen could have been mistaken or alternatively that he was lying as the track was blocked by a line of vehicles. He had not observed the distance from the level crossing at which van Rooyen had stopped his vehicle.

The witness, who had stated in his evidence-in-chief that the train was moving fast, under cross-examination experienced difficulty in giving an estimate of the speed of the train and failed to explain the basis for his conclusion that the ^E train was travelling at a fast speed. He was further unable to comment on the speed of the vehicle or vehicles which he had stated were in the process of negotiating the crossing at the time of the impact.

Kwambana, a workmate of Pindayi, stated that shortly before the collision he was sitting in a truck on the northern side of the crossing and outside the ^F premises of Earth and Fire Tile factory when Pindayi had asked him if he could see the train bearing down on the crossing whilst there was vehicular traffic in the crossing. The collision had occurred as the two were talking, with the train whistle having gone off as the train struck Ms Visser's vehicle. From his observation the train did not slow down at any stage.

There was at the time what he described as a traffic jam at the crossing, his exact ^G words being that there were "trucks jammed from Casalee on the southern side of the crossing to Earth and Fire on the other side". There were, he said, vehicles backed up across the railway line to a beerhall on the southern side. ^H He had no recollection of the state of the northbound traffic.

2004 (2) ZLR p32

Mungwira J

He recalled van Rooyen as the person who had approached Ms Visser's ^A vehicle to render assistance and who had instructed that she not be moved lest she sustain further injuries. When asked to describe the area, he stated that at the time there was grass on the verges, about half-a-metre in height, and that the road was full of holes.

Under cross-examination, he was asked who would have been better positioned ^B to make a more accurate observation given the conflicting evidence given by van Rooyen who had crossed the railway line shortly before the collision. The witness was of the view that he was at a vantage point as he was perched on the back of a lorry and thus had a better view than van Rooyen, who was at a lower level and was surrounded by grass which was at window height. He further disputed that van Rooyen could have heard the train whistle as the ^C train was some 80-90 metres from the crossing. When van Rooyen's version was put to him he remarked that van Rooyen must have been lying as he could not have crossed the railway track in the circumstances he described. He went so far as to say that it would have been folly for van Rooyen to have done so. He referred, without furnishing details, to an accident which had occurred some years before at the same spot. In the final analysis, the witness confessed ^D to his not having seen Ms Visser's vehicle before the accident.

The testimony of van Rooyen was to the effect that on 15 July 1998, he was driving in a southerly direction towards Casalee, which is on the southern side of the rail crossing at which the collision occurred. He had opted for that particular route in a bid to avoid congestion on the Mutare road caused by ^E construction work on that stretch of road. As he approached the level crossing, he observed many cars on either side of the crossing.

Initially, he stated that as he approached the track he heard a train whistle. He looked to his right and observed the train which was a distance of about 80-90 metres from the crossing. He made a decision to accelerate in order to ^F cross the track safely. As he was a distance of some 22-28 metres from the outer subsidiary track on the southern side, he heard a loud bang to which he reacted by stopping and alighting from his vehicle. It was then that he observed that a collision had occurred. He proceeded to render assistance. He was unable to comment on the positions of any other vehicles when he alighted from his vehicle after he heard the sound of the collision. He later stated that he had ^G stopped before the railway line to let vehicles go past from the southern side of the crossing and that he had started to move towards the crossing when he heard the whistle. He indicated that he did not hear the train whistle earlier.

It was the witness' evidence that when he was still on the northern side of the crossing he had seen several northbound vehicles on the southern side of the ^H

2004 (2) ZLR p33

Mungwira J

^A crossing. He had himself stopped short of the crossing, that is, approximately 8-9 metres from the crossing, to allow other vehicles ahead of him to cross the railway line. He could not recall the number of vehicles ahead of him although he recalled that there was more than one vehicle. To the

best of his recollection, there were a couple of oncoming vehicles on the southern side of the crossing. Asked to comment on the speed of the vehicles on his side of the track, he said ^a that those vehicles were "crawling, probably in first gear". He had little or no recollection of the state of the road or the surroundings on the southern side of the crossing. All that he was able to say was that, at the time he crossed the railway line, his vehicle was the only one on his side of the crossing and that is what had urged him to cross the line after he had seen the train.

The witness tended to be vague on the issue of whether he could have stopped ^c before the railway crossing, after the whistle gave him warning of the approach of the train. Although he denied that he took a risk, certain question marks were raised as to the reasonableness or otherwise of his decision to accelerate and clear the crossing in the face of the approaching train. He witness accepted that he was familiar with the crossing and conceded that, even for a first time ^d user, there are ample road signs at the particular crossing to warn motorists of the existence of the crossing.

The evidence of this witness was far from clear. He intimated that he was not paying any real or close attention to the events which were occurring, particularly on Ms Visser's side of the level crossing. He himself confessed to a poor recollection of the incident and the accuracy of his evidence is ^e questionable.

The difficulty which presented itself is in the patent conflict between his testimony and that of Pindayi and Kwambana. The versions of these three, whom one would describe as eye witnesses, is, even allowing for a margin of discrepancy such as might arise from individual observation or perception of ^f events, at such variance as to create an irreconcilable conflict.

The fourth witness, Schoeman, professed to be an expert witness. He is a former railway engine driver. He outlined his experience with the railways and it emerged that he had last worked for the railways in the sixties and he left that occupation more than thirty years ago. He is currently running a business in ^g an unrelated field and stated that he had come to be a witness in response to a request by Ms Visser's parents, with whom he is acquainted.

He testified to the rules and regulations which a train driver is expected to observe by reference to the relevant manuals. He proved to be helpful at the inspection *in loco* by pointing out the various warning boards, signs and ^h signals and what they represent.

2004 (2) ZLR p34

Mungwira J

In his opinion, a driver is expected to whistle upon passing or reaching a board ^a a little over 700 metres from a level crossing and again at various other points before the crossing and is in addition, expected to have his train in check with brakes applied to enable him to stop the train short of the crossing should the need arise. He however, indicated that, in the circumstances of this case, he did not believe that a driver would have succeeded in stopping short of the ^b crossing, even if he had applied brakes. He mentioned that there were other relevant factors to consider, such as the weight and speed of the train and any load carried. He further went on to state that it was the duty of a driver to report to the authorities that the level crossing was busy, in order that consideration could be given to extending the level of protection at the level crossing. He himself did not "feel" that the particular crossing was adequately protected ^c as there were no flicking lights and no booms. He made mention of his being aware of an accident that had occurred earlier at the same crossing, without giving any details as to the cause or nature of that accident.

He acknowledged the existence of the St. Andrew's cross on the southern side of the crossing but said that this was a basic warning which the public tended to ignore. He did, however, concede that as an ordinary driver one would be ^d obliged to bring one's vehicle to a halt and to check both sides of the crossing before proceeding to cross a railway line.

Upon being referred to the section of the Highway Code, which deals with instructions to a driver at a railway crossing, in the light of van Rooyen's evidence, his comment was that the conduct of van Rooyen in crossing in the ^e circumstances that he did was negligent, and in fact "very careless". Following upon this, was asked if, in the circumstances, it was not folly for any other driver to cross the railway line after van Rooyen. His remark was the grass and a big tree might have caused an obstruction and that there was perhaps other traffic in front of the particular car. His attention was drawn to the detail of van Rooyen's evidence. This time his response was that a person who behaved ^f in that manner would be taking a calculated risk with his life.

The witness was asked whether, in mentioning the need for flashing lights, he was aware of the existence of a signals department within the railway administration, whose job it was to trigger the installation of preventive mechanisms by the relevant urban or rural authority in the case of national roads. His response was that he had been led to believe that that was within the province of the National Railways. He however, conceded that to be the correct position when the question was repeated. He further went on to agree that that aspect of National Railways operations was not within his area of expertise. ^h

2004 (2) ZLR p35

Mungwira J

^A He indicated that he only became aware at a late stage that in this particular case traffic had been re-routed solely because of the ongoing road construction work on the Harare-Mutare road as he himself did not use the road much. This would seem to imply that his assessment as to the preventive requirements for this crossing was based upon it being a permanent, rather than a temporary, route.

^B The witness referred to an earlier accident that had occurred at the same spot and that that on its own would have warranted the installation of a CDC facility as a preventive measure. He was asked if this would have had to be done as an immediate reaction to the fact that an accident had occurred. His answer was that these signals were there to control the movement of trains but that ^C the facility would not stop accidents. It was then put to him that in fact such a facility was in place at the scene. The witness simply accepted that this was the case and that on the particular day the light was green in favour of the train.

The next question to the witness related to the need to conduct a traffic count before a decision could be made to install booms. His response was that he would not know as he had never worked in the railway traffic department. He ^D did, however, finally accept that a traffic count was necessary but that he was personally ignorant of the level of traffic that would justify the installation of booms and flashing lights. A further concession was made to the effect that the conduct of a motorist at a railway crossing is regulated, as are traffic signs, which signs fall into different categories in terms of the relevant statutory instruments e.g. danger, informative, regulatory.

^E He admitted knowledge of the fact that the St Andrew's cross sign was originally designated as a danger sign but has since been reclassified as a regulatory sign, the reclassification having the effect of placing added responsibilities upon motorists at level crossings with the result that any person who crosses a railway track in the face of a rail borne vehicle commits ^F a criminal offence, RGN 666/73.

The witness agreed that in the circumstances, and confronted with van Rooyen's evidence, that van Rooyen committed an offence, as would anyone else who crossed after him. He was asked if he was aware of the existence of the Estate Department of the railways, that is the department responsible for ^G level crossings, and that in terms of the departmental manual which is consistent with the regulations the railways has the right of way at every level crossing.

He was further asked if he was familiar with the method for calculating braking ^H distances for trains. He said that a train driver was obliged to take into account

2004 (2) ZLR p36

Mungwira J

the load of the train and the speed at which he was travelling, together with ^A the condition of the brakes. When the question was repeated, his sole comment was that that was a question for the driver's judgment. It was suggested to him that there were other additional factors to consider such as the gradient. He was also asked if he had ever heard of an engineer by the name of ^D Chapman. After he said that he could have heard of the name in passing ^B it was put to him that ^D Chapman is the engineer who derived the formula to be used in calculating braking distances for trains. He pleaded ignorance of that fact.

The defence went further and told the witness that calculations in this case had been done by Engineer Kaseke of the National Railways and that the result had been that the train driver in this case could not have stopped in time to ^C avoid the accident whilst travelling at 60 km/h. It was put to the witness that at the inspection *in loco* the driver had indicated that he started to brake at a

distance of approximately 127 metres from the crossing but had only come to rest some 237-247 metres beyond the crossing which would reflect that he was travelling at approximately 50-55 km/h. The response was that the driver would have stopped 150-175 metres short of the level crossing regardless of **D** the shoes on the brakes.

Photographs of the scene were produced in evidence. These photographs were taken by Ms Visser's father at different times of the year but not about or near the time of the accident. The photographs were taken in January 1999 and shortly before the inspection *in loco* in respect of those photographs **E** which were taken whilst there was uncut grass growing on the verges. Mr Visser stated that he had to put the wheels of his vehicle on the subsidiary tracks to enable him to see down the railway track. He said that he was not aware if his daughter was familiar with the area or the particular crossing such that one might infer that she could not have been expected to find a train there.

The general principles governing the rights and duties of road users and of **F** rail traffic using level crossings are to be found in the following passage from *Worthington & Ors v CSAR* 1905 TS 149 at 150-1 *per* Solomon J: see Cooper's *Motor Law* p 173:

"... Where the public road crosses the railway, the rights and the obligations of the officials of the train and of people who are travelling on the public **G** road are mutual. The level crossing itself is common both to the railway and to the public. Each has the right to pass over it, and to expect that due care will be exercised by the other to avoid mishaps; but it is quite clear from the nature of the case that a train cannot in the ordinary course be expected to pull up at a crossing to allow passengers by the public road **H**

2004 (2) ZLR p37

Mungwira J

A to get over the crossing. The train must necessarily have the preference over passengers by road.

It is the duty of the traveller to look out for and wait for the train. At the same time, a condition is attached to the preference which the railway has, and that is that the train ought to give due warning of its approach when it is nearing a level crossing of this nature, so that persons might stop and **B** allow the train to pass. The train is bound, in my opinion, to give due and timely warning of its approach, and also not to be travelling at such an excessive rate of speed that the warning it might give should be of no avail. What is an excessive speed and what is due warning must entirely depend on the special circumstances of each case. Where there are obstructions to prevent persons travelling along the road from seeing an approaching train, or where there are any other circumstances which would make it **C** difficult to ascertain that a train is approaching, then, of course, better warning would have to be given, and the train would have to travel at a slower speed. But even if a train, in approaching a level crossing, does not give due and timely warning of its approach, that in itself does not relieve a person who is travelling along the road from the necessity of taking every care in crossing the line. A level crossing must always have a certain **D** element of danger, and any person, before crossing the railway, should exercise due and proper care in order to see that a train is not approaching; and neglect on the part of railway officials in not giving warning of its approach is in my opinion no excuse whatever for neglect on the part of anyone travelling along the road. Anyone so travelling is bound to use his eyes and ears, and if he does not use his senses, and so fails to observe **E** that a train is approaching, then he himself is primarily responsible for any injury he may sustain, and which would have been avoided if he had exercised reasonable care."

The defendant, in submissions made in support of its application for absolution, highlights van Rooyen's account of his 'scramble' through the crossing. Emphasis is placed on the fact that van Rooyen stated that at the time he went **F** through the crossing there was no other vehicle on the track and that the vehicle at the head of the queue of stationary oncoming vehicles was about 17 metres from the outer track of the southern subsidiary track. The defendant submits that assuming that that vehicle was Ms Visser's vehicle, she could only have entered the crossing after van Rooyen and at a time when the train **G** was sounding its whistle. The defendant drew the court's attention to the fact that even according to the judgment of the other three witnesses, the conduct of van Rooyen was dangerous and constituted a calculated risk, amounting **H** to what could be deemed recklessness.

2004 (2) ZLR p38

Mungwira J

The court was further asked to have regard to the legal position as put to **A** Schoeman, the plaintiff's expert witness, more specifically the existence of the regulatory sign in the form of a St Andrew's cross, which would have certain implications and legal ramifications for a driver failing to take heed of the sign. In other words, what is raised is the question of whether Ms Visser herself, confronted by the warning sign, was on her guard and approached the **B** crossing with due care such that she

entered the danger area with her vehicle fully in control; in other words did she act as a reasonably careful driver would have done.

Bearing in mind that the accident occurred in broad daylight and on a day on which visibility was good, and having been afforded the opportunity to make observations at an inspection *in loco*, there were numerous questions which went unanswered and which the plaintiff omitted to address.

We have the version of van Rooyen, which I have commented on above. No attempt was made to deal with an issue, which in the peculiar circumstances of this case is vital and which addresses specifically the question of how Ms Visser's vehicle came to be on the crossing in the face of the warning sign, the guard rails and the gradient which allows for a clear view of the crossing when one is a substantial distance from the crossing. In fact, the crossing is visible before one even proceeds beyond the wall surrounding the Casalee premises on the southern side of the crossing, that is, from a distance in excess of 60 metres. A further feature was that this crossing is made up of a two subsidiary tracks and a main line which runs between the subsidiary tracks, which subsidiary tracks measure 6 metres in width. The issue of the height of any grass that might have obscured her line of vision was skimmed over. The photographs produced did not provide substantial proof of the facts which they sought to support. It would amount to speculation were one to accept that they reflect the position as at the time of the accident, given that they were taken some time after and that there are certain variables which determine the growth and length of the grass. The only reference of sorts to the grass was from the Earth and Fire employees whose evidence was lacking in detail. At most, on the evidence before the court, one can conclude only that there was grass growing alongside the verges but without there being any means of ascertaining whether it was of such height as might have hindered Ms Visser or any other driver using that portion of road from having a clear view of the railway line or any trains travelling thereon. This I say bearing in mind that at the inspection *in loco* it was established that a driver emerging from the Casalee premises would have a 180 degree line of vision.

2004 (2) ZLR p39

Mungwira J

A Schoeman's evidence was to some extent subjective and largely based on assumptions and speculation. He, at one point, went so far as to say that he did not "feel" that the level of protection at the crossing was adequate. He was at sea when it came to real evidence on technical issues such as the speed of the train, the method of calculating that speed, the justification for additional safety measures over and above those in place and the duties of the various authorities responsible for such matters. Initially, he appeared to be an authority with considerable knowledge about the matters on which he spoke but in cross-examination it soon became abundantly clear that this was not the case. Some of his observations were such as might as have been made by the ordinary man in the street without the backing of any empirical data. His testimony, one might say, was coloured more by his own brief experience as a train driver and did not contribute much to shedding light on the question of liability. His evidence crumbled as he made a number of concessions which did little to enhance the plaintiff's case and tended to support the defendant's case. An example of this, arises in his acceptance that, going by van Rooyen's testimony and the distance at which he said he saw the train before he made the decision to cross the track, the driver of the train would not have succeeded in those circumstances in stopping his train short of the crossing, whereas in his evidence-in-chief the witness had indicated that the train driver ought to have been able to stop some 100-150 metres short of the crossing. The effect of this evidence was that there was no evidence before the court to show that once the danger became apparent the train driver could have avoided a collision such that his failure to do so might be considered negligent.

The reference to a previous accident, without delving into the cause or circumstances of that accident, did not take the plaintiff's case further.

I have little hesitation in agreeing with the defendant that the sum total of the evidence of Pindayi and Kwambana was that they reacted to the sound of the collision. If van Rooyen heard the train whistle before he crossed the line, how does one then account for the fact that Kwambana and Pindayi only heard the whistle go off at the point of impact? The question is posed with a full appreciation of the principle that an engine-driver is not necessarily absolved from negligence merely because he has sounded his whistle in terms of the regulations and that conversely, he is not necessarily guilty of negligence because he has not strictly observed the regulations. Relying upon *R v Herbst* 1948 (2) SA 201 (N) at 202, Cooper at p 578 *op cit*, submits that an engine-driver is entitled to assume that a motor vehicle approaching a crossing will respect his right of

precedence, albeit he must keep an approaching motor vehicle under careful observation and should he

2004 (2) ZLR p40

Mungwira J

reasonably anticipate that the motor vehicle does not intend to stop at the ^a crossing, he should, at the same time as continually sounding his whistle, immediately slow down and, if possible, stop his train. The inquiry as to whether a train driver has failed to keep a proper lookout is a question of fact. In the instant case, the evidence before the court is that Ms Visser's vehicle must have been stationary on the southern side of the crossing, at a minimum ^b distance of 17 metres from the outer subsidiary track. This at a time when the train was barely 80 metres from the crossing with its whistle blowing.

In *Fortman v SAR. & H* 1948 (3) SA 595 (N) at 598, cited by Cooper *op cit* at p 579, the court dealt with the question of speed as follows:

"... having regard to practical considerations, more especially the consideration that normally a train travelling at any reasonable speed ^c cannot pull up with anything like the facility with which a road vehicle can pull up when travelling at any reasonable speed, a train possesses a prior right as it were and is not expected to approach a level crossing at a speed which enables it to pull up short of the crossing; but this right is conditional upon its giving fair and reasonable warning of its approach ..."

Cooper *op cit* goes on to state that this view finds support in ^d *Dyer v SAR* 1933 AD 10 where it was held that a train has a right of way and its speed cannot be decreased at every crossing so as to make sure no collision will occur. He goes further to say the matter was put beyond doubt in *Pretoria City Council v SAR & H* 1957 (4) SA 333 where, after a consideration of a number of authorities, the court came to the conclusion that an engine-driver is under ^e no duty to travel at such speed that, in the event of the crossing being obstructed, he can stop the train between the point where the crossing comes into view and the obstruction, and it accordingly held that the mere fact that the train could not be stopped in such a distance was in itself not negligence.

In response to the application for absolution, the plaintiff argued that the inquiry is not limited to the obligations of the injured driver but extends to the ^f obligations of the train driver and the railway authority. I did not hear Adv *Mushore* make any meaningful or persuasive submissions to the effect that the evidence adduced by the plaintiff is such that the court might at this stage determine that there is evidence upon which it might find in favour of the plaintiff. The plaintiff's argument is, in my view, untenable in that the plaintiff ^g seeks to place the defendant in the witness stand for the purpose of eliciting from the defendant evidence of negligence on its part when, at the conclusion of its case, the cause of the accident has not been established. At the end of the day, and after taking into account that the essential question, which is that of whether one might say that the evidence adduced provides sufficient basis ^h

2004 (2) ZLR p41

Mungwira J

^a upon which one might at this stage rule that the acts and omissions on the part of the administration and its employees which might have put Ms Visser off her guard or that there were insufficient precautions to render the level crossing reasonably safe, has not been adequately addressed.

I do not believe it necessary for me to consider the question of contributory negligence, which would have perhaps warranted consideration if there had ^b been evidence of negligence on the part of the defendant.

I am in the result satisfied that, it would be proper to grant the order sought by the defendant.

In the result, an order of absolution from the instance is granted, with costs ^c to be borne by the plaintiff.

Coghlan, Welsh and Guest, plaintiff's legal practitioners

^d *Chihambakwe, Mutizwa and Partners*, defendant's legal practitioners

Document 5 of 47
Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/GUMBO & ANOR v ZIMBABWE STOCK EXCHANGE 2004 (2) ZLR 42 (H)

GUMBO & ANOR v ZIMBABWE STOCK EXCHANGE 2004 (2) ZLR 42 (H)**2004 (2) ZLR p42**

Citation	2004 (2) ZLR 42 (H)
Case No	Judgment No. HH-150-04
Court	High Court, Harare
Judge	Gowora J
Heard	29 July 2003
Judgment	28 July 2004
Counsel	<i>A P de Bourbon SC</i> , for the applicants <i>R Y Phillips</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administrative law — *statutory bodies — duty to act fairly whether or not c acting in a quasi-judicial capacity — decisions subject to review*

Administrative law — *suspension of applicants' registration as stockbrokers followed by cancellation thereof — suspension not the final step in the process — cancellation of registration subject to an independent consideration by Registrar — in these circumstances no need to consider the merits of applicant's suspension D*

Practice and procedure — *application — new facts coming to the knowledge of respondent after it had filed its opposing papers — need for a further affidavit — application for the filing of the further affidavit granted*

Professions and trades — *stockbroker — discipline — Committee of Stock E Exchange — suspension of stockbroker and referral to Registrar for cancellation — need for Committee to properly examine case against alleged offender and make decision to refer matter — such decision reviewable*

Review — *reviewable decision — what is — suspension of registration of stockbroker — cancellation of registration of stockbrokers ordered F after their suspension — notwithstanding cancellation stockbrokers entitled to bring suspension on review — suspension a decision prejudicially affecting their rights and interests*

Headnote

In High Court applications, if new facts come to the knowledge of a G respondent after he has availed himself of the opportunity of filing affidavits, the court will accept affidavits dealing with those facts which are tendered after applicants' answering affidavits have been filed, but will require satisfactory information that the facts in question come to the respondent's knowledge in the manner stated or alleged. H

2004 (2) ZLR p43

A The applicants had been stockbrokers, duly registered as such in terms of the Zimbabwe Stock Exchange Act [*Chapter 24:18*]. As a result of the unsatisfactory nature of certain share transactions conducted by the, their registration as stockbrokers had been suspended by the respondent in terms of s 35(1) of the Act. That section provides that any registered stockbroker

who *inter alia* is not considered to be a suitable person to be registered as such, who has contravened any provision of the Act or who has been guilty of disgraceful conduct, shall be suspended from practice upon notification to the Registrar of the Stock Exchange. In accordance with that provision, the respondent duly notified the Registrar who after affording applicants the opportunity of making representations as to why their registration as stockbrokers should not be cancelled, determined the matter on the evidence and the representations before her. She ordered that the applicants' registrations be cancelled and their names were duly deleted from the register of stockbrokers. Both applicants appealed to the Minister against her order. Their appeals were unsuccessful.

- On seeking a review of the respondent's decision to suspend their registration as stockbrokers, it was argued on behalf of the applicants that the decision of the Registrar to cancel their registration in terms of 35(3) of the Act was irrelevant. Such information placed before the court by the respondent after opposition by the applicants. In persisting in their review of the respondent's suspension of them, the applicants urged that had the respondent not done so in terms of s 35 (1), the Registrar could not have cancelled their registration in terms of s 35(3) of the Act. It was further argued on their behalf that the decision by the respondent to suspend the applicant was capable of review, in that the respondent had acted in a quasi-judicial capacity and reached a decision which had led, in the result, to the cancellation of their registration as stockbrokers. On behalf of the respondent, however, it was argued that the application was ill-founded in that, in exercising its powers in terms of s 35 (1) of the Act, the respondent had done no more than express an opinion, which was then transmitted to the Registrar for a final decision. It was argued that the application to introduce the fourth affidavit was justified because it was common cause that it concerned events that had arisen after the applicants had commenced proceedings and about which the respondent was unaware at the time it filed its opposing papers. In the result, the respondent argued, the application had been overtaken by events: the applicants' registrations had now been cancelled and a

2004 (2) ZLR p44

Gowora J

consideration of their earlier suspension as stockbrokers would now serve no useful purpose. What the applicants were now seeking was, in effect, a *declaratur*, which would not do away with future litigation.

Held, that the application to introduce a fourth affidavit setting out events that had occurred subsequent to the suspension of the applicants' registrations as stockbrokers should be granted. The fact that the Registrar had canceled their registrations was not irrelevant.

Held, further, that irrespective of whether the decision of the respondent to suspend the registrations of applicants as stockbrokers was final or not, that decision was reviewable. It was a decision which prejudicially affected the rights and interest of the applicants. Statutory bodies such as the respondent, whether or not they act in a quasi-judicial capacity, have a duty to act fairly and the only manner that can be ensured is by the decisions they make being subject to the scrutiny of the courts.

Held, further, however, that this finding was not the end of the matter. The Registrar was enjoined in terms of the Act to consider the matter on the merits. She had done so and, independently of any findings of the respondent on the need for cancellation, had concluded that the applicants' registrations as stockbrokers should be cancelled. In view of her decision and that of the Minister, the application was not the final process in the status of the applicants, which had been determined beyond the suspension.

Held, further, that as there was no point in dealing with the merits of the applications, it should be dismissed with costs.

Cases cited

Logan v Morris NO & Ors 1990 (2) ZLR 65 (S)

Neale v Mayor, East London 1935 EDL 225 F

Legislation considered

Zimbabwe Stock Exchange Act [Chapter 24:18], ss 35(1) & (3)

Case information

A P de Bourbon SC, for the applicants ^G

R Y Phillips, for the respondent

Judgment

GOWORA J: The applicants were suspended from the Stock Exchange as a result of a decision by the first respondent that they were not suitable persons to remain registered as stockbrokers. In this application, they are seeking a ^H

2004 (2) ZLR p45

Gowora J

A review of the decision of suspending them to be set aside on the following grounds:

- (a) gross unreasonableness;
- (b) bias, interest in the cause; and
- (c) irrationality.

^B The background to this dispute is as follows. The applicants are both executive directors of Continental Securities Trading (Pvt) Ltd, hereinafter referred to as the company. Both applicants are registered with the respondent as stockbrokers in terms of s 31(4) of the Zimbabwe Stock Exchange Act [*Chapter 24:18*] hereinafter referred to as "the Act". The respondent is a body corporate which is established in terms of the Act, and which is managed by ^C a committee responsible for the management of all its affairs. The committee consists of five members appointed in terms of s 5 of the Act.

In July 2002, the two applicants were requested by the committee to give explanations of certain transactions which they had conducted on behalf of the company with particular reference to their purchase and sale of Old Mutual ^D shares. It transpires that the company had purchased the shares which it was offloading on the stock exchanges of London and Johannesburg. A response from the applicants resulted in the committee of the respondent soliciting further information from the applicants and the company. The committee was not satisfied with the responses from the applicants and as a result resolved unanimously to suspend the three from further trading on the stock exchange ^E and at the same time wrote to the Registrar of the stock exchange recommending that the registration of all three be cancelled. Although the applicants were advised of the resolution by the committee verbally on 8 November 2002, the letter confirming the decision was not addressed to them until 11 November 2002. This application is to have the decision to suspend them from the stock exchange set aside. I propose to deal with the matter on the basis of the issues ^F that are examined in the heads of argument filed on behalf of both parties to the dispute.

At the outset, Mr *Phillips* on behalf of the respondent sought leave to tender a supplementary affidavit adduced on behalf of the respondent after the answering affidavit had been filed and both parties had in fact filed their heads ^G of argument. He sought reliance on the authority of *Herbstein & van Winsen*, on the grounds that special circumstances existed which would justify the admission of the affidavit at this stage. He submitted that the factor that would entitle the respondent to seek the admission of the affidavit was the existence ^H of new facts which did not exist at the time that the respondent filed its

2004 (2) ZLR p46

Gowora J

opposing affidavit and therefore facts which the respondent could not have ^A dealt with at the time the affidavit was deposed to and filed. He submitted further that the court had a wide discretion, and that in the exercise of that discretion the court would require a reasonable explanation as to why the facts were not put in the affidavit.

Mr *de Bourbon*, on the other hand, submitted that the affidavit was not ^B relevant, and further that although it could be admitted, it was up to the court to decide whether or not it was admissible.

The affidavit that is sought by the respondent to be admitted at this stage was deposed to by one Barfoot. He describes himself as a consultant to the Zimbabwe Stock Exchange. He was deposing to the affidavit in the absence of Emmanuel Haggai Munyukwi, the Chief Executive Officer of the

respondent c who was, at the time of deposition, on a business trip outside the country. He further states that the facts that he is deposing to were in his personal knowledge and further that he had the authority of the respondent to depose to the same.

In substance, he states that after the filing of papers in this matter there had d been relevant developments, of which the court should be made aware. He stated that upon receipt by the registrar of the respondent's notice of 8 November 2002, the registrar had invited the two applicants to make representations in writing in terms of s 35(3)(a) of the Act. Thereafter the registrar had, on 21 January 2003, indicated her intention to proceed with the cancellation of the registrations of the applicants as stockbrokers. A copy of e the letter of the registrar of the same date is annexed to his affidavit. Subsequent to this, on 29 January 2003, the applicants noted an appeal against the deregistration to the Minister in terms of s 39 of the Act, which is confirmed by a letter addressed to the registrar by Continental Securities dated 21 February 2003. The appeal was dismissed by the Minister as appears from a f letter addressed to the applicants on 3 July 2003 by the registrar. Ultimately it was the contention of Barfoot that the decision to set aside the applicant's suspension would have no practical effect.

Rule 235 of the High Court Rules provides that after an answering affidavit has been filed no further affidavits may be filed without the leave of the court or a judge. In *Civil Practice of the Supreme Court of South Africa* 4 ed, g van Winsen, Cilliers and Loots at p 360 state that if new facts come to the knowledge of the respondent after he has availed himself of the opportunity of filing affidavits, the court will accept affidavits dealing with those facts which are tendered after the applicant's replying (answering) affidavits have been filed, but will require satisfactory information that the facts in question h

2004 (2) ZLR p47

Gowora J

A came to the respondent's knowledge in the manner stated or alleged.

The respondent's opposing affidavit was signed on 9 December 2002, which is the same day that it was filed. An answering affidavit was filed on the applicants' behalf on 2 January 2003. The registration of the two applicants was cancelled by the Registrar on 21 January 2003, and the appeal to the Minister was in turn dismissed on 3 July 2004. In my view, the facts in the fourth b affidavit came to light after the respondent had filed its opposing affidavit, and there is justification for its admission.

I turn now to the merits of the application.

The founding affidavit for the application was sworn to by the first applicant in the following terms.

c He is a registered stock broker and is registered as such with the respondent in terms of s 31 of the Zimbabwe Stock Exchange Act [*Chapter 24:14*]. The first and second applicants are directors of Continental Securities Trading (Pvt) Ltd which until 21 February 2003 was the first applicant herein. It has since filed a notice of withdrawal and tendered costs. The first applicant has d authority to represent second the applicant in these proceedings. The deponent's authority to represent the second applicant is confirmed in an affidavit filed by the said second applicant.

In July 2002, the applicants were requested by the committee to provide an explanation of the purchase and sale of shares in Old Mutual being conducted on behalf of the company. The shares in question were being traded on the e stock markets of Johannesburg and London. The query by the committee was in relation to the use of the parallel market rate in the purchase of the shares. The query was responded to the effect that the use of the parallel rate was not irregular as the money was being brought back into the country and that therefore there was no prejudice occasioned to the country.

f On 9 October 2002, the respondent sent a letter to the first and second applicants requesting information on certain trades in shares that they had executed. The applicants responded by letter dated 10 October 2002. Again, in October 2002 the respondent sent them a query regarding the Nicoz-Diamond initial public offer (IPO). There was an allegation that when an application for the purchase of shares was submitted some of the applicants g were fictitious. The applicants explained to the committee that it would have been impossible for the company to detect that some of the applicants for the purchase of the shares were fictitious as the applications were made at the eleventh hour and were in turn voluminous and that this was an industry wide h problem and was not confined to the company alone. It was also deposed by

Gowora J

the applicant that, prior to the applications being submitted, the second ^A applicant had actually advised the Chief Executive Officer of the respondent that there was a possibility that some of the applications could be fictitious due to time constraints and that therefore the issuing house and the transfer secretaries could do the vetting of applicants and that the Chief Executive Officer of the respondent had acceded to this request and the applicants were ^B astonished that after this communication, the respondent could allege that the applicants had been guilty of conduct likely to bring the respondent into disrepute. The applicants furnished the committee with proof that they were not in fact the beneficiaries of the fictitious applications and that in fact the issue of fictitious applications was an industry wide problem, and the Chief Executive Officer of the respondent had himself given them examples of other ^C brokers who had submitted fictitious applications, and yet no action had been taken against the stockbrokers in question.

In October, the applicants were again requested to explain the conduct of the company regarding the issue of the sale of Old Mutual shares both internally and externally, which allegedly was done in contravention of ^r 2 of the Reserve Bank requirements, which requires that shares can only be sold outside the ^D country at a price higher than that obtaining within the country. The respondent was advised that the price outside Zimbabwe was higher and it would appear that the explanation had at the time been found to have been satisfactory. There was a further allegation relating to the returns to the Reserve Bank which was alleged not to have been done in full. The applicants pointed out that the ^E ultimate person to render returns were the transfer secretaries. The applicants were also alleged to have failed in submitting returns for purchases for their own account, and it was the averment of the first applicant that the respondent had been advised that returns were only due three months after the end of the financial year.

A further allegation against the applicants was that trading in Camco, which ^F had been a division of the company, and other related accounts had been widely abused. It was the position of the first applicant that the division was used for the benefit of a few wealthy clients and their funds were managed by the applicants and a response had been provided in relation to the excess trading profit queried by the respondent. The allegation against the excessive ^G trading in Camco by the two applicants had also been responded to, in that they had been no trading for themselves in Camco.

On 6 November 2002, the applicants were verbally advised by the respondent's Chief Executive Officer that they had been suspended from the Exchange with effect from that date. On 11 November 2002, they queried why there had been ^H

Gowora J

^A no written notification to them of the suspension, whereafter they were then given letters advising them that they had been suspended with effect from 8 November 2002. According to the first applicant, the letter of 8 November addressed to the registrar of the Stock Exchange contains new allegations which are at variance with the ones that had been investigated by the committee. The applicant then lists the new complaints appearing in the letter. ^B It is his view that the addition of the departure from the original investigation and the failure to raise the stated allegations before suspending them was a breach of natural justice. It was also, he states, grossly unreasonable of the respondent to have departed from the original grounds for investigation and to come up with new and fresh grounds. In addition, the applicant states that there was possible bias on the part of the Committee given the fact that some ^C of the members of the committee were themselves stockbrokers who would be competitors for the same business and clientele as the applicants. He stated that the composition of the committee in fact shows that 70 percent of the members are stockbrokers, who would have an interest in the outcome of the investigations as they are competitors.

^D It was his prayer that decision by the respondent should be set aside.

The opposing affidavit by the respondent was deposed to by one Emmanuel Haggai Munyukwi, who states that he is the Chief Executive Officer of the respondent. He confirms that the committee of the respondent consists of two persons appointed by the Minister in accordance with the provisions of ^s 5 of the Act, and five members of the Stock Exchange. He confirms further that ^E both applicants are registered members of the Stock Exchange.

The deponent states that the committee described above monitors the activities of all members of the Stock Exchange. He was instructed to investigate the activities of the applicants and the company, and pursuant to a report he submitted to the committee, at an extra-ordinary meeting of the F committee held on 5 November 2002, the committee unanimously resolved that:

"The Zimbabwe Stock Exchange apply to the registrar for the deregistration of Continental Stockbrokers (Pvt) Ltd, Mr E Gumbo and Mr B Eeson. It was agreed that once this had happened, Mrs Mpofu would be requested to appoint a person to wind up the affairs of Continental Stockbrokers. G It was recommended that the chairman brief Mrs Mpofu and that the Zimbabwe Stock Exchange approach Messrs Honey and Blackenberg regarding the de-listing of the Brokers and company (sic)."

Pursuant to the resolution , the respondent on 8 November 2002, wrote to the H registrar in terms of s 35 of the Act, requesting the registrar to withdraw the

2004 (2) ZLR p50

Gowora J

registration of the applicants and the company, due to allegations of their A having contravened the Act and rules and usages of the Zimbabwe Stock Exchange. A copy of the letter to the registrar was annexed to the affidavit as were various other correspondence with the applicants and Nicoz-Diamond.

The deponent states that he had noted the huge number of applications submitted by the applicants with irregularities. He states that in a memorandum B dated 22 October 2002, the first applicant had admitted that they had been negligent and more care should have been exercised on their part. The applications had been accompanied by cheques from the applications amounting to an excess of \$426 million and it was inconceivable that the applicants had not looked at the applications and not checked them. During the investigative process, he had put to the applicants that they were required C to submit details of purchases for their own account annually, and they had admitted that they had not complied with this requirement.

In relation to Camco, it was his averment that the respondent had not been made aware of its existence prior to the investigations which had commenced with the trading in Old Mutual shares. He states that the \$7 billion worth of D assets that Camco was alleged to have should be reflected in the accounts of the company prior to its date of incorporation, He added that the committee considered that the profit of \$38 million in share dealing by Camco excessive in terms of Zimbabwe usage and it was likely to lead to manipulation of the market. His view was that the applicants and the company had admitted that the profit from Old Mutual shares by Camco had been for the benefit of the E company which statement was at odds with their statement that the three did not own Camco.

He averred that the applicants had failed to pay stamp duty, and he also denied that Old Mutual shares could during 2002, command a higher price on the London Stock Exchange, if the official exchange rate were used. Both the F Reserve Bank and the respondent were of the view that in trading in Old Mutual shares the applicants had contravened r 2 of the bank's regulations, and thus had brought the respondent into disrepute.

Consequently, the respondent had good reason to believe that the conduct of the applicant required further investigation by the registrar in terms of s 35 of the Act, which was why the matter was then referred to her. He stated that G immediately after the resolution was passed by the committee, the applicants were suspended as is required by s 35(1)(ii) of the Act until such time as the registrar would have acted in accordance with the provisions of the Act.

With regard to the application itself, the witness deposed that there had been no proceedings or decision made by the committee or anyone else. The H

2004 (2) ZLR p51

Gowora J

A registrar was still to determine whether or not the registration should be cancelled, and that decision lay with the registrar, who had yet to make it. It was his view that there was no basis for the application as there was nothing to review. In his view, therefore, this court did not have the jurisdiction to entertain the application for review. He continued that as there had been no decision there cannot have been any irregularity. He denied that the fact that B five members of the committee were themselves members of the Stock Exchange pointed to bias on the part of the committee. In addition the composition of and qualification for the committee was prescribed by the

Act, and the committee did no more than comply with its provisions. He prayed for the dismissal of the application with costs.

c Mr *de Bourbon*, on behalf of the applicants, submitted that the nature of the decision before the court was subject to review. He contended that before the Registrar could act, there must be notification in terms of s 35(1). In order to comply with the provisions of s 35, the committee must conduct an investigation before considering what provisions of the Act have been contravened and if it was the duty of the stockbroker to comply with the provision in question d In his view, the committee had a number of initial decisions that it had to make. It had to consider guilt of the stockbroker beyond a reasonable doubt. If however, as appeared in the affidavit of Munyukwi, the correct position was that the committee did not make a decision, then that amounted to a concession and it would mean that they had not found the applicants guilty. The committee was, in his view, obliged to consider whether the registration of a e stockbroker should be cancelled or not, which consideration is dependant on the degree of misconduct on the part of the registered stockbroker. In the event that the committee did not consider the misconduct as serious, then there would be no report to the registrar. The committee was also obliged to give reasons and the statement by Munyukwi that there had been no decision f determined the matter as the registrar cannot act of her own volition and proceed to cancel the registration.

He further submitted that there was no formal meeting by the committee as there were no minutes to evidence the meeting if such had taken place. There was thus no record of the proceedings and the only conclusion that the court could reach is that the fourth affidavit is not relevant. Further the court should g conclude that the committee did not meet and therefore did not reach a decision.

Camco was, according to him, initially a division of Continental Securities before being incorporated as a company. The statement by Munyukwi h regarding the decision related to facts not submissions. He said that the

2004 (2) ZLR p52

Gowora J

investigation instead of being carried out by Munyukwi was done by Barfoot a who is not a member of the committee and additionally there is no evidence that the applicants were accorded an opportunity to be heard. There was no record of the proceedings that was produced. There was therefore no evidence of when and how the committee reached its conclusion. The relevance of the fourth affidavit therefore must be premised on the basis that b the committee acted in terms of the law. If the jurisdictional base is not found then everything done by the committee is null and void. The committee would have no power to suspend in terms of s 35, but if the suspension had been done in terms of s 36 the committee would have had the power. A decision had to be made whether there has been a contravention of the Act from para (a) through to (h) and then the suspension occurs. The committee, in order to c consider the cancellation of their registration of the applicants, had to find them guilty of contravening all the paragraphs mentioned in the allegations. If however, the respondent made the conclusion that the applicants were guilty, then the conclusion was irrational.

The decision of the Minister was in his view extraordinary, in that it was conveyed by the person whose very decision had been the subject of an d appeal to the Minister.

Regarding the issue of Nicoz-Diamond, it was common cause that either of the applicants made duplicate applications and also that over 90 percent of the applications came in at the last opportunity during the last hour. The condition imposed on the entire stock exchange that an applicant should submit one e application made it difficult to vet the applications in one hour. The market is very competitive and if the committee was acting fairly it would have placed before the court evidence that this was an industry wide problem. He added that the vetting process allowed by Munyukwi had resulted in the withdrawal of applications valued at \$181 million.

On specific sections, he submitted that, as regards s 55 of the Act, the majority f of deals were between the applicant and other brokers as opposed to clients. In relation to the payment of stamp duty, the responsibility for that obligation has been accepted by Continental Securities. The failure to render submissions of sales and purchases in accordance with the provisions of s 61 was an industry-wide problem. In addition, the returns were only due by the end of g March 2003 and yet the report from Munyukwi had resulted in the committee suspending the applicants prior to the time that the submissions were due.

The possibility of bias could not be discounted as there were within the committee persons with the same financial or business interests as the applicants. ^h

2004 (2) ZLR p53

Gowora J

^a He concluded that the court could not second guess on which of the allegations the applicants had been found guilty by the committee as three of the grounds had been dropped by the time the matter came up for hearing. He submitted that the proceedings by the committee were in breach of the rules of natural justice, and therefore the application for review should be granted with costs.

^b In response, Mr *Phillips* submitted that the applicants' registration as stockbrokers was cancelled, and that an appeal was then lodged by them in terms of the Act which appeal was then dismissed. The deregistration was therefore not suspended. He contended further that, with the dismissal of their appeal, the application for review had been overtaken by events, and that ^c therefore the Minister's decision was the one that ought to have been taken on review. In addition, he argued that the applicants were not seeking a review but a *declarator* which would not do away with future litigation. In issuing the *declarator*, the court had to have regard to ^s 14 of the High Court Act. It was his further contention that the setting aside of the suspension would have no effect on the position of the applicants, as it was the decision of the Minister ^d that should be taken on review. He added for good measure that courts did not determine litigation on a piece-meal basis. He stated that when the review was filed the applicants were under suspension as the registrar had not at that stage determined the matter. He further stated that the registrar was not bound by what the committee of the stock exchange said. In his view, the registrar, before deciding whether or not the registration of a stockbroker should be ^e cancelled, had to have an enquiry.

As regards the merits of the review, he argued that the suggestion by the applicants that because five members of the committee were, like the applicants themselves, stockbrokers with interests to protect, was not true. According to him the test is whether or not the person concerned had an interest in the ^f proceedings and was so biased or whether there was a real likelihood of bias. He pointed out that the committee was set up by Parliament in order to protect the interests of the investing public and to monitor the conduct of stockbrokers. Parliament had apparently provided, in ^s 5(1)(b) of the Act, that five members of the committee should be members of the stock exchange. In terms of the Act, a member is defined as a registered stockbroker or one who has been admitted ^g by the committee to membership of the stock exchange as an associate member or non-broking member. It was also pointed out that at no stage prior to these proceedings had the applicants mentioned the issue of possible bias on the part of the committee. The fact that five of the seven members in the committee ^h were themselves stockbrokers, so his argument went, was testimony to the

2004 (2) ZLR p54

Gowora J

fact that only a stockbroker was best qualified to monitor the affairs of other ^a stockbrokers. As examples, he mentioned lawyers who sit on the disciplinary proceedings of other lawyers as well as doctors who also sit on proceedings involving other doctors. He contended that for such professionals to sit on those disciplinary proceedings was not suggestive of bias merely due to the fact that they belonged to the same profession.

He added that there must be present something that showed that led to the ^b inference, which was missing in the case before the court. He dismissed the suggestion by the applicants that, in view of the members of the committee belonging to the same profession as themselves, it could not be overlooked that they had had the licences cancelled in order to get rid of the competition ^c and get the business for themselves.

Mr *Phillips* submitted that the suggestions by the applicants that they were not given an opportunity to comment before the committee made certain findings which were to their detriment were not correct as they were not borne out by the facts appearing in the record. He points to the handwritten questionnaire by Barfoot, the response by both applicants, which bears the ^d signatures of both, and the recommendation of the committee to the registrar, which latter document he says contains the applicants' response to Nicoz-Diamond IPO in full as proof that in fact they were given an opportunity to make representations. The recommendation, he argued, also dealt with the

contravention by the applicant of ss 55 and 61 of the Act, and breaches of r 6.01 and s 17 of the Stamp Duties Act. ^E

Mr *Phillips* denied the suggestion on behalf of the applicants that the decision was irrational. He submitted that the composition of the committee and the requirements of the Act as a whole ensured that only what constituted disgraceful conduct within the profession would warrant cancellation of the registration. The standard as to what constituted disgraceful conduct was, ^F according to him, placed on the committee by the legislature. It was contended that from the composition of the Act as a whole and the committee, it was obvious that the legislature considered the committee as the best qualified body to judge what is disgraceful conduct in the profession and that therefore provision is made by the Act for the committee members to be appointed by the minister. ^G

Mr *Phillips* further argued that although the deponent to the opposing affidavit states that no proceedings had taken place there was a decision that had been made, but in fact, what is meant to be conveyed by that statement is that the applicants had been suspended, which is a fact. He submitted that there was on the papers a reviewable decision, and that decision was made ^H

2004 (2) ZLR p55

Gowora J

^A by the committee of the respondent. In support of the decision of the committee, he tabulated the failures by the applicants to comply with various provisions of the Act. He pointed out that as regards the Nicoz-Diamond IPO the applicants had withdrawn an application (whose total value was \$181 000) which was found to be a false application. In relation to Camco, he submitted that this was a division of the employer of the two applicants, and that the ^B committee, after considering the evidence before it, had rightly concluded that the applicants had contravened the Act. He contended further that the applicants had admitted negligence in their capacities as stockbrokers and that on that ground alone the committee would be entitled to suspend them in terms of s 35(1)(b)(ii). Further, he argued the applicants had contravened the following sections of the Act: 35(1)(c), 35(1)(h), 55 and 61, r 6:01, and s 17 ^C of the Stamp Duties Act [*Chapter 23:09*].

Regarding the alleged contravention of ss 51 and 65 of the Act, it was his submission that the committee had to be satisfied on their evidence of the two breaches. He said there was clear evidence of a failure on their part to pay stamp duties and commission. He concluded by saying that there was evidence of ^D contravention of the Stock Exchange Act, the Stamp Duties Act, the Reserve Bank rules and admitted negligence on the part of the applicants. In his view, any one of the alleged breaches was sufficient to warrant their suspension. The application was in his view unmeritorious and should be dismissed with costs.

^E I turn now to the merits of the dispute between the parties.

IN LIMINE

The respondent contends that the application by the two applicants is ill-founded as the respondent has not made a decision, which decision they are asking this court to set aside. The decision to cancel the registration, as argued ^F by Mr *Phillips*, is made by the registrar and therefore all that the respondent's committee does is to express an opinion which is then transmitted to the registrar for a final decision. All that the respondent provided was the evidence for the registrar to act upon, and it was not the function of the respondent to determine the guilt of the miscreant, which function was solely that of the registrar. It was further submitted that the Act made it mandatory ^G for the committee to suspend the stockbroker until such time as the registrar would have acted on its recommendation.

In addition, when one has regard to the fourth affidavit it now clear that the decision to cancel the registration of the applicants has been made by the ^H registrar and an appeal to the Minister has since been dismissed as being

2004 (2) ZLR p56

Gowora J

unmeritorious. Consequently, it is argued an order setting aside the suspension ^A will have no effect on the decisions of the registrar and the dismissal of the appeal by the minister.

Mr *de Bourbon* however contended that the nature of the decision which was the subject of the review proceedings was capable of being reviewed. He went on to say that before the registrar could act in terms of s 35(3) of the Act, he ^B must receive notification from the committee in accordance with the provisions of s 35(1). Before notifying the registrar, went the argument, the committee must carry out an investigation in order to consider which provisions of the Act would have been infringed and if it was the duty of the stockbroker to comply with the section in question. He argued further that the committee had to consider guilt beyond a reasonable doubt. If the committee says it has not ^C made a decision, then it would mean that it has not considered anything. He said that the committee must also consider cancellation of the registration and that the degree of misconduct must be such that the cancellation is warranted. He argued that the committee had a number of initial decisions that it had to make and it was not there merely to push paper from one person to the next. It was his contention that the committee in terms of s 35 of the Act, acted in ^D a quasi-judicial function which therefore rendered its decisions subject to review process. He added that s 35(1) requires the committee to meet and consider whether a registered stockbroker had committed the acts listed in subs (1) and thereafter conclude that the registration of the stockbroker should be cancelled. If the committee is of the view that the misconduct is not ^E serious then there would be no requirement that a report be made to the registrar. Where, however, notification has been decided on then the committee informs the registrar and the stockbrokers and suspends them. He contended that s 35(1)(ii) requires that reasons be given and further that the statement by Munyukwi that there had been no decision made determines the matter as the registrar cannot act on his own volition. The jurisdictional basis of his ^F decision was put into place by the decision of the committee. If, however, the committee did not make any decision then it followed that the basis for his acting as he did was missing. He stated further that the fact that the decision as to whether or not to cancel the registration lies with the registrar does not mean that the committee has no decision to make and thus is not obliged to ^G hold a meeting.

On this point, the enquiry is, in my view, two-pronged. The first is to determine whether the committee of the respondent made a decision as a result of which the applicants were suspended and if that decision by the committee is subject to the review process as envisaged in s 27 of the High Court Act [*Chapter 7:06*]. The next step is to consider what effect, if any, the cancellation of the ^H

2004 (2) ZLR p57

Gowora J

A registration and the dismissal of the appeal have on the proceedings to review the suspension.

Section 35 of the Act provides in the following terms:

"If the Committee considers that a registered stockbroker –

- (a) is not a suitable person to remain registered; or ^B
- (b) ...
- (c) has contravened any provision of this Act with which it is his duty to comply; or
- (d) has been guilty of –
 - (i) disgraceful conduct; or ^C
 - (ii) negligence in his capacity as a registered stockbroker; or
- (e) ...
- (f) ...
- (g) ...
- (h) has failed to pay any moneys due by him to the Exchange or the Fund; ^D or
- (i) ...

and that the registration of the registered stockbroker should be cancelled, the Committee shall forthwith –

- (i) notify the Registrar and the registered stockbroker in writing of its opinion and the reasons therefore; and
- (ii) ^E suspend the registered stockbroker from practice until the registrar has acted in terms of subsection (3)."

The ambit of the obligations of the committee hinge upon the meaning of the word "consider" as it appears in context. The *Oxford Dictionary of Current English* defines the word as follows:

"contemplate mentally, especially in ^F order to reach a conclusion, examine the merits of, look

attentively at, take into account, show consideration or regard for, have the opinion that". In *Neale v Mayor, East London* 1935 EDL 225, Gane J in considering the definition of the same word, had this to say at 230:

"Does it make any difference that the meeting was called to 'consider' the question of reduction? Probably, the most common meaning of the word 'to consider' is to ponder, to contemplate, to reflect upon. No one will contend that this meeting was confined to silent and Buddhistic reflection. At the very least, the question could have been considered through the medium of speeches for or against the suggested reduction. But I think that a very common meaning for the word 'consider' especially when it is used in relation to public business, is 'to argue pro and con', 'to consider

2004 (2) ZLR p58

Gowora J

by means of debate', generally with an implication that a decision will be taken as a result of such argument and debate."

I am, therefore, much inclined toward the submission by Mr *de Bourbon* that the committee is not there to push paper. It is required in terms of the Act to ponder and deliberate. It must examine the merits of the allegations leveled against the registered stockbroker as against the evidence that has been gathered or is available in support of those allegations. The committee must then debate the evidence available in order to come to a decision as to whether there has been an infringement of the provisions concerned. It must then make a finding on the facts that the allegation on the situations referred to in s 35(1) of the Act have been proved and that its conclusion following thereon is that the registration of the stockbroker be cancelled, and thereafter notify the registrar, thus triggering the cancellation process in motion. Thus, the committee makes a decision that the registered stockbroker has acted contrary to the provisions of s 35 of the Act, and it is this decision that is a precursor to the process of cancellation, which cannot happen in the absence of a decision by the committee to that effect. The suspension of the registered stockbroker is, in terms of the Act, a statutory consequence arising from the decision of the committee that the registration be cancelled. It is a peremptory duty imposed on the committee by the statute. Whether or not the decision to suspend is out of the discretion of the committee does not, in my respectful view, detract from the statutory power of the committee to determine whether or not there has been conduct on the part of the registered stockbroker which in terms of the Act justifies that his registration as such be cancelled. The section grants the committee the power to make decisions which prejudicially affects the rights and interest of a registered stockbroker.

The question that then confronts us is whether or not the nature of the decision by the committee is such that it is reviewable. It was the contention of Mr *de Bourbon* that in exercising its functions under the Act the committee was acting in a quasi-judicial capacity which rendered its decisions subject to judicial review. He added, however, that even if the committee had acted in a purely administrative capacity, still its decision would be subject to the review process. The distinction between judicial and administrative functions as a ground for review has been done away with in our law. What is of import is whether or not the administrative body in exercising its statutory functions has acted fairly. In *Logan v Morris NO & Ors* 1990 (2) ZLR 65 (S) at 68, McNally JA stated the following:

"This court has indicated in such cases as *PF-ZAPU v Min of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (S); 1986 (1) SA 532 (ZS) that:

2004 (2) ZLR p59

Gowora J

whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectations of the subjects or citizens, the jurisdiction of the courts is not ousted. The private rights, interests and legitimate expectations of the citizens subject to judicial review acts of the executive which would otherwise oust the jurisdiction of the courts' (at p 313G-H)

See also *Public Service Commission v Tsomondo* 1988 (1) ZLR 427 (S), where we spoke of an individual's 'legitimate expectation' that he would be treated fairly.

These are indications of a developing approach to the validity of administrative acts in which the old distinction between quasi-judicial acts on the one hand and purely administrative acts, on the other, has been swept away. Quite apart from the cases referred to by counsel, the whole matter has now been restated in clear and simple terms, as far as the Roman-Dutch law is concerned, by Corbett CJ in *Administrator, Transvaal & Ors v Traub* 1989 (4) SA 731(A). In considering an earlier *dictum* in which the distinction had been made, he said (at p 763H):

'This *dictum* appears to define "quasi-judicial" in terms which the **D** decision has upon the individual concerned. On this basis a classification as quasi-judicial adds nothing to the process of reasoning: the court could just as well eliminate this step and proceed straight to question as to whether the decision does prejudicially affect the individual concerned. As I have shown, traditionally the enquiry has been limited to prejudicial effect upon the individual's liberty, property and existing rights, but **E** under modern circumstances it is appropriate to include his legitimate expectations. In short, I do not think the quasi-judicial/purely administrative classification, relied upon by counsel, is of any material assistance in solving the problem presently before the court'."

Wade *Administrative Law* 6 ed comments thus at p 636:

'But *certiorari* and prohibition will issue in respect of any exercise of **F** statutory power which involves a true legal decision or determination, such as the grant of a licence or the issue of a search warrant. They will lie where there is some preliminary decision as opposed to a mere recommendation, which is prescribed in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affect rights itself. Where a telegraph operator was **G** entitled to claim compensation for telegraphist's cramp on production of a certificate from a medical officer specified in the Act, the refusal of a certificate by a different and unauthorised medical officer was quashed as being so much waste of paper. The court thus removed what would otherwise have been a legal obstacle to claiming a certificate from the **H** proper officer. In the same way, *certiorari* was granted to quash a

2004 (2) ZLR p60

Gowora J

medical certificate stating that a boy was an imbecile and incapable of **A** benefiting from attendance at school, when one of the signatory doctors had not himself seen the boy and the question was, in any case, for determination by the Board of Education under the Act. Even a report may be quashed if it is substantially a decision rather than a recommendation, e.g. where the Act provides that it shall be final. There is no magic in the word "report". The question is whether some issue is **B** being determined to some person's prejudice in law."

In casu, it cannot be gainsaid that the committee made a decision, irrespective of whether or not it was a final decision. The decision that it made put into motion a chain of events that ultimately led to the cancellation of the applicants' registration. It was a decision that prejudicially affected the rights and interest of the applicants. It would be, in my respectful view, be absurd **C** to find as submitted by the respondent, that the decision of the committee is not liable to judicial review, as such a finding would lead to an injustice being done. It would put the decisions of the committee outside the realm of court interference and thus oust the decisions from jurisdiction of the courts. Statutory bodies have the duty to act fairly and the only manner in which that **D** can be ensured is by the decisions it makes under the Act being subject to the scrutiny of the courts.

That is however not the end of the end of the matter. In terms of the affidavit of Barfoot, subsequent to the notification of the suspension of the applicants, the registrar proceeded to cancel their registration, which cancellation was effected after representations had been sought from the two applicants. An **E** appeal was lodged by both to the Minister in terms of the Act, which appeal was ultimately refused.

It is the contention of the respondent that it is the decision of the registrar which ought to have been taken on review, as the registration of the two applicants has now been cancelled and that even if this court were to hold that **F** the decision of the committee to suspend both applicant had been unprocedural resulting in the suspension being set aside, that would not assist the applicants as their deregistration would still stand. In the event, contends Mr *Phillips* on behalf of the respondent, the consideration of the decision of the committee would serve no useful purpose. He further argued that the applicants' deregistration had not been suspended and that in effect what the **G** applicants were seeking was not a review but a declaration which would not do away with future litigation. In issuing the declaration therefore, the court had to have regard to the provisions of s 14 of the High Court Act. He maintained that at the time that the suspension was taken on review the **H**

2004 (2) ZLR p61

Gowora J

A registrar had not yet determined the issue of the cancellation of their registration. In determining the registration, the Registrar was not bound by the decision of the committee and had in terms of the provisions **B** of the Act to have an enquiry into the suitability of the applicants remaining registered as stockbrokers.

The duties or obligations of the registrar are prescribed as follows in s 35(3) of the Act:

“(3) Upon receipt of a notification made in terms of subparagraph (i) of subsection (1) or a request made in terms of subsection (2), as the case may be, the registrar may –

(a) cancel in the Register the registration of the registered stockbroker c concerned:

Provided that –

(i) where the registrar –

(a) has received notification in terms of subparagraph (i) of subsection (1); and

(b) D proposes to cancel the registration of the registered stockbroker concerned;

he shall notify the registered stockbroker concerned in writing of the proposal referred to in paragraph (b) and the reasons therefor and afford that registered stockbroker an opportunity of showing cause to the contrary by means of representations in writing;

(ii) E in the case of a request [not applicable]; or

(b) decline to effect the cancellation referred to in paragraph (a).”

Clearly, from a reading of that subparagraph, the registrar is enjoined, in terms of the Act, to consider the matter on the merits and make his own determination as to whether the registration of a registered ought to be cancelled. The F registrar has a discretion which is exercisable independent of the notification or the finding by the committee on the need for cancellation. It would appear that the registrar indeed called for submissions from G the applicants and then proceeded to determine the matter on the basis of the evidence placed before her by the committee, as well as the written comments she had solicited from the applicants.

The effect of the cancellation of the registration as stockbrokers of the applicants is that their names have been deleted from the register of stockbrokers. An order setting that aside would not affect that position and would not result H in the names of the applicants being reinstated in the register. In my view, the

2004 (2) ZLR p62

Gowora J

application to set aside the suspension has been overtaken by events. The A decision that decided the fate of the applicants is that of the Minister in refusing to upset the decision by the registrar to cancel the registration of the two. Setting aside the suspension would therefore be an academic exercise which would be of benefit to no one. It would in fact be a *brutum fulmen* and of no assistance or benefit to anyone. It would not, as correctly submitted by B Mr Phillips, stop further litigation between the parties. In view of the decisions by the registrar and the Minister, it is not the final process in the status of the applicants which has been determined beyond the suspension. I am therefore not inclined to deal with the merits of the application.

The application is therefore dismissed with costs. c

Gill, Godlonton & Gerrans, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners D

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Document 6 of 47

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ATTORNEY-GENERAL v MAKAMBA 2004 (2) ZLR 63 (S)

2004 (2) ZLR p63

Citation 2004 (2) ZLR 63 (S)

Case No Judgment No. S-74-04

Court	Supreme Court, Harare
Judge	Ziyambi JA
Heard	30 August 2004
Judgment	30 August 2004
Counsel	<i>Criminal Division of the Attorney-General's Office</i> , applicant's legal practitioner <i>Chikumbirike & Associates</i> , respondent's legal practitioners
Case Type	Chamber Application
Annotations	Link to case annotations

Flynote

c Criminal procedure — review — incomplete proceedings — refusal by magistrate to discharge accused at end of State case — refusal based on findings of fact — not a gross irregularity entitling High Court to interfere on review

Headnote

The respondent had pleaded not guilty before the regional court to five charges of contravening the Exchange Control Regulations, as read with ^d the Exchange Control Act [*Chapter 22:05*]. At the conclusion of the State case, he applied for discharge in terms of s 198 (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. His application was refused and he was placed on his defence. During the course of a subsequent remand, he filed an application to the High Court for a review of the matter, ^e seeking of an order that the proceedings before the regional magistrate be set aside on the grounds that his application for discharge was wrongly refused. A single judge of the High Court upheld his application. The applicant sought leave to appeal against the ruling of the High Court.

Held, granting the applicant leave to appeal, that in terms of the proviso to s 29(5)(b) of the High Court Act [*Chapter 7:06*], the power of the High ^f Court to set aside the criminal proceedings of an inferior court upon review can only be exercised by a judge with concurrence of another judge of that court. Failure to obtain such concurrence rendered the review proceedings void.

Held, further, that in any event, the magistrate had made findings of fact upon which his decision not to discharge the respondent was bas ^g ed. It was not open to the judge, on review, to enquire into the correctness of that ^h finding as this was the province of an appeal court.

2004 (2) ZLR p64

Ziyambi JA

Legislation considered ^a

High Court Act [*Chapter 7:06*], ss 29(2)(b)(iii), 29(5)(b) proviso & 44(6)

Supreme Court Act [*Chapter 7:13*], s 13(1)

Judgment

ZIYAMBI JA: On 30 August 2004 I granted leave to the applicant to note an appeal against the judgment of the High Court setting aside a judgment of the ^b regional magistrate's court and acquitting the respondent on certain criminal charges. The following are my reasons for so doing.

The respondent (to whom I shall refer as "the accused") was on trial before the regional court in Harare. Before the magistrate he pleaded "not guilty" to five charges of contravening s 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*], as read with s 11(1)(a) of the Exchange Control Regulations, ^c Statutory Instrument 109 of 1996.

Evidence was duly led in support of the State case against him and, at the conclusion of the State case, an application was made for the discharge of the respondent in terms of s 198(3) of the Criminal Procedure and Evidence Act [Chapter 9:07], which provides as follows: ^D

"198(3) If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

The regional magistrate, after considering the detailed submissions from both parties, dismissed the application for discharge and ordered that the accused ^E be placed on his defence. The accused commenced his evidence and the matter was remanded to 29 July 2004 for continuation.

During the adjournment, the accused filed an application to the High Court for a review of the proceedings and for an order, *inter alia* —

- (1) setting aside the judgment of the regional magistrate dismissing the ^F application for discharge; and
- (2) discharging the accused and acquitting him on all counts.

The application was upheld by the learned judge who presided over the matter. He found justification for the unusual course of interfering in an uncompleted trial in the following passage from *Criminal Procedure in Zimbabwe* by John ^G Reid-Rowland at 26-11 where the author states:

"(4) **Incomplete Proceedings**

The High Court's statutory powers of review can be exercised at any stage of criminal proceedings before an inferior court. However, in uncompleted cases this power should be sparingly exercised. It would only be ^H

2004 (2) ZLR p65

Ziyambi JA

A appropriate to do so in those rare cases where otherwise grave injustice might result or justice might not be obtained. For example, if grave irregularity or impropriety occurred in the proceedings, it would be appropriate for the High Court to consider the matter. Generally, however, it is preferable to allow the proceedings to run to their normal completion and seek redress by means of appeal or review."

^B He acquitted the accused on all charges and ordered his release from remand prison where he was detained pending the completion of his trial.

It is against this judgment that the applicant sought leave to appeal in terms of s 44(6) of the High Court Act [Chapter 7:06] ("the High Court Act"), which provides:

"(6) ^C If the Attorney-General is dissatisfied with the judgment of the High Court in a criminal matter, whether in the exercise of its original or appellate jurisdiction or on review, including a review pursuant to s 57 of the Magistrates Court Act [Chapter 7:10] —

- (a) on a point of law; or
- (b) because it has acquitted or quashed the conviction of the person who ^D was the accused in the case on a view of the facts which could not reasonably be entertained;

he may, with the leave of a judge of the Supreme Court, appeal against such judgment to the Supreme Court:

Provided that the person who was the accused in the case shall have the right, should he so desire, at his own expense to appear in person or to ^E be legally represented or a judge of the Supreme Court may order that such person be legally represented in which event the expenses of such representation shall be defrayed out of moneys appropriated for the purpose by Act of Parliament."

And also in terms of s 13(1) of the Supreme Court Act [Chapter 7:13], which ^F provides:

"(1) Where the Attorney-General seeks the leave of a judge of the Supreme Court to appeal against the judgment of a court —

- (a) on a point of law; or
- (b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could ^G not reasonably be entertained;

a judge of the Supreme Court may, in granting such leave or at any time thereafter, make such orders or give such directions as he thinks fit in order to secure the attendance before the Supreme Court of the person who was the ^H accused in the case concerned, including orders or directions for the

2004 (2) ZLR p66

Ziyambi JA

issue of a summons or warrant of arrest, and the granting of bail or taking a of recognizances.”

In determining the matter, the learned judge purported to exercise powers of review. His powers are set out in the High Court Act. In terms of s 29(2)(b)(iii), he is empowered to set aside or correct the proceedings of any inferior court or tribunal or any part thereof: **B**

“... or generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made on any matter which was before it in the proceedings in question.”

However, this power can only be exercised if another judge of the High Court has agreed with the exercise of the power in that particular case. See the **C** proviso to s 29(5)(b) of the High Court Act. The learned judge did not obtain the concurrence of another judge. He accordingly had no power to set aside the judgment of the regional magistrate.

For this reason it was clear to me that the learned judge had committed a gross irregularity which could only be corrected on appeal and I was satisfied, **D** having regard to the urgency of the matter, that leave to appeal could be granted without prejudice to the respondent, since submissions from him would not alter the stark fact that the learned judge was not empowered to grant the order that he did.

The learned judge also found that the failure by the magistrate to discharge the respondent at the end of the State case constituted a gross irregularity **E** justifying his interference. I take a different view. The magistrate made findings of fact on which the decision not to discharge was based. The judge could not, on review, enquire into the correctness of that finding as this is the province of an appeal court.

It was for the above reasons that, after reading the papers, I granted the order **F** sought by the applicant.

Criminal Division of the Attorney-General's Office, applicant's legal practitioner

Chikumbirike & Associates, respondent's legal practitioners **G**

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Document 7 of 47

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MOYO v CHIPANDA 2004 (2) ZLR 67 (H)

2004 (2) ZLR p67

Citation	2004 (2) ZLR 67 (H)
Case No	Judgment No. HB-98-04
Court	High Court, Bulawayo
Judge	Chiweshe J
Heard	3 May 2004
Judgment	2 September 2004
Counsel	The plaintiff in person <i>B Ndove</i> , for the defendant
Case Type	Civil action
Annotations	Link to case annotations

Flynote

^c **Delict**— *actio injuriarum* — defamation — plaintiff — reference to — defamatory statement not identifying plaintiff — subsequent publication of a statement disclosing plaintiff's identity and linking him with previous defamatory statement — plaintiff entitled to base action on earlier statement

Headnote

^d The plaintiff brought an action against the defendant for defamation. The statement, published in a widely circulated newspaper, did not refer to him by name or by description. However, the same newspaper subsequently published articles in which the plaintiff was identified and linked to the earlier statement. The defendant excepted to the declaration. It was argued that a subsequent publication cannot cure the defect in a ^e previous publication.

Held, that publication of defamatory words and identification of the person intended to be defamed need not occur contemporaneously. It would be absurd to hold that a summons was excipiable merely on the ground that identification of the plaintiff occurred after the publication complained ^f of and in subsequent publications. The evidence of such subsequent publication was therefore admissible and could be summoned to support the plaintiff's case.

Cases referred to

Ferreira v Sardinha 1917 TPD 477

^g *Vermaak v van der Merwe* 1981 (3) SA 78 (N)

Case information

The plaintiff in person

^h *B Ndove*, for the defendant

2004 (2) ZLR p68

Chiweshe J

Judgment

CHIWESHE J: The plaintiff, a registered legal practitioner, issued summons ^a out of this court against the defendant for defamatory damages in the sum of \$25 million arising from an article published by the *Chronicle* newspaper of Friday 13 February 2004. The plaintiff avers that the article was published at the defendant's instance. The plaintiff also seeks interest *a tempore morae* from 16 February 2004, the date of demand to date of full payment and costs ^b of suit.

The plaintiff's declaration reads in the penultimate paragraphs as follows:

- "3. On Friday February 13, 2004 at Bulawayo an article was published in the *Chronicle*, entitled 'Woman forcibly takes away son.' A copy of the article is attached hereto marked as 'Annexure CP1'.
4. The *Chronicle* is a newspaper that is widely distributed in Zimbabwe ^c and is also widely read by the general public.
5. The article said of plaintiff that:
 'The boy's father, Mr Purves Chipanda, said the wrangle began last year in September, two years after he separated with the child's mother, Petronella Tiwandire ... ^d
 Mr Chipanda alleged his wife's lawyer (name supplied) phoned and threatened him. He phoned me and threatened, telling me that the child was not mine but his he said ...
 When the lawyer's wife was contacted for comment on these allegations she said she was not aware of them.'
6. The above mentioned words, taken in the context of the article are ^e wrongful and defamatory of plaintiff in that they were intended and were understood by the readers of the *Chronicle* that the plaintiff indulges in extra-marital sexual affairs with his clients. That he is a violent person and uses

threats to induce fear in others to obtain an unfair advantage over them. That plaintiff was not a fit and proper person to practice as a lawyer. ^F

7. As a result of this defamation plaintiff was brought to contempt and undue ridicule. He was lowered in the estimation of right 'thriving' [(*Sic*): presumably this should be 'thinking'] or reasonable members of society generally. Plaintiff thus suffered damages in the sum of \$25 million."

The defendant has excepted to the plaintiff's summons and declaration as ^G follows:

- "1. Plaintiff's summons and declaration do not disclose a cause of action for the delict of defamation for *inter alia* the following reasons:
 - (a) The words complained of by the plaintiff do not make reference to the ^H

2004 (2) ZLR p69

Chiweshe J

- ^A plaintiff and in any event these words do not sufficiently identify with the plaintiff.
- (b) Further, and in any event, the words complained of are not reasonably capable of being understood by an ordinary reader of the article as referring to plaintiff. Accordingly therefore the words are not defamatory of plaintiff *per se*.
- (c) ^B In the premises the plaintiff has got no *locus standi* to bring this action.
- (d) *Prima facie*, plaintiff's declaration does not even allege that defendant himself published or intended or authorised the publication of ^C the words complained of. Neither does plaintiff allege that, to defendant's knowledge, the *Chronicle* had a legal or moral obligation to publish the words complained of.

Wherefore, and for the aforesaid grounds, defendant prays for the dismissal of plaintiff's claim with costs on an attorney-client scale."

In support of its exception the defendant raises three points. Firstly, the defendant argues that the article in question did not disclose the plaintiff's ^D names and that in any event the article does not sufficiently identify with the plaintiff. I agree with the defendant's contention in that regard.

Secondly, the defendant argues that the words complained of are not reasonably capable of being understood by an ordinary reader of the article as referring to the plaintiff and for that reason the words and the article are not defamatory of the plaintiff *per se*. To that extent, therefore, so argues the ^E defendant, the plaintiff does not have *locus standi* to bring this action. Both the first and second points raised by the defendant hinge on the same or similar factual basis – namely that the article does not sufficiently identify the plaintiff in the eyes of the ordinary reader and that for that reason there is no cause of action. I will return to this argument in due course.

^F The third point raised by the defendant is that the summons and declaration do not allege that the defendant himself published or intended or authorised the publication of the words complained of nor is it alleged that to the defendant's knowledge the *Chronicle* had a legal or moral obligation to publish the words complained of. I disagree with that view. The plaintiff's claim on the face of the summons is for defamatory damages "arising from an ^G article published by the *Chronicle* on Friday 13 February 2004 at the instance of defendant" (own emphasis) And under para 5 of the plaintiff's declaration a quotation from the article complained of indicates that the *Chronicle* reporter attributed the words complained of to the defendant, the primary ^H source. In my view, there is no basis for alleging, as the defendant does, that

2004 (2) ZLR p70

Chiweshe J

the summons and declaration do not link the defendant to the publication. If ^A it is true that the defendant uttered the words complained of to a newspaper reporter, the implication, in the absence of anything to the contrary, must be that the defendant intended or must have intended that the words be published in the *Chronicle*, whether or not the *Chronicle* had any legal or moral obligation to do so. I would accordingly dismiss the defendant's third ^B contention on that basis.

I now return to the point raised earlier, namely, the contention by the defendant that the article does not sufficiently identify the plaintiff as the person in respect of whom the words complained of were published. During argument it was accepted by both parties and correctly so, in my view, that a previous publication which explicitly identified a party would cure the defect if a ^C complaint arose out of a subsequent publication, if in respect of such subsequent publication an exception were to be raised on the grounds that the publication did not sufficiently identify the defamed party. The

question that arose during argument was whether the converse was true, namely whether a subsequent publication that explicitly identified the plaintiff, for example, by name and other details could be relied upon as ground upon which D an exception such as the present could be dismissed in an action involving a previous publication in which the reference to the plaintiff was so general that at the time of the publication the ordinary reader could not have immediately identified the plaintiff as being the subject of such publication.

The defendant argues that a subsequent publication cannot cure the defect E in a previous publication. If that position were to be accepted as correct, so argues the defendant, then the court will have taken an unprecedented and novel position. There is no authority according to the defendant for the court to arrive at such a decision. The plaintiff argues to the contrary, namely that a subsequent publication reinforces the previous publication. For the record it is accepted that the *Chronicle* subsequently published another article in F which the plaintiff's identity was disclosed in full as being the person referred to in the article under present consideration.

Assuming, then, that the present article does not sufficiently identify the plaintiff and that any summons based on it is for that reason prone to exception, would a later publication explicitly identifying the plaintiff cure the G defect inherent in the present publication in respect of which summons has been issued?

The plaintiff argues that the defect complained of by way of exception (if any) was cured by a subsequent publication in which his identity was exposed. The H

2004 (2) ZLR p71

Chiweshe J

A article the subject matter of this action was published by the *Chronicle* on 13 February 2004. The subsequent article was published on 5 March 2004. In the subsequent article the plaintiff was identified in the following explicit terms:

"A Bulawayo lawyer Mr Charles Paul Moyo is set to appear in court on 16 March facing a charge of contravening a section of the Posts and Telecommunications Act after he allegedly insulted over the phone a city B man who was involved in a case he was handling. Sources say that Mr Moyo (44) who resides at Warnborough Flats in the city centre and works for Majoko and Majoko Legal Practitioners ..."

On 17 March the *Chronicle* published another article in which it reported criminal proceedings against the plaintiff but in addition repeated the assertions made in the two previous publications. This article was supported by a picture C of the plaintiff and his legal practitioner.

On 18 March 2004 the paper published a cartoon depicting the plaintiff demanding from another man custody of a child he called his and the words "Whose kid is this?" inscribed at the end of the cartoon.

Another article appeared in the same newspaper on 20 March 2004 and yet D another on 3 April 2004 in which it was imputed that the plaintiff had had an adulterous affair. The last article was published on 7 April 2004 under the title "Lawyer Remanded". The present E exception was heard on 3 May 2004, a month after the last publication of

7 April 2004. Do these subsequent articles have a bearing on the fate of the exception?

The plaintiff has relied on the decisions in *Ferreira v Sardinha* 1917 TPD 477 and *Vermaak v van der Merwe* 1981 (3) SA 78 (N), both of which decisions were the subject of comments by J M Burchell in *The Law of Defamation in South Africa* (1 ed) at p 691. The facts in *Ferreira v Sardinha* 1917 TPD 477 were summarised by Howard and Thirion JJ in *Vermaak v van der Merwe* F *Supra* at 82 as follows:

"The defamatory statement which figured in that case had been written in a complaints book. It was intended to refer to the plaintiff but did not mention his name or otherwise identify him as the person against whom the imputation was made. Those who read the defamatory complaint did not immediately know that it referred to the plaintiff but were informed G soon afterwards that it did so. In the magistrate's court the plaintiff obtained judgment in his favour. One of the grounds on which the judgment was attacked on appeal was that the defamation was not actionable in the absence of proof that the persons who read the complaint H knew, at the time of reading it, to whom it referred.."

2004 (2) ZLR p72

Chiweshe J

The learned judges agreed with the decision reached in that case, namely, that a publication of defamatory words and identification of the person intended to be defamed need not occur contemporaneously. They agreed with de Villiers JP when he stated in that case as follows:

"I agree with the argument that if a person uses defamatory language in such a way that he leaves it so vague that it may equally apply to a number B of persons and he does not do anything by which it can be ascertained who was meant, although he may have intended a definite individual, he cannot be held liable. But if he makes a statement, even confidentially, to some person and it leaks out in that way whom he meant, it makes no difference whether the person who read the defamatory statement knows to whom it refers at the time he reads it or whether he obtained the C information afterwards."

In *Vermaak v van der Merwe (Supra)* at 83, Howard and Thirion JJ state as follows:

"In our view the law would be deficient in a most material respect if a person who did everything he thought necessary to defame another could escape liability simply because the person to whom he addressed his D defamatory statement did not immediately grasp the true significance of what he had been told. If the person addressed discovered the defamatory significance of the statement at a later stage, the defendant should be held liable regardless of the length of the time lapse between communication and understanding."

I agree with the reasoning in that case. I would therefore reject that the E summons is explicable merely on the ground that identification of the plaintiff occurred after the publication complained of and in subsequent publications. It would be absurd to hold otherwise, particularly in this case where the first subsequent publication came barely three weeks after the initial publication. The evidence of such subsequent publication is admissible and can be F summoned to support the plaintiff's case.

It was for these reasons that the exception was dismissed with costs. Arising from the same facts, the plaintiff sued the *Chronicle* newspaper separately under case number HC 703/04 for similar relief. The *Chronicle* excepted to the summons on pretty much the same grounds as in the above case. The two cases were argued before me in one sitting. G

For the same reasons I also dismissed with costs the exception raised in that case.

T Hara & Partners, defendant's legal practitioners H

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Document 8 of 47

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/MARIMO v MPOFU 2004 (2) ZLR 73 (H)

MARIMO v MPOFU 2004 (2) ZLR 73 (H)

2004 (2) ZLR p73

Citation	2004 (2) ZLR 73 (H)
Case No	Judgment No. HB-99-04
Court	High Court, Bulawayo
Judge	Cheda J
Heard	11 June 2004
Judgment	9 September 2004
Counsel	<i>R Moyo-Majwabu</i> , for the applicant <i>T Moyo</i> , for the respondent
Case Type	Civil application

Annotations

No case annotations to date

Flynote

c Practice and procedure — process — service of — summons — service at place of employment — service at branch other than that at which defendant employed — service defective — need for place to be that where defendant is normally physically present

Headnote

The papers in an application were served on the respondent by handing them ^d to a clerk at the Bulawayo premises of the company which employed the respondent. The respondent was in fact employed at the company's branch in Chivhu, and became aware of the application only after judgment had been given against her in default. In an application for rescission of the judgment:

^e *Held*, that the service was defective. A person who was working in Bulawayo but has been transferred to Chivhu cannot be regarded as employed in Bulawayo for the purpose of the rules of court.

Cases cited

Green v Herridge & Co (1885) 4 EDC 358

^f *Smith v Smith* 1947 (1) SA 474 (W)

Solomon v Arkon Motors (Pty) Ltd 1960 (4) SA 329 (T)

Legislation considered

High Court Rules, 1971, O 5 r 39

Case information

^g *R Moyo-Majwabu*, for the applicant

T Moyo, for the respondent

Judgment

CHEDA J: This is an application for rescission of judgment which ^h was granted in favour of the respondent on 6 June 2002 in matter number

2004 (2) ZLR p74

Cheda J

HC 1142/02. The applicant is the respondent in case number 1142/02. Although ^a both parties are respondents in case number 1243/03, case number 1142/02 is the most relevant in these proceedings.

The applicant averred that she only became aware of case number 1142/02 after her legal practitioner of record had been contacted by Janet Moyo, who was the applicant ⁱ in case 1243/03, well after the respondent had obtained judgment ^b against her. It is her further averment that on perusal of the court record she discovered that the court application, which she did not oppose and which resulted in a default judgment, was served on Ishmael Dhlamini at office number 20 Larbourn House, Bulawayo on 10 May 2002 and a default judgment was granted on 6 June 2002. As the applicant was not personally served, it stands to reason that service on Ishmael Dhlamini was served on ^c "a responsible person," which service is in fact proper service.

It is the applicant's contention, through her legal practitioner Mr *Moyo-Majwabu*, that service at one of her employer's premises in Bulawayo is not proper service, since she was based in Chivhu at the time of the said service.

Mr *Moyo* for the respondent on the other hand contends that this type of ^d service is, no doubt, proper service which entitled the respondent to a default judgment in the absence of opposition.

The question which falls for determination is whether service on Mr Ishmael Dhlamini, described by the Deputy Sheriff as "a responsible person and clerk found present at the place of employment of the respondent Chipo Marimo [£] namely office number 20 Larbourn House, L Takawira Ave, Lobengula St, Bulawayo", is proper or effective service as envisaged in the rules which read:

"Order 5

Service of Process

39. Manner of service of process generally

- (2) Subject to this order, process other than process referred to in sub ^F rule (1) may be served upon a person in any of the following ways –
- (a) ...
 - (b) by delivery to a responsible person at the residence or place of business or employment of the person on whom service is to be effected or at his chosen address for service." ^G

The applicant averred that she indeed is employed by a company carrying on business at 20 Larbourn House, but she was based at the Chivhu Branch. It is for this reason that she contends she was not properly served and only became aware of the said judgment through her legal practitioner and thereafter lodged her application for rescission of judgment within 30 days ^H

2004 (2) ZLR p75

Cheda J

A from the date she learnt of the default judgment. In light of that, she is of the view that she was not in wilful default.

It is a fact which was not challenged that, although the applicant's employers carry out their business at 20 Larbourn House, they also carry out business in Chivhu, which is where the applicant was employed and in other words where she was *physically* (my emphasis). I do not think that the rules ^B envisaged "a place of employment" as a place other than where the applicant was ordinarily and physically at.

In *Solomon v Arkon Motors (Pty) Ltd* 1960 (4) SA 329 (T) the appellant appealed against the decision of a magistrate for dismissing his application for rescission of judgment made against him as the trial court had found him ^C to have been in wilful default of entry of appearance to defend. The summons was addressed to the defendant as "c/o Printing Dept, c/o Cola Cola Bottling Co. Johannesburg, 8 Owl Street, Braamfontein, Johannesburg." The messenger of court's return of service was endorsed:

"You are hereby informed that the above-mentioned process in this matter could not be served on the defendant on the date hereof as he could not ^D after diligent search be found at the address given. Coca Cola has only one K M Solomon who has no knowledge of this matter."

The contents of the return of service were obviously not satisfactory to plaintiff's legal practitioner who gave further instructions regarding who to enquire from at the alleged defendant's place of employment. The messenger ^E of court after service sent a return of service with the following endorsements:

"On the 12 May 1959, at 850 a.m. the defendant was duly served with the above mentioned process in this case by delivering a copy thereof to the secretary at defendant's employment ..."

There was a further return of service which was lodged in court in support of applicant for default judgment and it read "... defendant leaves and returns ^F irregularly at employment informed by receptionist."

Steyn J at page 330H-331A held:

"...it does not seem to me that rule 8(3)(iii) can be interpreted to mean that service can be effected upon a defendant by delivering a copy of the summons to the secretary of the company by whom he is employed ^G irrespective of the address at which he is employed. The rule clearly says 'at his place of employment' which, in my view, means the place where he is employed, and not upon the secretary of the company by whom he is employed, irrespective of the place where he is employed ... A company may have various subsidiaries in various parts of the Union and a person ^H may be employed by a company with its registered office in Johannesburg

2004 (2) ZLR p76

Cheda J

while the person is employed, for instance, in Cape Town. Service upon a the secretary of the company in Johannesburg would not be service 'at the place of employment' of the person concerned if he is employed at Cape Town."

See also *Smith v Smith* 1947 (1) SA 474 (W) and *Green v Herridge & Co* (1885) 4 EDC 358.

I totally associate myself with the learned judge's reasoning in the above case. B It is a fact that due to the expansion and wide diversity in both the industrial and commercial sectors, companies do not necessarily carry out their businesses where they were originally operating from or from their registered companies offices. It is for this reason that employees are placed at different places, quite often away from where they were when they were first engaged. c It will be, in my view, not correct to say that a party who although was working in Bulawayo but transferred to Chivhu should still be regarded as employed in Bulawayo for the purpose of the rules of this court. Such a person, strictly speaking, cannot be said to be working in Bulawayo as he/she will in fact not be in Bulawayo. Service of court process upon a person who is not ordinarily and physically present at either his residence or employment cannot and d should not be regarded as proper and effective service as per the rules of this court.

In conclusion therefore, I hold that service upon Ishmael Dhlamini, a clerk in the applicant's Bulawayo office, was defective *ab initio* and accordingly there was no wilful default on the applicant's part. She is therefore entitled to defend e the respondent's action.

This application accordingly succeeds with costs.

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

Hwalima, Moyo & Associates, respondent's legal practitioners f

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Document 9 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/MOYO v MOYO 2004 (2) ZLR 77 (H)

MOYO v MOYO 2004 (2) ZLR 77 (H)

2004 (2) ZLR p77

Citation	2004 (2) ZLR 77 (H)
Case No	Judgment No HB-112-04
Court	High Court, Bulawayo
Judge	Ndou J
Heard	6 October 2003
Judgment	2 September 2004
Counsel	<i>J Tshuma</i> , for the applicant <i>S S Mazibisa</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

c Practice and procedure — pre-trial conference — purpose of — agreement made at conference — effect of — matrimonial matter — party disputing agreement allegedly reached at pre-trial conference — matter referred to trial

Headnote

The respondent sued her husband for divorce. At the time the suit was ^b instituted, she was represented by a particular legal practitioner. A pre-trial conference was held and the matter set down for trial, the issue at the trial being the disposition of the matrimonial property. Before the trial, the respondent changed her legal practitioner. The pre-trial conference was reconvened. It was not attended by the respondent or her new representative; her former legal practitioner appeared. At the conference, ^e an agreement was reached about the matrimonial property and a consent paper drawn up. The husband sought an order setting the matter down for trial on an unopposed basis and to incorporate the agreement reached. The respondent requested a further pre-trial conference, on the grounds that the pre-trial conference was conducted in her absence and contrary to her instruction.

^f *Held*, that the objects of a pre-trial conference are (a) to reach agreement on as many aspects of the matter as possible with the object of curtailment of the proceedings; (b) to facilitate settlement discussions, timeous consideration of specific topics and (c) to protect a party against costs required to ward off an opponent who is unable to proceed to trial or is ^g not serious about doing so.

Held, further, that this being a matrimonial matter, personal notice of set down on the respondent would be required if the matter were to be set down on the unopposed roll by the applicant. She would be entitled to appear ^h at the motion court hearing and be heard and could still challenge the

2004 (2) ZLR p78

Ndou J

relevant part of the pre-trial memorandum. The matter would inevitably ^a be referred for trial on the disputed issue.

Held, further, that if the matter were set down as an unopposed one, the effect would be that she was bound by the concessions made allegedly on her behalf and in her absence and that she would be denied the opportunity afforded by the rules to lead evidence on the admissibility of the ^b conference memorandum against her. Consequently, the matter would be referred to trial.

Cases cited

Chisnall & Chisnall v Sturgeon & Sturgeon 1993 (2) SA 642 (W)

Lekato v Editor, "Tribune" Magazine, & Anor 1995 (2) SA 706 (W) ^c

Le Roux v Le Roux 1957 (2) R & N 831 (SR)

Rood v Rood 1947 (2) SA 722 (C)

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

Strydom v Strydom 2003 (1) ZLR 379 (H)

Legislation considered ^d

High Court (General) Rules 1971 (RGN 1047 of 1971), rr 182, 183, 184, and 272(2)(b)

Case information

J Tshuma, for the applicant

S S Mazibisa, for the respondent ^e

Judgment

NDOU J: This is an application in terms of Order 23 r 152 of the High Court (General) Rules, 1971 for an order giving directions as follows:

"It is ordered that:

1. Leave be and is hereby granted to defendant (applicant in *casu*) to F set down the matter between Lizzie Moyo and Gilton Moyo case number HC 1204/97, as an unopposed matter and to obtain an order of divorce and other ancillary relief in terms of the pre-trial conference minutes dated 20 March 2000.
2. Defendant be and is hereby granted leave to serve the notice of set down and any other process on plaintiff through her legal practitioners G of record, Messrs Cheda and Partners.
3. The plaintiff pays the costs of this application."

The brief facts are that the parties were married to each other in February 1991. In May 1997, the respondent issued summons against the applicant for H

2004 (2) ZLR p79

Ndou J

A divorce with ancillary relief. The applicant opposed the suit. Pleadings were eventually closed and a pre-trial conference was held before a Judge on 28 July 1999. Both parties were in attendance with their lawyers. The matter was referred to trial with the issues of the matrimonial property being reserved for trial. The respondent changed legal representation before the trial. The new legal practitioners assumed agency on 7 March 2000. For reasons that are not B relevant to this application, the pre-trial conference was reconvened on 24 March 2000. It is not clear whether or not the applicant attended this latter conference but the respondent did not attend. Her erstwhile legal practitioner attended. The outcome of this conference is captured in the Judge's minute which reflects, *inter alia*,

" C It is ordered that:

The parties have managed to reach agreement. What has been agreed is that the divorce settlement is summoned [sic] up in the defendant's synopsis of evidence filed on 15 February 1999.

The outstanding issue was the one regarding the immovable property. It has been agreed that the defendant will retain as his property stand 43 D Millais Road, Romney Park, Bulawayo. The plaintiff will be paid an amount of \$10 000 in full and final settlement of any claim she may have had in the said property.

It is recorded that the defendant owes the plaintiff an amount of \$8 000 which he agrees to pay her together with the \$10 000 making a total of \$18 000.

E With regards to the costs, each party should bear its own costs.

The plaintiff can now enrol this matter for a divorce on the unopposed roll. This agreement to be incorporated in the said order."

A consent paper was drafted incorporating the above. The respondent declined to sign it. Instead, she dispensed with the services of her legal F practitioners on the basis that her erstwhile legal practitioner misrepresented her position in the matter at the second pre-trial conference and that the resultant pre-trial conference memorandum was conducted in her absence and without her instructions. The respondent requested a further pre-trial conference.

Ultimately this application was made arising from these facts. What is the G effect of the contents of a pre-trial memorandum or minute? Contextually, Order 26 r 182 requires the parties to an action to hold a pre-trial conference with the object of reaching agreement on as many aspects of the matter as possible with the object of curtailment of the proceedings. The object is to H facilitate settlement discussions, ensure timeous consideration of specific

2004 (2) ZLR p80

Ndou J

topics and protect a party against costs required to ward off an opponent who A is unable to proceed to trial or is not serious about doing so – see also rr 183 and 184 and *Chisnall & Chisnall v Sturgeon & Sturgeon* 1993 (2) SA 642 (W); *Lekato v Editor, "Tribute" Magazine, & Anor* 1995 (2) SA 706 (W) and the Judge President's Practice Direction Number 1 of 1995. Another relevant factor is that, this being a matrimonial matter, personal notice of set down on B respondent would be required in the event that the matter is set down on, the unopposed roll by the applicant. The respondent would be entitled to appear at the motion court hearing and be heard. At that stage she can still challenge the relevant part of the pre-trial memorandum. In that event, then the matter will inevitably be referred for trial on the disputed issue – Order 35 r 272(2) (b); *Strydom v Strydom* 2003 (1) ZLR 379 (H); *Le Roux v Le Roux* 1957 (2) R & N C 831 (SR); *Rood v Rood* 1947 (2) SA 722 (C).

The respondent has refused to sign the consent paper. She wants to be heard on the question of the distribution of the matrimonial property. She did not attend in person the pre-trial conference where the agreement on the distribution of the matrimonial property was reached. Normally she should have attended the conference with her legal practitioner, unless, for good cause, she applied to the judge for her to be excused – para 10 of the Practice Direction No 1 of 1995, *supra*. There is no averment in the application that was done in this case.

In the circumstances if I direct as prayed by the applicant, I will in essence be ruling that even if she was not part of the conference, she is bound by the concessions made allegedly on her behalf by her erstwhile legal practitioners in her absence. I will effectively deny her the opportunity afforded to her by r 272(2)(b), *supra* to lead evidence on the admissibility of the conference memorandum against her. In this regard I refer to what McNally JA said in *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 213A. Although in that case the learned Judge of Appeal was dealing with an application for rescission, I hold the view that the statement is of equal application to the facts of this case. The learned Judge of Appeal observed:

“One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence. If I were convinced that the defendant in this case was *bona fide* and had a *prima facie* defence, then I might be unjustified in condemning him for so short a delay, despite the inadequacy of his explanation.”

In my view, the interests of justice demand that I allow the respondent an opportunity, in a trial, to establish that the concessions by her legal practitioner were made without her knowledge or instructions. If she fails to do so, ^h

2004 (2) ZLR p81

Ndou J

A obviously the trial court will be in a position to deal with the issue.

In the circumstances I direct that the matter in case number 1207/97 be and is hereby referred to trial. The issue of whether the pre-trial conference of 7 March 2000 was held pursuant to the respondent's instructions to her erstwhile legal practitioner and the effect of the pre-trial memorandum is to be ^b dealt with at the trial.

Webb, Low & Barry, applicant's legal practitioners

c Cheda & Partners, respondent's legal practitioners

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Document 10 of 47

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/S v MASUKU 2004 (2) ZLR 82 (H)

S v MASUKU 2004 (2) ZLR 82 (H)

2004 (2) ZLR p82

Citation	2004 (2) ZLR 82 (H)
Case No	Judgment No. HB-114-04
Court	High Court, Bulawayo
Judge	Ndou J
Heard	29 June 2004
Judgment	2 September 2004

Counsel	<i>J James</i> , for the applicant <i>A Gabie</i> , for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Criminal procedure — *Attorney-General* — *concession by* — *Attorney- c General's representative conceding that leave to appeal should be granted* — *whether such concession may be withdrawn* — *procedure to follow if Attorney-General seeks to withdraw concession*

Headnote

When the applicant was convicted, the Attorney-General's representative (who had not himself prosecuted the case) conceded that leave to appeal ^o should be granted. At the application for bail, the Attorney-General's representative (who had not appeared previously) sought to withdraw the concession.

Held, that the Attorney General occupies a pivotal role in the criminal justice system. His opinion in applications before the court commands respect ^e because of his experience and the responsibility of his office. A concession made by him must be an informed one; it cannot be withdrawn willy-nilly in criminal proceedings. If he seeks to withdraw a concession, this must be properly done, giving the accused an opportunity to make submissions, as the withdrawal of a concession will, in most cases, result in prejudice to the other side. There was no submission that the Attorney-General's ^f previous representative was aware of the withdrawal that he made on behalf of the State. Even if he were aware, he would be required, as an officer of the court, to file an affidavit in support of the withdrawal accepting blame for erroneous concession.

Cases cited ^g

Challenge Auto & Ors v Standard Chartered Bank Zimbabwe Ltd 2003 (1) ZLR 17 (H)

Cobra and the Wild Cat (Pvt) Ltd v Tundu Distributors (Pvt) Ltd 1990 (1) ZLR 133 (H) ^h

2004 (2) ZLR p83

Ndou ^j

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

S v Benatar 1985 (2) ZLR 205 (H)

S v Bennett 1976 (3) SA 652 (C)

S v Kantor 1964 (3) SA 376 (W)

S v Lulane 1976 (2) SA 204 (N)

R v Muller 1957 (4) SA 642 (A)

^b *S v Ndlovu* HH-177-01

S v Tengende & Ors 1981 ZLR 445 (S)

S v Williams 1980 ZLR 466 (A)

Case information

J James, for the applicant

^c *A Gabie*, for the respondent

Judgment

NDOU J: This is an application for bail pending appeal. The applicant was on 31 May 2004 convicted of two counts of theft of motor vehicles, one count of armed robbery and fourteen counts of contravening s 12(2)(b) of the Miscellaneous Offences Act [Chapter 9:15]. I sentenced him to five years' imprisonment on each of the two counts of car theft, ten years' imprisonment for the armed robbery and a total of one year for all the counts of contravening s 12(2)(b) of the Miscellaneous Offences Act. I ordered all the sentences to run concurrently, resulting in the sentence of ten years of which three years were suspended. The applicant is to serve an effective sentence of seven years.

With the consent of the respondent, I granted the applicant leave to appeal against both conviction and sentence in respect of all the counts. For the record, Mr S Musonah prosecuted this matter, but when judgment was handed down, sentence passed and the application for leave to appeal was heard, Mr H S Ushewokunze appeared for the State (respondent). He is the one who consented to the leave to appeal being granted. During this appeal hearing, Mr Gabie appeared for the State (respondent). He submits that Mr Ushewokunze made the above concession in error. He supported his submission by levelling criticism against his colleague. In my view, the Attorney-General occupies a pivotal role in the criminal justice system. The opinion of the Attorney-General in applications before the court commands respect because of his experience and the responsibility of his office: *S v Lulane* 1976 (2) SA 204 (N); *S v Kantor* 1964 (3) SA 376 (W); *S v Bennett* 1976 (3) SA 652 (C) and *S v Ndlovu* HH-177-01. Whilst these cases deal with the Attorney-General's attitude in bail applications, the rule, in my view, is applicable to all criminal applications wherein his attitude or opinion is expected or necessary. This

2004 (2) ZLR p84

Ndou J

must be borne in mind by all officers who represent the Attorney-General in a court. The concessions of the Attorney-General cannot be made and withdrawn willy-nilly in criminal proceedings. They must be informed concessions. In the case of withdrawals of concessions, these must be properly done, giving the accused an opportunity to make submissions. Such withdrawal of concessions will, in most cases, result in prejudice to the other side. In this case, there is no submission that Mr Ushewokunze is aware of the withdrawal that he made on behalf of the State. Even if he is aware, I hold the view that in such an instance, he would be required, as an officer of this court, to file an affidavit in support of the withdrawal accepting blame for an erroneous concession: *Independence Mining (Pvt) Ltd v Soko* S-188-93; *Cobra and the Wild Cat (Pvt) Ltd v Tundu Distributors (Pvt) Ltd* 1990 (1) ZLR 133 (H) at c 135G-136B and *Challenge Auto & Ors v Standard Chartered Bank Zimbabwe Ltd* 2003 (1) ZLR 17 (H). There is no such comment by Mr Ushewokunze. Accordingly, I cannot allow the respondent to withdraw the concession that it made in earlier proceedings. In any event, the withdrawal should not have waited for the applicant to make his bail application. It would be unfair to accept it at this juncture.

On the merits, it is trite that after conviction and sentence, the presumption of innocence no longer exists. It is no longer a factor in bail pending appeal. The approach is that in the absence of positive grounds for granting bail, bail should be refused – *S v Tengende & Ors* 1981 ZLR 445 (S). The onus is on the applicant to show that he should be admitted to bail. He can discharge this onus by focussing on two major factors i.e. (a) the likelihood of abscondment in light of the lengthy sentence imposed, and (b) the prospects of success on appeal: *S v Williams* 1980 ZLR 466 (A); *R v Muller* 1957 (4) SA 642 (A) and J Reid Rowland *Criminal Procedure in Zimbabwe* at 6-17 to 6-18.

Another relevant factor raised by the applicant is the likely delay before the appeal can be heard. This is also a relevant factor: *S v Benator* 1985 (2) ZLR 205 (H).

The legal and factual issues raised in the notice of appeal were extensively canvassed by counsel during the trial and in closing submissions. We dealt with them in detail in our judgment. Most of the issues were decided upon on the basis of findings of fact. The applicant does not seem to criticise our findings on the basis that it is against logic, outrageous or unsupported by evidence. There are no reasonable prospects of success on appeal, notwithstanding the respondent's consent to leave to appeal. The length of the sentence imposed *in casu* is likely to induce the applicant to abscond.

As regards the delay in the appeal being heard, I take notice of the fact that

2004 (2) ZLR p85

Ndou J

A recently there are hardly any appeal matters for set down resulting in the Supreme Court sitting in Bulawayo being shortened or failing to take off. In such a situation, if the applicant is assertive, the question of dilatoriness would not arise.

The cumulative effect of my above findings is that there are no positive grounds for granting the applicant bail. He failed to discharge the onus on him to show that he should be admitted to bail. He is accordingly refused bail pending appeal.

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

c Criminal Division, Attorney-General's Office, respondent's legal practitioners

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Document 11 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/ATTORNEY-GENERAL v MBEWE 2004 (2) ZLR 86 (H)

ATTORNEY-GENERAL v MBEWE 2004 (2) ZLR 86 (H)

2004 (2) ZLR p86

Citation	2004 (2) ZLR 86 (H)
Case No	Judgment No. HB-91-04
Court	High Court, Bulawayo
Judge	Chiweshe J & Ndou J
Heard	19 May 2003
Judgment	3 September 2004
Counsel	Mrs <i>I M Nyoni</i> , for the appellant <i>K I Phulu</i> , for the respondent (at the request of the court)
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

Criminal law (statutory offences) — *Dangerous Drugs Act [Chapter 15:02] — s 9(b) — possession of dagga — meaning of — normal meaning to c be given to concept of possession — need for State to show physical detention as well as intention to exercise control*

Headnote

The respondent was acquitted on a charge of contravening s 9(b) of the Dangerous Drugs Act [Chapter 15:02], that is being in possession of dagga. Two friends of her brother had brought the dagga to the lodgings she shared with her brother and told her that he had told them to leave it there. She accepted it on the basis of his instructions. The magistrate acquitted her on the grounds that she lacked the necessary *mens rea* to possess the dagga. The Attorney-General appealed.

Held, that the statute did not give an extended meaning to the concept of ϵ possession. Accordingly, the prosecution had to show not only that the respondent had physical detention of the dagga but also that the detention was accompanied by *mens rea*. This additional factor would be present if it were shown that there was an intention on her part to exercise control on the part of the accused. Knowledge that what she ϵ physically detained is dagga was an essential factor.

Held, further, that the respondent did not have the requisite intention to exercise custody. She was not in control of the lodgings.

Cases cited

S v Adams 1986 (4) SA 882 (A)

S v Ahmed 1977 (1) RLR 59 (A) $\mathfrak{G}$

R v Binns 1961 (2) SA 104 (T)

S v Blauw 1972 (3) SA 83 (C)

R v Britz 1949 (3) SA 293 (A)

S v Cain 1973 (2) SA 522 (N) $\mathfrak{H}$

2004 (2) ZLR p87

Ndou J

A R v Dhlumayo & Anor 1948 (2) SA 677 (A)

R v H 1944 AD 121

S v Haywood 1978 RLR 238 (A)

R v Hlatshwayo 1946 NPD 118

R v Kezwa 1949 (3) SA 1 (O)

R v Matsoso 1950 (4) SA 178 (O)

$\mathfrak{B}$ *S v Mbanda* S-184-90

S v Mjoli 1968 (3) SA 397 (T)

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

R v Moyage & Ors 1958 (3) SA 400 (A)

R v Ndhlovu 1948 (1) SA 728 (N)

S v Ngcobo 1972 (2) SA 557 (N)

$\mathfrak{C}$ *S v Ramuabe* 1964 (2) SA 61 (T)

R v Sibanda & Anor (1) 1963 R & N 593 (SR); 1964 (1) SA 311 (SR)

S v Smith 1965 (4) SA 166 (C)

S v Soko S-118-92

R v Wallendorf & Ors 1920 AD 383

Legislation considered $\mathfrak{D}$

Dangerous Drugs Act [*Chapter 15:02*], s 9(b)

Case information

Mrs *I M Nyoni*, for the appellant

ϵ *K I Phulu*, for the respondent (at the request of the court)

Judgment

NDOU J: As the appeal centred around legal issues, we felt that the respondent may not appreciate the basis thereof let alone being able to articulate her response thereto. We directed the Assistant

Registrar to seek legal representation on her behalf. We are indebted to Mr Phulu for coming to the rescue and offering qualitative submissions on the respondent's behalf.

¶ The respondent was charged with being in possession of 50 kg of prepared Indian Hemp, commonly known as dagga in our jurisdiction, in contravention of s 9(b) of the Dangerous Drugs Act [Chapter 15:02]. She was aged 20 then, and pleaded not guilty to the charge. After hearing and evaluating the evidence, the trial court found that on the facts, the accused person was not 6 in possession in the manner envisaged by the Act and the accused was accordingly acquitted and discharged. The appellant now appeals against that decision.

It is common cause that the police searched the respondent's place of 8 residence and recovered ten bags of dagga. According to the evidence of the

2004 (2) ZLR p88

Ndou J

police officers, the respondent knew that the ten bags contained dagga; her 9 only excuse was that the dagga belonged to someone else. The respondent herself does not dispute that she knew that the bags contained dagga. In her evidence, she says that the dagga was brought into the house by people who told her that they had been authorised by her brother Philip. The trial court accepted that the respondent had initially refused to accept the dagga in 10 question and then at a later stage, upon instruction from her brother Philip, she "accepted the dagga to be placed in the house". From the record, the use of the word "accepted" is clearly in the sense that she did not prevent the depositors from depositing the dagga in the lodgings in question. The *raison d'être* of the trial court seems to be that she had no power to prevent the act in question. It is common cause that those depositors had, on a previous 11 occasion, not subject to the trial in the court *a quo*, brought dagga to the house and the respondent refused to accept it but it was left in the house on the instructions of Philip. It is common cause that when the same persons arrived with the dagga forming subject the matter of these proceedings, they told her that they had been authorised by Philip to come and leave the dagga. She let them leave the dagga in the lodgings. I think it is necessary to highlight the 12 set up at the respondent's house to give the context to the question of possession of the dagga. Her testimony, which was apparently accepted by the trial court, was as follows:

"Your Worship, the reason why I came to stay with the last witness (Philip, brother) is that both my parents have passed away. I had a small child, the 13 father of that child abandoned me and the baby and went to South Africa. I was being looked after at the church so that last witness' mother said that it was not good for me to be kept at the church yet she had a room to accommodate me, so *I was being kept there and I had to follow every rule in the house*. Even if Philip, the head, allowed those people to bring those goods to the house, *I had no powers to shun them away*" (my 14 emphasis).

She also testified –

"America came to ask me to safe-keep the dagga for his wife. *I refused*. He went away and came back. *He talked to Philip who agreed to safe-keep the dagga ...*

Q. When that happened were you present when Philip agreed to safe 15 -keep the dagga?

A. I was there *but I was not in the room in which they were discussing the issue. I only saw the dagga brought at a later stage.*

Q. To who was it (the money) being paid?

A. It was being paid to Philip" (my emphasis). 16

2004 (2) ZLR p89

Ndou J

17 In her cross-examination of a police officer, she said:

"Q. I was trying to tell you that *the presence of the dagga in the house was beyond my powers.*

A. *It is true*" (my emphasis).

The appellant seeks to rely on Philip's evidence to the effect that he had not 18 instructed the bearers of the dagga to take it to his lodgings. His evidence was rejected by the trial court and there is no legal basis for us to upset this finding on appeal. There has been no contention that the court *a quo* misdirected itself in making all the above factual findings. In any event, the appellant does not seek a reversal of these factual findings of the trial court. Even if it did so, there would be no legal basis for us to grant the request in line with decided cases: 19 see *S v Mlambo* 1994 (2) ZLR 410 (S); *S v Soko* S-118-92; *S v Mbanda* S-184-90 and *R v Dhlumayo & Anor* 1948 (2) SA 677 (A).

In the circumstances, we have to go by the factual findings of the trial court and decide whether the respondent possessed the dagga. On the facts, it is clear that the trial magistrate found that the respondent was not the person **D** in charge of the house. She found:

"Given that kind of background, the court was quite at large to infer that the accused person did not have the requisite mental element to possess the dagga in question. The court did not lose sight of the fact that indeed, the accused was aware that to be having dagga in the house was an offence, she clearly conceded that but she clearly explained as to how she accepted the dagga on the date in question. It was a clear cut case that **E** she was not accepting the dagga as per her agreement with the person in question but that she was only being used as an agent by the brother in question who was having dealings with the people in question. Given that set up, the court is satisfied that the requisite mental element has not been proven as far as the possession of the dagga in question."

F From these findings of the court *a quo*, it is clear that:

- (a) the respondent was not in charge of the house in question;
- (b) the respondent was aware that possession of dagga in the house was an offence;
- (c) the respondent "accepted" the dagga, not pursuant to an agreement with **G** the bearer thereof but acting as agent of her brother Philip;
- (d) she accepted the dagga to keep it on behalf of her brother. She was acting under the instructions of her brother – obeying his unlawful instructions so to speak.

H From all these findings, did she knowingly possess the dagga? It is trite that

2004 (2) ZLR p90

Ndou **J**

mens rea is clearly an essential ingredient of the offence: see *R v Sibanda & A Anor* (1) 1963 R & N 593 (SR) at 596D-G; 1964 (1) SA 311 at 313; *S v Ahmed* 1977 (1) RLR 59 (A) and *S v Haywood* 1978 RLR 238 (A) at 239E-F. *In casu*, it has been accepted that the respondent knew that the 10 bags contained dagga and that it was unlawful to possess the dagga. But did she possess these bags of dagga in law? Possession is the act. The appellant referred us to a passage **B** from C.R. Syman's *Criminal Law* 2ed p 414 [pp 387-8 in 3ed]. The South African Act (Drugs and Drug Trafficking Act 140 of 1992) differs materially from our Act on the definition of "possession". In addition to possession in the ordinary juridical sense, there are two other ways in which the prosecution in South Africa may prove possession *viz.*: (a) the extended meaning of possession; and (b) the presumption of possession. **C**

Both these ways are provided for in their Act. Our Act does not have similar statutory forms of possession. It therefore, follows that, the passage cited by the appellant is not applicable in our jurisdiction. Our Interpretation Act [*Chapter 1:01*] is not of assistance in this regard as it does not define possession.

Coming to the facts of this case, did the prosecution prove possession in the **D** ordinary juridical sense? Possession consists of two elements, namely, a physical or corporeal element (*corpus* or detention) and a mental element (*animus*, that is the intention of the possessor): see *R v Binns* 1961 (2) SA 104 (T) at 107 and *S v Adams* 1986 (4) SA 882 (A) at 890-1. According to C R Snyman *op cit*, at p 387: **E**

"The physical element consists in an appropriate degree of physical control over the thing. The precise degree of control required depends upon the nature of the article and the way in which control is ordinarily exercised over such a type of article. The control may be actual or constructive. Constructive control through somebody else, such as a representative or servant (*C F Singiswa* 1981 (4) SA 403 (C)). The *animus* **F** element of possession relates to the intention with which somebody exercised control over an article and differs according to the type of possession. 'Possession' may have different meanings in different statutes and in different branches of the law, and these differences are reflected in the different meanings of the *animus* element in each particular type of possession ... 'possess' may be restricted to situations where **X** exercises **G** control over an article with the intention of keeping or disposing of it as if he were the owner as opposed to keeping it (temporarily or otherwise) on behalf of somebody else. This is called *possessio civilis* (*Voet* 41.2.3; *Wicks v Place* 1967 (1) SA 561 (E) 567; *S v R* 1971 (3) SA 798 (T) 800). This is the narrow meaning of 'possession'. There can be no doubt that if **X's** **H**

2004 (2) ZLR p91

Ndou **J**

A possession of the substance amounts to this form of possession, he is guilty of contravening ..."

It is not sufficient for the prosecution to prove that the accused merely had physical detention of dagga but, in addition, it must be established that the detention was accompanied by *mens rea*. This additional factor is present when it is shown that there was an intention to exercise control on the part of the accused. Knowledge that what she physically detained is dagga is an essential factor: see *R v Hlatshwayo* 1946 NPD 118; *R v Ndlovu* 1948 (1) SA 728 (N) and *R v Kezwa* 1949 (3) SA 1 (O). The State also has to establish some sort of knowledge on the part of the accused that the thing possessed is a forbidden thing: see *R v Matsoso* 1950 (4) SA 178 (O) and *S v Smith* 1965 (4) SA 166 (C). In *R v Sibanda & Anor supra* at 596; 313 of the SA Report, Beadle CJ observed:

"The books abound with authority dealing with the question of the proof of *mens rea* in statutory offences where the unlawful 'possession' of certain articles is forbidden. In all these cases, it has always been held that the onus is on the Crown to prove *mens rea*: see, for example the following cases: unlawful possession of firearms or explosives, *R v Ruda* 1958 R & N 275; unlawful possession of filings of current coins, *R v Shankerji* 1932 TPD 343; unlawful possession of uncut diamonds, *R v Matsoso* 1950 (4) SA 178 (O) at p 184; unlawful possession of unwrought gold, *R v Gumbi* 1927 TPD 660 at p 662; unlawful possession of liquor, *R v Kezwa* 1949 (3) SA 1(O); unlawful possession of barberton, *R v Binns & Anor* 1961 (2) SA 104 (T); unlawful possession of yeast, *R v van Ewyk* 1945 TPD 70. Such cases as *R v Seboko & Anor* 1936 AD 173, which may appear at first sight to adopt a contrary view, can be distinguished, as all that these cases lay down is that in many instances it is not necessary for the Crown to establish *animus possidendi*; that it is sufficient if the Crown shows that the accused merely knew that he had the thing in his physical possession. It is clear, therefore, on the above authorities that the onus is on the Crown to establish *mens rea* in the case of possession."

It is important for the court to distinguish clearly between the mental element necessary to establish possession and the mental element constituting *mens rea*. In this regard, Corbett J (as he then was) in *S v Smith supra* at 171E-172A said:

"The concepts of custody or possession comprise two main elements: they are, firstly, the physical element of corpus i.e. physical custody or control over the *res* in question, exercised either mediately or immediately, and the mental element of animus, i.e. the intention to exercise control over the thing ... At the same time, there is a general rule that ordinarily speaking, a crime is not committed if the mind of the person doing the act in question

2004 (2) ZLR p92

Ndou J

is innocent: *actus non facit reum nisi mens sit rea*. This principle applies to statutory offences, save that a statutory enactment may be construed as having absolutely prohibited certain conduct and as having constituted it an offence without reference to whether the wrongdoer had an innocent or guilty state of mind. Whether a statutory enactment should be so construed depends upon its wording and various other considerations. The express words of the statute may indicate that *mens rea* was intended to be an essential element of the offence, in which case, the onus is upon the State to establish *mens rea*. Even where there are no such words, however, a consideration of such factors as the context of the enactment, the object and scope of the statute, the nature and extent of the penalty attaching to the offence, and the ease with which the beneficial provisions of the statute could be evaded if the defence of the absence of *mens rea* were allowed to be set up, may lead the court to the conclusion that the general requirement of *mens rea* was not excluded by the enactment. In that event, however, the State would not normally be required to prove the existence of *mens rea*; *prima facie* the enactment is satisfied when the objective conduct of the accused person is brought within its terms and the onus is then upon the accused to prove the absence of *mens rea* upon a balance of probabilities. Generally, the courts are reluctant to construe an enactment as excluding *mens rea* from consideration in applying a penal provision: see generally, *R v Wallendorf & Ors* 1920 AD 383; *R v H* 1944 AD 121; *R v Britz* 1949 (3) SA 293 (A); *R v Moyage & Ors* 1958 (3) SA 400 (A); *S v Ramaube* 1964 (2) SA 61 (T)."

In casu, it has to be emphasised that the offence is the possession of dagga, and not failing to report the presence of dagga to the police or the authorities. This distinction is necessary because the State's representative in the court *a quo* and the State counsel before us placed a lot of weight on the failure by the respondent to make a report to the police about the presence of the dagga in the lodgings, she was sharing with others. In my view, the mere presence of the respondent in the room in which the dagga was did not bring her within the ambit of this definition of possession of dagga in terms of s 9(b), *supra*. The question is whether the dagga was in her custody or under her control: see *S v Cain* 1973 (2) SA 522 (N); *S v Ngcobo* 1972 (2) SA 557 (N); *S v Blauw* 1972 (3) SA 83 (C) and *S v Mjoli* 1968 (3) SA 397 (T).

It is clear that the appellant is relying on the extended meaning of possession ^g as per the South African cases. It has been shown above that our Act does not provide for the extended meaning of possession. The appellant failed to appreciate the difference between the South African and the Zimbabwean Acts. The whole basis of the appeal is not known in Zimbabwean law and the appeal is, therefore, ill-conceived. ^h

2004 (2) ZLR p93

Ndou J

^a On the facts, the court *a quo* accepted the evidence of the respondent that she did not have the intention to have custody of the dagga. She did not have an intention to exercise custody. She was not in control of the lodgings, she was there at the mercy of Philip. It is Philip who gave instructions for the dagga to be introduced into the lodgings. She had no say in the matter. The court *a quo* found that because she had no say and was not in charge of the house, ^b she was not in possession of dagga. In other words, the court *a quo* found that she was, in the circumstances of this case, not in physical detention or custody or control of the dagga. The question of the *animus* element does not arise. This finding of fact cannot be faulted.

Accordingly, the appeal must fail on both the factual and the legal basis. It is ^c ordered that the appeal be and is hereby dismissed.

Chiweshe J concurred.

^d *Coghlan & Welsh*, respondent's legal practitioners

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Document 12 of 47

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STANDARD CHARTERED BANK OF ZIMBABWE LTD v CHIPININGU 2004 (2) ZLR 94 (S)

2004 (2) ZLR p94

Citation	2004 (2) ZLR 94 (S)
Case No	Judgment No. S-104-02
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi, JA and Malaba JA
Heard	4 June 2002
Judgment	7 September 2004
Counsel	<i>G E Mandizha</i> , for the appellant <i>D A Machingura</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — dismissal of employee — breach of Code of Conduct — "gross c negligence causing serious loss" — "gross negligence" — what amounts to — total disregard of his duty by an employee — entire failure of his duty — such conduct amounts to "gross negligence" justifying employees dismissal.

Headnote

"Gross negligence" is a nebulous concept, the meaning of which depends on the context in which it is used. It is a futile exercise to seek to provide a definition which would be applicable to all circumstances.

The respondent had been employed by the appellant bank at one of its Harare branches. As part of his duties, he was given charge of a set of keys to the bank strong room in which was stored a very large amount of cash. In order to open the strong room, it was necessary to utilise two different sets of keys, one of which was in the custody of the respondent and the other was in the custody of his superior, J, who was a senior employee at the bank. As an important security measure it was made clear to the respondent that a withdrawal of cash had to be effected by both co F-custodians of the strong room. The one had to witness a withdrawal of cash by the other. Both had to sign for any such withdrawal. In terms of standing instructions, respondent was not to hand over his set of keys to anyone, including J, without first obtaining authority from the branch manager at the bank.

Notwithstanding that breach of this rule was viewed seriously, the respondent, G upon being asked by J for his set of keys to the strong room, complied with the request. Although being unable to accompany J to the strong room, he did not seek permission from the branch manager before handing him the keys. J returned the keys to the respondent later that day. H

2004 (2) ZLR p95

A Ten days later, J surrendered his set of keys and disappeared. The appellant then discovered that a cash amount of \$50 000 had been stolen. The respondent subsequently faced a disciplinary charge of failing to protect appellant's money against theft by his co-custodian. He was charged with "gross negligence causing serious loss to the bank". The respondent admitted his negligence and the serious loss to the bank but B denied the allegation of "gross negligence." The disciplinary hearing officer found his negligence to be "gross" and, in terms of the code of conduct, ordered his discharge. Various appeals subsequently took place. At issue was whether the admitted negligence was "gross", so as to justify the respondent's dismissal. The Labour Relations Tribunal, to which the matter was finally referred, determined that the respondent's C conduct was not "grossly negligent" so as to justify his dismissal. On appeal to the Supreme Court, therefrom, it was:

Held, that in handing over his set of keys to J and failing to accompany him to the strong room, the respondent was acting in total disregard of his duty to the bank. His behaviour amounted to an entire failure of duty.

D *Held*, further, that for this reason, the respondent had been "grossly negligent" and that the appeal from the Labour Relations Tribunal must be allowed with costs.

Cases cited

Bickle v Ministers of Law and Order 1980 ZLR 36 (H)

CSAR v Adlington & Co 1906 TS 964 E

Essa v Divaris 1947 (1) SA 753 (A)

Government of the Republic of South Africa (Department of Industries) v Fibre Spinners and Weavers (Pty) Ltd 1977 (2) SA 324 (D)

Rosenthal v Marks 1944 TPD 172

Zeeta Manufacturers (Pvt) Ltd v Zimbabwe United Freight Co Ltd 1990 (1) ZLR 337 (H) F

Case information

G E Mandizha, for the appellant

D A Machingura, for the respondent

Judgment

G MALABA JA: This is an appeal from the Labour Relations Tribunal dated 14 September 2000 dismissing with costs an appeal from a decision of the Appeals Board of the National Employment Council for the Banking Undertaking "the Appeals Board"). The Appeals Board had held that failure **H** by the respondent to take care to protect the appellant's money against theft

2004 (2) ZLR p96

Malaba JA

by a co-custodian of the money did not constitute "gross negligence causing **A** serious loss to the bank".

The respondent, to whom I shall refer as "Mr Chipingu" was employed by the appellant ("Standard Chartered") a financial institution registered as such under the laws of Zimbabwe. He had worked as a teller at the West End branch of Standard Chartered in Harare and was acting in the position of "Teller-One" **B** at the time the events which led to disciplinary action being taken against him arose.

When acting in the position of "Teller-One" Mr Chipingu bore the onerous duty of controlling treasury cash jointly with an officer of the rank of Deputy Personnel Manager or above. It was his duty as a co-custodian of treasury cash to protect it from possible theft by anyone including the co-custodian. **C** The strong room in which the money was kept could only be opened by the use of two different sets of keys. Each custodian had to have physical custody of one set of keys.

In terms of the standing instructions brought to the attention of Mr Chipingu at the time, he assumed the duties of joint controller of treasury cash, he was **D** not to hand over his set of keys to the strong room to anyone, including the co-custodian, without first obtaining authority from the Branch Manager.

Breach of this rule was viewed seriously. It was a provision of the standing instructions that a plea of acting in obedience to superior orders would not be accepted as an excuse for breach of the duty. The reason for the strict **E** prohibition is obvious. If a custodian handed over his set of keys to his co-custodian, that would enable the latter to open the strong room and have access to treasury cash alone without supervision from anyone. The co-custodian would, in the circumstances, be placed in a position from which he could easily steal treasury cash and cause loss to the bank.

On the morning of 10 November 1995, Mr Chipingu was working at West End **F** branch serving customers. He had his set of keys to the strong room. One of the tellers ran out of cash and approached the co-custodian of treasury cash, a Mr Jambo. Mr Jambo happened to be the branch operations manager. He exercised joint control with Mr Chipingu over payments of money into and withdrawals from the treasury. He had physical possession of the second set **G** of keys to the strong room.

Mr Jambo asked Mr Chipingu to hand over to him the other set of keys to the strong room. Mr Chipingu was expected not to hand over his set of keys to the branch operations manager but to go with him to the strong room and use his own keys as Mr Jambo also used his to jointly open the strong room. **H**

2004 (2) ZLR p97

Malaba JA

A He had to witness the withdrawal of the amount of cash needed by the teller and countersign in the treasury cash book that the amount recorded therein was the correct amount of money withdrawn from treasury.

What actually happened that day was in total breach of the standing instructions. If Mr Chipingu was unable, for some reason, to accompany Mr Jambo to the strong room in compliance with his duties as a co-custodian **B** of treasury cash he had to first obtain authority from the Branch Manager to hand his keys over to him. He did nothing of the sort, but simply complied with the request by Mr Jambo. In handing over his set of keys to the co-custodian, Mr Chipingu enabled him to open the strong room and have access to treasury cash alone without anyone to oversee what he was doing.

C Mr Chipingu said he handed over his set of keys to Mr Jambo and did not accompany him to the strong room because he was busy serving customers. He also said he trusted his co-custodian who was a branch operations manager, presumably not to steal treasury cash.

Mr Jambo returned Mr Chipiningu's keys later that day. They never jointly opened the strong room again. Ten days later Mr Jambo surrendered all the ^D keys he held for the bank and disappeared. When the strong room was opened and the cash therein counted, it was found that an amount of \$50 000 was missing. Mr Jambo was suspected of having stolen the money on 10 November when he opened the strong room and had access to treasury cash on his own.

It was clear that Mr Chipiningu's breach of duty as a custodian of treasury ^E cash had contributed in bringing about the serious financial loss suffered by the bank. On 13 December 1995, he was brought before a disciplinary hearing officer to answer a charge of "gross negligence causing serious loss to the bank" in contravention of s 11 subs 15 of the Code of Conduct SI 201 of 1995. The sanction for Category D offences, in which the act of misconduct charged against Mr Chipiningu fell, was dismissal.

^F Mr Chipiningu admitted that he was negligent in handing over his keys to Mr Jambo without first obtaining authority from the Branch Manager to do so. He also admitted that his negligence caused the serious financial loss suffered by the bank. He, however, argued that his negligence did not constitute "gross negligence".

^G Different answers were given by the different tribunals that had to determine the question whether the admitted failure by Mr Chipiningu to discharge his duty to protect treasury cash constituted gross negligence. The particulars were that he handed over his set of keys to the strong room to his co-custodian ^H without having obtained authority to do so from the Branch Manager and as

2004 (2) ZLR p98

Malaba JA

a result enabled him to open the strong room and have access to treasury cash ^A on his own without any supervision.

The disciplinary hearing officer ruled that his negligence was "gross" and imposed the sanction of dismissal. Mr Chipiningu appealed to the Grievance and Disciplinary Committee. The members of the committee who heard the appeal were equally divided on the question. A second hearing of the appeal ^B by the Grievance and Disciplinary Committee was reconvened. The decision this time went against Standard Chartered. It appealed to the Labour Relations Tribunal but lost.

In the judgment the learned acting Chairman of the Tribunal made reference to the definition of "gross negligence" given by Murray J (as he then was) in *Rosenthal v Marks* 1944 TPD 172, cited in *Bickle v Minister of Law and* ^C *Order* 1980 ZLR 36 (H) and *Zeeta Manufacturers (Pvt) Ltd v Zimbabwe United Freight Co Ltd* 1990 (1) ZLR 337 (H).

In an apparent application of the principles extracted from the definition of gross negligence adopted in the cases referred to, the learned acting Chairman said: ^D

"On the facts of this case, can it be said that the appellant's conduct in handing over his keys to the operations manager without first obtaining permission from the branch manager or administrative manager amounted to a total disregard of his duty? I think not, otherwise what would have been the degree of negligence had he handed over the keys to a total stranger? ^E

It appears to me that what we have here is a question of misplaced trust. The operations manager was a person employed in a responsible position of trust. He had authority to enter the treasury albeit under given restrictions. Although the appellant's conduct amounted to negligence it certainly did not amount to gross negligence."

There is no doubt that the learned acting Chairman of the Tribunal misdirected ^F himself in the application of the principles derived from the definition of "gross negligence" and reached a wrong conclusion on the facts of the case. One must first have a clear understanding of what "gross negligence" entails.

It has been pointed out that "gross negligence" is a nebulous concept, the meaning of which depends on the context in which it is used and it is a futile ^G exercise to seek to provide a definition which would be applicable to all circumstances: see *Govt of Republic of SA (Dept of Ind) v Fibre Spinners and Weavers (Pty) Ltd* 1977 (2) SA 324 (D) *supra* at 335E; *Bickle v Minister of Law and Order (Supra)* at 41A. It has been described as "ordinary negligence of an aggravated form which falls short of willfulness" (*Bickle's case, supra*); "^H

2004 (2) ZLR p99

Malaba JA

a very great negligence or want of even scant care or a failure to exercise even that care which a careless person would use": see Prosser *Law of Torts* 4 ed at 183.

The definition of the concept which has for practical purposes, been quoted with approval in many cases is that suggested by Murray J in *Rosenthal v B Marks supra* at 180 where he said:

"Gross negligence (*culpa lata, crassa*) connotes recklessness, an entire failure to give consideration to the consequences of his actions, a total disregard of duty: see *per* Wessels J in *Adlington's case supra* at p 973, and *Cordey v Cardiff Ice Co* (88 LT 192)."

Prosser *supra*, makes the observation at pp 183-184 that:

" c There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less than conscious indifference to consequences; and that it is, in other words, merely an extreme departure from the ordinary standard of care."

The meaning of gross negligence may also be better understood from results ^d of the application of principles derived from the definitions adopted in some of these cases. In *CSAR v Adlington & Co* 1906 TS 964, Wessels J gave as an example of "gross negligence" the case of a person who, when he has taken charge of property, leaves it so exposed that thieves may carry it off. In *Rosenthal's case supra*, there was no gross negligence because the garage owner had not completely abandoned the duty to take care of the respondent's ^e car when he left it parked on the ground floor near to the entrance to the street from where it was stolen.

The reasons for the decision in the case of *Essa v Divaris* 1947 (1) SA 753 (A) show that had the appellant proved that the fire which damaged his motor vehicle, at the time it was parked in the respondent's garage, had been caused ^f by the latter's employee by striking a match at night in order to be able to replace a plug in the petrol tank of one of the cars from which he was extracting petrol, the respondent would have been found guilty of gross negligence rendering him liable for the damage which resulted from the burning of the motor vehicle. Just like the person who leaves, exposed to thieves, the property of which he was expected to take charge, the respondent, in *Essa's* ^g case *supra*, would have totally disregarded his duty to protect the respondent's motor vehicle at the time his employee struck a match and caused the fire which damaged the motor vehicle. The appellant in *Essa's case supra*, failed to prove ^h the cause of the fire.

2004 (2) ZLR p100

Malaba JA

Lastly, the respondent in *Zeeta Manufacturers (Pvt) Ltd v Zimbabwe United A Freight Co Ltd supra*, was found not guilty of "gross negligence" because when its employee left the tricycle used in the delivery of parcels to various customers, unattended and unlocked, leading to its being stolen together with the parcel belonging to the appellant which was in a container fixed to the front part of the tricycle, the employee had not completely abandoned his duty. He ^b was in the course of performing his duty of delivering parcels to the customers. When he parked the tricycle it was in order to carry out his duty to deliver a parcel to one of the customers. His was ordinary negligence, in that his failure related to not locking the tricycle or securing it to some fixed object or having somebody attend it whilst he delivered the parcel to the customer.

In this case, there was total disregard of the duty itself by Mr Chipingu. The ^c facts of his case fit the example given by Wessels J in *Adlington's case supra*. In leaving the property so exposed that thieves may carry it off, the person would have totally disregarded his duty to take care of the property. Mr Chipingu did not seek authority from the Branch Manager to do so before he handed over his set of keys to Mr Jambo. In handing over the set of keys to his co-custodian, he totally disregarded his duty to take care of ^d treasury cash against possible theft by the joint custodian. He did not accompany Mr Jambo to the strong room. As a result of being placed in possession of both sets of keys Mr Jambo was able to open the strong room and have access to treasury cash on his own without any supervision. He was put in a position from which he was able to steal the money which he did. I can ^e think of no better example of an "entire failure of duty" or "total disregard of duty".

The reasoning by the learned acting Chairman that Mr Chipingu would have been guilty of gross negligence if he handed the keys to a total stranger, suggests that at the time he handed over the keys to his co-custodian and let him open the strong room and have access to treasury cash, he was still acting ^f in accordance with some aspect of his duties as defined in the standing instructions. The fact is that Mr Chipingu stopped acting in accordance with his duties as a joint controller of

treasury cash the moment he handed over his keys to the strong room to Mr Jambo without having obtained the authority of the Branch Manager to do so. From then on, he did nothing to protect treasury cash from theft.

The explanation given by Mr Chipingu for his entire failure of duty did not help him at all. He was not to discharge his own duty through the branch operations manager. It must have been clear to him from the nature of the duties given to him, that the other custodian would always be an officer of a rank

2004 (2) ZLR p101

Malaba JA

A higher than or superior to that of Teller-One. They were equal partners when exercising the duties of joint custodians of treasury cash.

The issue was, in fact, not whether Mr Chipingu was right or wrong in trusting his co-custodian of treasury cash with both sets of keys to the strong room. Whether the handing over of his set of keys to Mr Jambo was motivated by the trust he placed in him or not did not detract from the fact that it constituted an entire failure of duty or a total disregard of duty by him. In my view, Standard Chartered proved "gross negligence" against Mr Chipingu and should have succeeded in its appeal to the Labour Relations Tribunal.

The appeal accordingly, succeeds with costs. The decision of the Labour Relations Tribunal is set aside and in its place substituted the following:

c "The appeal against the determination of the Appeals Board of the National Employment Council of the Banking Undertaking is allowed with costs."

Chidyausiku CJ & Ziyambi JA concurred.

Coghlan, Welsh & Guest, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners

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Document 13 of 47

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/LATIF v LATIF 2004 (2) ZLR 102 (S)

LATIF v LATIF 2004 (2) ZLR 102 (S)

2004 (2) ZLR p102

Citation	2004 (2) ZLR 102 (S)
Case No	Judgment No. S-49-04
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA and Gwaunza JA
Heard	8 March 2004
Judgment	9 September 2004
Counsel	<i>A Ebrahim</i> , for the appellant No appearance for the respondent
Case Type	Civil appeal

Flynote

Family law — husband and wife — divorce — jurisdiction — domicile — length of husband's residence in Zimbabwe — relevance of — what must c be shown to establish domicile — requirement for matrimonial domicile not same as that for immigration purposes

Headnote

In matrimonial cases, the onus of proving a domicile of choice is discharged once physical presence is proved and it is further proved that the *de cujus* had at the relevant time a fixed and deliberate intention to abandon his ^d previous domicile and to settle permanently in the country of choice (*dicta per* Potgieter AJA in *Eilon v Eilon* 1965 (1) SA 703 (A) at 721A followed).

The appellant had, in the High Court, sought a decree of divorce and ancillary relief against the respondent. Her declaration alleged that the respondent ^e had been born in Pakistan and had come to Zimbabwe in August 2001. Since then he had been residing in Zimbabwe which he now regarded as his permanent home. The declaration further alleged that he was domiciled in the country and lived and worked here. The respondent entered no appearance to defend the proceedings and stated, by letter, that he did not oppose the appellant's desire to terminate the marriage. He denied ^f none of the allegations in the declaration. The High Court ruled that it had no jurisdiction to entertain the suit as, notwithstanding his employment, there was nothing to show that the respondent had any financial stake in the country. Reference was made to s 3(3) of the Immigration Act [*Chapter 4:02*], which requires a person to have remained in the country for a continuous period of ten years before ^g domicile can be acquired.

Held, allowing the appeal and granting the divorce, that in the absence of any denial by the respondent of the facts alleged in the declaration supported by the affidavit of evidence deposed to by the appellant, the court had no basis upon which to refuse to accept as a fact that the respondent took ^h

2004 (2) ZLR p103

Malaba JA

^a the residence in Zimbabwe with the intention of making the country his permanent home.

Held, further, that there is no requirement for the purposes of matrimonial domicile that a plaintiff should show that the residence of a defendant was of certain duration as is the case with domicile for immigration ^b purposes.

Cases cited

Eilon v Eilon 1965 (1) SA 703 (A)

Fenner v Fenner 1943 SR 188

Legislation considered ^c

Immigration Act [*Chapter 4:02*], s 3

Case information

A Ebrahim, for the appellant

No appearance for the respondent

Judgment

^d **MALABA JA:** This is an appeal from a judgment of the High Court dated 16 October 2002 in terms of which it declined jurisdiction for a decree of divorce and ancillary relief against the respondent.

The appellant was born and bred in Zimbabwe. On 30 August 2001, she married the respondent in Harare. The respondent is a citizen of Pakistan. He entered ^ε this country in August 2001 and got employment. The marriage relationship did not yield the desired happiness to the parties resulting in the appellant instituting divorce proceedings on 25 June 2002, one year after the respondent acquired residence in the country. At the time she instituted divorce proceedings, the appellant expected respondent's child who has since been born.

^ε The declaration alleged in para 4 that:

"The defendant was born in Pakistan and came to Zimbabwe in August 2001, and has since been residing in Zimbabwe and he now regards Zimbabwe as his permanent home. The defendant is domiciled in Zimbabwe and presently lives and works in Zimbabwe."

^ε The averments on respondent's domicile were supported by an affidavit of evidence deposed to by the appellant. The respondent did not enter appearance to defend, indicating by letter written on his behalf by his legal practitioner, that he had no intention of opposing the appellant in her quest for the termination of the marriage relationship. The matter was placed before the ^η High Court as an unopposed application.

2004 (2) ZLR p104

Malaba JA

The learned judge before whom the application was placed during motion ^α proceedings, declined to grant the appellant the relief she sought on the ground that, she had not established respondent's matrimonial domicile to confer the court with jurisdiction. His reasoning was that the appellant had to show that, the respondent had resided in Zimbabwe for a period of one year or more and had the intention of remaining in the country permanently to show ^β that he had acquired domicile of choice. He made reference to s 3(3) of the Immigration Act requiring a person to have remained in Zimbabwe for a continuous period of ten years before he can acquire domicile in the country.

After referring to authorities on the requirements for matrimonial domicile the learned judge said:

"It is clear from the foregoing that *cujus* in every case had had his place of ^γ abode in this country for a period of time in excess of a year and had manifested the idea of some permanence by what each of them had done. In the present case the defendant arrived in August 2001 and on 30 August 2001 married the plaintiff and from that date there has been persistent antagonism between the parties. The defendant is being employed but there is nothing on the papers before me to show that he ^δ has some financial stake in this country."

In *Eilon v Eilon* 1965 (1) SA 703 (A) at p 721A Potgieter AJA said that:

"The onus of proving a domicile of choice is discharged once physical presence is proved and it is further proved that the *de cujus* had at the relevant time a fixed and deliberate intention to abandon his previous ^ε domicile, and to settle permanently in the country of choice."

In the absence of any denial by the respondent of the facts alleged in paragraph 4 of the declaration supported by the affidavit of evidence deposed to by the appellant, the learned judge had no basis upon which to refuse to accept as a fact proved that respondent took residence in Zimbabwe with the intention of making the country his permanent home. That he had taken actual ^ε residence in the country was clear from the papers. The fact of his intention to make Zimbabwe a permanent home was also established through the averments in the founding affidavit the contents of which were not denied by the respondent. If his residence in Zimbabwe was accompanied by a different state of mind from making the country his permanent home the respondent would have disclosed at the time he received the papers that at the material ^ε time he regarded Pakistan as his permanent home.

The appellant had discharged the *onus* on her by proving the facts required to establish matrimonial domicile for the purposes of conferring jurisdiction upon the court. There is no requirement for the purposes of matrimonial ^η

2004 (2) ZLR p105

Malaba JA

^α domicile that the plaintiff should show that the residence of the defendant was of a certain duration as is true with domicile for immigration purposes.

In *Fenner v Fenner* 1943 SR 188 Tredgold J (as he then was) at p 191 said:

"The fact that such residence may terminate abruptly at the will of another cannot alter its actuality. The requirements of the intention and the residence itself must not be confused. The person seeking to

establish a domicile is not to prove that the residence he has established is in fact permanent. To ask this would be to demand the impossible for who can say what the future may hold and what circumstances may intervene to terminate his residence. He has simply to show that he is resident and that that residence is coupled with the intention permanently to reside”.

Once the facts the existence of which showed acquisition by the defendant c of matrimonial domicile were established, the appellant was entitled to the determination of her claim by the court *a quo*.

The appeal succeeds. The decision of the court *a quo* is set aside and in its place is substituted the following:

“It is ordered that: d

1. A decree of divorce be and is hereby granted.
2. Sole custody and sole guardianship of the minor child Swalehah Latif (born 5 November 2002) be awarded to the plaintiff.
3. The defendant shall have all rights of reasonable access to the child at reasonable times. e
4. The plaintiff is entitled to sign the passport application forms in her capacity as sole guardian.
5. There will be no order as to costs.”

f Sandura JA and Gwaunza JA concurred

Ali Ebrahim, appellant’s legal practitioners

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Document 14 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/COMMERCIAL UNION FIRE MARINE AND GENERAL INSURANCE CO LTD & ORS v CHINGWARU & ANOR 2004 (2) ZLR 106 (S)

COMMERCIAL UNION FIRE MARINE AND GENERAL INSURANCE CO LTD & ORS v CHINGWARU & ANOR 2004 (2) ZLR 106 (S)

2004 (2) ZLR p106

Citation	2004 (2) ZLR 106 (S)
Case No	Judgment No S-50-04
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA, Gwaunza JA and Malaba JA
Heard	15 January 2004
Judgment	9 September 2004
Counsel	<i>R M Fitches</i> , for the appellants <i>D Drury</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Delict — negligence — defence of sudden emergency — limits to — need c for proximate connection between act taken to avoid danger and the damage caused by that act — where no such connection, actor cannot rely on sudden emergency

Headnote

The third appellant drove a vehicle which collided with another, killing both **D** people in it. The High Court found him guilty of negligent driving, rejected his plea of sudden emergency, and awarded damages against him, his employer and the latter's insurer. On appeal against liability only:

Held, that where a person is placed in danger by the wrongful act of another, that person is not negligent if, in the agony of the moment, he exercises such care as may be reasonably expected of him in the reasonable **E** apprehension of the danger in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances. However, this principle cannot be taken too far. Not every act taken in a situation of sudden emergency excuses the actor from the duty to take reasonable care and use reasonable skill to avoid foreseeable harm to others. In each **F** case in which the defence of sudden emergency is raised the question whether or not the act which caused the actionable damage is evidence of what a reasonable person would have done in the circumstances will depend on the particular facts. There must be a proximate connection in time and space between the act undertaken in the spur of the moment to avoid a dangerous situation created by some one else and damage **G** caused by that act. The question is how much allowance should be made in each case for the suddenness of the thing when determining whether there was a want of reasonable care and reasonable skill.

Held, further, that the third appellant coped with the critical situation which confronted him when a bus suddenly and unexpectedly stopped in front **H**

2004 (2) ZLR p107

A of his motor vehicle by swerving to the right. This was a thing any reasonable driver faced with the same situation would have done. However, when he subsequently collided with an oncoming vehicle, the sudden emergency which had occurred was no longer dictating the manner in which he drove his motor vehicle. The sudden emergency did not have a proximate connection with his failure to act reasonably to **B** avoid the subsequent collision. He had failed in his duty of care to the deceased and had correctly been found liable.

Cases cited

S v Mauwa 1990 (1) ZLR 235 (S)

c Stoomvaart Maatschappij Nederland v Peninsular and Oriental Steam Navigation Co (1880) 5 AC 876 (HL)

Case information

R M Fitches, for the appellants

D Drury, for the respondents

Judgment

D MALABA JA: On 27 July 1996, the third appellant was driving a DAF truck without a trailer belonging to his employer, the second appellant, in the course and within the scope of his employment along Mazowe – Harare Road towards Harare.

At the junction of Mazowe-Harare Road and Eskbank Farm Road the horse **E** driven by the third appellant collided with a Mazda B 2200 pick up driven in the opposite direction by the first respondent's husband with the second respondent's wife being a passenger. Both occupants of the Mazda B 2200 died from injuries sustained in the accident.

On 25 July 1998, the respondents instituted action in the High Court claiming **F** damages for loss of support and funeral expenses from the appellants jointly and severally, one paying the others to be absolved. The first appellant was sued because it was the approved insurer for the purposes of Part III of the Road Traffic Act [Chapter 13:11].

The respondents alleged that the accident was caused solely by the third appellant's negligence in that he overtook in front of oncoming traffic, failed **G** to keep a proper look out, failed to keep his

motor vehicle under proper control, failed to stop or act reasonably when an accident seemed imminent and drove at an excessive speed in the circumstances.

The third appellant denied the allegations of negligence pleading instead the defence of sudden emergency. He alleged that, at the time his motor vehicle

2004 (2) ZLR p108

Malaba JA

collided with the deceased's car, he had been presented with a sudden and an unexpected emergency by a bus which had abruptly stopped in front of his motor vehicle upon completing the overtaking manoeuvre.

The court *a quo* found that the collision was caused by the third appellant's negligent driving and awarded the respondents damages. This appeal is against the finding by the court *a quo* on the liability of the appellants. There was no appeal against the quantum of damages.

The contention advanced on behalf of the appellants is that the learned judge erred in rejecting the evidence of the third appellant that he was faced with a sudden emergency, and holding instead that he negligently caused the death of the deceased.

It is common cause that Mazowe-Harare Road is a tarred road with two lanes for traffic going in the opposite directions. Before one gets to the junction between Mazowe-Harare Road and Eskbank Farm Road which joins it from the left when facing Harare, the road has an open bend to the left before it enters a straight stretch. The centre of the road where it has the bend and forms the straight stretch is marked by double unbroken white lines. There are signs on either side of the road prohibiting any stopping by motor vehicles in the area.

The third appellant gave evidence to the effect that before he entered the bend he saw a bus driving behind his motor vehicle. The bus driver indicated his intention to overtake his motor vehicle. For 50 metres, the bus tried to overtake his truck. He lifted his foot from the accelerator but did not reduce speed to allow the bus to overtake. The bus eventually overtook his motor vehicle at the end of the bend. A Toyota Hilux quickly moved into the space between the bus and his truck. He said he had not realised that the Toyota Hilux had also been overtaking his motor vehicle because of smoke spewed out by the bus.

When the bus was about 10 metres in front of his motor vehicle, the third appellant said, it suddenly and without warning stopped on the left hand side of the road. The Toyota Hilux quickly swerved to the right successfully avoiding colliding with the back of the bus before driving on. He said he applied brakes to avoid ramming into the back of the bus. His motor vehicle swerved to the left. He turned it to the right thereby avoiding a collision with the back of the bus. He said his truck stopped in the centre of the road. The Mazda B2200 came and collided with his motor vehicle whilst it was stationary. The Mazda B2200 was on impact pushed backwards across the Mazowe bound lane. He said he did not see the Mazda B2200 before it collided with his truck. He was driving at 60 km/h.

2004 (2) ZLR p109

Malaba JA

The court *a quo* found that the third appellant was not being truthful as to what he did and where he stopped after swerving his motor vehicle to the right to avoid ramming into the back of the bus. The evidence of tyre marks and debris revealed that his motor vehicle travelled for 60 metres on its correct side of the road after it had successfully avoided ramming into the back of the bus. At the time, it collided with the Mazda B2200 the evidence showed that the third appellant's motor vehicle had encroached onto the incorrect side of the road by 0.7 metres. The point of impact was found to have been on the Mazowe bound lane. Evidence also revealed that the Mazda B2200 had been pushed backward on impact over 10 metres. The third appellant had said he did not swerve to the left side of the road because there was a ditch or storm water drain. The court *a quo* found that an inspection *in loco* had revealed that there was no ditch or storm water drain on that side of the road.

The court *a quo* found as a fact that the third appellant failed to control his motor vehicle over a distance of 60 metres before colliding with the Mazda B 2200 because he was driving at an excessive speed in the circumstances. His speed was estimated as having been 100 km/h in an 80 km/h maximum speed limit zone. For the same reason (driving at an excessive speed) the court *a*

quo found that he had failed to keep the vehicle under proper control or act reasonably when the accident seemed imminent. It also found that he did not see the oncoming motor vehicle before the collision because he was not keeping a proper look out.

The court *a quo* rejected the third appellant's evidence of sudden emergency finding instead that there was no such occurrence. The learned judge said:

"He became aware that the bus and the Toyota Hilux were overtaking his vehicle at a dangerous stretch of the road. According to his evidence in re-examination the bus and Toyota Hilux were overtaking for a distance of some 50 metres. A careful driver would have applied his brakes in order *f* to allow the bus and the Toyota Hilux to overtake safely. The third defendant did not do so. When the bus brake lights came on showing that the bus was going to stop it should have been at that point in time that the third defendant should have applied his brakes. Allowing for his reaction time, the third defendant must have become aware that the bus was going to stop at least some 10 or 50 metres before he applied his brakes. Even if some allowance were to be given by accepting that he *g* reacted quickly to what he saw, he should have begun to react some five metres before he applied his brakes. The third defendant was unable to stop his motor vehicle for 60 metres as indicated by the tyre marks on the road. Thus at the very least he had 65-70 metres within which to stop his *h* vehicle and an even longer distance to apply his brakes from the time that

2004 (2) ZLR p110

Malaba JA

the other motor vehicles were overtaking his own. His failure to do so is a telling ... He was driving a horse without a trailer which in all probability should stop much quicker than when it is pulling an 18 ton loaded trailer.

... I am satisfied that the third defendant was negligent in that he failed to take reasonable action in the circumstances. It is on this reasoning also that I am satisfied that the situation which he faced did not qualify as a *b* sudden emergency. He should have reduced his speed when the other vehicles were overtaking his own. All he did was to remove his foot from the accelerator. That was not sufficient action in the circumstances. I am satisfied too that he was negligent in that he failed to stop when he had at least 60 metres within which to do so. I am satisfied that he was travelling at a speed which was excessive in the circumstances. He thus failed to act reasonably when an accident seemed imminent. He also failed to keep his *c* horse under proper control hence the swerving and his deliberate steering of the horse to the right. On impact, his vehicle pushed the deceased's vehicle some 10 metres off the road before it came to a stop. The extensive damage sustained by the deceased's vehicle suggests that the third defendant's horse did not only stop at the continuous white lines but also that it was still in some considerable motion at the moment of the collision. *d* I am satisfied that the third defendant was negligent and he must be found liable for the collision."

It seems to me that the learned judge was on the facts wrong in holding that the third appellant was not faced with a sudden emergency. An emergency is a dangerous act which happens suddenly which a reasonable driver cannot anticipate and guard against. He accepted the evidence of the third appellant *e* that the bus abruptly stopped in front of his motor vehicle thereby creating a sudden and unexpected dangerous situation to which he had to react and deal with in the best manner possible. There was no suggestion that the third appellant caused the dangerous situation by his failure to reduce speed when the bus was overtaking his motor vehicle. *f*

On the evidence, the third appellant could not have expected the bus to stop suddenly in front of his motor vehicle in the manner it did upon completion of the overtaking manoeuvre because the indication had been that the bus driver intended getting back onto the correct side of the road and drive on. The "no stopping" signs on either side of the road entitled the third appellant to anticipate that the bus would continue moving on. In my view, the facts *g* show that the third appellant was faced with a sudden emergency when the bus abruptly stopped in front of his truck.

The question is what allowance should be given to the sudden emergency in determining whether the duty the third appellant owed to the deceased to take care and use reasonable skill in driving his motor vehicle and avoid colliding *h*

2004 (2) ZLR p111

Malaba JA

a with their motor vehicle was discharged. The failure by the third appellant in his duty of care towards the deceased excused by the sudden and expected occurrence of the emergency must be such that although he may not have done what was the right thing to do he was not culpable for the tragic consequences.

In *S v Mauwa* 1990 (1) ZLR 235 (S), Korsah JA at 241A-B said:

" In *Brandon v Osborne, Garrett & Co* [1924] 1KB 548 at 552, Swift J expressed the view that if a person does something which a reasonable person in the circumstances ought not to have done that person would not be entitled to damages, but if what that person did was done instinctively and was in the circumstances a natural and proper thing to do, then she would be entitled to recover. I infer from this *dictum* that c where a person or third party is placed in danger by the wrongful act of another, that person is not negligent if, in the agony of the moment, he exercises such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances."

o But the doctrine of sudden emergency cannot be taken too far. Not every act taken in a situation of sudden emergency excuses the actor from the duty to take reasonable care and use reasonable skill to avoid foreseeable harm to others. In each case in which the defence of sudden emergency is raised, the question whether or not the act which caused the actionable damage is evidence of what a reasonable person would have done in the circumstances e will depend on the particular facts.

There must be a proximate connection in time and space between the act undertaken on the spur of the moment to avoid a dangerous situation created by some one else and damage caused by that act.

In *Stoomvaart Maatschappij Nederland v Peninsular & Oriental Steam Navigation Co* (1880) 5 AC 876 (HL) at 891, Lord Blackburn said:

"... a man may not do the right thing, nay may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill; and I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too g much. If, to take the example Lord Justice James gives, the driver of a van cracking his whip makes the horses of a carriage suddenly unmanageable, the fact that the driver of the carriage pulled the wrong rein would be much less cogent evidence of want of reasonable skill or of reasonable care on his part, than if he did the same thing when driving h along in the ordinary way, but it would still be evidence."

2004 (2) ZLR p112

Malaba JA

As pointed out by Lord Blackburn in the *Stoomvaart* case *supra*, the a question is, how much allowance should be made in each case for the suddenness of the thing when determining whether there was a want of reasonable care and reasonable skill. In this case the facts show that the third appellant coped with the critical situation which confronted him when the bus suddenly and unexpectedly stopped in front of his motor vehicle. He swerved to the right which in my view, was a thing any reasonable driver faced with b the same situation would have done.

The act of colliding with the oncoming vehicle did not, however, occur when he was still in the process of avoiding the dangerous situation. In *Mauwa's* case *supra*, the defendant hit the scooter in the course of performing the act of avoiding ramming into the back of the army truck that had stopped suddenly c and unexpectedly in front of his bus. After successfully avoiding the collision with the bus and having overtaken it, the third appellant's motor vehicle moved over a distance of 60 metres on its correct side of the road before encroaching on its incorrect side and colliding with the oncoming truck. At that time, the sudden emergency which had occurred was no longer dictating the manner in which the third appellant drove his motor vehicle. d

He was under a duty to take reasonable care and use reasonable skill in driving his motor vehicle to prevent a collision with other motor vehicles. There was no good reason why he failed to see the on-coming truck. He was not keeping a proper look out. He failed to keep his motor vehicle under proper control because he was driving at an excessive speed in the circumstances. These failures were in my view, evidence of want of reasonable care and skill on his e part. The sudden emergency did not in the circumstances have a proximate connection with his failure to act reasonably to avoid the collision.

I therefore, reach the same conclusion as the court a quo that, the third appellant negligently caused the collision in which the deceased received the injuries from which they died. I make that finding notwithstanding a finding that he was faced with a critical situation when the bus had earlier on suddenly f stopped in front of his motor vehicle.

The appeal is accordingly dismissed with costs.

Sandura JA & Ziyambi JA concurred.

Wintertons, appellant's legal practitioners ^G

Gollop & Blank, respondents' legal practitioners ^H

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Document 15 of 47

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/DELTA OPERATIONS LTD v MPEPULA 2004 (2) ZLR 113 (S)

DELTA OPERATIONS LTD v MPEPULA 2004 (2) ZLR 113 (S)

2004 (2) ZLR p113

Citation	2004 (2) ZLR 113 (S)
Case No	Judgment No. S-60-04
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Malaba JA
Heard	13 May 2004
Judgment	9 September 2004
Counsel	<i>R Y Phillips</i> , for the appellant Respondent in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administrative law — *functus officio* — when official becomes *functus officio* — employer deciding to warn employee found guilty of misconduct, c then deciding to dismiss him — whether dismissal valid

Headnote

An official who, with full knowledge of the facts, has made a decision that is favourable to another person cannot, without that other person's consent, reverse that decision so as to affect or abolish rights which the decision has already created.

- The respondent, who was employed by the appellant company, appeared before a disciplinary committee charged with poor work performance. The committee found him guilty of the charge and recommended his dismissal. The company's managing director, however, believed the respondent had potential for improvement and imposed a penalty of a final written warning instead of dismissal. The managing director sent the ^εwritten warning to the respondent and asked him to sign it, but the respondent took so long to comply that the managing director revoked his decision and substituted it with dismissal. The respondent appealed to the Labour Relations Tribunal (now the Labour Court), which decided, for reasons that are not relevant to this report, that the respondent's dismissal was unlawful. The company appealed to the Supreme Court.

¶ Held that the managing director, having made the decision on the facts before him, became *functus officio*. There was no question of a mistake: he knew what he was deciding upon and therefore could not alter the penalty from a final written warning to a dismissal.

Case cited ^G

Forestry Commission v Kujinga HH-36-92

Case information

R Y Phillips, for the appellant

¶ Respondent in person

2004 (2) ZLR p114

Malaba JA

Judgment

MALABA JA: This is an appeal from a judgment of the Labour Relations ^A Tribunal (now the Labour Court) ("the Tribunal") dated 5 September 2002, in terms of which a decision to dismiss the respondent from employment with the appellant was set aside and an order made in its place to the effect that he be reinstated to his original position without loss of salary or benefits, failing which he be paid damages, the *quantum* of which would be agreed upon by ^B the parties or assessed by the Tribunal on being approached by any of the parties in the event of an agreement not being reached.

The respondent was employed by Megapak (Pvt) Ltd ("the company"), which is part of the Delta group of companies, at its plastic moulding factory at Ruwa as a shift supervisor and fitter and turner. His duties involved overseeing the proper functioning of moulding machines. It was also his duty to ensure that ^C machine operators recorded production figures in respect of each machine they were using in the production books provided for the purpose. He had to examine the production books to satisfy himself that the figures had been recorded. As a shift supervisor he had to ensure that quality products were produced. Where a machine produced rejects he had to recycle the product and mix it with high density polythene to obtain the correct product. Production ^D of rejects was regarded as a loss to the company because they were not being bought in the market.

On 9 March 1999 the respondent appeared before a disciplinary hearing committee of the company charged with poor work performance. The allegations were that on 1 February 1999, whilst acting as the shift supervisor, the ^E respondent had failed to examine the production book for machine no. 3 and as a result did not know that the machine operator had not recorded the production figures for that machine on the day in question. It was also alleged that on 23 February 1999 the respondent, as a shift supervisor, had let a machine produce rejects throughout the shift.

The appellant proceeded in terms of a Code of Conduct registered in respect ^F of Delta Operations (Pvt) Ltd. The Code of Conduct was registered in 1991, whilst Megapak (Pvt) Ltd was incorporated in 1993. When the Code of Conduct was registered the undertaking was known as Mega Industries, to which the Code of Conduct did not apply.

The disciplinary committee found the respondent guilty of the charge of poor ^G work performance and recommended to the managing director that his contract of employment be terminated. The respondent was then serving a final written warning. ^H

2004 (2) ZLR p115

Malaba JA

^A When the matter came before him, the managing director of the company took the view that the respondent had the potential of improving his work performance as long as he changed his negative attitude towards authority. Although he found that the respondent had correctly been found guilty of poor work performance, the managing director imposed the penalty of another final written warning on the respondent instead of dismissal. He sent the ^B respondent the final written warning and asked him to sign it. The respondent took a long time to sign the final written warning until the managing director believed that the respondent was mistaking the leniency extended to him for weakness on the part of management.

On 4 June 1999 the managing director revoked his decision to give the respondent a final written warning and substituted it with dismissal. The letter of termination of the respondent's contract of employment read, in relevant part:

"You have obviously interpreted the leniency exercised as a sign of weakness on management's part and as an indicator of indispensability on your part. I therefore find myself with no option but to rescind my earlier decision to allow you an opportunity to reform and to uphold the committee's recommendation to have you summarily dismissed. Your failure to acknowledge my letter dated 29 April 1999 is sufficient testimony to the effect that you do not agree with the decision spelt out therein, i.e. overturning the committee's recommendation. This letter therefore serves to formally advise you of the summary termination of your contract of employment with effect from 3 June 1999. The salaries officer will be advised to work out your terminal benefits."

The respondent appealed to the Tribunal against his dismissal. The grounds of appeal were that the appellant could not proceed in terms of a Code of Conduct registered for Delta Corporation (Pvt) Ltd. He contended that, being a legal entity, the company ought to have had its own registered Code of Conduct, which it would have been bound to follow if it intended to dismiss him from employment for poor work performance. As it could not terminate his employment for misconduct in terms of an unregistered Code of Conduct, the company was bound to follow the procedure laid down under the provisions of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985). He argued that as the company had not complied with SI 371 of 1985, which required an employer to obtain the prior written approval of the Minister of Labour before summarily dismissing or otherwise terminating a contract of employment with an employee, the decision to dismiss him from employment was null and void.

2004 (2) ZLR p116

Malaba JA

The Tribunal found as a fact that the company did not have a registered Code of Conduct. It found that as it had not complied with the provisions of SI 371 of 1985, the dismissal of the respondent was unlawful. It correctly rejected the argument that on the authority of the decision in *Forestry Commission v Kujinga* HH-36-92 acceptance of terminal benefits by the respondent constituted acceptance of termination of employment in terms of s 2 of SI 371 of 1985. There was no mutual termination of the contract of employment by *agreement in writing* (the emphasis is mine).

It appears to me that the Tribunal's approach overlooks the question whether the decision of the managing director to dismiss the respondent from employment would in the circumstances have been valid if the company had a registered Code of Conduct. The question for determination by the Tribunal was whether or not the managing director was entitled to rescind the decision to impose the penalty of a final written warning and substitute it with dismissal. Had the Tribunal addressed its mind to the proper question for determination, it would have realised that it was immaterial whether the company had a registered Code of Conduct because it would have been clear that the managing director, having made the decision on the facts before him, became *functus officio*. There was no question of a mistaken decision. The managing director knew what he was deciding upon and as such could not alter the penalty from a final written warning to dismissal. He had decided that the misconduct committed by the respondent did not go to the root of the contractual relationship between the employer and the employee and imposed a final written warning as the appropriate punishment.

An official cannot make a decision which affects or abolishes rights which his previous act has already created. Such a favourable decision may only be revoked with the consent of the beneficiary. Intolerable uncertainty would result if previous decisions favourable to employees were to be reversed at any moment by the same official who would have made them with full knowledge of the facts on which the decision had to be based.

It must follow that, as the managing director was not entitled to reverse the earlier decision to impose the penalty of a final written warning, the question whether or not the company ought to have complied with the provisions of SI 371 of 1985 did not arise for determination because such an obligation attached to an employer who intended to terminate the contract of employment with the employee. In this case a final written warning did not have the effect of terminating the respondent's contract of employment.

There cannot be any question of the respondent not having been properly found to have committed the misconduct of unsatisfactory work performance.

Malaba JA

A He failed to check the production book for machine no. 3 and discover that the operator had not recorded production figures. The admitted failure to discharge his duties constituted unsatisfactory work performance. It was also no defence at all to say he let a machine produce reject plastic moulds for the whole period of his shift because he did not have access to high density polythene.

B Although for different reasons, this court has come to the same conclusion as the Tribunal, that the dismissal of the respondent was unlawful. The decision of the Tribunal did not, however, take into account the fact that the respondent was properly found guilty of the acts of misconduct charged against him and that the penalty of a final written warning was properly c imposed on him.

The appeal is dismissed with costs. The order of the Tribunal is altered to reads as follows:

"Accordingly, the appeal is allowed. The decision to dismiss the appellant from employment is set aside with costs. The original decision of the managing director finding the appellant guilty of poor work performance d and imposing on him the penalty of a final written warning is to stand. The respondent is ordered to reinstate the appellant in his original position from the date of dismissal without loss of salary and benefits. If reinstatement is no longer possible, the respondent is ordered to pay the appellant damages, the *quantum* of which is to be agreed by the parties, failing which either party may approach the Tribunal for quantification."

E Sandura JA and Cheda JA concurred.

F *Gill, Godlonton & Gerrans*, appellant's legal practitioners

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Document 16 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/EX PARTE NDLOVU 2004 (2) ZLR 118 (H)

EX PARTE NDLOVU 2004 (2) ZLR 118 (H)

2004 (2) ZLR p118

Citation	2004 (2) ZLR 118 (H)
Case No	Judgment No. HB-116-04
Court	High Court, Bulawayo
Judge	Ndou J
Heard	9 September 2004
Judgment	9 September 2004
Counsel	Details not supplied
Case Type	Civil review
Annotations	No case annotations to date

Flynote

Family law — child — guardianship — application for change of c guardianship — need for application to be advertised — advertisement may not be dispensed with

Headnote

The applicant applied for sole guardianship of his younger sibling following the death of their parents. The provincial magistrate, operating as a juvenile court, dispensed with the requirement to advertise the proposed d appointment because of the poverty of the applicant. On automatic review:

Held, that the advertisement was mandatory under s 9(3) of the Guardianship of Minors Act [Chapter 5:08] and non-compliance with the requirement defeated or frustrated the object of the legislation. The publication is a e mechanism to prevent appointment of a guardian to the detriment of the minor. Appointment of guardianship is a major change in the status of a minor and the intention of the legislature is to make sure that it is done in the best interest of the minor. The juvenile court is a creature of statute with no inherent jurisdiction and has no power to dispense with the provisions of s 9(3). The application should have been advertised, in f spite of the applicant's poverty. The authorities are urged to look into the problem of scarce resources being used on advertising instead of looking after the needy children as a matter of urgency.

Cases cited

Lion Match Co Ltd v Wessels 1946 OPD 376 g

Ex p Ndlovu 1981 ZLR 216 (G)

Sterling Products Intl Ltd v Zulu 1988 (2) ZLR 293 (S)

Swift Transport Svcs (Pvt) Ltd v Pittman & Ors NNO 1975 (2) RLR 226 (G); 1976 (1) SA 827 (R) h

2004 (2) ZLR p119

Ndou J

Legislation considered a

Guardianship of Minors Act [Chapter 5:08], s 9(3)

Judgment

NDOU J: This matter was referred to me for automatic review in terms of s (9)(6) of the Guardianship of Minors Act [Chapter 5:08]. Briefly, the applicant applied to be appointed guardian of his sibling Zibusiso with full b powers of guardianship over the said minor. The application was necessitated by the death of their parents. The application was made in terms of s 9 of the Act. In the application the applicant stated, *inter alia*,

"The problem is that we have got no money for advertising. We cannot afford to raise the money for the expenses as in our account there is little c money. So we need your assistance."

Without making reference to this request it seems the provincial magistrate agreed because he dispensed with the requirement of publication as provided for in s 9(3). The question is whether he was correct in doing so in the face of the applicant's plea of poverty. The subsection states:

"(3) Upon receipt of an application in terms of subsection (2) the clerk of d the juvenile court *shall*, notwithstanding subsection (5) of section 5 of the Children's Act [Chapter 5:06], publish in the *Gazette* and in a newspaper circulating in the area where the minor resides a notice which —

- (a) calls upon any person who has an interest in the matter to appear before the court on a date to be specified in the notice, which shall e be not less than seven days and not more than thirty days after publication of the notice; and
- (b) specifies the name of the person, if any, proposed for appointment as the guardian." (emphasis added)

It is now trite that the categorisation of enactment as peremptory or directory f with 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. The criterion is not the quality of the command but the intention of the legislature, which can only be derived from the words of the enactment, its general plan and objects: *Sterling Products International Ltd v*

Zulu 1988 (2) ZLR 293 (S) at 301B; *Lion Match Co Ltd v G Wessels* 1946 OPD 376 at 380; *Swift Transport Services (Pvt) Ltd v Pittman & Ors* NNO 1975 (2) RLR 226 (G) at 228C-229C; 1976 (1) SA 827 (R) at 828 and Ex parte *Ndlovu* 1981 ZLR 216 (G) at 217F-G. The object of subs (3) *supra*, is fundamental to the policy of the Act and non-compliance with it defeats or ^Hfrustrates the object. The publication is a mechanism to prevent appointment

2004 (2) ZLR p120

Ndou J

of a guardian to the detriment of the minor. Appointment of guardianship is ^Aa major change in the status of a minor and the intention of the legislature is to make sure that it is done in the best interest of the minor. Usually proceedings involving minors are done *in camera* but this is one exception where the name of the minor and the applying "guardian" are publicised. The juvenile court derives its powers from the Act. It is a creature of statute with ^Bno inherent jurisdiction. It has no power to dispense with the provisions of s 9(3), *supra*. The application should have been advertised. I also sympathise with the poor people who have to bear enormous advertising costs for such applications. A lot of scarce resources are being expended on advertising instead of going to the needy children who have lost their guardians. In most cases such advertising costs extinguish the entire estate. The relevant ^Cauthorities are urged to look into this issue as a matter of urgency.

In light of the above I set aside the order of the juvenile court and remit the matter to the juvenile court, Gwanda, to comply with the provisions of s 9(3) of the Act. ^D

Chiweshe J concurred. ^E

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Document 17 of 47

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/EVANS v SNAPPER 2004 (2) ZLR 121 (S)

EVANS v SNAPPER 2004 (2) ZLR 121 (S)

2004 (2) ZLR p121

Citation	2004 (2) ZLR 121 (S)
Case No	Judgment No. S-55-04
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Ziyambi JA
Heard	19 July 2004
Judgment	10 September 2004
Counsel	<i>D S Mehta</i> , for the appellant <i>E T Matinenga</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

c **Contract** — *illegality — par delictum rule— relaxation of — may be relaxed where defendant would be unjustly enriched at expense of plaintiff — where defendant not enriched, no basis for relaxation of rule*

Headnote

The appellant on a number of occasions gave a sum of Zimbabwean money to the respondent, with which she was to acquire foreign currency from *D* persons she knew in an embassy. She gave the money to her contacts and on the first three or four occasions received the requested amount of foreign currency. However, on the next two occasions no foreign currency was given to the respondent in return. The appellant and the respondent looked in vain for the men to whom the respondent had handed the money. The appellant sued her for the sum of money he had *E* handed to her.

Held, that the contract was illegal, being in breach of the exchange control laws. However, the rule that *in pari delicto melior est condition possidentis* may be relaxed to prevent injustice between man and man and where, if relief were refused to the plaintiff, the defendant would be unjustly enriched at his expense. In this case, however, the respondent *F* was not enriched; the money had been lost to fraudsters. Consequently, the claim must fail.

Cases cited

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

G Logan v Sibiya HH-88-02

S v Robinson & Ors 1968 (1) SA 666 (A)

Case information

D S Mehta, for the appellant

H E T Matinenga, for the respondent

2004 (2) ZLR p122

Sandura JA

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which *A* dismissed with costs the appellant's claim for payment of the sum of \$9 550 000, together with interest and costs of suit.

The background facts are as follows.

At the relevant time the appellant ("Evans") and the respondent ("Snapper") had known each other for more than five years. In May 2001 Evans became *B* aware that Snapper could purchase United States dollars through her contacts at the Embassy of the United States of America in Harare ("the Embassy"). As he was in need of the foreign currency he asked her to purchase it for him. She agreed to do so and was to receive a commission.

Thereafter, on three or four occasions Snapper purchased a total of US\$86 000 *C* and handed it to Evans. The exchange rate applied was US\$1.00 to Z\$100.

On each occasion the procedure adopted was that Evans took a certain sum in local currency and handed it to Snapper at her residence. Thereafter, Snapper took the money to the Embassy where she handed it to two men, whom she knew as Robin and Brian but whose surnames she did not know. When the foreign currency was ready for collection, Snapper was contacted *D* by Robin or Brian and was so informed. Snapper then went to the Embassy, collected the foreign currency, took it to her residence and informed Evans, who later collected it from the residence.

The first three or four transactions did not cause any problems and a total of US\$86 000 was handed to Evans by Snapper. However, two subsequent *E* transactions, which were not successful, led to the present dispute between the parties.

The first of these involved the sum of Z\$5 600 000, which Evans handed to Snapper in June 2001; and the second involved the sum of Z\$3 950 000, handed by Evans to Snapper in July 2001. In the circumstances, the total sum in dispute is Z\$9 550 000. It was common cause that, after handing that sum to Snapper, *F* Evans did not receive any foreign currency from her as anticipated.

According to Snapper, after handing the money to Robin and Brian, with whom she had conducted foreign currency transactions for about two years, she did not hear from them. She got worried and started looking for them but could not find them. She went to the Embassy and was informed that the Embassy did not have anyone called Robin or Brian. She went to Marine House in the suburb of Newlands in Harare, where she believed Robin and Brian lived, but was informed that no-one called Robin or Brian lived there.

Snapper then informed Evans about her predicament, and both of them visited H

2004 (2) ZLR p123

Sandura JA

A the Embassy, Marine House and a house in Borrowdale looking for Robin and Brian but could not find them.

Subsequently, Evans instituted a civil action in the High Court against Snapper, claiming from her payment of the total sum of Z\$9 550 000, together with interest and costs of suit.

B In her plea Snapper averred that as she was not an authorised foreign currency dealer in terms of the Exchange Control Act and Regulations, a fact which Evans knew, the transactions between her and Evans were not authorised by the Exchange Control Authority and were, therefore, illegal. In addition, she averred that she had lost the money to fraudsters when she attempted to secure foreign currency on behalf of Evans, and that she had not been C negligent.

At the civil trial which ensued, both parties gave evidence and were cross-examined. At the end of that trial, the learned judge in the court *a quo* accepted Snapper's version of what had happened, and dismissed Evans' claim with costs. Aggrieved by that decision, Evans appealed to this court.

D The issue which arises in this appeal is whether the learned judge in the court *a quo* ought to have relaxed the maxim *in pari delicto potior est conditio possidentis* and ordered the restitution of the sum of Z\$9 550 000 to Evans.

In *Dube v Khumalo* 1986 (2) ZLR 103 (S), Gubbay JA (as he then was) considered the above maxim and said the following at 109D-G:

"There are two rules which are of general application: The first is that an E 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; 1949 SR 197. 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 F 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 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 G 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 properly take into account the doing of simple justice between H man and man'."

2004 (2) ZLR p124

Sandura JA

And at 110B-C the learned Judge of Appeal said: A

"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 (see at 191)."

I entirely agree with the learned Judge of Appeal. However, the first maxim B referred to by him, i.e. *ex turpi causa non oritur actio*, is not in issue in the present appeal because Evans did not seek the enforcement of the illegal agreement. Instead, he sought the restitution of money which he had handed to Snapper pursuant to the illegal agreement. It is, therefore, only the second maxim, i.e. *in pari delicto potior est conditio possidentis*, which is in issue, the issue being whether the rule should have been relaxed in favour of Evans. C

In determining that issue, the learned judge in the court *a quo* was alive to the fact that it was important to make sure that Snapper was not unjustly enriched at the expense of Evans.

After referring to *Logan v Siviya* HH-88-2002 (not reported), in which Hungwe J relaxed the *par delictum* rule, the learned trial judge said: ^d

"In this case, if I were satisfied that the defendant in this case had defrauded the plaintiff and had been enriched by 5.6 million (dollars) and 3.95 million (dollars) that the plaintiff gave her, I would have made the same decision that Mr Justice Hungwe did. I would have relaxed the *par delictum* rule and ordered the defendant to pay the plaintiff.

However, having given careful consideration to all the evidence before ^e this court, I am satisfied that on a balance of probabilities the defendant has established that she was not enriched by the money which she received from the plaintiff. I am satisfied that she gave the money to Robin and/or Brian who were employed at the United States Embassy. One or both of them made off with that money."

After a careful scrutiny of the whole of the evidence in this matter, I am satisfied ^f that the learned trial judge correctly determined the matter. In my view, the finding that Snapper was not unjustly enriched at the expense of Evans cannot be faulted.

In any event, that was a finding of fact based on Snapper's credibility as a witness. The learned trial judge, who had an opportunity of seeing, hearing ^g and appraising Snapper, believed her. Being an appellate court, this court cannot lightly interfere with such a finding.

As Holmes JA said in *S v Robinson & Ors* 1968 (1) SA 666 (A) at 675 G-H:

"A court of appeal, not having had the advantage of seeing and hearing the witnesses, is of necessity largely influenced by the trial court's ^h

2004 (2) ZLR p125

Sandura JA

a impressions of them. Having regard to the re-hearing aspects of an appeal, this court can interfere with a trial judge's appraisal of oral testimony, but only in exceptional cases, as aptly summarised in a Privy Council decision quoted in *Parkes v Parkes* 1921 AD 69 at p 77:

'Of course it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or ^b probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a court of appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony.'"

^c Applying that test, I am satisfied that there is no basis on which the finding by the learned trial judge can be interfered with by this court.

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

^d Cheda JA and Ziyambi JA concurred.

Costa & Madzonga, appellant's legal practitioners

^e *Musunga & Associates*, respondent's legal practitioners

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Document 18 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/BARCLAYS BANK ZIMBABWE LTD v MAHACHI 2004 (2) ZLR 126 (S)

BARCLAYS BANK ZIMBABWE LTD v MAHACHI 2004 (2) ZLR 126 (S)

2004 (2) ZLR p126

Citation 2004 (2) ZLR 126 (S)

Case No Judgment No. S-62-04

Court Supreme Court, Harare

Judge	Sandura JA, Ziyambi JA & Gwaunza JA
Heard	22 June 2004
Judgment	10 September 2004
Counsel	<i>G V Mamvura</i> , for the appellant <i>H Zhou</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *code of conduct* — *appeal against determination made under code* — *effect of* — *determination not suspended c*

Headnote

The respondent, a managerial employee of the appellant bank, had committed dishonest acts inconsistent with the articles of his employment when he allocated foreign currency to a company of which he was the sole shareholder. A hearing board convicted him on two counts and imposed ^d a penalty of dismissal. An appeal board upheld the conviction on one count but reduced the penalty to a written warning, and set aside the conviction on the other count. The bank appealed to the Labour Relations Tribunal. The respondent did not cross-appeal against the upholding of his conviction on one count. The Tribunal ordered that the bank pay the respondent his salary and benefits pending the hearing of ^e the appeal. The bank appealed to the Supreme Court against that order. The appeal was allowed.

Held, that the Tribunal had misdirected itself in holding that the respondent's prospects of success were bright for a number of reasons, and so the court would exercise its own discretion.

Held, further, that while s 97(3) of the Labour Act [*Chapter 28:01*] provides ^f that an appeal against a determination made under an employment code of conduct shall not have the effect of suspending the determination or decision appealed against, the code itself provided that a decision of the Appeals Board would be binding unless appealed against within fourteen working days to the Labour Relations Tribunal. he bank had appealed ^g within that time, so the Appeals Board's ruling did not become operative. The respondent was thus not entitled to his salary. ^h

2004 (2) ZLR p127

Sandura JA

Cases cited ^a

Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)

Robinson v Min of Lands & Anor 1994 (2) ZLR 171 (S)

UTC (Zimbabwe) (Pvt) Ltd v Chigwedere 2001 (1) ZLR 147 (S)

Case information

G V Mamvura, for the appellant

^b *H Zhou*, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the Labour Court (formerly the Labour Relations Tribunal) which ordered the appellant ^c (the Bank) to pay to the respondent (Mahachi) his

salary and benefits pending the determination by that court of Mahachi's appeal against his dismissal by the Bank.

The factual background is as follows. Mahachi was employed by the Bank as an assistant director in the Corporate Banking Division. At the relevant time, there was a critical shortage of foreign currency in Zimbabwe. In order to ensure that all the foreign currency that accrued to the Bank was properly allocated, the Bank established an Allocations Committee (the Committee). Mahachi occasionally sat on the committee.

Although the Committee had no written rules regulating the allocation of foreign currency, a practice developed and it was understood that persons requiring foreign currency for certain purposes would be given priority in the allocation of foreign currency. For example, those who required foreign currency for medical or educational purposes and large companies, which were customers of the Bank, were given priority over all other applicants. One of the Bank's customers, whose affairs at the Bank were handled by Mahachi, was a company called National Power International Ltd (the Company), which had its head office in the United Kingdom and a subsidiary operating in Zimbabwe. The Company had a foreign currency account in pounds sterling at the Bank, as well as a current account in local currency which had an overdraft.

In September 2001, Mahachi received instructions from the Company's head office in the United Kingdom to close the Company's foreign currency account. Part of the foreign currency was to be converted into local currency which was to be transferred to the current account in order to pay off the overdraft, and the balance of the foreign currency was to be remitted to the Company's bank in the United Kingdom.

Acting on these instructions, Mahachi converted £9 080.65 into local currency, using the official exchange rate, paid off the overdraft on the Company's

2004 (2) ZLR p128

Sandura JA

current account and remitted the balance of the Company's foreign currency, amounting to £518.94, to the Company's bank in the United Kingdom.

Having done that, Mahachi then allocated the £9 080.65 to his own company called Shamina Holdings (Pvt) Ltd (Shamina Holdings), without the involvement of the Committee, and paid for the foreign currency using his own money. Thereafter, Mahachi used the foreign currency which he had allocated to Shamina Holdings, and some of his own money, to import a motor vehicle from South Africa. The motor vehicle was subsequently registered in his name.

At the relevant time, Shamina Holdings was not a customer of the Bank. When the Bank discovered that foreign currency had been allocated to an unknown entity, investigations were instituted and it was later discovered that the foreign currency had been allocated by Mahachi.

When Mahachi was questioned about the foreign currency allocation, he disclosed for the first time that Shamina Holdings was his company and that he was its sole director. In addition, he stated that Shamina Holdings had concluded an agreement with the Company which owned the foreign currency, in terms of which Shamina Holdings had acquired the foreign currency from the Company without the involvement of the Bank and the Committee. As a result of Mahachi's claims, the Bank contacted its customer in the United Kingdom, and the claim by Mahachi that the Company had sold its foreign currency to Shamina Holdings was denied.

In the circumstances, the Bank charged Mahachi with two acts of misconduct under s 5.4.4 of the Managerial Employees Code of Conduct (the Code). Section 5.4.4 of the Code reads as follows:

"Any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of any employee's contract of employment with the Bank."

In the first count, it was alleged that Mahachi had committed the act of misconduct set out in s 5.4.4 of the Code, as read with article 4 of the Articles of Agreement, which Mahachi had signed when he joined the Bank. That article in the relevant part, reads as follows:

"The employee agrees to serve the Bank honestly, faithfully and diligently, and to comply with all the rules and regulations of the Bank. He agrees at all times readily to obey all orders and instructions and duly, honestly and faithfully to account for all moneys, securities, vouchers, bills, cheques, title deeds and other instruments which shall come into his hands as a servant of the Bank, and he further agrees to conduct himself in such a way as shall not injure the reputation of the Bank ..."

Sandura JA

A In the second count, it was alleged that Mahachi had committed the act of misconduct set out in s 5.4.4 of the Code, as read with article 5 of the Articles of Agreement. That article reads as follows:

"The Employee agrees that he will not, without the written consent of the Bank first obtained, at any time during the continuance of his employment under this Agreement, engage or be engaged or concerned directly or B indirectly in any other business or occupation whatsoever whether for profit or otherwise either as principal, agent, servant or in any other capacity, but will devote the whole of his time and attention to the business of the Bank and will use his best endeavours to promote and extend it."

In due course, the matter came before the hearing authority of the Bank and C Mahachi was found guilty on both counts. The penalty imposed in respect of each count was that of dismissal. Aggrieved by that decision, Mahachi appealed to the Bank's appeals board. Thereafter, in October 2002, the appeals board confirmed the conviction on the first count but set aside the penalty of dismissal and substituted a final written warning. However, with regard to the second count, the appeals board set aside the conviction as well as the penalty D imposed. Dissatisfied with that result, the Bank noted an appeal to the Labour Relations Tribunal. In its notice of appeal, the Bank challenged the decision by the appeals board to substitute a final written warning for the penalty of dismissal in respect of the first count. In addition, it challenged the setting aside of the conviction on the second count and the penalty of dismissal E imposed in respect of that count. There was no cross-appeal by Mahachi against the confirmation of his conviction on the first count.

However, before the appeal was heard by the Labour Court, Mahachi filed an application in that court seeking an order directing the Bank to pay him his salary and benefits pending the determination of the Bank's appeal by that court. That application was made in terms of s 97(4) of the Labour Act [Chapter F 28:01] (the Act), which reads as follows:

"Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires."

The application was granted in February this year. Feeling aggrieved by that decision, the Bank appealed to this court on the ground that the Labour G Court's decision is grossly unreasonable. It is clear from the provisions of s 97(4) of the Act that the President of the Labour Court has a discretion to grant the interim relief sought by Mahachi. In the circumstances, unless it is shown that the learned President made an error in exercising that discretion, H this court would not interfere with her decision.

2004 (2) ZLR p130

Sandura JA

As Gubbay CJ said in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at A 62G-63A:

"It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination B should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing."

See also *Robinson v Minister of Lands & Anor* 1994 (2) ZLR 171 (S) at 175A-C.

In the present matter, I am satisfied that the learned President erred and seriously misdirected herself when she concluded that Mahachi's prospects C of success in opposing the Bank's appeal to the Labour Court were bright. I say so because in her judgment, and whilst dealing with the act of misconduct charged in the first count, the learned President said the following:

"I have considered the applicant's submissions ... I find that the submissions have merit thereby making his prospects of success in D defending the appeal bright. The applicant committed a one off act of misconduct for which he was convicted. *This was an abuse of authority*. Abuse of authority is an offence on its own in terms of the respondent's Code. Its penalty is a written warning" (my emphasis).

In this regard, I wish to make three points. The first point is that it was wrong to describe the act of misconduct for which Mahachi was convicted in the first E count as an abuse of authority. I say so because Mahachi did not have any authority whatsoever to allocate foreign currency to Shamina Holdings. The allocation of foreign currency was the special preserve of the Committee and Mahachi knew this. He, therefore, acted dishonestly in breach of Article 4 of the Articles of Agreement. The second point is that in the first count Mahachi was not charged with abuse of authority, but with

committing an act or ^F conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment with the Bank, as read with Article 4 of the Articles of Agreement. He was convicted by the hearing authority and that conviction was subsequently confirmed by the appeals board. Thereafter, when the Bank noted an appeal against the setting aside of the penalty of dismissal, Mahachi did not cross-appeal against the confirmation of his ^G conviction. This fact was overlooked by the learned President in determining Mahachi's prospects of success in contesting the Bank's appeal to the Labour Court. The third point is that the learned President overlooked the fact that the Bank had noted an appeal against the decision by the appeals board ^H

2004 (2) ZLR p131

Sandura JA

^A to set aside the conviction on the second count and the penalty of dismissal imposed in respect of that count. She did not deal at all with Mahachi's prospects of success in contesting the Bank's appeal on that count.

In the circumstances, this court will exercise its own discretion in the matter. However, in view of the fact that the Bank's appeal is still pending in the Labour Court, the views I shall express on the prospects of success of that appeal are ^B *prima facie* views which are not in any way intended to influence the Labour Court in the determination of that appeal.

In my view, and bearing in mind all the evidence in this matter, the Bank has good prospects of success in respect of the appeal pending in the Labour Court. It seems to me that with regard to the first count, the appeals board ^D correctly set out the aggravating factors in the matter as follows:

- "(a) The appellant (Mahachi) was a very senior member of staff in whom the Bank had a lot of trust and who had to be exemplary in the way he conducted himself in the eyes of his juniors and customers.
- (b) He exposed the Bank to a serious reputational risk by falsely claiming that he had been involved in a parallel deal with the customer. The ^D Bank had to verify (the) appellant's assertions with its customer in Britain through Barclays plc. That exposed the Bank to a serious risk which the Bank has to guard very jealously in these days of stiff competition.
- (c) The appellant hid his transaction behind a company. He did not want to leave tracks that connected him. That showed the worst sin in ^E banking, that of dishonesty. A banker is expected and is supposed to be honest and faithful in whatever he does. The appellant's failure to live up to that standard made his offence very serious.
- (d) The appellant abused his position in the Bank and the relationship that he enjoyed with the customer. He used the relationship to his personal benefit.
- (e) ^F The appellant did what he did out of greed and not need. The appellant bought a vehicle which is an item of luxury which clearly shows that he did not need forex for a pressing desperate purpose. Considering his position in the Bank, the appellant obviously had a car already which he had purchased through the Bank's assistance and could have got another if he had properly approached the Bank ^G with a case for replacement. Here, the appellant was very selfish."

In the circumstances, the Labour Court should have dismissed Mahachi's application for interim relief. However, that is not the end of the matter because *adv Zhou* submitted that it had not been necessary for the respondent to apply ^H for interim relief because, by operation of law, the respondent was entitled to

2004 (2) ZLR p132

Sandura JA

his salary and benefits, notwithstanding the noting of the appeal by the Bank. ^A In making that submission, counsel relied upon the provisions of s 97(3) of the Act and the decision of this court in *UTC (Zimbabwe) (Pvt) Ltd v Chigwedere* 2001 (1) ZLR 147 (S).

Section 97(3) of the Act provides that an appeal against a determination made under an employment code shall not have the effect of suspending the ^B determination or decision appealed against. In the *UTC* case *supra*, this court decided that the noting of an appeal against a determination made in terms of a registered Code of Conduct did not have the effect of suspending the decision appealed against. In the circumstances, counsel submitted that as the appeals board set aside the penalty of dismissal which had been imposed on Mahachi this meant that Mahachi remained an employee of the Bank and ^C was entitled to his salary and benefits, notwithstanding the noting of an appeal by the Bank against the decision of the appeals board. Although the argument sounds persuasive, it overlooks the fact that there is a specific provision in the Code which

determines whether or not the decision appealed against becomes operative. It is s 3.1.f, which reads as follows:

“The decision of the Appeals Board will be binding unless appealed against within fourteen working days to the Labour Relations Tribunal.”

What this provision means is that where an appeal is noted against the decision of the appeals board within the fourteen day period, the decision appealed against does not become operative. The provision is part of the agreement between the Bank and its managerial employees, and is binding on them. In the present case, the appeals board handed down its decision on 14 October 2002 and the Bank noted its appeal to the Labour Relations Tribunal on 18 October 2002. As the appeal was noted within the fourteen-day period, the decision of the appeals board, which set aside Mahachi’s dismissal, did not become operative. It therefore, follows that Mahachi was not entitled to his salary and benefits.

In the circumstances, the following order is made – F

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

“The application is dismissed with costs.”

ZIYAMBI JA & GWAUNZA JA concurred. G

Scanlen & Holderness, appellant’s legal practitioners

Manase & Manase, respondent’s legal practitioners H

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Document 19 of 47

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/IN RE HATIVAGONE & ANOR 2004 (2) ZLR 133 (S)

IN RE HATIVAGONE & ANOR 2004 (2) ZLR 133 (S)

2004 (2) ZLR p133

Citation	2004 (2) ZLR 133 (S)
Case No	Judgment No. S-67-04
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA, Ziyambi JA, Malaba JA & Gwanzura JA
Heard	10 June 2004
Judgment	10 September 2004
Counsel	<i>P Kwenda</i> , for the first applicant <i>N Chikomo</i> , for the second applicant
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of c Rights — s 18(2) — right to trial within a reasonable time — factors to be considered — onus on applicant — effect of failure by applicant to establish all points in his favour*

Headnote

The appellants were arrested on criminal charges in 1998 and placed on remand. They denied the charges. In 1999 the charges were withdrawn ^d before plea. Four years later, the accused were summoned to appear to answer the charges. The Attorney-General had deferred the prosecution of the applicants until the trial of the accomplice who was to be the principal witness against them was complete. This person had been prosecuted, but the proceedings were set aside and had to be restarted. ^e The applicants brought an application for a permanent stay of proceedings, arguing that their right under s 18(2) of the Constitution to a fair trial within a reasonable time had been violated.

Held, that in order for the application to succeed, it was necessary to consider: (a) the length of delay and whether it was presumptively prejudicial; (b) the reasons for the delay; (c) whether the applicants had ^f asserted their right to a speedy trial; and (d) the prejudice to the applicants.

Held, further, that in considering the length of the delay, the fact that the charge had been withdrawn before plea did not assist the State, as the withdrawal was not unconditional. The overall delay was presumptively prejudicial.

^g *Held*, further, that the reasons given for the delay were reasonable in the circumstances and to a large extent the Attorney-General was not to blame for the delay.

Held, further, that the applicants had failed to discharge the onus on them ^h to show that they had asserted their right to a speedy trial.

2004 (2) ZLR p134

Held, further, that the applicants were prejudiced by the fact that potential ^a defence witnesses were not available, having either died or emigrated.

Held, further, that nonetheless, because the Attorney-General's explanation was reasonable and because the applicants had failed to assert their rights, the application must fail.

Cases cited ^b

Barker v Wingo 407 US 514 (1972)

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

Mlambo, In re 1991 (2) ZLR 339 (S)

S v Banga 1995 (2) ZLR 297 (S) ^c

Legislation considered

Constitution of Zimbabwe 1980, s 18(2)

Case information

P Kwenda, for the first applicant

N Chikomo, for the second applicant ^d

Judgment

SANDURA JA: At the request of counsel for the applicants, this matter was referred to this court by a regional magistrate in terms of s 24(2) of the Constitution of Zimbabwe ("the Constitution"), which reads as follows:

"If in any proceedings in the High Court or in any court subordinate to the High Court, any question arises as to the contravention of the Declaration ^e of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

The specific question referred for determination by this court is whether the prosecution of the applicants for fraud should not be permanently stayed on ^F the ground that their right to a fair trial within a reasonable time, enshrined in s 18(2) of the Constitution, had been violated.

The relevant factual background upon which the applicants based their contentions may be tabulated conveniently as follows:

1. At the relevant time, the first applicant (Hativagone) was the managing ^G director of five companies ("the companies") and the second applicant (Jirivengwa) was an executive officer in the accounts section of the Central Mechanical Equipment Department in the Ministry of Transport (the CMED). ^H

2004 (2) ZLR p135

Sandura JA

2. ^A On 24 December 1997, Hativagone received from the CMED five cheques totalling \$2 796 336.33, allegedly for goods supplied or services rendered by the companies to the CMED.
3. On 16 April 1998, Hativagone was arrested and formally charged with five counts of fraud, the allegations being that in December 1997 he and Jirivengwa had unlawfully and with intent to defraud, misrepresented to ^B the CMED that the companies had supplied goods or rendered services to the CMED, and that as a result of that misrepresentation, the CMED had issued five cheques payable to the companies totalling \$2 796 336.33 for goods which had not been supplied or services which had not been rendered to it.
^C On the same day, Hativagone made a warned and cautioned statement in which he denied the charges. When asked whether he could produce the relevant documents showing the goods supplied or the services rendered to the CMED by the companies, he said:
 "The policy in my group of companies is to get rid of documents once a transaction has been finalised. Although at this stage, I do not know ^D specifically whether these were destroyed. I shall check and produce them if they are available."
 However, the required documents were never produced.
4. On 20 April 1998, Hativagone was taken to the magistrates court and was placed on remand.
5. ^E On 14 December 1998, Jirivengwa was arrested and on the same day was taken to the magistrates court for the initial remand, having made a warned and cautioned statement in which he denied all the five counts of fraud.
6. On 18 February 1999, the charges against Hativagone were withdrawn before plea, and thereafter in September 1999 the charges against Jirivengwa ^F were also withdrawn before plea. Hativagone had, therefore, been on remand for about ten months and Jirivengwa for about nine months.
7. However, on 31 July 2003, the charges were resurrected and the applicants' trial was set down to commence on 27 October 2003 in the regional magistrates court. The trial date was later altered by consent to 17 November 2003 and the applicants were issued with summonses directing ^G them to appear in the regional magistrates court on that date.
8. On 28 October 2003, counsel for the applicants notified the public prosecutor that on 17 November 2003 the presiding regional magistrate would be requested, in terms of s 24(2) of the Constitution, to refer the matter to this court in order for this court to determine whether the ^H prosecution of the applicants for fraud should not be permanently stayed.

2004 (2) ZLR p136

Sandura JA

9. On 17 November 2003, after the applicants had pleaded not guilty to the ^A charges, counsel for the applicants requested the presiding regional magistrate to refer the matter to this court, as previously indicated. Both applicants gave evidence in support of that request and were cross-examined by the public prosecutor. Thereafter, the presiding regional magistrate referred the matter to this court, the public prosecutor having ^B conceded that the raising of the constitutional question was not merely frivolous or vexatious.

Section 18(2) of the Constitution, which the applicants relied upon, reads as follows:

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable ^C time by an independent and impartial ^G court established by law."

The factors which must be considered in the determination of whether an accused person has been afforded a fair hearing within a reasonable time were identified by Justice Powell in *Barker v Wingo* 407 US 514 (1972) at 530-532 as follows:

"The length of the delay is to some extent a triggering mechanism. Until [▷] there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the [◻] delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to the length of delay is the reason that government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the [◻] government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility [◻] to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, [◻]

2004 (2) ZLR p137

Sandura JA

[◻] which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasise that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

[◻] A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the [◻] fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

[▷] This passage was quoted with approval by Dumbutshena CJ in *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S) at 113A-114A, and by Gubbay CJ in *In re Mlambo* 1991 (2) ZLR 339 (S) at 349H-351A. The factors identified by Powell J have, therefore, received the approval of this court.

In the light of these factors, four questions arise for determination. The first is whether the delay in bringing the applicants to trial was presumptively [◻] prejudicial; the second is whether the Attorney-General gave a reasonable explanation for the delay; the third is whether the applicants asserted their right to be tried within a reasonable time; and the fourth is whether the applicants have been prejudiced by the delay. I shall deal with these questions in turn.

[◻] LENGTH OF DELAY

As already stated, Hativagone was formally charged on 16 April 1998 and was placed on remand on 20 April 1998. Jirivengwa was formally charged on 14 December 1998 and was placed on remand on that date.

Thereafter, on 18 February 1999, the charges against Hativagone were [◻] withdrawn before plea and in September 1999, the charges against Jirivengwa were also withdrawn before plea. In respect of both applicants, the charges were subsequently resurrected on 31 July 2003 and the trial was set down to commence on 27 October 2003, which date was later altered by consent to [◻] 17 November 2003.

2004 (2) ZLR p138

Sandura JA

In determining the length of the delay, the time frame commences to run from ^a the time of arrest or first remand, and the subsequent withdrawal of the charges before plea is irrelevant. That point was made by Gubbay CJ in *In re Mlambo supra*, at 348C-E as follows:

“Can the State stop the clock by resorting to the expedient of withdrawing the charge before plea, as it is permitted to do under s 297(3) of the Criminal ^b Procedure and Evidence Act, only to reinstate the same charge, or a charge based on the identical information, when in a position to commence with the trial?

In my opinion, the type of withdrawal envisaged in s 18(2) of the Constitution is an irrevocable one – a withdrawal after plea by the Attorney-General in terms of s 13 of the Criminal Procedure and Evidence ^c Act, thereby entitling the accused to a verdict of acquittal in respect of that charge. In other words, the withdrawal must be one in which no hearing of the charge can ever arise. To adopt any other construction would be to emasculate the protection the Constitution intends to afford.”

Applying that principle, the delay in respect of Hativagone was about five-and-a-half years and that in respect of Jirivengwa was about four years and ^d ten months.

In my view, there can be no doubt that the delay in bringing the applicants to trial was presumptively prejudicial. Indeed, Mr *Shava*, who appeared for the Attorney-General, quite properly conceded this. The first question posed above is, therefore, answered in the affirmative. ^e

EXPLANATION FOR DELAY

The explanation given by the Attorney-General was as follows: He had waited for the completion of a criminal trial in which the accused was Elvis Zvinavashe (“Elvis”), an alleged accomplice of the applicants and a former employee of the CMED, who had been charged with contravening a section of the ^f Prevention of Corruption Act [*Chapter 9:16*], and whom the Attorney-General regarded as a key State witness in the trial of the applicants.

The allegation against Elvis was that he had received from Hativagone a bribe, in the form of a Mazda B1800 pick-up truck, as an inducement for him to process for payment the fictitious invoices submitted to the CMED by Hativagone, through Jirivengwa. It was alleged that Jirivengwa had handed the said ^g invoices to Elvis with the instruction that they be processed for payment, and that Elvis had complied with that instruction because he had been bribed by Hativagone.

In the circumstances, it was alleged that Elvis had facilitated the issuing of the five cheques, totalling \$2 796 336.33, by the CMED for goods which had not ^h

2004 (2) ZLR p139

Sandura JA

^a been supplied or services which had not been rendered to it. The allegations against Elvis were, therefore, inextricably intertwined with the allegations against the applicants.

In due course, Elvis was tried and convicted. However, the proceedings were subsequently set aside by the High Court and a fresh trial was ordered in 2002. The fresh trial took place some time later and Elvis was again convicted, and ^b was sentenced to six years’ imprisonment with labour. It was only then that the Attorney-General was in a position to prosecute the applicants. The charges against them were then reinstated and the applicants’ trial was set down to commence in October 2003, with Elvis as a key witness for the prosecution.

^c In my view, the Attorney-General gave a satisfactory explanation for the delay in bringing the applicants to trial. In the first place, the decision by the Attorney-General to defer the prosecution of the applicants until Elvis’ trial had been completed cannot be described as unreasonable, bearing in mind that Elvis was going to be the principal State witness at the trial of the applicants, and that as he was an accomplice, it would have been undesirable ^d to call him as a witness before his own trial had been completed. Secondly, the fact that Elvis had to go through a second trial, after the proceedings in the first trial had been set aside by the High Court, was largely responsible for the delay in bringing the applicants to trial, and this is not something for which the Attorney-General could be blamed.

^e In the circumstances, the second question posed above is answered in the affirmative.

ASSERTION OF CONSTITUTIONAL RIGHT

As already stated, Hativagone had been on remand for about ten months and Jirivengwa for about nine months when the charges were withdrawn before ^F plea. During those periods, the applicants must have appeared in the magistrates court for remand on numerous occasions. The issue which arises for consideration is whether, and on how many occasions, the applicants asserted their constitutional right to be tried within a reasonable time. The issue is important because, if they did not assert that right, they could hardly complain about the delay in bringing them to trial when they were informed ^G about the trial date.

The record of the proceedings in the regional magistrates court shows that, when Hativagone was asked by the public prosecutor how he had asserted his constitutional right to be tried within a reasonable time, he said that his ^H counsel had visited the investigating officer at his offices, but did not say what

2004 (2) ZLR p140

Sandura JA

had been discussed on that visit. Indeed, as he had not attended the meeting, ^A he could not have known what was discussed. When asked whether he had asserted his right in court, he said "it was also raised during the time of remand", but did not say how he had asserted his right, when he had done so and on how many occasions he had done so. Similarly, when Jirivengwa was asked whether he had asserted his right to be tried within a reasonable time, ^B he said his legal practitioner had written a letter to the magistrates court asking for a trial date. On that evidence, this court must determine whether the applicants asserted their right to be tried within a reasonable time. As the burden of proof rest on them, the court must determine whether, on a balance of probabilities, that burden was discharged by the applicants.

Bearing in mind the evidence, there can be no doubt that the applicants failed ^C to discharge that burden. As they were remanded on numerous occasions, it is rather surprising that they gave no evidence on the frequency and force of their objection to the delay in bringing them to trial. Instead, they appear to have made a half-hearted attempt to complain about the delay on a single occasion.

In the circumstances, the third question is answered in the negative. That ^D conclusion is fatal to the success of the application.

PREJUDICE

With regard to the fourth factor, the evidence given by Hativagone was that the delay had caused him actual prejudice in several ways. Firstly, four of the ^E five companies involved in supplying the goods or rendering the services in question to the CMED had closed down and the former employees could not easily be located. Some of them had left the country and one had died. Secondly, most or all, the records of his companies had been destroyed because it was the policy of his companies that documents which were considered no longer relevant should be destroyed after three years. Since the ^F transactions in question took place in 1997, i.e. more than three years ago, the required documents must have been destroyed. Thirdly, he had tried to contact the investigating officer in the case in order to find out what documents were required to rebut the fraud allegations, but was informed that he had left the police force and could not be located. And fourthly, since 1998, the only company of his which was still operational had relocated on three ^G occasions and many documents had been destroyed as a result.

In the circumstances, it was submitted on behalf of Hativagone that it was no longer possible for him to find the documents required by him to rebut the fraud charges. However, it seems to me that if the relevant documents were destroyed they were not destroyed in the circumstances alleged. I say so ^H

2004 (2) ZLR p141

Sandura JA

^A because when Hativagone made his warned and cautioned statement on 16 April 1998, about four months after the offences had been committed, he undertook to produce the relevant invoices to the police but never did. The relevant part of his warned and cautioned statement reads as follows:

"Q. Are you in a position to supply documents in respect of (the) services which were rendered and for which the payments were made by ^B CMED?

- A. The policy in my group of companies is to get rid of documents once a transaction has been finalised. Although at this stage I do not know specifically whether these were destroyed I shall check and produce them if they are available.”

c It is important to note the contradiction between what Hativagone said in his statement and what he subsequently said to the regional magistrate about when the documents were to be destroyed. In his statement, he said the destruction took place once the transaction had been finalised, but in his evidence in the regional magistrates court he said documents which were considered no longer relevant were destroyed three years after the transaction.

d Nevertheless, it is clear that on 16 April 1998, Hativagone knew that the relevant invoices were required by the police. He should have taken them to the police shortly thereafter or explained to the police why he could not produce them, but did not do so. Thus, if the relevant invoices were in his possession or that of his companies, he should have carefully kept them, bearing in mind the fact that he required them to rebut the fraud charges. On e the other hand, if they had already been destroyed, a trial within a reasonable time would not have assisted him as far as the invoices were concerned. It follows, therefore, that the Attorney-General was not responsible for any prejudice to Hativagone which was caused by the unavailability of the required invoices. But any prejudice caused by the unavailability of potential f witnesses would have been caused by the delay, in respect of which the Attorney-General gave a reasonable explanation.

I now wish to consider Jirivengwa’s evidence on how the delay prejudiced him. The only valid ground on which he alleged that the delay had prejudiced him was the unavailability of potential witnesses. He alleged that one had died and that it would be difficult to locate those potential witnesses who were no g longer working for the CMED.

In the circumstances, and on the basis that both applicants were prejudiced by the unavailability of potential witnesses, the fourth question is answered in the affirmative. Nevertheless, the application cannot succeed for two h reasons already stated. The first is that the Attorney-General had given a

2004 (2) ZLR p142

Sandura JA

satisfactory explanation for the delay, and the second is that the applicants a had failed to establish that they had asserted the right to be tried within a reasonable time.

Finally, in line with the decision of this court in *S v Banga* 1995 (2) ZLR 297 (S), I shall make no order as to costs.

In the result, the application is devoid of merit and is therefore dismissed. b

CHEDA JA, ZIYAMBI JA, MALABA JA & GWAUNZA JA concurred.

P Kwenda & Partners, first applicant’s legal practitioners

Mhiribidi Ngarava & Moyo, second applicant’s legal practitioners c

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Document 20 of 47

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S v MUPAMBWA & ANOR 2004 (2) ZLR 143 (S)

2004 (2) ZLR p143

Citation	2004 (2) ZLR 143 (S)
Case No	Judgment No. S-75-04
Court	Supreme Court, Harare

Judge	Sandura JA, Ziyambi JA and Gwaunza
Heard	14 September 2004
Judgment	14 September 2004
Counsel	Miss <i>N P Goneso</i> , for the appellants <i>R K Tokwe</i> , for the respondent
Case Type	Criminal Appeal
Annotations	No case annotations to date

Flynote

Military law — court martial — appeal against decision of — to whom c appeal lies — Court Martial Appeal Court — composition of

Headnote

As a result of amendments to the Defence Act [*Chapter 11:02*], after 10 October 1997, any person intending to appeal against a judgment of a court martial is required to appeal to the Court Martial Appeal Court consisting of such judges of the High Court, not being less than two, as ^D the Judge President of the High Court may from time to time appoint. An appeal therefrom lies to the Supreme Court, in all respects as though it were a decision of the High Court.

As the appeal, *in casu*, was not in conformity with the Defence Act [*Chapter 11:02*], as amended by Part XIII of the Schedule to the ^E Magistrates Court Amendment Act 1997 (Act 9 of 1997), it was not properly before the Supreme Court and had to be struck off the roll.

Case cited

S v Mugoni 1994 (2) ZLR 184

Legislation considered ^F

Defence Act [*Chapter 11:02*], ss 78, 79(1) 80(1) and 88A

Case information

Miss *N P Goneso*, for the appellants

R K Tokwe, for the respondent

Judgment

^G **SANDURA JA:** The appellants were charged with contravening para 39(2)(a) of the First Schedule to the Defence Act [*Chapter 11:02*] ("the Act"). The allegation against each appellant was that on thirty-three occasions during the period extending from December 1999 to August 2002 he defrauded the ^H State by withdrawing a pension from the war veterans fund, well knowing that

2004 (2) ZLR p144

Sandura JA

he was not entitled to it as he was not a war veteran. Both appellants were ^A regular members of the Air Force of Zimbabwe.

On 16 January 2003, the appellants appeared before a General Court Martial and pleaded not guilty to all the thirty-three counts of fraud. They were, however, found guilty as charged after a trial had been conducted, and were sentenced to, *inter alia*, one year's imprisonment with labour. Aggrieved by ^B that result, they appealed to this court against conviction and sentence.

On 13 September 2004, the day before the appeal was due to be heard, I requested the registrar of this court to contact both counsel and inform them that at the hearing of the appeal they would be required, first of all, to deal with a preliminary point, which was whether the appeal was properly before this court, in view of the provisions of ss 78 and 79 of the Act, as amended by c Part XIII of the Schedule to the Magistrates Court Amendment Act, No. 9 of 1997 ("the Amendment Act").

When the appeal was called on 14 September 2004, Mr *Tokwe*, who appeared for the respondent, handed in the respondent's heads of argument on the preliminary point, in which he submitted, quite correctly in my view, that in d terms of s 79(1) of the Act as amended the appeal should be heard by a Court Martial Appeal Court consisting of such judges of the High Court, not being less than two, as the Judge President of the High Court may appoint. Ms *Goneso*, who appeared for the appellants, agreed with that submission. Consequently, as we were in full agreement with counsel's submission, the appeal was struck off the roll. I now set out the full reasons for that decision e .

Before the Act was amended by the Amendment Act, which was promulgated and came into effect on 10 October 1997, the words "Appeal Court", "appellant" and "judges" were defined in s 78 of the Act as follows:

"'Appeal Court' means the Court Martial Appeal Court established in f terms of section *seventy-nine*;

'appellant' means a person who has been convicted by a court martial and desires to appeal under this Part;

'judges' means the Chief Justice and the other judges of the Supreme Court."

And, before it was amended by the Amendment Act, s 79(1) of the Act, read g as follows:

"There shall be a Court Martial Appeal Court which shall consist of such judges, not being less than two, as the Chief Justice may from time to time appoint." h

2004 (2) ZLR p145

Sandura JA

A Consequently, before 10 October 1997, any person appealing against the judgment of a Court Martial appealed to a Court Martial Appeal Court, consisting of such judges of the Supreme Court, not being less than two, as the Chief Justice appointed: see *S v Mugoni* 1994 (2) ZLR 184 (A) at 186E.

However, the Amendment Act altered the definition of "judges" in s 78 and the composition of the Court Martial Appeal Court established in terms of b s 79(1) of the Act. In addition, it introduced a new section, s 88A.

The definition of "judges" in s 78, as amended, is as follows:

"'judges' means the Judge President and the other judges of the High Court."

Section 79(1), as amended, in terms of which the Court Martial Appeal Court c is established, now reads as follows:

"There shall be a Court Martial Appeal Court which shall consist of such judges, not being less than two, as the Judge President may from time to time appoint."

Section 80(1), which deals with appeals from a Court Martial, and which was d not altered by the Amendment Act, reads as follows, in relevant part:

"Subject to this section, an appellant may appeal against conviction to the Appeal Court ..."

As already indicated, "Appeal Court" means the Court Martial Appeal Court established in terms of s 79(1).

e Finally, s 88A, which makes provision for appeals from the Court Martial Appeal Court to this court, reads as follows:

"An appeal shall lie to the Supreme Court from any judgment, decision or order of the Appeal Court in all respects as if the judgment, decision or order were given in a criminal appeal before the High Court."

Thus, after 10 October 1997, any person intending to appeal against the f judgment of a Court Martial would appeal to the Court Martial Appeal Court consisting of such judges of the High Court, not being less than two, as the Judge President of the High Court may from time to time appoint.

If such a person felt aggrieved by the judgment, decision or order of the court Martial Appeal Court and intended appealing against it, he would appeal to g this court in terms of s 88A of the Act.

In the circumstances, since s 79(1) as amended provides that the Court Martial Appeal Court shall consist of such judges of the High Court as the Judge President of the High Court may from time to time appoint, this appeal was not properly before us and had to be struck off the roll.

2004 (2) ZLR p146

Sandura JA

Ziyambi JA & Gwaunza JA concurred. ^A

Goneso & Associates, appellants' legal practitioners ^B

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Document 21 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/MATANHIRE v BP & SHELL MARKETING SERVICES (PVT) LTD 2004 (2) ZLR 147 (S)

MATANHIRE v BP & SHELL MARKETING SERVICES (PVT) LTD 2004 (2) ZLR 147 (S)

2004 (2) ZLR p147

Citation	2004 (2) ZLR 147 (S)
Case No	Judgment S-113-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	21 September 2004
Judgment	21 September 2004
Counsel	<i>K Muskwe</i> , for the appellant <i>W Ncube</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

c Appeal — notice of — requirement to state date of decision being appealed against — reason for — failure to state date — effect — notice incurably defective and incapable of being amended — appropriate procedure to follow

Costs — *de bonis propriis* against legal practitioner — exceptional measure ^D for cases involving neglect or impropriety

Headnote

Rule 7 of the Supreme Court (Miscellaneous Appeals and References) Rules 1975 provides that a notice of appeal against a judgment of the Labour Court or tribunal other than the High Court *shall* state, *inter alia*, the date ^E of the decision which is being appealed against. The purpose of requiring the date to be stated is to enable the respondent and the court to determine *ex facie* the notice of appeal whether the provisions of r 5 of the Rules, prescribing the time limit in which the appeal should be instituted and the notice of appeal delivered and filed, were complied with.

Failure to comply with all the requirements of the rule renders the F notice of appeal fatally defective and a nullity. It therefore cannot be amended. What needs to be done is to draw up a new notice of appeal complying with the requirements of r 7 and make an application for an extension of time within which to deliver and file the notice of appeal and for condonation for non-compliance with the Rules.

Costs *de bonis propriis* will be awarded against a lawyer as an exceptional G measure and in order to penalize him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself (*dicta per* Gillespie J in *Omarshah v Karasa* 1996 (1) ZLR 584 (H) H at 591F followed).

2004 (2) ZLR p148

Malaba JA

Cases cited A

Business Equipment Corporation v Baines Imaging Group 2002 (2) ZLR 354 (S)

Hattingh v Pienaar 1977 (2) SA 182 (O)

Jensen v Acavalos 1993 (1) ZLR 216 (S)

Omarshah v Karasa 1996 (1) ZLR 584 (H)

S v Ncube 1990 (2) ZLR 303 (S) B

Talbert v Yeoman Products (Pvt) Ltd S-111-99

Legislation considered

Supreme Court (Miscellaneous Appeals and Offences) Rules 1975 (RGN 449 of 1975), r 7 C

Case information

K Muskwe, for the appellant

W Ncube, for the respondent

Judgment

MALABA JA: At the end of argument *in limine* on a point taken on behalf D of the respondent, to the effect that there was no valid appeal before the court, we upheld the submission and ordered that the matter be struck off the roll with costs *de bonis propriis*.

It is not usual to write a judgment on a matter that has been struck off the roll: see *S v Ncube* 1990 (2) ZLR 303 (S). This judgment has been written for purposes of drawing the attention of legal practitioners to the fact that all the E matters required by the Rules of Court to be stated in a valid notice of appeal are of equal importance so that failure to state one of them renders the notice of appeal invalid.

Rule 7 of the Supreme Court (Miscellaneous Appeals and Offences) Rules ("the Rules") provides that a notice of appeal against a judgment of the labour F court or tribunal other than the High Court *shall* state:

- "(a) the tribunal or officer whose decision is appealed against; and
- (b) the date on which the decision was given; and
- (c) the grounds of appeal; and
- (d) the exact nature of the relief sought; and G
- (e) the address of the appellant or his legal representative."

On 15 January 2004 the Labour Court gave a judgment against which the appellant ("Matanhire") sought to institute an appeal on 25 February 2004. Rule 5 of the Rules provides that an appeal against a decision of the Labour Court shall be instituted within fifteen days of the decision being given. The H

2004 (2) ZLR p149

Malaba JA

A notice of appeal, stating all the matters required by r 7 of the Rules to be stated, must also be delivered to all interested parties and filed with the registrar of the Supreme Court within fifteen days of the decision appealed against being given.

The document delivered and filed by Matanhire's legal representative as a notice of appeal did not state the date on which the decision appealed against ^B was given. The respondent's heads of argument drew the attention of Matanhire's legal representative to the fact that failure to state the date when the decision was given rendered the notice of appeal fatally defective and a nullity. It was indicated that what was needed to be done was to draw up a new notice of appeal complying with the requirements under r 7 of the Rules and ^C make an application for an extension of time within which to deliver and file the notice of appeal and for condonation for non-compliance with the Rules of Court.

Mr *Muskwe*, who was Matanhire's legal representative, believed that failure to state the date when the decision appealed against was given did not have an invalidating effect on a notice of appeal as would failure to state the other ^D matters, such as grounds of appeal or the exact nature of the relief sought. He did not even bother to read the cases referred to in the respondent's heads of argument on what should be done when a fatally defective notice of appeal has been delivered and filed. He asked the court to simply amend the notice of appeal by inserting the date when the decision of the Labour Court appealed ^E against was given.

A nullity cannot be amended. In *Jensen v Acavalos* 1993 (1) ZLR 216 (S) Korsah JA at 220B said that the reason why a fatally defective notice of appeal could not be amended was that:

"... it is not only bad but incurably bad".

Citing *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183 for authority, the learned ^F Judge of Appeal said that what should actually be applied for is an extension of time within which to comply with the relevant Rule and condonation of non-compliance.

In *Business Equipment Corp v Baines Imaging Group* 2002 (2) ZLR 354 (S) a notice of appeal which did not state the date on which the judgment appealed ^G against was given, in contravention of s 29(1)(a) of the Rules of the Supreme Court, was held to be fatally defective and the procedure stated in *Jensen's* case *supra* was approved as the appropriate remedy in having a proper notice of appeal placed before the court. See also *Talbert v Yeoman Products (Pvt) Ltd* S-111-99.

2004 (2) ZLR p150

Malaba JA

The purpose of requiring the date when the decision appealed against to be ^A stated in a notice of appeal is to enable the respondent and the Court to determine *ex facie* the notice of appeal whether the provisions of r 5 of the Rules, prescribing the time limit in which the appeal should be instituted and the notice of appeal delivered and filed, were complied with.

As no valid notice of appeal was delivered and filed within fifteen days of the ^B date when the decision of the Labour Court was given, there was no appeal before the court and to merely insert the relevant date in the defective notice of appeal, as suggested by Mr *Muskwe*, without an application for an extension of time within which to institute the appeal and for condonation of non-compliance with the Rules of Court, would be grossly irregular. The matter had to be struck off the roll ^C.

The costs were awarded *de bonis propriis* to register disapproval of the manner in which Mr *Muskwe* conducted the case. He was to blame for drawing up a defective notice of appeal. The existence of the defect was drawn to his attention through the respondent's heads of argument and the appropriate remedy for rectifying the situation pointed out to him about two months before ^D the hearing. It became apparent during the argument he presented to the court that Mr *Muskwe* had not bothered to read the cases cited for his benefit on the law relating to defective notices of appeal in the respondent's heads of argument.

In *Omarshah v Karasa* 1996 (1) ZLR 584 (H) at 591F Gillespie J stated that:

"Costs *de bonis propriis* will be awarded against a lawyer as an exceptional ^E measure and in order to penalise him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself."

Chidyausiku CJ and Ziyambi JA concurred. ^F

Muskwe & Associates, appellant's legal practitioners

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Document 22 of 47**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume
2/BARCLAYS BANK OF ZIMBABWE LIMITED v ZIMBABWE REVENUE AUTHORITY 2004 (2) ZLR 151 (H)

BARCLAYS BANK OF ZIMBABWE LIMITED v ZIMBABWE REVENUE AUTHORITY 2004 (2) ZLR 151 (H)**2004 (2) ZLR p151**

Citation	2004 (2) ZLR 151 (H)
Case No	Judgment No HH-162-2004
Court	High Court, Harare
Judge	Makoni J
Heard	27 March 2003
Judgment	22 September 2004
Counsel	<i>A P de Bourbon SC</i> , for the applicant <i>P Nherere</i> , for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

C Revenue and public finance — *income tax — assessment — what notice of assessment must contain — need for assessment to be issued before taxpayer's funds may be garnished*

Revenue and public finance — *income tax — "income" — whether payments constitute capital or income*

D Revenue and public finance — *income tax — "interest" — meaning of in terms of Income Tax Act [Chapter 23:06] (16th Schedule)*

Revenue and public finance — *income tax — management share option scheme — whether it creates an "advantage or benefit" in terms of s 8(1)(f) of Income Tax Act — PAYE — whether payments under scheme E were remuneration, and liable for deduction of PAYE, or were of a capital nature*

Revenue and public finance — *income tax — withholding tax on fees due to a non-resident — when fees are deemed to have been paid — fulfilment of conditions on which non-resident entitled to fees — meaning — not F a reference to grant of exchange control authority for payment*

Headnote

The applicant sought a declaratur that it was not liable in tax in the amount of some \$283 million to the respondent. The respondent sought to obtain the sum demanded by garnishee order on the applicant's account. Initially, the respondent contended that the applicant should have G objected in terms of s 62(1) of the Act rather than seek a declaratur.

Held, that before the Commissioner of the Zimbabwe Revenue Authority may garnishee a taxpayer's funds, an assessment must be issued. The assessment must comply with the requirements of ss

2 and 51 of the Income Tax Act [Chapter 23:06], in that it must show any taxable income

2004 (2) ZLR p152

or credits to which the taxpayer is entitled and any assessed loss ranking ^A for deductions. It must also give the taxpayer notice that any objection to the assessment shall be lodged with the Commissioner within 30 days from the date of the notice. A document which does not comply with these requirements is not an "assessment". The garnishee was thus invalid, and the applicant had proceeded correctly.

Held, further, that withholding tax on fees due to a non-resident is payable ^B within 30 days of the date when the payment is deemed to have been made. There are two possible dates. The first is when the fees are actually credited to the non-resident's account. The other is when, though the fees are not credited to the non-resident's account, they are so dealt with by the payer in a manner which discharges the payer's obligation to the ^C non-resident. The phrase "conditions under which he is entitled to them are fulfilled" does not refer to the granting of exchange control authority for the payment.

Legislation considered

Income Tax Act, [Chapter 23:06], ss 2 (definition of "assessment"), ^D 8(1)(b), 8(1)(f), 51(2), 51(3) and the 16th and 17th Schedules

Case information

A P de Bourbon SC, for the applicant

P Nherere, for the respondent

Judgment

MAKONI J: This is a matter brought by way of an application where applicant ^E seeks a declarator from the court. The material facts in this matter are common cause and can be summarized as follows. In or around February 2001 the respondent embarked on an audit of the banking sector to check compliance in respect of tax matters. The applicant was one of the institutions to be ^F audited. The exercise was completed in October 2001 after which the respondent produced a schedule, Annexure A, in respect of its findings on the applicant. Various meetings were held after the schedule was served on the applicant by the respondent. The outcome of the meetings was that after an alleged tax shortfall of \$301 872 750 the applicant conceded owing an amount of \$11 783 467. The applicant subsequently paid to the respondent an amount of \$8 881 ^G 435.69 which figure took into account \$2 904 031.31 which was a duplicated payment. This left an amount of \$283 107 759.80 as a disputed amount of tax between the applicant and the respondent. ^H

2004 (2) ZLR p153

Makoni J

^A Prior to the meetings, the applicant had communicated to the respondent over the tax issue through their consultants Messrs Price Waterhouse Coopers. The dispute culminated in the respondent issuing a garnishee order against the applicant, for the disputed amount, through the Reserve Bank of Zimbabwe. After the applicant became aware of the garnishee further meetings were held in which the respondent granted an extension to the applicant for effecting ^B of the garnishee. The dispute between the parties was not resolved resulting in the garnishee being effected against the applicant on 6 November 2001 by the Reserve Bank of Zimbabwe. The garnishee was in the disputed amount of \$283 107 759.80.

There are five main areas in contention, namely:

1. ^C Withholding taxes on fees
2. Management share option scheme
3. Restraint of trade payments
4. Non-residents tax on interest
5. Excessive penalties on amounts conceded

^D In addition to the above areas of contention, raised by the applicant in his founding affidavit, an additional area of contention was raised by the respondent in its opposing affidavit. The additional

dispute can be summarized as follows — whether Annexure A constitutes an assessment in terms of the Income Tax Act [*Chapter 23:06*] (the Act) or is a demand for the disputed tax. ^εDependant on this issue are the questions whether the garnishee was lawful and whether the application is properly before the court.

Before I deal with the five main issues, I shall deal with the additional issues first, as they determine whether the application is properly before the court or not.

The respondent, in raising this issue, contends in para 44.5 that Annexure A ^ε is an assessment in terms of the Act. Being an assessment, the respondent contends that the proper procedure by the applicant should have been an objection in terms of s 62(1) of the Act rather than to approach the court for a declarator.

On the other hand, the applicant contends that Annexure A does not ^ε constitute an assessment as it does not reflect the taxable amounts and credits as required by the definition of assessment in terms of s 2 of the Act.

In assessing whether Annexure A is an assessment or not I shall not deal with the aspect of the lawfulness or otherwise of the garnishee as the applicant's ^ε pleadings regarding of April did not seek an amendment to the Draft Order to

2004 (2) ZLR p154

Makoni J

incorporate the relevant declarator regarding the lawfulness of the garnishee. ^ε A

In terms of s 2 of the Act, assessment is defined as follows:

“Assessment means

- (a) the determination of taxable income and of the credits to which a person is entitled to in terms of the charging Act; or
- (b) the determination of an assessed loss ranking for deduction ^ε B .”

It is clear from the definition section that an assessment should determine and contain

- (i) taxable income and
- (ii) credits to which a person is entitled.

This is not disputed by the respondent. In para 6 of its Heads of Argument ^ε c the the respondent clearly lays out the requirements of an assessment.

In addition, in terms of s 51 of the Act, a notice of assessment should be issued whenever an assessment is carried out. Among other things s 51 of the Act stipulates the following:

- (i) Section 51(2) – a notice of assessment and of the amount of tax payable ^ε D shall be given to the tax payer.
- (ii) Section 51(3) – the commissioner shall give the taxpayer notice that any objection to the assessment shall be sent to the commissioner within 30 days after the date of such notice.

On close scrutiny of annexure A, it is apparent that it does not show any taxable ^ε income or credits to which the applicant is entitled nor any assessed loss ranking for deductions. Annexure A only reflects the sums due to the respondent in the form of taxes, penalties and interest.

It is imperative that an assessment contains the requirements of the Act as the administrative functions bestowed by the Act on the Commissioner amount ^ε F to a determination which is executable through a garnishee. He is also bestowed with the power to hear any objections, in terms of the assessment made, after which he can insist on payment of the tax pending the determination of any dispute arising from an assessment. The legislature could only have envisaged granting the commissioner power to execute pending determination in circumstances where the taxpayer has been clearly advised of the basis for ^ε G the assessment. In addition s 51 requires the taxpayer to be given due notice of the assessment and the tax payable in the manner stipulated in that section. There should be no doubt as to whether the document sent by the Commissioner to a tax payer is an assessment in view of the taxpayer's right to object within 30 days ^ε H .

2004 (2) ZLR p155

Makoni J

A Annexure A is not headed "Notice of assessment" nor "assessment" and does not give the 30 days' notice for an objection as is required by the Act. Further, the document cannot be said to constitute an assessment as it falls short of the definition of assessment in terms of s 2 of the Act. In the process of serving the taxpayer with an assessment and hearing objections, the Commissioner should comply with the provisions of the Act as his B administrative acts have far reaching consequences of a garnishee on the taxpayer.

In view of the foregoing I find that Annexure A falls far short of being an assessment or notice of assessment as envisaged by the Act. The applicant could not have lodged an objection within the 30 days without being served C with any assessment or notice of assessment. Of interest to note is the fact that the garnishee was effected before the expiry of 30 days within which the applicant is entitled to note the objections. This fact fortifies my view that Annexure A cannot be classified as an assessment or notice of assessment.

I find that the applicant is properly before the court.

I will now proceed to deal with the initial five areas of contention as raised by D the parties.

WITHHOLDING OF TAX ON FEES

Withholding tax on fees is tax on fees payable to a non-resident, which tax should be withheld and paid to the Commissioner of Taxes within 30 days from the date of payment of fees to the non-resident or from the time such fees are E dealt with in such a way that the conditions under which the non-resident is entitled to them are fulfilled, at which stage the fees are deemed to have been paid.

The contentious issue brought up by the applicant for determination by this court is the interpretation or meaning of para 2(1)(c) of the 17th Schedule F regarding the issue when fees are deemed to have been paid. The provision reads:

"Fees shall be deemed to be paid to the payee if they are credited to his account or so dealt with that the conditions under which he is entitled to them are fulfilled, whichever occurs first...."

G The part of the provision which deals with crediting of the fees to the payees account is not in dispute.

It is the second part which reads:

"....or so dealt with that the conditions under which he is entitled to them H are fulfilled, whichever occurs first...."

2004 (2) ZLR p156

Makoni J

The applicant contends that the phrase "the conditions under which he is A entitled to them are fulfilled...." relates to the granting of the exchange control authority for payment. In interpreting the phrase in dispute the court will not have regard to the facts of this matter but will simply interpret the phrase as it stands.

In interpreting a statute, the court starts by ascribing the ordinary grammatical B meaning which can be given to the provision. If the first part of s 2(1)(c), whose meaning is not in dispute, is read in context with the second part, and the ordinary meaning of the words is ascribed it becomes clear that the section deals with two scenarios where the withholding tax becomes due. The first scenario is where fees are credited to the non-resident's account. The second scenario are instances where, though the fees are not credited to the non C -resident's account, they are dealt with by the payer in a manner which discharges the payer's obligation to the non-resident. These are instances where payments are deemed to have been made. The legislature saw fit to make an omnibus reference to various other methods open to the payer to discharge his obligation to the non-resident other than direct payment to his or her D account, because the list of indirect payments cannot be exhaustive.

If the court were to accept the meaning ascribed by the applicant to the disputed part of the section, the concluding phrase "whichever occurs first" would not make sense. This is so because in both scenarios referred to by the court above, exchange control authority would be imperative. In this regard, the credit referred to would not occur first in the absence of exchange control E authority. If the meaning ascribed by the applicant is accepted, this would mean that the legislature would, in

the first scenario, sanction an unlawful crediting of funds to the non-resident in the absence of exchange control authority.

In the circumstances, the court declines to grant the declarator sought by the F applicant in respect of withholding tax. In view of the failure of the application for the declarator I will not grant the corresponding consequential remedies sought by the applicant.

In any event on the facts of this matter the applicant would not have succeeded on the aspect of consequential remedy. The applicant does not dispute that he claimed the expenses incurred, on the fees, in his books of accounts G, notwithstanding that exchange control approval had not been granted by the Reserve Bank. Companies have strict obligations to keep accurate records for tax purposes and where inaccurate records are found to have been kept, this may result in a finding in favour of the taxing authority. H

2004 (2) ZLR p157

Makoni J

A **MANAGEMENT SHARE OPTIONS SCHEME**

Under this head the applicant seeks a declarator in the following terms:

- (i) No taxable benefit accrued to employees of the applicant as at the date of exercising rights in terms of the management share option scheme and accordingly that the applicant was not obliged to withhold any employee's B tax in respect of the exercise of such option.
- (ii) The management share option scheme does not constitute tax avoidance on the part of the applicant for the purposes of s 98 of the Income Tax Act [*Chapter 23:06*].

The management share option scheme is a scheme introduced by the applicant for the benefit of fulltime managerial employees of grade 8 and above. The main C purpose of the scheme, as stated in clause 2 of Annexure II, is:

"2 **PURPOSE OF SCHEME**

To provide further incentives for motivating and retaining management staff for the benefit of the bank."

The scheme operated on the basis that an option was granted, to the D beneficiaries to purchase a specified number of shares allocated under the scheme at the mid market price prevailing on the grant of the option. The main conditions attached to the option were:

- (1) Any option or portion of option not exercised by participant would automatically lapse:
 - (a) E On the effective date of termination of ...within the bank ...resignation or dismissal.
 - (b) On demotion to a grade lower than managerial grade 8.
 - (c) On expiry of 12 months from the date the participant retired from the bank's service after reaching the normal retirement age or from the date on which participant dies in the bank service.
 - (d) F On expiry of 10 years from the date upon which the option was granted.

Some of the management employees sold shares which had been obtained by way of the exercise of the option and made a profit.

The issue to be determined by the court, as raised by the parties, is whether G the difference between the mid-market price as at the grant of the option and the mid market price as at date of exercise of the option constitutes either an advantage or a benefit in terms of s 8(1)(f) of the Act.

The applicant's contention is that the difference constitutes a gain which can be H classified as capital gains or other income which is taxable in the hands of

2004 (2) ZLR p158

Makoni J

the employee rather than the employer and the applicant was thus not obliged A to withhold any tax from the employee.

The respondent's contention is that the difference in dispute constitutes an advantage or benefit in terms of s 8(1)(f) of the Act AND that the manner in which the shares were dealt with constitutes an enjoyment of property corporeal or incorporeal, including a loan or an allowance. The respondent B further contends that the granting of options was conditional.

To determine the issue raised by the parties, it is my view that the term “advantage or benefit” has to be analysed. The relevant portion, under the definition section of s 8(1)(f), of advantage or benefit which requires scrutiny reads as follows:

“1. ‘ADVANTAGE OR BENEFIT’ c

(a) means —

(i) ...

(ii) ...

(iii) ...

(iv) the use or enjoyment of any other property whatsoever, corporeal d or incorporeal, including a loan, whether of the same kind as that referred to in subparagraph (1), (ii) or (ii) or not, which is not an amount referred to in paragraph (a), (b) or (c) of the definition of ‘gross income’ in this subsection or

(v) ...”

The key words to be analysed under subpara (iv) are: e

“Use or enjoyment of any other property whatsoever corporeal or incorporeal”.

The court will also examine whether the circumstances under which the shares were dealt with amounted to a grant of a loan by the applicant to its employees f .

In analysing whether the scheme amounts to use or enjoyment of property by the employee arising from his working relationship with employer the court will examine the objects of the share option scheme. The purpose of the scheme was to provide incentives for motivating and retaining managerial staff of grade 8 and above. The scheme further stipulates that on termination of employment either by resignation or dismissal any option which had not g been exercised would automatically lapse. The option was exercisable for a period of 10 years at a fixed price.

The applicant did not challenge that the majority of the participants did not pay cash at the time of exercising the share options but paid for the shares from the proceeds obtained after the sale of the shares. h

2004 (2) ZLR p159

Makoni J

A It is the court’s finding that the abovementioned advantages or benefits fall within the meaning of the phrase “use or enjoyment of property whatsoever, corporeal and incorporeal.”

It is clear from the above that the senior management employees of grade 8 and above used and enjoyed their employer’s shares in advantageous circumstances which were not open to junior employees or persons outside b the applicant’s employ. The applicant concedes that the delay of 10 years between the grant and exercise of an option constitutes an advantage in the widest sense. The applicant, however, further avers that the advantage does not fall within the ambit of s 8(1)(f) but does not give reasons why such an advantage cannot fall under the ambit of s 8(1)(f). It is my view that the c applicant failed to find reasons justifying the exclusion of the conceded advantage from the ambit of s 8(1)(f) in view of the above facts.

The court finds that the difference between the mid-market price on granting and mid-market price on exercise of option is an advantage or benefit to the employee constituting gross income and the applicant was supposed to withhold tax.

d The issue of whether the scheme falls under an income tax avoidance scheme has far reaching consequences on other similar schemes. The applicant covered this issue in para 28 of its founding affidavit in a cursory manner. Likewise the respondent did not take this issue seriously. In the result the court is unable to decide this issue, which has far reaching effects, on the e papers before it.

RESTRAINT OF TRADE PAYMENTS

Under this head, the applicant seeks the following declaration

- (i) The payment of the Zimbabwean equivalent of £94 128.66 made by the applicant to Alex Chrispen Jongwe was of a capital nature, and thus not f liable to income tax.
- (ii) The respondent was not entitled to gross up the income received by Mr Jongwe in the form of offshore payments since liability for tax on such income was Mr Jongwe’s, as employee, rather

than the applicant's, as employer, and no scheme of tax avoidance had been entered into between the applicant and Mr Jongwe.

6 The facts on this issue can be summarized as follows:

The applicant and Chrispen Alec Jongwe (Jongwe) entered into a contract of employment, Annexure C on 4 December 1997. The parties subsequently, on 28 March 1998, entered into a further agreement, Annexure G. In terms of

2004 (2) ZLR p160

Makoni J

Annexure G Jongwe was entitled to certain payments. After the audit carried out by the respondent, the respondent effected a garnishee in respect of alleged PAYE which it deemed due from the payments arising from Annexure G.

The issue arising from the above facts is whether the payments made to Jongwe under Annexure G constitute remuneration for which PAYE is 8 deductible in terms of s 8(1)(b) or are payments of a capital nature and not subject to income tax.

The applicant contends that the payments to Jongwe are not connected with services rendered or to be rendered but are of a capital nature. The applicant contends that the sums payable under Annexure G are payments made in return for Jongwe's undertaking not to work for or consult for any other similar 9 institution while in the employment of the applicant and for three years after leaving the applicant's employment. It further contends that restraint of trade contract payments are of a capital nature and are not remuneration in terms of s 8(1)(b) of the Act.

In the alternative, the applicant contends that the payments were made in 10 compensation for the loss of Jongwe's right to participation in the previous employee's share option scheme and that the payments maintain their capital nature.

The respondent, on the other hand, contends that Annexure G was entered into pursuant to the original contract of employment entered on 4 December 1997 and that Annexure G is not a genuine restraint of trade contract as it refers 11 to the original service contract. The applicant was not obliged to compensate Jongwe for losing his right to participate in a share option scheme but was making good the loss in appreciation of the services to be rendered by Jongwe.

In analysing the matter, the court notes that in its founding affidavit, the applicant's main argument is that the payments made in terms of Annexure G 12 were in pursuance of a restraint of trade contract and that Jongwe's loss of the right to participate in the previous employee share option scheme was simply used by the applicant and Jongwe to arrive at the payment figure. The alternative argument in the founding affidavit is that the payments were made as compensation for loss of recipient's right to participate in the share option 13 scheme and they retain their capital nature.

This directly contradicts the arguments presented by the applicant in its heads. In its heads, the applicant submits that the payments were being made to compensate Jongwe for share options relinquished by him and in consideration for those payments Jongwe agreed to the restraint of trade. 14

2004 (2) ZLR p161

Makoni J

15 On analysing Annexure G, the court finds that the position taken by the applicant, in its founding affidavit, on the restraint of trade issue, cannot be sustained by the agreement. Annexure G, para 3, clearly states that payment was to compensate Jongwe for the share options he relinquished and that payment would only be made on production of evidence of forfeiture of the options in the form of the original share option certificates. In addition, clause 16 5 of the same agreement stipulates that if Jongwe leaves service within a period of 5 years from date of commencement of service, he would be obliged to pay the bank, on a pro-rata share, the total payments received by him relating to the unexpired portion of the said five year period. No reference is made to the restraint of trade period in clause 5 of Annexure G. The stipulation in clause 5, regarding pro-rata payment, is itself an indication that the payments granted 17 to Jongwe under clause 3 were made in view of services to be rendered to the applicant by Jongwe, which services the bank expected for a certain minimum period.

There was no obligation for the applicant to pay for the loss of the relinquished shares. The applicant would not have done so were it not to employ Jongwe. ^D A scrutiny of Annexure G does not support the applicant's contention that it is a restraint of trade agreement as the restraint factor is a secondary issue.

Clause 6 of Annexure G indicates that Annexure G is additional to and in no way contradicts or replaces any of the terms of the employment contract entered into between the parties. It is, in essence, part of the contract of ^E employment rather than a separate restraint of trade contract as contended by the applicant.

It is trite law that the applicant's case stand on this founding affidavit and where the applicant abandons his founding affidavit mid-stream, his case inevitably falls. In view of the above, I cannot grant the relief sought under this head.

^F DISCOUNTING OFFSHORE DOCUMENTS

Under this head, the applicant seeks a declarator in the following terms:

1. That discounts deducted by Barclays Bank plc on bills drawn under Tobacco Merchant line of credit and under general offshore lines of credit do not constitute interest for the purposes of the 16th Schedule of the ^G Income Tax Act [*Chapter 23:06*] and are accordingly not subject to withholding of non-residents' tax on interest.

The applicant further seeks consequential remedy which is in line with the declarator sought. The consequence remedy sought is that the respondent ^H should refund the relevant amount garnished under this head.

2004 (2) ZLR p162

Makoni J

The applicant's contention is that the difference between the discounted ^A value received by the borrower (the cost of the bill) and the face value (also known as the maturity value) of the bill is discount earned and cannot be classified as interest for the purposes of the 16th Schedule of the Act.

The applicant further contends that though in banking practice discount and interest are loosely regarded as one and the same thing, in law, however there ^B is a clear distinction between the two concepts. The applicant also contends that the bench marking of discount yields to interest rates cannot by itself change the nature of the discount yield to an interest yield.

The applicant's basis for the contention is mainly that:

1. The 21st Schedule of the Act was specifically amended to include ^C discounts earned in the definition of interest. As this was not done in respect of the 16th Schedule, discount earned is excluded from the definition of "interest" in the Schedule.
2. The funding agreements with customers were discounting facility agreements rather than loan agreements.

On the other hand, the respondent's case is that the Act does not give a ^D general meaning for the word "interest" and as such the ordinary meaning of the word applies in respect of sections where the word is not specifically defined. In addition the respondent contends that the applicant, in all its documents, generated before the dispute arose, described or recorded the discounted payments made and the discount value received as loan and ^E interest respectively.

In analysing the issues raised by the parties, the court notes that the declarator being sought by the applicant is not merely based on the interpretation of the word "interest" as defined under the 16th Schedule. It is also based on the particular facts of this matter. The applicant further seeks consequential remedy based on the facts ^F.

The issue to be determined by this court is dependant on the nature of the transaction. Were the transactions relating to the tobacco lines of credit loan agreements similar to that of Propaco or were they discount facilities?

The applicant attached to its founding affidavit Annexure L, as an example of one such agreement under which deductions for withholding tax were ^G garnished by the respondent. On the other hand, the respondent attached Annexure OO as an example of a further agreement under the Tobacco

Credit Lines. Annexure OO was not challenged by the applicant. It is apparent from the papers before this court that the sample agreements provided do not relate ^H

2004 (2) ZLR p163

Makoni J

^A to the full amount garnished under this heading from the applicant by the respondent.

Annexure L is in the form of a letter and is headed "US Dollar bill discounting facility" and makes reference to bills of exchange. On the other hand Annexure OO relates to a financing facility which facility is described under clause 1.1 as an agreement by the bank (Barclays Bank plc) and Barclays Bank of ^B Zimbabwe to advance up to US 45 million to the borrower (Zimbabwe Leaf Tobacco Company).

Annexure L and OO depict totally different positions. The question that arises from the different positions is in which category do the remaining unattached agreements fall. In the absence of all the agreements pertaining to the sum total ^C deducted under offshore withholding tax, it is difficult for the court to grant the declarator and the consequential remedy sought by the applicant on the facts.

In addition, the nature of each agreement falling under this head has the effect of determining whether the benefit accrued in each of the transactions can be described as an interest or discount yield.

^D The doubt as to the exact nature of the transactions is worsened by the fact that, before the dispute, the bank recorded the transactions as loan and interest, as opposed to discounts earned. No plausible explanation has been given by the applicant for such recording.

With regard to the issue of whether the yield rate on a bill of exchange can be ^E classified as interest under the 16th Schedule, the court notes that there is no general definition given to the word "interest" under the Act. The court further notes the word "interest" is not specifically defined in the 16th Schedule but the section lists what is included and what is excluded for taxation purposes. The meaning of the word "interest", ascribed to the 21st Schedule by the ^F amendment, particularly relates to that section and does not preclude a different interpretation of the word in relation to sections where the word is not specifically defined.

The court is of the view that the ordinary meaning of the word "interest" should be given in relation to this definition under the 16th Schedule of the Act. The Concise Oxford Dictionary defines "interest" as "an advantage or ^G profit especially when financial, money paid for use of money lent, or for not requiring the payment of a debt". In paying the face value of the bill, on the date agreed, the borrower pays an advantage or profit over and above the ^H value he actually received in exchange of the bill. This brings the definition

2004 (2) ZLR p164

Makoni J

of the discount earned into the ambit of the ordinary meaning of the word ^A "interest" as defined in the Concise Oxford Dictionary.

The applicant therefore had an obligation to withhold tax and for the above reasons the application fails.

PENALTIES AND INTEREST

With regard to the issue of penalties, the parties are agreed that the issue can ^B be remitted to the respondent for re-assessment. The court is of the view that the position agreed by the parties is proper and hereby grants the alternative remedy sought by the applicant in the draft order as amended by para 77 of the applicant's heads of argument.

In the result the court: ^C

- (a) dismisses with costs the application seeking declarators by the applicant in para 1 to 9 of the draft order.
- (b) by consent of both parties, remits the issue of penalties and interest to the respondent for re-consideration. ^D

Scanlen & Holderness, applicant's legal practitioners

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Document 23 of 47**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/S v ZENDERE & ANOR 2004 (2) ZLR 165 (H)

S v ZENDERE & ANOR 2004 (2) ZLR 165 (H)**2004 (2) ZLR p165**

Citation	2004 (2) ZLR 165 (H)
Case No	Judgment No. HH-157-04
Court	High Court, Harare
Judge	Uchena J
Heard	22 September 2004
Judgment	22 September 2004
Counsel	<i>Gula Ndebele and Partners</i> , applicant's legal practitioners <i>Attorney-General's Office, Criminal Division</i> , respondent's legal practitioners
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

^c **Criminal procedure** — *forfeiture to State* — *unlawful sale of fuel* — *fuel that remains unsold* — *whether unsold fuel may be declared forfeited to the State*

Headnote

The accused ran a business in which he obtained petroleum products on commission for an independent company which then supplied them to ^d bulk consumers. Contrary to the agreement between himself and the company, the accused sold some of the petroleum to members of the public who were not customers of the company, and for this he was convicted by a magistrate of selling fuel without a licence in contravention of an order made under the Control of Goods Act [*Chapter 14:05*]. As part of the sentence the magistrate ordered that a large quantity of diesel ^e fuel found in the accused's premises should be forfeited to the State; in so doing the magistrate purported to act in terms of s 62(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which allows a court to declare forfeit articles "by means whereof" an offence is committed or which are "used in the commission" of an offence, or which are "used for the purpose of or in connection with the commission" of an offence ^f specified in the Second Schedule to the Act. The accused, through his legal practitioners, sought a review of the forfeiture order on two grounds: first, that it was unlawful and, second, that the magistrate imposed it by altering the court record after the trial had ended. This second ground was not backed up by affidavits or any form of evidence.

^g *Held*, that the forfeiture order was not authorised by s 62(1) of the Criminal Procedure and Evidence Act. An article "by means whereof" an offence is committed is one which enables the offender to commit the offence or assists or aids the offender in committing the offence. This did not extend ^h to the diesel fuel which remained after other fuel had been sold in

2004 (2) ZLR p166

contravention of the law; the forfeited fuel did not play any part in, nor ^a was it used in, the commission of the offence. Moreover, the offence was not one specified in the Second Schedule to the Act.

Held, further, that legal practitioners should not lightly make allegations alleging impropriety on the part of a judicial officer without first establishing and verifying the basis for the allegations. In this case the ^b court could not resolve the issue in the accused's favour on the basis of a bald allegation not substantiated by evidence.

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 62(1) ^c

Judgment

UCHENA J: The accused was on 14 May 2004 at Gokwe Magistrate's Court charged with the contravention of s 5 of the Control of Goods (Petroleum Products Prices) (Amendment) Order, 2003 (No 3) (SI 189 of 2003) as read with s 6 (3) of the Control of Goods Act [*Chapter 14:05*]. He pleaded guilty and was convicted on his own plea. The conviction is proper but issues have been ^d raised on the forfeiture of 29 000 litres of diesel found at the premises the accused was operating from.

The facts of the case are that the accused operates a petroleum products agency known as Preview Investments (Pvt) Ltd. His agency had a contract with Dunleth Enterprises (Pvt) Ltd. The agreement between the accused's agency and Dunleth Enterprises is that the accused mobilises or obtains bulk ^e petroleum products for Dunleth. Thereafter Dunleth would deliver supplies for the bulk consumers and pay the accused's agency a commission.

Contrary to the agency agreement, the accused obtained deliveries of diesel which he kept at Dzinemhuru garage. The accused then sold some of the diesel to members of the public not covered by the contract between him and Dunleth ^f Enterprises. He was at the time of his arrest found in possession of 29 000 litres of diesel stored in drums.

On being charged he pleaded guilty and was convicted on his own plea. He was sentenced to a fine of \$200 000 or, in default of payment six months' imprisonment. In addition, the 29 000 litres of diesel were forfeited to the State ^g.

In terms of s 59 of the Magistrates Court Act [*Chapter 7:10*] the accused's legal practitioners submitted a statement on review. In it they alleged that:

- "(1) The magistrate acted *ultra vires* the provisions of s 5 of SI 189 of 2003 which does not provide for forfeiture of the goods except where the forfeiture was being done by a regional magistrate. The magistrate ^h

2004 (2) ZLR p167

Uchena J

^a did not have the powers to forfeit the said product to the State as she had no capacity to do so.

- (2) The forfeiture was made by way of alteration after the court had adjourned in the absence of the accused and the prosecutor.
- (3) The alteration of the sentence by the magistrate has seriously prejudiced Dunleth Enterprises (Pvt) Ltd, the owner of the diesel that ^b was confiscated, who has since been granted an order interdicting the police from disposing the diesel pending the application for review."

The dispute concerning the forfeiture of the diesel first appeared before me on 26 May 2004 as an urgent chamber application under HC 6008/04. At the ^c hearing of the urgent chamber application the parties consented to the granting of an interdict preventing the police from disposing of the diesel pending the review of the criminal proceedings which had resulted in the forfeiture of the diesel to the State.

The record of the criminal proceeding was placed before me in early July 2004. On the 5th of July 2004 my clerk wrote to the Provincial Magistrate, Midlands, asking the trial magistrate to comment on the allegations made against her decision in the application for review. In particular, she was to comment on (1) whether she made the forfeiture order after the court had adjourned and (2) the allegation that her forfeiture order was *ultra vires* the provisions of s 5 of SI 189 of 2003.

¶ No response was received. When my clerk made telephonic inquiries with Gokwe Magistrates' Court he was advised that the record had not been received. He on 2 September 2004 sent another letter and a photocopy of the record made from HC 2008/04. By a letter dated 6 September 2004 the trial magistrate responded, commenting as follows on the issues raised in the F accused's legal practitioners' statement on review:

- (1) She agrees that SI 189 of 2003 does not make provision for forfeiture. She however used the power conferred on her by s 62(1) of the Criminal Procedure and Evidence Act [Chapter 9:07].
- (2) She denies making alterations to the sentence after the court had adjourned, but says she made the forfeiture order at the time she passed sentence.

¶ The accused's legal practitioner made a bald allegation in her statement on review that the forfeiture order was made after the adjournment. She was herself not present at that hearing. She did not attach any affidavit by the accused or some other person present at the hearing to the statement on H review to substantiate the allegation. It must be stressed that legal practitioners

2004 (2) ZLR p168

Uchena J

should not lightly make allegations alleging impropriety on the part of a judicial A officer without first establishing and verifying the basis for the allegation.

In this case the magistrate denies forfeiting the diesel to the State after the court had adjourned. She says she forfeited the diesel to the State at the time she passed sentence. I cannot resolve this issue in the accused's favour on the basis of a bald allegation not substantiated by any evidence B .

However, an examination of the magistrate's reasons for sentence does not reveal any mention of the forfeiture. The magistrate should have dealt with the forfeiture in her reasons for sentence. Her failure to do so seems to indicate that she did not properly direct her mind to the forfeiture.

The second issue raised was that of the forfeiture being *ultra vires* the C provisions of s 5 of SI 189 of 2003. In her response the magistrate does not dispute that SI 189 of 2003 does not provide for forfeiture. She however said she acted in terms of s 62(1) of the Criminal Procedure and Evidence Act (hereunder referred to as the "CP & E Act").

Section 62(1) of the CP & E Act provides as follows:

"62(1) A court convicting *any person of any offence may*, without notice D to any other person, declare forfeited to the State –

- (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
- (b) if the conviction is in respect of *an offence specified in the Second E Schedule, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or, in the case of a conviction relating to the theft of anygoods, for the conveyance or removal of the stolen property;*

and which was seized in terms of this Part." (emphasis added)

My understanding of s 62(1) is that the court has a discretion on whether or F not to forfeit to the State any article involved in the commission of any offence. That discretion should be exercised reasonably and judiciously in circumstances where the article is one mentioned in s 62(1)(a) or (b).

A court must therefore start by considering whether or not the article is one by means whereof the offence was committed or the offence falls under the G Second Schedule to the CP & E Act. If it is, the court must then consider whether the article should be forfeited in terms of s 62(1)(a) or (b). In terms of s 62(1)(a) the article must be one "by means whereof the offence was committed" or "one which was used to commit the offence". H

2004 (2) ZLR p169

Uchena J

A In the present case the magistrate should have asked herself whether the diesel she was forfeiting to the State was an article by means whereof the offence was committed or one used to commit the offence.

The offence the accused person was convicted of is that of selling petroleum products to the public while not being a holder of a licence. The agreed facts reveal that the accused was an agent of Dunleth for purposes of finding bulk B consumers to whom Dunleth would sell diesel and the accused would be paid commission. In para 4 of the State's outline it is alleged as follows:

- "4 Between the period extending from 5 April 2004 to 4 May 2004 the accused obtained deliveries of diesel fuel which he kept at Dzinemhuru Garage. The accused proceeded to sell diesel fuel to members of the C public who are not catered for in the contractual agreement with Dunleth Enterprises."

In para 5 of the State's outline it is alleged –

- "5 The State may produce receipts in respect of small quantity sales made direct to the public from Dzinemhuru Garage."

The offence was the sale to members of the public. The question the magistrate D should have asked herself is whether the diesel which was found at the garage had been sold to members of the public or was a means by which diesel had been sold to members of the public or was used to commit the offence.

In my view an article "by means whereof" the offence is committed is one which enables the offender to commit the offence or assists or aids the offender in E committing the offence. For example, a motor vehicle used to transport goods with which the offence is committed can be described as a means whereof the offence is committed. In my view this does not extend to diesel which remains after other diesel has been sold in contravention of the law. This should be so if regard is had to the State's own outline, which clearly states that the accused had a contract which allowed him to sell to bulk consumers on behalf F of Dunleth. Should diesel meant for bulk consumers be forfeited just because some diesel has been sold to public consumers? I am of the view that the diesel which was forfeited did not play any part, nor was it used, in the commission of the offence. The diesel should therefore not have been forfeited to the State in terms of s 62(1)(a) of the CP & E Act.

G In terms of s 62(1)(b) the offence for which the accused has been convicted must be one falling under the Second Schedule. If the offence falls under the Second Schedule to the CP & E Act then the article can be forfeited and the court can proceed to consider whether the article qualifies for forfeiture in H terms of s 62(1)(b). If the offence does not fall under the Second Schedule, the

2004 (2) ZLR p170

Uchena J

article cannot be forfeited to the State and the inquiry should end there. A

The Second Schedule to the CP & E Act provides for four groups of offences in connection with which articles may be seized and be confiscated in terms of s 62. The offences are:

- (1) Any offence under any enactment relating to the unlawful possession, conveyance or supply of habit-forming drugs or harmful liquids B.

The offence for which the accused was charged is not in any way connected to habit forming drugs or harmful liquids so the offence does not fall under this group.

- (2) Any offence under any enactment relating to the unlawful possession of, or dealing in, precious metals or precious stones. C

The offence for which the accused in this case was convicted does not fall under this group D.

- (3) Theft, either at common law or as defined by any enactment.

Again, the offence for which the accused was convicted does not fall E under this group.

- (4) Breaking and entering any premises with intent to commit an offence, either at common law or in contravention of any enactment.

Again the offence for which the accused was convicted does not fall under this group.

The fact that the offence for which the accused was convicted does not fall under any of the four groups of offences under the Second Schedule means the diesel should not have been seized and

confiscated in terms of s 62(1)(b) of the C P & E Act.

It must be noted that while s 62(1) of the CP & E Act can be used to forfeit goods or articles used in committing any offence, care must first be taken to ensure that the article is one by means whereof an offence was committed or was used ^F to commit the offence or the offence falls within the Second Schedule as it is only articles which fall under s 62(1)(a) and (b) which can be forfeited even if the act under which the offence was created does not provide for forfeiture.

If the magistrate in this case had properly applied her mind to the provisions of s 62(1)(a) and (b) she would not have forfeited the diesel to the State. ^G

In the circumstances the magistrate's order forfeiting the 29 000 litres of diesel to the State is set aside. The Officer-in-charge Gokwe Police Station is ordered ^H

2004 (2) ZLR p171

Uchena J

A to immediately release the 29 000 litres of diesel to Dunleth Enterprises.

Mavingira J concurred.

Gula Ndebele and Partners, applicant's legal practitioners

^B *Attorney-General's Office, Criminal Division*, respondent's legal practitioners

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Document 24 of 47

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/MTEMERERWA & ANOR v TAWARWISA & ANOR 2004 (2) ZLR 172 (H)

MTEMERERWA & ANOR v TAWARWISA & ANOR 2004 (2) ZLR 172 (H)

2004 (2) ZLR p172

Citation	2004 (2) ZLR 172 (H)
Case No	Judgment No HH-160-04
Court	High Court, Harare
Judge	Kamocha J
Heard	15 June 2004
Judgment	22 September 2004
Counsel	<i>E Jori</i> , for the applicants <i>C Mantsebo</i> , for the first respondent No appearance from the second respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Agent — authority — power of attorney — limits to — agent given powers c to conduct transactions relating to purchase of property — not a mandate to institute legal proceedings

Headnote

By special power of attorney the applicants appointed a person to conduct all transactions relating to the purchase of a property on their behalf. When a dispute arose, the agent instituted proceedings to secure **d** transfer of the property. The seller argued that the agent had no mandate to institute such proceedings.

Held, that a power of attorney must be carefully drawn and strictly construed. In particular, where it is meant to authorise litigation, it must be particular as to the nature of the action to be instituted, as well as the relief to be **e** claimed. Authority to demand transfer does not include authority to institute legal proceedings to obtain transfer on behalf of the principal. The institution and prosecution of legal proceedings is an important step which may involve the principal in great expense and there is no justification for holding that where a principal authorises an agent to demand and receive a thing, the principal must be taken to have intended **f** to include the authority to bring and prosecute legal proceedings.

Case cited

Ashley v South African Prudential Ltd 1929 (1) TPD 283

Case information

E Jori, for the applicants **g**

C Mantsebo, for the first respondent

No appearance from the second respondent **h**

2004 (2) ZLR p173

Kamocha J

Judgment

A KAMOCHA J: The applicants, who are husband and wife, sought an order in the following terms:

"It is ordered that:

1. The respondent should sign all the necessary papers to enable registration of title within seven days of the date of service of this order on them, failing which the Deputy Sheriff be and is hereby **b** authorised to sign all the necessary transfer documents and papers on their behalf.
2. The respondent should pay costs of application."

The applicants were based in Riyadh, Saudi Arabia, but they wanted to buy a property, back home, known as 703 Moffat Heights, Avenues, Harare. By **c** special power of attorney they appointed a Mr Hamadziripi Gwaendepi Msipa to conduct all transactions relating to the purchase of the property. The special power of attorney read in part:

"That I

Do hereby nominate and appoint Hamadziripi Gwaendepi Msipa

d To be my General Attorney and agent for managing and transacting all my affairs, involving The Purchase of an Undivided 1.786 per cent share being share No. 51 In certain Piece of Land Situate In The District Salisbury Called Lot 1 of Stand 1721 Salisbury."

The applicants executed their special powers of attorney in Riyadh on 30 October 2002.

e It is not clear from the papers filed of record whether or not Hamadziripi represented the applicants when the agreement of sale was signed by the respondent on 18 June 2002. Be that as it may, the parties appeared to have agreed that the applicants purchase the property from the respondent for four million dollars. In terms of the agreement the full purchase price of \$4 000 000 was to be payable by the purchaser to the seller's conveyancers against **f** registration of transfer. Thereafter the seller would be obliged to tender transfer of the property within seven days of the date upon which the purchaser fulfils his obligation.

In the event of the purchasers wanting to make payment through the agent, clause 10 of the agreement stipulated that any payment made to the agent must **g** only be made to the office cashier

in the offices of Alexander Court Estate Agents against issue of a formal company receipt. The applicants paid \$1 587 000 on 20 June 2002 and \$5 625 000 on 1 July 2002 through the agent and were issued with an 2004 (2) ZLR p174

acknowledgement of receipt which was in the following form –

2004 (2) ZLR p174

Kamocha J

"Acknowledgement of Receipt A

DATE 20/06/2002

I Ronald Muchaka on behalf of Maria Kudakwashe Tavarwisa hereby confirm receipt of cash totaling \$1 587 000 (one million five hundred and eighty seven thousand dollars) from Willard Nhau and Precious Beauty Mtemererwa being part payment towards the purchase of Flat B No. 703 Moffat Heights, Avenues, Harare."

The acknowledgement in respect of the balance of \$5 625 000 paid on 1 July 2002 is worded in the same manner. Both of them were signed by the agent of the respondent and witnessed by two people.

The agreement of sale which the seller signed on 18 June 2002 was not signed by the purchasers for quite sometime. They still had not signed it on 4 July c 2004 when the respondent called upon her agent Mr Machaka to ensure that the purchasers signed the agreement without any further delay as the unsigned one was of no use to her.

According to the respondent the agreement remained still unsigned up to 9 August 2004 when she decided to cancel it. The respondent said the d applicants failed to sign the agreement, that was the reason why she decided to cancel it.

The applicants in their founding affidavit had averred that they had in fact signed it on 18 June 2002. That, of course, was not true. The applicants conceded in their answering affidavit that they did not sign the agreement on 18 June 2002 as suggested in the founding affidavit. They in fact do not know e when they signed it. They did not give any date. They simply say it was signed on the occasion they were back in the country but failed to say when that was. They submitted that it must have been before the respondent cancelled it. This submission does not assist the applicants at all as they do not recall when it was signed. The respondent, on the other hand, is clear on that point. She said f it remained unsigned until she called it off on 9 August 2002. It therefore follows that since the agreement was unsigned by the applicants at the time it was called off, no contract had come into fruition at that stage.

The respondent further stated that she had not even received any money as alleged by the applicants. Since the applicants claimed to have paid through the agent, formal company receipts should have been issued to them. The g acknowledgments of receipt cannot be said to have been company receipts of Alexander Court Estate Agents. The agent was clearly in breach of clause 10 of the agreement. h

2004 (2) ZLR p175

Kamocha J

A The respondent also pointed out that Hamadziripi had no mandate to institute proceedings to obtain transfer. The power of attorney quoted above does not authorise him to do so. It was further submitted that a power of attorney is a document which is strictly construed and must be carefully drawn. More so, where the power of attorney is meant to authorise litigation, it must be particular as to the nature of the action to be instituted as well as the relief to b be instituted as well as the relief to be claimed. There is merit in the respondent's submissions. Herbstein and van Winsen *The Civil Practice of the Superior Courts of South Africa* 4 ed at p 233 states that "Authority to demand transfer does not include authority to institute legal proceedings to obtain transfer on behalf of the principal."

c In *Ashley v SA Prudential Ltd* 1929 (1) TPD 283 at 285 Tindall J had this to say –

"But, in my opinion, where the authority is stated to be 'to demand and receive the title deeds relating to such transfer' it cannot be said that bringing legal proceedings to obtain the title deeds is a necessary or usual means of executing the authority to 'demand and receive'. The institution d and prosecution of legal proceedings is an important step which may involve the principal in great expense and I see no justification for holding that where a principal authorises an agent to demand and receive a thing, the principal must be taken to have intended to include the authority to bring and prosecute legal proceedings. There is no

reason for construing the word 'demand' in a sense other than its ordinary sense which is well understood and means 'claim', in other words an extrajudicial demand."

In casu the power of attorney nominated and appointed the agent for managing and transacting all the principal's affairs involving the purchase of the property. There would be no justification for construing it to have authorised him to bring and prosecute legal proceedings. He had no mandate to do that.

¶ In the light of the above findings this application must fail and is hereby dismissed with costs.

Wintertons, applicants' legal practitioners

¶ *Mantsebo & Partners*, first respondent's legal practitioners

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Document 25 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/COSMOS CELLULAR (PVT) LTD v POSTS & TELECOMMUNICATIONS CORPORATION 2004 (2) ZLR 176 (S)

COSMOS CELLULAR (PVT) LTD v POSTS & TELECOMMUNICATIONS CORPORATION 2004 (2) ZLR 176 (S)

2004 (2) ZLR p176

Citation	2004 (2) ZLR 176 (S)
Case No	Judgment No. S-77-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Ziyambi JA
Heard	22 July 2004
Judgment	23 September 2004
Counsel	<i>A Mugandiwa</i> , for the appellant <i>E T Matinenga</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal — powers of court on appeal — decision of lower court based on exercise on c discretion — limited powers of appeal court to interfere with decision

Headnote

An appeal court is not imbued with the same broad discretion as a trial court ^D and its power to interfere with the exercise of a judicial discretion is limited. It is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body

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

Cases referred to ^G

Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)

Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 (CA) ^H

2004 (2) ZLR p177

^A *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S)

Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd 1984 (3) SA 202 (T)

Case information

A Mugandiwa, for the appellant

E T Matinenga, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which ^B granted a provisional judicial management order in respect of the appellant company ("Cosmos") at the request of the respondent ("the PTC").

The factual background in the matter was correctly set out by the learned judge in the court *a quo* as follows:

"In November 1996 the PTC launched its cellular telephone service ^C Net*One, with Cosmos and two other companies being service providers. In terms of the contracts entered into with the three service providers, the PTC was to set up a cellular telephone service centred around an electronic switching device ('the mobile switch') which receives and distributes electronically all calls so made, and notifies the service providers of all such calls, their destinations and the duration of each. The ^D role of the service provider is to sign up customers to use the PTC cellular service, to provide them with Sim cards, and to bill the customers, collect the money due and pay the PTC its charges within thirty days. The service provider enters into a contract with each subscriber and provides the cellphone. For its services the service provider is entitled to a monthly commission on the charges it collects. It is responsible for, and must carry, the bad debts that occur.

^E In April 1999 the PTC issued summons claiming payment of \$74 558 801.82. Cosmos admitted that as at July 1999 the amounts due to the PTC that were outstanding amounted to \$92 471 168.86, but claimed that various amounts totaling just over \$20 million were not in fact owing, and that it had a counter-claim for loss of revenue in the sum of \$48 million. Therefore, the PTC avers Cosmos is incapable of paying its debts as envisaged by ss ^F 205(c) and 300(a) of the Companies Act [*Chapter 24:03*]."

The learned judge in the court *a quo* had to determine three questions. The first was whether, in September 1999, when the application for a provisional judicial management order was filed in the High Court, or in October 2001, when the application was heard, Cosmos was unable to pay its debts. The learned ^G judge answered that question in the affirmative.

The second question was whether Cosmos was unable to pay its debts by reason of mismanagement. That question was answered in the affirmative.

^H And the third question, which was also answered in the affirmative, was

2004 (2) ZLR p178

Sandura JA

whether it was just and equitable that Cosmos be placed under judicial management ^A.

In the circumstances, the learned judge granted the order placing Cosmos under provisional judicial management forthwith. Aggrieved by that decision, Cosmos appealed to this court.

In my view, there are three sections of the Companies Act [Chapter 24:03] ^B ("the Act") which are relevant in determining the issues in this appeal.

The first section is s 205(c), which reads as follows:

"205 When company deemed unable to pay its debts

A company shall be deemed to be unable to pay its debts –

- (a) – (b) ...; or c
- (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

The second relevant section of the Act is s 299(1)(a), which reads as follows: ^D

"299 Circumstances in which provisional judicial management order may be obtained

- (1) Subject to section *three hundred*, the court may –
- (a) on an application being made to it for such an order by any person who would be entitled to apply for the winding up of the company, grant a provisional judicial management order ^E."

And the third relevant section is s 300(a), which reads as follows:

"300 Requirements for provisional judicial management order

The court may grant a provisional judicial management order in respect of a company –

- (a) on an application referred to in paragraph (a) of subsection (1) of ^F section *two hundred and ninety-nine*, if it appears to the court –
 - (i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and
 - (ii) that there is a reasonable probability that if the company is placed ^G under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and
 - (iii) that it would be just and equitable to do so." ^H

2004 (2) ZLR p179

Sandura JA

A It is clear from the above statutory provisions that in granting the provisional judicial management order the learned judge in the court *a quo* exercised a judicial ^B discretion. In a number of cases, this court has stated that its power to interfere with the exercise of a judicial discretion is limited.

Thus, in *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S) at 618 B-C, Gubbay CJ said the following about the exercise of a judicial discretion:

"In considering the cogency of the submission, what should not be overlooked is that Bartlett J exercised a discretion to hear the matter. That he did so is a significant factor at this stage of the proceedings. Unless it can be found that no reasonable judge would have acted other than to decline jurisdiction – certainly a length to which I am not prepared ^C to go – the decision made is plainly beyond interference by this court."

About three years later, in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S), Gubbay CJ again commented on the exercise of a judicial discretion and at 62F-63A set out the grounds on which this court would interfere with the exercise of a judicial discretion as follows:

"^D The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first – one which clearly involved the exercise of a judicial discretion – may only be interfered with on limited grounds. See *Farmers' Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that ^E if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise ^F its own discretion in substitution, provided always it has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

A similar principle has been expressed by the judiciary in the United Kingdom. Thus, in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345 B-C Asquith LJ said:

"^G It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a

discretion that on the same evidence two different minds might reach widely different decisions ^h without either being appealable. It is only where the decision exceeds the

2004 (2) ZLR p180

Sandura JA

generous ambit within which reasonable disagreement is possible, and is, ^a in fact, plainly wrong, that an appellate body is entitled to interfere."

With that principle in mind, I now turn to the questions which the learned judge in the court *a quo* had to answer, and determine whether there is any basis for interfering with the exercise of his judicial discretion.

As already indicated, the first question considered by the learned judge was ^b whether in September 1999, when the application for a provisional judicial management order was filed in the High Court, or in October 2001, when the application was heard, Cosmos was unable to pay its debts.

In this regard, I wish to make three points. The first is that in a letter to the PTC dated 30 November 1998 the chairman of Cosmos, Mr Siziba ("Siziba"), admitted that Cosmos owed the PTC at least \$21 489 820.01. The letter, in ^c relevant part, reads as follows:

"You will note that we have taken the liberty of deducting interest charges raised by you in anticipation of your favourable consideration of our request that you waive your claim for interest.

This leaves the outstanding amount due to you as \$21 489 820.01 which ^d we undertake to pay to you by weekly installments of not less than \$1 500 000 payable by noon every Friday commencing 4 December 1998."

In my view, that was a clear admission by Cosmos that it owed the PTC more than \$21 489 820.01. Cosmos was aware that interest was payable but hoped that the PTC would waive its claim in that respect. However, it gave no reason as to why the interest which the PTC was entitled to charge should be waived. ^e In addition, the undertaking by Siziba that the debt of \$21 489 820.01 would be paid off by weekly installments of \$1 500 000 was not carried out.

The second point I wish to make is that the papers show that at a meeting held at Kopje Plaza on 26 August 1999 Cosmos admitted that its cumulative outstanding debt to the PTC up to July 1999 was \$92 471 168.86, but claimed ^f that certain amounts had to be deducted from that sum.

The first deduction claimed by Cosmos was the sum of \$7 278 761.62 in respect of commissions which Cosmos alleged were payable to it by the PTC. However, it is pertinent to note that as a result of a court application filed in the High Court by the PTC, and opposed by Cosmos, Mubako J issued a declaratory order indicating that the commissions in question were not ^g payable by the PTC. There was, therefore, no basis for deducting the sum of \$7 278 761.62 from the admitted debt of \$92 471 168.86.

The second deduction claimed by Cosmos was the sum of \$10 923 419.78 in ^h

2004 (2) ZLR p181

Sandura JA

^a respect of sales tax. In this regard, the contention by Cosmos was that it was liable to pay sales tax to the Commissioner of Taxes, and not to the PTC, for onward transmission to the Commissioner of Taxes. However, Cosmos did not dispute that the amount was payable in respect of sales tax. It follows, therefore, that the sum of \$10 923 419.79 was a debt payable by Cosmos, either to the PTC or to the Commissioner of Taxes. Cosmos did not give any reason ^b for not having paid the sales tax to the Commissioner of Taxes.

The third deduction claimed by Cosmos was the sum of \$12 911 686.19 in respect of a July 1999 invoice. The deduction was claimed on the basis that the amount was not due and payable until a week later on 2 September 1999. However, that date came and went and the amount was not paid.

^c The fourth and final deduction claimed by Cosmos was the sum of \$48 000 000, being the loss allegedly sustained by Cosmos as a result of the alleged failure by Net*One to supply Cosmos with 5 000 SIM cards when the service provider contract was signed in 1996. The PTC denied liability in respect of that claim, and Cosmos did not take any legal action against the PTC to enforce the claim. In addition, there was no indication whatsoever of how ^d the sum of \$48 000 000 had been arrived at.

The third point I wish to make is that the answering affidavit filed by the PTC in June 2001 established that since the filing of the application for a provisional judicial management order in September 1999 the debt owed to the PTC by Cosmos had increased very substantially to about two hundred million R dollars, and that it was not diminishing.

Counsel for Cosmos criticised the learned judge in the court *a quo* for taking into account allegations contained in the answering affidavit which had not been set out in the founding affidavit filed by the PTC.

Whilst it is correct that in general an applicant must stand or fall by his founding affidavit and the facts alleged in it, and that he should not introduce F new matter in his answering affidavit, this is not an absolute rule. Where, for example, the omission of the allegations from the founding affidavit has been satisfactorily explained, the introduction of the new allegations in the answering affidavit should be sanctioned. See *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205F-I.

G In the present case, the allegations in the answering affidavit relied upon by the PTC relate to events which took place after the application had been filed and could not have been included in the founding affidavit. That, in my view, satisfactorily explains why the allegations were not set out in the founding H affidavit.

2004 (2) ZLR p182

Sandura JA

In the circumstances, the learned judge came to the conclusion that at the time A the application for a provisional judicial management order was filed in the High Court in September 1999, and at the time the application was heard in October 2001, Cosmos was unable to pay its debts. I cannot see any basis for interfering with that conclusion, a conclusion reached by the learned judge in the exercise of his judicial discretion. The conclusion cannot be said to be plainly wrong, having regard to the evidence. B

I now wish to consider the second question determined by the learned judge, which was whether Cosmos was unable to pay its debts by reason of mismanagement.

Dealing with that issue, the learned judge said the following at pp 9-11 of the cyclostyled judgment, judgment no. HH-199-2001:

"Cosmos admitted that it had been remiss in that it has not kept detailed C minutes of its various meetings. It also admitted that it had not produced financial statements for the years ended 31 December 1996, 1997 and 1998. It said that it had produced draft financial statements for each of the three years but they had not been finalised because of the ongoing commission disputes with the PTC. It is significant that none of these drafts were filed. Cosmos did not deny the allegation [that] it has never had any of its D accounts audited since its inception. Neither did it deny the allegation that no statutory returns have been rendered to the Registrar of Companies since it was first registered. Cosmos also admitted that it had a debt recovery problem ...

In my view, the PTC has established that the failure by Cosmos to pay its debts E could be said to be due to mismanagement. Cosmos has not refuted most of the allegations made by the PTC to support its claims of mismanagement."

I entirely agree with the observations and conclusions of the learned judge.

Finally, with regard to whether it was just and equitable to place Cosmos under judicial management, the learned judge said the following at p 11 of the cyclostyled judgment: F

"The object of judicial management is to obviate a company being placed in liquidation if there is some reasonable probability that, by proper management or by proper conservation of its resources, it may be able to surmount its difficulties and carry on. There is no doubt that the PTC has very substantial claims against Cosmos, and if it were now to enforce its claims, Cosmos would be liquidated, to the detriment of its subscribers. G The PTC has been more than patient ... but has now come to the end of its tether and rightly so, because every month Cosmos' debts to the PTC are increasing, instead of diminishing. The alternative to judicial management is to place Cosmos in liquidation. In the circumstances, it seems to me that it is just and equitable to place Cosmos under judicial management." H

2004 (2) ZLR p183

Sandura JA

A I cannot find any fault with the learned judge's reasoning.

Before concluding this judgment, I would like to deal very briefly with the submission that since the granting of the provisional judicial management order Cosmos had ceased conducting its core business. I do not think that that is an issue which should concern this court, because the alleged information is not properly before us. However, the information could form a basis on ^B which Cosmos could oppose the granting of a final judicial management order on the return day of the provisional order.

There is, therefore, no basis on which this court can interfere with the exercise of a judicial discretion by the learned judge when he granted the provisional ^Cjudicial management order in favour of the PTC.

In the circumstances, the appeal is dismissed with costs.

Chidyausiku CJ and Ziyambi JA concurred.

^D *Wintertons*, appellant's legal practitioners

^E *Coghlan, Welsh & Guest*, respondent's legal practitioners

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Document 26 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/MAKWIRO PLATINUM MINES v PARADZAYI 2004 (2) ZLR 184 (S)

MAKWIRO PLATINUM MINES v PARADZAYI 2004 (2) ZLR 184 (S)

2004 (2) ZLR p184

Citation	2004 (2) ZLR 184 (S)
Case No	Judgment No. S-46-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	29 June 2004
Judgment	9 September 2004
Counsel	<i>T Bhatasara</i> , for the appellant Respondent in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — code of conduct — proceedings under — conduct complained ^C of — whether work-related — acts taking place when employee not actually working — acts committed while employee staying at accommodation provided by employer and adversely affecting fellow employees — such conduct work-related and subject to code of conduct

Headnote

The respondent, an employee of the appellant, behaved in a drunken and **D** unruly manner when he was staying at the compound erected by the appellant for the accommodation of those of its employees who were on duty at the mines operated by the appellant. As he had been disciplined for such conduct previously, he was, following an enquiry under the company's code of conduct, dismissed. He argued that he should not have been dismissed because the conduct took place when he was off **E** duty and was therefore not work-related.

Held, that to accept that argument would create a fertile ground for violence outside the work place which may have its origins inside the workplace and a working relationship. The appellant was on duty that weekend; that was the purpose for which he was booked in the compound. His undisciplined behaviour created a stressful atmosphere and made it **F** impossible for the other employees to get any sleep, factors which could adversely affect his co-employees at work. He had threatened to ill-treat the son of a workmate, who was his subordinate at work. Ill-treatment of a subordinate by his superior is likely to have adverse effects on the victim and his work to the detriment of the employer. The conduct of the **G** respondent was thus work related, and the only test to be applied was whether the respondent's conduct amounted to misconduct as defined in the code of conduct. If it did, the appellant was entitled to proceed in terms of the code of conduct. **H**

2004 (2) ZLR p185

Case referred to **A**

Zimpak (Pvt) Ltd v Mugarabi S-196-04

Case information

T Bhatasara, for the appellant

Respondent in person

Judgment

B ZIYAMBI JA: This is an appeal against a decision of the Labour Court. The respondent was found guilty by the disciplinary committee of the appellant of disorderly behaviour and indiscipline in contravention of the Code of Conduct for the Mining Industry SI 165 of 1992 ("the Code of Conduct"). Since he had been issued with a final warning about three weeks earlier for a similar **C** offence and warned of the consequences, he was dismissed from the appellant's employ. He appealed to the Labour Court on the grounds that the Code of Conduct did not apply and that he ought to have been disciplined in terms of the Village Rules.

The following facts were common cause at the hearing before the Labour Court:

D The respondent and his fellow employees were living in a compound erected by the appellant for the accommodation of those of its employees who are on duty at the mines. The village is called Makwiro Platinum Mines Village.

On 10 March 2002 at about 8.40 pm, the respondent, who was booked in the village from 6 to 13 March 2002, stormed into the canteen in a drunken state **E** and, shouting at the top of his voice, used abusive language to James Mketwa, the Village Manager, and a workmate. He then threatened to ill-treat the son of James Mketwa, who works in his department and is his subordinate at work. From there, the respondent proceeded to the television lounge where his workmates were watching the news, continuously shouting at the top of his **F** voice. His workmates tried without success to restrain him. Two of the workmates then dragged the respondent to his room upon instructions from the Village Manager and locked him there. The respondent responded by shouting louder and threatening to break down the door. He persisted in this unruly conduct making it impossible for his workmates to sleep until about 11 pm when he was removed from the village and taken to his home in Chegutu.

G Before the Labour Court, the respondent contended that since the alleged acts of misconduct occurred when he was away from work, he ought to have been disciplined in terms of the village rules. This contention found favour with the **H** Labour Court which found as follows:

2004 (2) ZLR p186

Ziyambi JA

"I agree with the appellant's submission and further add that in the event ^a that the respondent's village supervisor had failed to deal with applicant, he was at liberty to call for the assistance of the Zimbabwe Republic Police. This to me was a clearly an issue that fell outside the respondent's Code of Conduct. The fact that the village is a property of the respondent did not necessarily justify the application of the respondent's Code of Conduct on acts done by appellant when not on duty. The appellant's ^b conduct had nothing to do with his services under the respondent. This is a case where the conduct of the appellant was not work-related. See *Zimpak (Pvt) Ltd v Mugarabi* S-196-94."

It was submitted on behalf of the appellant that the conclusion that the misconduct was not job related was based on reasoning that is bad in law and ^c constituted a failure to hear and determine according to law.

Indeed, the case to which the learned Senior President of the Labour Court referred seems to point to a conclusion contrary to the one arrived at by the court. In that case, the respondent, who was the chairman of the workers' committee at his place of employment, complained of favouritism accorded to female employees by the telephonist of the appellant regarding the use of the ^d telephone. The two women made insulting remarks about him at the workplace and he threatened, at the work place, to beat them up after working hours so that management would have no jurisdiction over the matter. After work, the respondent came upon the two women, shook them and threatened to assault one of them although he did not actually hit her. The Tribunal having concluded that the assault having taken place outside the work premises was ^e not work-related, Korsah JA, who delivered the judgment of the court, said:

"It seems to me that to accept this proposition as law would be to create a fertile ground for violence outside the work place which may have its origins inside the workplace and a working relationship";

and, after recounting the evidence: ^f

"In my view, the conclusion that the ensuing assaults were not job-related was based on reasoning that was bad in law and constituted a failure to hear and determine according to law."

The finding by the Labour Court that the respondent's conduct had nothing to do with his services under the respondent and was therefore not work-related is not supported by the facts on record. In the first place, the appellant ^g was on duty that weekend; that is the purpose for which he was booked in the village. His undisciplined behaviour created a stressful atmosphere and made it impossible for the other employees to get any sleep, factors which could adversely affect his co-employees as regards the service which they rendered ^h

2004 (2) ZLR p187

Ziyambi JA

^a to their employer. In the second place, he threatened to ill-treat the son of a workmate, who was his subordinate at work. Ill-treatment of a subordinate by his superior is likely to have adverse effects on the victim and his work to the detriment of the employer.

The Labour Court also found that the appellant should have been disciplined in terms of the Village Rules. As the respondent submitted, these are in-house ^b rules designed to ensure proper administration of the village and do not enjoy the status of a registered code of conduct. Accordingly, the conduct of the respondent being work related, the only test to be applied is whether the respondent's conduct amounts to misconduct as defined in the Code of Conduct. If it does, the employer is entitled to proceed in terms of the Code ^c of Conduct. This is the prerogative of the employer.

The respondent's position is aggravated by the fact that he had been given a final warning in respect of similar behaviour some three weeks earlier and was aware of the consequences of repetition of such behaviour. In my view, the employer ought not to be obliged to condone the repetition of the very actions for which the respondent had been given a final warning.

^d Accordingly, the appeal is allowed with costs.

The order of the Labour Court is set aside and substituted with the following:

"The appeal is dismissed with costs".

^e Chidyausiku CJ and Malaba JA concurred.

^f *Kantor & Immerman*, appellant's legal practitioners

Document 27 of 47**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/LEVER BROTHERS v BIMHA & ORS 2004 (2) ZLR 188 (S)

LEVER BROTHERS v BIMHA & ORS 2004 (2) ZLR 188 (S)**2004 (2) ZLR p188**

Citation	2004 (2) ZLR 188 (S)
Case No	Judgment No. S-85-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba JA and Gwaunza JA
Heard	6 September 2004
Judgment	30 September 2004
Counsel	<i>E W W Morris</i> , for the appellant <i>B T Mtetwa</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — contract — terms of — collective bargaining agreement — c "hours of work" — meaning — such hours not including thirty minute break allowed during every shift

Words and phrases — "hours of work" — Collective Bargaining Agreement: Detergents, Edible Oils and Fats Industry (SI 89 of 1997) — s 6(2)

Headnote

Section 6(2) of the Collective Bargaining Agreement Detergents: Edible Oils and Fats Industry, 1997 (SI 89 of 1997) provides that:

"The ordinary hours of work for shift workers shall not exceed forty-five hours per week, or nine hours in any period of twenty-four hours."

The respondents, all of whom were employed by the appellant as shift workers, successfully argued before the Labour Relations Tribunal that the thirty minute break from their duties which they were allowed during the night shift, should be included as part of their hours of work. If so included, it followed that they were required to work for a period of time in excess of that laid down in s 6(2) of the Agreement. Thus, they had persuaded the Tribunal, they were entitled to overtime payments. On an appeal by the appellant from the decision of the Labour Relations Tribunal:

Held, allowing the appeal, that in accordance with the ordinary and grammatical meaning of the phrase, "hours of work" referred to time the shift workers were actually engaged in work. It excluded the thirty minute break that the night shift workers took during each shift. That time, although spent at the workplace, was not part of the time the workers were productively engaged; the workers could use it for their own purposes, such as taking a nap, having

refreshment or attending to personal business. Consequently, the workers were not entitled to overtime pay. ^H

2004 (2) ZLR p189

Cases cited ^A

Chegut Municipality v Manyora 1996 (1) ZLR 262 (S)

Mudoda v Tanganda Tea Co Ltd 1999 (1) ZLR 374 (S)

Legislation considered

Collective Bargaining Agreement: Detergents, Edible Oils and Fats ^B Industry, 1997 (SI 89 of 1997), ss 3, 6(2), 6(3) and 27(2)

Judgment

GWAUNZA JA: The respondents are employed by the appellant as shift workers. The parties have had a longstanding dispute concerning the hours shift workers are required to work during night shifts.

^C It is not in dispute that the appellant operates three shifts a day for five days a week, for the hours indicated below:

- | | | |
|-------------------------------------|---|----------------------|
| 1. Morning shift | : | 7 a.m. – 3 p.m.; |
| 2. Afternoon shift | : | 3 p.m. – 11 p.m.; |
| 3. Night shift | | |
| (i) ^D Monday to Thursday | : | 11 p.m. – 7 a.m.; |
| (ii) Friday | : | 11 p.m. – 8 a.m.; |
| (iii) Sunday | : | 12 midnight – 7 a.m. |

It is also common cause that the working hours for shift workers are regulated by s 6(2) of the Collective Bargaining Agreement: Detergents, Edible Oils and ^E Fats Industry (SI 89 of 1997), which provides as follows:

“The ordinary hours of work for shift workers shall not exceed forty-five hours per week, or nine hours in any period of twenty-four hours.”

The point of law raised by the appellant on appeal relates to the interpretation of this clause, and the computation, based on such interpretation, of the hours ^F that workers on night shifts should work.

The appellant argues that the working hours for the night shift should be reckoned so as to exclude the thirty minute break that the workers are allowed per shift. This would translate to six-and-a-half hours on Sunday, seven-and-a-half hours on Monday, Tuesday, Wednesday and Thursday, and eight-and-a-half hours on Friday. By the appellant’s calculation, the total thus ^G worked per week would be forty-five hours, a period which accords with the regulated hours.

The respondents, in disputing the appellant’s interpretation of s 6(2) of SI 89 of 1997, contend that the thirty minute breaks are included in the working hours ^H for the night shift. By their calculation, this meant that night shift workers

2004 (2) ZLR p190

Gwaunza JA

worked a total of forty-eight hours per week. This exceeded by three hours the ^A regulated period of forty-five hours. It is contended for the respondents that had the legislature intended the thirty minute breaks to be excluded, it would have made a specific provision to that effect. The

respondents also argue that the "extra" time they were required to work during night shifts should be taken as overtime and that they should be paid accordingly. ^b

The Labour Relations Tribunal ("the Tribunal") (now the Labour Court) was persuaded by the respondents' submissions, and ordered that the respondents be paid their back-pay and overtime from "1 September 1999 to 1 September 2000".

The appellant now appeals against that order.

It is contended for the appellant as follows in para B.5 of its heads of argument: ^c

"5. It is respectfully submitted that the court *a quo* was wrong in determining that the legislature should have been specific if it wanted to exclude the thirty minutes from the working time. That reasoning, with respect, is fundamentally wrong in two respects, namely –

- (a) the legislature specifically excluded the thirty minutes from the ^d working time by providing for that break. During that thirty minute break, the employee is thus excused from work, and may be enjoying his/her drink or minding some other personal business;
- (b) by its very nature, a break means that the employee temporarily takes leave of his work for thirty minutes. It would, therefore, have been superfluous to state that the time when the employee is on thirty ^e minutes leave from his work shall not be included as part of his working time. That simply would not make sense, with respect."

I am persuaded by these submissions.

The provision for the break, referred to in para (a) above, is found in s 6(3) of SI 89 of 1997, which reads as follows: ^f

"No employer shall permit a shift worker to work for a continuous period of more than five hours without a break of at least thirty minutes."

As I understand it, this provision draws a distinction between the time that workers are actively and productively engaged in their work, and the time that they are not. During the latter period, the workers are free to take a nap, rest, take refreshment, and attend to personal or other business entirely unconnected ^g with their work. It would therefore, in my view, not be accurate to suggest, as the respondents do and the Tribunal found, that the period during which the workers are thus employed in leisurely activities should count as, and be included in, the time that they are productively engaged. This circumstance ^h

2004 (2) ZLR p191

Gwaunza JA

A ⁱ is not altered by the fact that such leisure time may be spent within or at the workplace, or that the employer, in terms of s 6 of SI 89 of 1997, may provide beverages for the workers during the break.

Mr *Dondo*, for the respondents, correctly submits that one of the golden rules of interpretation of statutes is that words must be given their grammatical and ordinary meaning unless absurdity results: see *Mudoda v Tanganda Tea Co v Ltd* 1999 (1) ZLR 374 (S) at 377; and *Chegututu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264D. If this rule is applied to the interpretation of s 6(2) of SI 89 of 1997, I am satisfied that the words "hours of work" would refer to the time that the workers are actually engaged in work. That, in my view, would be the ordinary and grammatical meaning of the phrase. This interpretation is ^c reinforced by the paragraph immediately following para 6(2), which distinguishes between the time the workers are working and the time they are not.

I would therefore uphold the appellant's contention that the hours of work per week, that are referred to in s 6(2) of SI 89 of 1997, exclude the thirty minute breaks that the night shift workers take during each shift. It follows that its ^d calculation of the actual hours of work per week for night shifts, as forty-five, is correct.

This finding, I am satisfied, effectively settles the dispute concerning whether or not the "extra" hours of work that the respondents aver they were made to work constitute overtime. As correctly observed for the appellant, "overtime" ^e is defined in s 3 of SI 89 of 1997 as "any time worked outside the ordinary weekly hours of work required to be exhibited in terms of subs (2) of s 27".

Subsection (2) of s 27 of SI 89 of 1997 requires every employer to exhibit a notice, in the prescribed manner, showing the ordinary working hours per week and the normal daily hours of starting and finishing work for each class or group of employees. In compliance with s 27(2), the appellant would ^f therefore be required to exhibit a notice showing the actual hours workers in each

shift would be required to work, *exclusive* of the break times. Including the break time in the hours of work would be acting contrary to the meaning of s 6(2) of SI 89 of 1997. The fact that the appellant may have done so, as the respondents seem to suggest, should in my view not be taken as an acceptance by the appellant that the thirty minute break time is to be considered as part ^G of the actual hours worked.

If it is accepted, as I have found, that the thirty minute breaks are not included in the hours of work for the night shift, it becomes evident that they cannot ^H constitute overtime, as defined in SI 89 of 1997. Overtime refers to actual work

2004 (2) ZLR p192

Gwaunza JA

done, beyond the normal working hours, and no work is done during the thirty ^A minute breaks.

All in all, I find there is merit in the appeal, which must therefore succeed. It is accordingly ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the Labour Relations Tribunal is hereby set aside and ^B substituted with the following:
 - "1. The appeal is accordingly allowed.
 2. The decision appealed against is hereby set aside."

Chidyausiku CJ & Malaba JA concurred. ^C

Coghlan, Welsh & Guest, appellant's legal practitioners

Chinamasa, Mudimu & Chinogwenya, respondents' legal practitioners ^D

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Document 28 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/LEE GROUP OF COMPANIES v ELDER 2004 (2) ZLR 193 (S)

LEE GROUP OF COMPANIES v ELDER 2004 (2) ZLR 193 (S)

2004 (2) ZLR p193

Citation	2004 (2) ZLR 193 (S)
Case No	Judgment No. S-88-04
Court	Supreme Court, Harare
Judge	Malaba JA
Heard	30 June
Judgment	6 October 2004
Counsel	Mrs <i>B Mtetwa</i> , for the applicant Respondent in person
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure — *time — reckoning of — heads of argument — c time within which heads of argument to be filed — application to Supreme Court — time period does not exclude time when court is on vacation — difference between Supreme Court and High Court practice*

Headnote

Rule 238(2c)(i) of the High Court Rules, which provides that the court vacation shall not be taken into account for the purposes of calculating ^b the period of time within which heads of argument are to be filed, does not apply to the Supreme Court. The manner of calculating the time within which heads of argument are to be filed in the Supreme Court is different from that which is applicable in the High Court and as such, the provisions of s 58(1) of the Rules of the Supreme Court do not apply.

^e The period of fifteen days within which an appellant must file his heads of argument for the purposes of s 43 (1) of the Supreme Court rules does not take cognizance of any time during which the Supreme Court is on vacation.

Case cited

^e *Ellis & Anor v Maceys Stores (Pvt) Ltd* 1983 (2) ZLR 17 (S)

Legislation considered

Supreme Court Rules 1964 (RGN 380 of 1964), rr 3, 43(1), 43(2), 44(1), & 58(1)

^g High Court Rules 1971 (RGN 1047 of 1971), r 238(2a)(i)

Case information

Mrs *B Mtetwa*, for the applicant

^h Respondent in person

2004 (2) ZLR p194

Malaba JA

MALABA JA: This is an application for an order of reinstatement of an appeal ^a regarded as abandoned and deemed to have been dismissed in terms of subrule (1) of Rule 44 of the Supreme Court Rules ("the Rules").

On 6 December 2002 the applicant filed a notice of appeal against the whole judgment of the Labour Relations Tribunal ("the Tribunal") delivered on 14 November 2002. On 31 March 2004 the registrar of this Court ("the registrar"), ^b acting in terms of subrule (1) of Rule 43 of the Rules, sent a letter to the applicant's legal practitioners calling upon them to file heads of argument within fifteen days after the date of notification and warning that should they fail to comply with the requirement the appeal would be regarded as abandoned and deemed to have been dismissed. ^c

The applicant's legal practitioners received the notification on 5 April 2004, two days into the first term vacation. Heads of argument were not filed within the time limit specified in the written notification. On 4 May 2004 the registrar wrote to the applicant's legal practitioners indicating that the appeal was, in terms of subrule (1) of Rule 44 of the Rules regarded as abandoned and deemed to have been dismissed. ^d

On 10 May 2004 the applicant's legal practitioners wrote to the registrar in these terms:

"Thank you for your letter dated 4 May 2004 and received by us on 5 May 2004. We received your notice on 5 April 2004 which was the last week of the first term. We immediately briefed counsel to prepare heads of argument but *as the reckoning of time period for the filing of heads* ^e *excludes the period of vacations we believed the heads would be due on 18 May 2004*. As we understand it, this is because most advocates are away during the vacation and the High Court has in fact accepted this interpretation of the Rules. However, we have never had to deal with this interpretation in the Supreme Court and we would be grateful if you could kindly advise whether the Supreme Court accepts such an interpretation". ^f

When the registrar refused to accept that the reckoning of the time specified in the written notification of 31 March 2004 was wrong, an application for an order of reinstatement of the appeal was made on 28 May 2004. The explanation given for non-compliance with subrule (2) of Rule 43 of the Rules was that the legal practitioners believed that the days when the court was on vacation were excluded from the reckoning of the time within which heads of argument were required to be filed with the registrar.

Mrs *Mtetwa*, for the applicant, argued that there was an omission in the Rules to provide, as was done under r 238(2a)(i) of the High Court of Zimbabwe Rules ("the High Court Rules"), that in computing the time within which heads of

2004 (2) ZLR p195

Malaba JA

A argument are required to be filed before applications, exceptions or applications to strikeout were set down the period during which the court is on vacation shall be excluded. She stated that she believed that r 238(2a)(i) was applicable to the reckoning of the time within which heads of argument were required to be filed because subrule (1) of r 58 of the Rules provided that in any matter not dealt with in its Rules the practice and procedure in the Supreme Court shall, B subject to any direction to the contrary by the Court or a judge, follow, as near as may be, the practice and procedure of the High Court.

It is clear that r 58 of the Rules is only applicable where there has been an omission in the Rules to deal with a matter and not where, as in this case, the matter is dealt with in the Rules in a manner which is different from the practice and procedure of the High Court.

C Rule 3 of the Rules provides that:

"Where anything is required by these Rules to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of the period."

In terms of r 3, the reckoning of the time within which the applicant was D required under subrule (2) of r 43 of the Rules to file heads of argument included all days embracing the period when the court was on vacation except Saturdays, Sundays or public holidays. Rule 3 of the Rules differs from r 238(2a)(i) of the High Court Rules, in that it deals with the period when the Court is on vacation by requiring that it be included in the reckoning of the E time within which heads of argument are required to be filed under subrule (2) of r 43 of the Rules, whilst the latter deals with the same period by requiring that it be excluded from the computation of the time within which heads of argument are to be filed in the High Court before applications, exceptions or applications to strike out can be set down for hearing.

It seems to me that Mrs *Mtetwa* acted upon her belief that r 238(2a)(i) of the F High Court Rules was applicable to the reckoning of the time within which to file heads of argument as required by subrule (2) of r 43 of the Rules without having carefully studied the provisions of r 3 of the Rules.

The fact that the time within which the applicant ought to have filed the heads of argument in the appeal included the period when the Court was on vacation G lends support to the explanation that non-compliance with the Rules was due to a genuine but mistaken belief that the period when the Court was on vacation was not included in the reckoning of the time within which to file H heads of argument. I accept the explanation as reasonable.

2004 (2) ZLR p196

Malaba JA

The delay in making the application for an order of reinstatement of the appeal A was eight days, which is not an inordinate delay. In *Ellis and Anor v Maceys Stores Ltd* 1983 (2) ZLR 17 (S) the extent of the delay of eight days to note an appeal was held to be by no means inordinate and an explanation that non-compliance with the Rules was as a result of a misinterpretation of r 30 of the Rules, influenced by the position under the High Court Rules, was also B accepted as a reasonable explanation.

It was argued that the applicant had good prospects of success on appeal. The contention was that the Tribunal applied wrong principles of law to the facts and directed its mind to matters that had not been placed before it for determination. The question the Tribunal ought to have determined was whether or not the respondent had resigned from employment. C

It does appear that the Tribunal failed to apply the correct law to the resolution of the dispute between the parties. It cannot be said on the merits that the prospects of the appeal succeeding are not reasonable.

I would accordingly grant the order for the reinstatement of the appeal in terms of the draft order. **D**
Kantor & Immerman, applicant's legal practitioners **E**

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Document 29 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/STANDARD CHARTERED BANK v CHINYEMBA 2004 (2) ZLR 197 (S)

STANDARD CHARTERED BANK v CHINYEMBA 2004 (2) ZLR 197 (S)

2004 (2) ZLR p197

Citation	2004 (2) ZLR 197 (S)
Case No	Judgment No S-87-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Gwaunza JA
Heard	12 July 2004
Judgment	11 October 2004
Counsel	<i>C Phiri</i> , for the appellant <i>A M Gijima</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *appeals under labour legislation — appeal to Labour Relations Tribunal — notice of appeal — validity — not defective if it c does not set out relief sought*

Headnote

The employer dismissed the employee, on various grounds of misconduct, on 13 December 1995. The employee appealed, after various false starts, to a labour relations officer who allowed the appeal on the grounds of **D** non-compliance with the provisions of SI 371 of 1985. On appeal to a senior labour relations officer, it was held that the appeal had prescribed and accordingly the decision of the LRO was reversed. On appeal to the Labour Relations Tribunal, the decision of the LRO was reinstated. The employer then appealed to the Supreme Court. It was argued, *inter alia*, that the notice of appeal was fatally and incurably defective because it **E** did not set out the relief sought.

Held, that a notice of appeal to the Labour Relations Tribunal is not defective if it does not set out the relief sought. A proper reading of the Labour Relations (Settlement of Disputes) Regulations 1993 (SI 30 of 1993) showed that the lawmaker intended to allow for a certain amount of latitude

in respect of proceedings before the Tribunal. The regulations ^F allowed the Tribunal to seek clarification in respect of notices of appeal which are not clear.

Legislation considered

Labour Relations Act [*Chapter 28:01*], s 94(3)

^G Labour Relations (Settlement of Disputes) Regulations 1993 (SI 30 of 1993), s 14

Case information

C Phiri, for the appellant

^H *A M Gijima*, for the respondent

2004 (2) ZLR p198

Chidyausiku CJ

Judgment

CHIDYAUSIKU CJ: This is an appeal from the ruling of the Labour Relations ^A Tribunal (the Tribunal), now the Labour Court. The background of this appeal is as follows.

The respondent was employed by the appellant. He was suspended after police investigated him for exchange control offences. He was placed in police custody and released after three weeks. He continued receiving his salary for ^B a period of 17 months, that is, from the date of his suspension, which was 13 June 1993 to 31 October 1994. On 31 October 1994 the appellant stopped paying the respondent his salary and benefits. The respondent remained on suspension.

In April 1994 the charges against the respondent were withdrawn by the State ^C before plea. In February 1995 the respondent applied to the appellant for voluntary retrenchment which was refused by the appellant on the basis that the appellant was charging the respondent with misconduct and disciplinary measures against him were pending.

On 6 December 1995 the respondent was charged with misconduct. He was charged with four counts of misconduct, namely: ^D

- (1) gross incompetence and inefficiency in the performance of work;
- (2) absence from work for a period of more than five working days;
- (3) failure to comply with SITO or follow established procedures;
- (4) concealing one's defective work. ^E

The respondent was found guilty on counts 2, 3 and 4, and was dismissed from employment on 13 December 1995. The hearing was conducted in terms of the code of conduct, SI 201 of 1995.

The respondent was aggrieved by the determination to dismiss him and he appealed to the Appeals Committee in terms of the code. The Appeals Committee was unable to reach a decision on whether or not the respondent ^F should be dismissed. He thereafter appealed to the National Employment Council of the Banking Undertaking. It refused to hear the matter because there was no determination by the Appeals Committee in respect of which an appeal could be launched. The Chairman of the Appeals Committee advised the respondent to seek redress with the Labour Relations Officer. The ^G respondent, acting on this advice, referred the matter to the Labour Relations Officer for determination of the lawfulness or otherwise of his dismissal. The Labour Relations Officer determined that the appellant had not complied with the provisions in SI 371 of 1985 in dismissing the respondent. In terms of SI 371 of 85 the appellant was required to obtain the Minister's permission ^H

2004 (2) ZLR p199

Chidyausiku CJ

^A before dismissing the respondent. The permission to dismiss the respondent had to be applied for forthwith upon suspension of the respondent. There was no compliance in that regard.

Statutory Instrument 371 of 85 has since been repealed and was not operational at the time of the disciplinary proceedings in December 1995.

The appellant was not satisfied with the determination of the labour relations officer and it appealed to the senior labour relations officer. The appeal was successful and the senior labour relations officer set aside the determination of the labour relations officer on the basis that the respondent's claim had prescribed in terms of s 94(3) of the Labour Relations Act, (the Act).

The respondent was dissatisfied with that determination and he appealed to the Labour Relations Tribunal. The Labour Relations Tribunal allowed the appeal and set aside the determination of the senior labour relations officer. The determination of the labour relations officer setting aside the respondent's dismissal was confirmed.

The appellant was dissatisfied with this determination. It now appeals to this court.

o The appellant appealed to this court on four grounds set out in the notice of appeal, namely:

- "1. The Tribunal erred in dismissing the point raised by appellant *in limine* and completely misdirected herself in her interpretation and appreciation of s 14 of SI 30 of 1993 and thereby misdirected herself in her conclusion that the appeal notice was not fatally flawed, in circumstances where the notice, as aforesaid, was incurable.
2. That the Tribunal misdirected itself and thereby erred in concluding that respondent's claim had not prescribed in terms of s 94 of the Labour Relations Act [Chapter 28:10], where the respondent applied for recourse for the unfair labour practice found to have occurred by the senior labour relations officer, at a date more than 180 days after the unfair labour practice had so occurred.
3. That the Tribunal misdirected itself, when it concluded that:
'The labour officers clearly had jurisdiction to deal with the matter in view of the fact that the pending disciplinary action had arose (*sic*) before the registration of the Code of Conduct' and thereby erred in its conclusion that the labour relations officer had jurisdiction in circumstances where the Code was registered on 31 March 1995 and the disciplinary action took place on 13 December 1995.

2004 (2) ZLR p200

Chidyausiku CJ

4. That the Tribunal misdirected itself by its failure to determine the issue of respondent's repudiation of contract after 2 July 1993, and thereby erred."

Dealing with the first ground of appeal the appellant argued before the Labour Relations Tribunal and, indeed, before this court that the notice of appeal to that Tribunal was fatally defective and that the Labour Relations Tribunal should have dismissed the appeal on that basis. The contention is that the impugned notice of appeal does not set out the relief sought. The Tribunal dismissed this point *in limine* on the basis that in terms of s 14 of the Labour Relations (Settlement of Disputes) Regulations 1993 (the Regulations), the court is empowered to seek clarification in respect of notices of appeal which are not clear. She concluded that this provision gives litigants an opportunity to cure defective notices of appeal at the hearing of the Tribunal and consequently any defects in the notices of appeal cannot be fatal.

I agree with the conclusion of the Tribunal. The alleged defect in the notice of appeal in this case is not fatal. Statutory Instrument 30 of 1993 sets out the procedures to be followed on appeal. Statutory Instrument 30 of 1993 does not prescribe the contents of a notice of appeal. It does not, for instance, provide that the appellant should set out the relief sought as does, for instance, r 29(1)(e) of the Supreme Court Rules which provides as follows:

- "29. (1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his legal representative, which shall state —
- (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) the exact nature of the relief which is sought;"

There is no provision in SI 30 of 1993 similar to the Supreme Court Rules. A notice of appeal to this court would be fatally defective if it does not state the exact nature of the relief sought by reason of r 29(1)(e), but the same cannot be said of an appeal to the Tribunal. A proper reading of SI 30 of 1993 reveals that the law maker intended to allow for a certain amount of latitude in respect of proceedings before the Tribunal. The first ground of appeal therefore fails.

The second ground of appeal is that the Tribunal misdirected itself by concluding that the respondent's claim had not prescribed in terms of s 94 of the Act which then provided as follows: ^h

2004 (2) ZLR p201

Chidyausiku CJ

^a "94. **Prescription of Disputes**

(1) Subject to subsection (2), after the 1st January 1993, no labour relations officer shall entertain any dispute or unfair labour practice which —

- (a) arose before 1st January 1993, unless it is referred to a labour relations officer within one hundred and eighty days from 1st January 1993, ^b and any debts arising therefrom have not prescribed in terms of the Prescription Act [*Chapter 8:11*];
- (b) arises after 1st January 1993, unless it is referred to a labour relations officer within one hundred and eighty days from the date which such dispute or unfair practice first arose."

It is common cause that: ^c

- (a) on 13 June 1993 the respondent was suspended on full pay and benefits;
- (b) in October 1994 the appellant stopped payment of salary and benefits to the respondent but the respondent remained on suspension;
- (c) on 13 December 1994 the appellant dismissed the respondent from its employment; ^d
- (d) on 13 January 1994 the respondent referred his dismissal which he alleged was unlawful to a labour relations officer for determination.

In referring the matter to the labour relations officer, the respondent's cause of action was the alleged unlawful dismissal which occurred on 13 December 1994. He referred the matter to the labour relations officer in January, well ^e within the 180 days stipulated by the Act. The fact that the respondent might have had other causes of action, namely, arising from what occurred on 13 June 1993 and at the end of October 1994 is, in my view, irrelevant.

I accordingly agree with the conclusion of the Tribunal that the respondent's claim has not prescribed.

^f The third ground of appeal suggests that the labour relations officer had no jurisdiction in dealing with this matter because the banking sector has a code of conduct. I am not persuaded by this argument. The Tribunal correctly observed that this dispute arose at a time when there was no registered code and the respondent's right to refer the matter to the labour relations officer accrued then.

^g There is no substance in this ground of appeal.

In the fourth ground of appeal it is alleged that the Tribunal did not consider the issue of the respondent's failure to report for duty. It is correct that the ^h Tribunal did not advert to the issue of absenteeism but it is clear from the

2004 (2) ZLR p202

Chidyausiku CJ

proceedings before the labour relations officer that there is no substance in ^a this allegation. The respondent reported for duty but the appellant would not allow him to work. This ground of appeal also fails.

In the result the appeal has no merit and is, accordingly, dismissed with costs. ^b

Ziyambi JA & Gwaunza JA concurred.

Coghlan Welsh & Guest, appellant's legal practitioners

Matimba & Muchengeti, respondent's legal practitioners

Document 30 of 47**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/CHIWADZA v MATANDA & ORS 2004 (2) ZLR 203 (H)

CHIWADZA v MATANDA & ORS 2004 (2) ZLR 203 (H)**2004 (2) ZLR p203**

Citation	2004 (2) ZLR 203 (H)
Case No	Judgment No. HH-170-04
Court	High Court, Harare
Judge	Makarau J
Heard	23 September 2004
Judgment	13 October 2004
Counsel	<i>E Matinenga</i> , for the applicant <i>T H Chitapi</i> , for the first respondent <i>M Mahlangu</i> , for the fourth respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *execution — sale of immovable property — c setting aside of sale — grounds for — distinction to be made between applications for setting aside made before sale is confirmed by Sheriff, those made after such confirmation, and those made after property is transferred to purchaser*

Headnote

- ▯ There are three ways to approach the High Court to have a sale in execution set aside:
1. Before the sale is confirmed by the Sheriff, an interested person may apply to the Sheriff under r 359 of the High Court Rules to have the sale set aside on grounds specified in the rule, and if the person is aggrieved by the Sheriff's decision, he may approach the court to have the decision ^ε set aside.
 2. After the sale has been confirmed but before the property is transferred to the purchaser, an interested party may approach the court by way of ordinary review to have the sale set aside. Such an approach must be based on the general grounds of review provided for at common law, such as gross unreasonableness, bias and procedural irregularities; ^ε grounds such as an unreasonably low price or other grounds specified in the rules cannot be invoked unless they can be subsumed in the recognised grounds for review at common law.
 3. After the sale has been confirmed and transfer has been effected to the purchaser, an interested party may still approach the court at common ^g law to have the sale set aside, but not on the grounds of alleged violations of the rules of court nor on the general grounds of review at common law. The sale cannot be impeached in the absence of an allegation of bad faith, or knowledge of prior irregularities in the sale, or fraud. This is so because of the protection our legal system affords the innocent third party in ^h commercial transactions.

2004 (2) ZLR p204

Makarau J

Each approach has its peculiar requisites, and a failure to meet them may be a fatal to the application.

Cases cited

Mapedzamombe v Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257 (S) ^B

Maparanyanga v Sheriff of the High Court & Ors 2003 (1) ZLR 325 (S)

Legislation considered

High Court Rules, 1971 (RGN 1047 of 1971), O 40 r 359 ^C

Case information

E Matinenga, for the applicant

T H Chitapi, for the first respondent

M Mahlangu, for the fourth respondent

Judgment

MAKARAU J: The Zimbabwe Development Bank, the fourth respondent ^D herein, obtained judgment against the applicant from this court on 22 November 2000. In terms of that judgement, certain property called stand 6265 Salisbury Township of Salisbury Township Lands, ("the property"), was declared specially executable. In due course, the fourth defendant arranged for the property to be sold by public auction in terms of the rules of this court. The fifth respondent, which also held a judgment against the applicant, indicated ^E to the Sheriff that it intended to participate in the sale.

On 4 May 2001, the Sheriff, through an estate agent, sold the property at a public auction. The highest bid was by the sixth respondent on behalf of the first respondent. On 21 May 2001, the second respondent called for objections to the sale in terms of the rules. Having received no objections, the sale of the ^E property to the sixth respondent was confirmed and instructions were given for the conveyance of title in the property to the purchaser.

By 30 September 2001, the purchaser had not paid the purchase price for the property in the sum of the bid ^F and the Sheriff (the second respondent) purported to cancel the sale. Fresh instructions to re-auction the property were issued but before this could be done, the Sheriff re-instated the sale and ^G transfer was effected in favour of the first respondent. Thereafter the fourth and presumably the fifth respondent were paid out the amounts due to them. (The papers before me do not indicate whether the fifth respondent was paid since no papers have been filed on its behalf). ^H

2004 (2) ZLR p205

Makarau J

^A On 30 September 2003, some 28 months after confirmation of the sale in execution, the applicant filed this court application, seeking an order declaring the sale of the property by public auction a nullity and, consequently, a reversal of the transfer to the first respondent, and an order giving the applicant leave to settle his indebtedness to the fourth and fifth respondents within 30 days of the granting of the order. The applicant also sought an order ^B evicting from the property the first respondent and all those occupying through him.

At the commencement of the hearing, Mr *Mahlangu* for the fourth respondent applied to be excused from the proceedings as the fourth respondent should not have been cited at all. The application was granted with the consent of the other parties.

^C Prefacing the court application before me is an application for condonation. Mr *Matinenga* submitted in argument that the application for condonation was made out of an abundance of caution as the application before me was being brought under common law and did not have time limits prescribing when it should be filed.

^D The issue of whether the applicant is properly before me must detain me.

Mr *Matinenga* was ambivalent in his address as to the nature of the application before me. He submitted that the applicant was approaching this court for a *declaratur* at common law in the main

and if that did not find favour with the court, for a review of the decision of the second respondent on the basis of an alleged litany of irregularities, the existence of which has been denied by Mr Chitapi.

The issue of how to approach this court to set aside a sale in execution has been before these courts in a number of cases. It would appear to me that three distinct positions obtain.

¶ The first position is specifically provided for in the rules of this court. Rule 359 provides that any person who has an interest in the sale of a property in execution may approach the Sheriff to have the sale set aside on grounds specified in the rule. The approach to the Sheriff must be made before the sale is confirmed. Any person aggrieved by the decision of the Sheriff may, within one month, approach this court to have such a decision set aside.

¶ The above procedure has been legislated to replace the old procedure where the first port of call for any one with an interest in the sale would be this court. Thus, in terms of the rules, before a sale in execution is confirmed, any interested party may approach the Sheriff to have set aside a sale in execution or on any good ground as provided for in the rules.

2004 (2) ZLR p206

Makarau J

The rules do not provide for the procedure to be adopted after the sale in execution has been confirmed. It is my view that any party with an interest in the sale may approach this court by way of ordinary review to have the sale set aside. I do not read the amendment to the rules to be ousting the general jurisdiction of this court to bring under scrutiny the decisions of the Sheriff as a quasi-judicial officer. It is my considered view that the effect of the amendment to the rules was to introduce a further procedure of granting the Sheriff power to review his own decisions without necessarily taking away the vested right of interested parties at common law to approach this court for the exercise of its general and inherent review powers. The approach to this court after a sale in execution has been confirmed and in the absence of a prior approach to the Sheriff in terms of the rules is in my view to be based on the general grounds of review as provided for at common law. These would include such considerations as gross unreasonableness, bias and procedural irregularities, but cannot include such grounds as an unreasonably low price or that the sale was not properly conducted as provided for under the rules unless such can be subsumed in the recognised grounds of review at common law. It is my further view that this, which presents itself to me as the second approach, only obtains after confirmation of the sale but before transfer is effected to the purchaser.

After a sale has not only been confirmed but transfer of the property has been effected to a third party, interested parties may still approach this court at common law for the sale and transfer to be set aside. It further appears to me that an approach at this stage, after the property has been transferred to a third party, cannot be sustained on alleged violations of the rules of this court nor on the general grounds of review at common law but only on the equitable considerations aptly summarized by Gubbay CJ in *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) when at 260D he said:

“Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla v Bhura supra* at 283A-B. Once confirmed by the sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran v Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside

2004 (2) ZLR p207

Makarau J

A the transfer falls outside r 359 and must conform strictly with the principles of the common law.

This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because under the common law, immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale in execution, or fraud.”

The above then represents the three approaches that present themselves to *c* me. Each approach has its peculiar requisites and in my view, a failure to meet the requisites of the elected approach may be fatal to the application brought.

It is common cause that the applicant in *casu* did not approach the Sheriff in the first instance. The application before me cannot therefore be a review of the decision of the Sheriff in terms of the rules. It can only be an application brought outside the rules as a general review or for redress at common law.

d It is trite that a review application has to be brought in terms of the provisions of Order 33 of the High Court Rules. Such an application has to be brought within eight weeks of the decision to be scrutinised. Where an application is brought outside the time frame provided for in the rules and not in accordance with the provisions of the rules, an application for condonation must be made. *e* In *casu*, although intimation is made that such an application will be made, the application was not pursued with any vigour at the hearing. This may have been in realisation of the fact that it in any event lacks substance. No facts have been placed before me as to the cause of the delay in bringing the review proceedings, if these proceedings were to be construed as such. A bald averment is made that the applicant had lost all hope of reversing the sale until *f* he received advice from his current legal practitioners. I am not told of when all hope was lost and was had caused such a forlorn feeling to arise. A case for condonation is clearly not made out and I accordingly cannot consider the application before me as one for general review brought under the general powers of this court to review decisions of all inferior tribunals and quasi-judicial bodies.

It remains for me to consider whether the applicant has properly approached this court for redress at common law.

Mr *Matinenga* has, ingeniously in my view, sought to argue that the applicant *h* is approaching this court for a *declaratur* at common law, to have the decision

2004 (2) ZLR p208

Makarau J

of the second respondent set aside on the grounds that he did not abide by *a* the rules of this court. The ingenuity of the submission lies in that on one hand it denies that this is an application that ought to be brought in terms of the rules for alleged violations of the rules yet it relies on those same violations for its substance at common law. The only hurdle in Mr *Matinenga's* way is the fact that common law does not recognise violations of court rules as a ground upon *b* which a sale in execution may be set aside after transfer of the property has been effected in favour of the purchaser. This is the point made in the *Mapedzamombe* case cited above.

Although the *Mapedzamombe* decision was handed down before the amendments to the rules that I have referred to above, one is able to draw from this decision two main positions. The first one is that the grounds set out in *c* the rules cannot be used to found an application brought at common law to set aside a sale in execution. Thus the learned judge of appeal held that issues of an unreasonably low price and any other good ground that may have been relevant in an application brought in terms of the rules were of no relevance after the sale had been confirmed and transfer effected. Secondly, it appears *d* to me that the grounds upon which the sale can be set aside at common law aim at protecting the proprietary rights of the purchaser of the property whose title can only be impugned on account of fraud, bad faith and prior knowledge of the irregularities attendant upon the sale. The jurisprudential basis for so holding presents itself clearly to me as the usual protection that our legal system affords the innocent third party in commercial transactions. His *e* acquisition of title to the property is only open to attack on account of bad faith on his part or on account of his prior knowledge of the attendant irregularities or on account of fraud by any one of the other parties in the transaction.

In *casu*, the applicant seeks to rely on the alleged failure by the Sheriff to inform *f* him of the highest bid so that he could register his objections to the sale. Although not relevant, the objection he would have raised then is not disclosed in his papers, giving the impression that this has been raised merely as a convenient starting point to attacking the sale of the property. He also alleges that the Sheriff had no power to reinstate the sale after having advised the purchaser that he was cancelling the sale. Even assuming that the *g* applicant could sustain the allegations he raised, in my view such grounds are irrelevant for the purposes of bringing and sustaining an application under the common law.

In casu, no allegation has been made that the first respondent was aware of the irregularities alleged by the applicant when he took transfer of the property ^H

2004 (2) ZLR p209

Makarau J

^A or that he acted in bad faith in any way. Needless to say, no fraud has been alleged. On the basis of the foregoing, it is my view that the applicant was ill advised to bring this application at common law as he has no relevant ground to raise at common law. The grounds that he raises may be relevant in an application under the rules and or under the general review powers of this court, whose requirements I have already dealt with above.

^B It is therefore my finding that the applicant is improperly before me and cannot find redress.

Mr *Matinenga* has sought to rely on the case of *Maparanyanga v Sheriff of the High Court & Ors* 2003 (1) ZLR 325 (S) as authority for the proposition that one can approach the court at any time under common law to have a sale ^C in execution set aside after transfer on account of non-observance of the rules of this court by the sheriff. With respect, I did not understand that to be the import of the decision by Gwaunza JA in that case. The sole issue that the Supreme Court defined for itself in that matter was whether the failure by the Sheriff and the purchaser of the property to adhere strictly to the terms of the agreement between them constituted a ground for setting aside the sale in ^D question in terms of r 359 of the High Court. (See p 6-7 of the cyclostyled judgment). The issue of whether the appellant had been properly before the High Court did not arise and was not adjudicated upon. It appeared common cause that the appellant had been properly before the lower court and that his application in that court had been properly brought in terms of the rules. It was not an application to set aside a sale in execution at common law as is the ^E application before me.

Relying as he did on alleged violations of the rules by the second respondent, it is my view that the applicant ought to have followed the procedures laid down in the rules, culminating with an approach to this court for a review. Alternatively, he ought to have made out a case for condonation for the late ^F institution of general review proceedings. He chose not to do either at his peril.

In the result, the application is dismissed with costs.

Musunga & Associates, applicant's legal practitioners

T H Chitapi & Associates, first respondent's legal practitioners ^C

^G *Gill Godlonton & Gerrans*, fourth respondent's legal practitioners

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Document 31 of 47

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S v TSVANGIRAI 2004 (2) ZLR 210 (S)

2004 (2) ZLR p210

Citation	2004 (2) ZLR 210 (S)
Case No	Judgment No. HH-169-04
Court	High Court, Harare
Judge	Garwe J & Assessors
Heard	3 February 2003; 26 February 2004

Judgment	15 October 2004
Counsel	<i>B Patel</i> , with him <i>J Musakwa & M Nemadire</i> , for the State <i>G Bizos SC</i> , with him <i>J C Andersen SC & E Matinenga</i> , for the accused
Case Type	Criminal trial
Annotations	Link to case annotations

Flynote

Criminal law — *common law crimes — high treason — requirements — c evidence of conspiracy or incitement — must be at least one overt act or hostile intent — mere discussion not sufficient because there is no overt act or hostile intent*

Criminal law — *common law crimes — high treason — requirements — conspiracy — no conspiracy where one of conspirators merely pretending* ^D

Legal practitioner — *conduct and ethics — prosecutor — duty of — to bring all relevant evidence before court -- relevant even if it does not support case for prosecution*

Evidence — *admissibility — video or audio tape — tape admissible as evidence even if part is inaudible, especially if accused accepts accuracy* ^E *of audible parts*

Evidence — *witness — credibility — person standing to gain from his evidence cannot be considered credible*

Headnote

The accused, leader of the opposition Movement for Democratic Change, was charged with the crime of high treason. He was alleged to have ^F approached a company based in Canada and requested them to arrange the assassination of President Mugabe and the staging of a military coup. There were three meetings between the accused and a Mr Menashe representing the company. Menashe secretly audio-taped the second meeting and then presented the tape to intelligence operatives from the Zimbabwe Defence Force as evidence of a plot. They said the tape was not clear enough and paid Menashe to obtain better quality tapes at a third meeting. A video-tape, which was only partly audible, was made of the third meeting. Menashe presented it to the intelligence operatives. His company was subsequently contracted by the Zimbabwe Government to undertake publicity work on their behalf. ^H

2004 (2) ZLR p211

Garwe JP

^A The State alleged that the accused made the request in the first two meetings and then in the third meeting they discussed what would happen after the President was “eliminated”. The State’s case rested on the oral testimony of several witnesses, primary among them Menashe, and the video-tape of the third meeting. Menashe testified that the accused made the request for the assassination and military coup at the first two ^B meetings, and they agreed on the plot, but that he, Menashe, never intended to carry it out; he was pretending. The video-tape did not reveal any evidence of a plot, but referred to agreements made in the previous meetings. The State did not present the audio-tape of the second meeting or the transcript of what it allegedly contained

Held, that a conviction for treason would require evidence of an incitement ^C or a conspiracy. A request to another to engage in criminal conduct amounts to incitement. An agreement to undertake an act amounts to a conspiracy. But no credible evidence was presented to prove either incitement or conspiracy. Where no evidence is presented of an overt act or intention to commit an overt act or an agreed plot, a mere discussion ^D is not sufficient; an expression of hostile sentiments without incitement or conspiracy will not constitute treason, not because there is no overt act but because there is no hostile intent.

Held, further, that there cannot be a conspiracy where one of the alleged conspirators was only pretending and did not intend to act

Held, further, that the prosecutor should have presented the transcript of the ^εsecond meeting to the court; the fact that it did not disclose evidence of a plot made it relevant, even though it did not support his case; it is the duty of the prosecutor to present all relevant evidence

^ε *Held*, further, that the fact that a tape is inaudible in parts is no reason to require its exclusion, especially where the accused accepts the accuracy of the audible portions

Held, further, that the evidence of a person who stands to gain financially must be treated with circumspection. *In casu* the prime witness's testimony was not credible

Cases cited

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

S v Chindunga S-21-02

R v Harris (1927) 48 NLR 330

R v Labuschagne & Ors 1941 TPD 271

^h *S v Malinga* 1963 (1) SA 692 (A)

2004 (2) ZLR p212

Garwe JP

S v Mupfudza 1982 (1) ZLR 271 (S) ^a

S v Mutevera & Anor HH-112-01

S v Nkosiya 1966 (4) SA 655 (A)

S v Ohlenschlager 1992 (1) SACR 695 (T)

S v Ramgobin & Ors 1986 (4) SA 117 (N)

R v Wenzel 1940 WLD 269 ^b

Smyth v Ushewokunze & Anor 1997 (2) ZLR 544 (S)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 146 ^c

Case information

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

G Bizos SC, with him *J C Andersen SC & E Matinenga*, for the accused

Judgment

GARWE JP: The accused in this case is charged with the crime of high treason, it being alleged by the State that he approached a company called Dickens and Madson carrying on business in Canada and requested the company to ^d arrange the assassination of President Mugabe and the staging of a military coup. At the commencement of trial the particulars of the charge against the accused were that:

1. On 22 October 2001 at Heathrow Airport in the United Kingdom, the accused requested Ari Ben Menashe of Dickens and Madson to organize ^εthe assassination of President Robert Gabriel Mugabe and to arrange for a military coup against the Government of Zimbabwe. ^ε
2. On 23 October 2001 and at Heathrow Airport, London, accused two faxed to Dickens and Madson a memorandum of understanding which in actual fact was cover for the unlawful plot to overthrow the Government of Zimbabwe.
3. On 3 November 2001 and at Royal Automobile Club, London, in the United Kingdom accused one requested Ari Ben Menashe of Dickens and Madson to organize the assassination of President Robert Gabriel Mugabe and to arrange for a military coup against the Government of Zimbabwe. On the same date Dickens and Madson received from BSMG, a company ^g representing accused persons, US\$97 400 as initial deposit previously promised, constituting fees for the plot to carry out the assassination of President Robert Gabriel Mugabe and the overthrow of the Government of Zimbabwe. ^h

Garwe JP ^A

4. On 4 December 2001 and at Dickens and Madson offices, in Montreal, Canada, accused one requested members of Dickens and Madson to arrange for the assassination of President Robert Gabriel Mugabe and the carrying out of a military coup against the Government of Zimbabwe.

Following the acquittal of the second and third accuseds at the close of the State case, the particulars of the charge against the present accused were ^B amended by the State to read as follows:

1. On 22 October 2001 and at Heathrow Airport in the United Kingdom, the accused person requested Ari Ben Menashe of Dickens and Madson to arrange a military coup against the Government of Zimbabwe.
2. On 3 November 2001 and at Royal Automobile Club, London, in the United ^C Kingdom accused requested Ari Ben Menashe of Dickens and Madson to organize the assassination of ^D President Robert Gabriel Mugabe and to arrange for a military coup against the Government of Zimbabwe. At a later stage, Dickens and Madson received from BSMG a company representing accused persons, US\$97 400 as initial deposit previously promised, constituting part of the fees for the plot to carry out the assassination of President Robert Gabriel Mugabe and the overthrow of the Government of Zimbabwe.
3. On 4 December 2001 and at Dickens and Madson offices in Montreal, Canada, the accused person held a meeting with members of Dickens and Madson as well as a Mr Simms also known as Schuur and Mr Rupert ^E Johnson at which the elimination of Present Robert Mugabe and the setting up of a transitional Government in furtherance of the aforesaid plot were discussed.

The accused pleaded not guilty to the charge. He also denied the particulars of the charge as itemized.

^F THE EVIDENCE

The following is common cause or at least not seriously in dispute. Dickens and Madson is a company incorporated in Canada and carrying on business in Montreal, Canada. The Movement for Democratic Change popularly referred to as the MDC is an opposition political party in Zimbabwe. The discussions between the MDC and Dickens and Madson that have given rise ^G to the present allegations against the accused were facilitated by one Rupert Johnson. Rupert Johnson was fairly well known to Renson Gasela, the MDC Member of Parliament and Shadow Minister of Agriculture. Mr Gasela first came to know Mr Johnson in 1992 when Mr Johnson won a tender to supply ^H grain to Zimbabwe following a drought in the country. At the time Mr Gasela

Garwe JP

was the general manager of the Grain Marketing Board. Sometime in 2001 Mr ^A Johnson also made contact with Dickens and Madson. Thereafter Rupert Johnson arranged a meeting between the MDC and Mr Ben Menashe at the Heathrow Hilton Hotel, London, on 23 October 2001. Following that meeting, a decision was taken by Dickens and Madson to arrange another meeting with the accused. That meeting took place at the Royal Automobile Club in ^B London on 3 November 2001. The discussions that took place during that meeting were audio-taped by Tara Thomas, an assistant to Mr Menashe. The audio tape produced was of poor quality but a transcript was produced by Tara Thomas and Elizabeth Boutin, also employed by Dickens and Madson. Mr Menashe eventually took the audio-tape, transcript and disk and handed these over to Air Vice-Marshal Mhlanga in Harare on 23 November 2001. It ^C was on that date that Mr Menashe advised the authorities in Zimbabwe of a request allegedly made by the accused and his colleagues for Dickens and Madson to arrange the assassination of the President and the carrying out of a military coup. A decision was made that further evidence of the request be collected. A sum of US\$30 000 was provided by the government of Zimbabwe for this purpose. A third meeting was then convened at the offices of Dickens ^D and Madson in Montreal on 4 December 2001. That meeting was video taped. Following this a sum of US\$200 000 was transmitted to Dickens and Madson on 14 December 2001. A formal agreement was then entered into between Dickens and Madson and the government of Zimbabwe on 10 January

2002 in terms of which the former was to provide public relations consultancy ^E services and attract investment. That contract was subsequently renewed in March 2003.

What is in dispute in this case is the nature of the discussions that took place at each of the three meetings as well as the role played by Rupert Johnson. Rupert Johnson has not availed himself to give evidence and indications are that he is somewhere in the United Kingdom. The State on the one hand is ^F saying the accused requested Dickens and Madson to arrange the assassination of the President and the staging of a military coup and that it was the MDC that sent Rupert Johnson to arrange the first meeting in London during which the request was allegedly made. The accused denies this and says Rupert Johnson approached the MDC indicating that he was a director ^G of Dickens and Madson and that his company was able to do lobbying work on behalf of the MDC in North America and to raise funds for the party.

The State called a number of witnesses. These were Mr Ben Menashe, Tara Thomas, Air Vice-Marshall Robert Mhlanga, Bernard Schober, Chief Superintendent Moses Magandi, Senior Assistant Commissioner Mutamba, ^H

2004 (2) ZLR p215

Garwe JP

^A Retired Brigadier Happyton Bonyongwe, Air Marshal Perence Shiri, Constantine Musango, Tineyi Nyawasha and Edward Tamukaneyi Chinhoyi.

The defence called the accused, Mr Welshman Ncube, Mr Renson Gasela and Mr Giles Mutseyekwa. The evidence led during the trial was very lengthy. The trial spanned a period of over a year. A detailed summary of the evidence given by the various witnesses has been prepared and is attached to this judgment ^B as Annexure 'A'.

CREDIBILITY OF WITNESSES

Mr Ari Ben Menashe

He is the main witness for the prosecution as it was he who played the leading role in the meetings that took place with the accused and also arranged the ^C recording of the meeting of 4 December 2001 in Montreal, Canada.

The defence attacked his reputation during cross-examination. Various allegations made in various press articles and publications attacking his general reputation were put to him. He denied these allegations. No witnesses were called to give evidence on his reputation. All that is before the court, ^D therefore, are unsubstantiated allegations made in some cases by persons who are unknown. Having carefully considered the evidence, this court is of the view that the allegations suggesting a bad reputation on the part of Mr Menashe have not been proved.

Turning to Mr Menashe's demeanour in the witness box, there is no doubt that Mr Menashe was very rude during the proceedings despite being warned ^E by the court on several occasions. On occasions, he made gratuitous remarks about the accused. He would desist when warned but would thereafter engage in similar conduct. He derided defence counsel. In reference to the accused and his erstwhile co-accused, he used language such as murderers, a criminal, a terrorist. He remarked, at one stage, that the accused has no intellectual ^F capacity to undertake an analysis of the results of the referendum. In reference to the accused he further remarked that a person who negates himself in evidence is mentally unstable. During cross-examination by Adv Bizos, he remarked at one stage "You are talking nonsense" and "Stop your nonsense".

The witness was unpleasant and continued to exhibit contemptuous behaviour even after being warned by the court. There were occasions when he appeared ^G not to appreciate he was in a court of law.

There is however need for fairness and on a careful reading of the record it is apparent that the cross-examination by lead counsel was unnecessarily long and in some instances repetitive. This was brought to the attention of the lead ^H counsel on occasions. The cross-examination was at times confusing. The

2004 (2) ZLR p216

Garwe JP

language used in some instances was not always the most polite. This may, ^A to some extent, explain the sudden and somewhat puerile outbursts on the part of Mr Menashe. Nevertheless this cannot be an excuse for some of the utterances he made during the course of the proceedings.

There are aspects of Mr Menashe's evidence that call for closer analysis.

The first relates to the role played by Rupert Johnson and in particular whether ^B Rupert Johnson represented the MDC in the meetings that took place. It will be recalled that it was Mr Menashe's evidence that Mr Johnson represented the MDC in all the dealings they had with him. Mr Menashe was asked to explain a number of documents which reflect Mr Johnson as a director of Dickens and Madson. These are Mr Johnson's business card, the contract ^C dated 24 September 2001 (Exhibit 3), the contract dated 23 October 2001 (Exhibit 4) which is addressed to Mr Johnson and the money transfer request dated 2 November 2001 (Exhibit 24) addressed by Mr Johnson as director of Dickens and Madson to Natwest Bank London. A careful perusal of these documents shows that Johnson must have represented himself, with the knowledge and approval of Mr Menashe, as a director of Dickens and ^D Madson. The court says so for the following reasons. Mr Menashe admits he saw a copy of the contract signed by Mr Johnson dated 24 September 2001. Mr Johnson signed that contract in his capacity as a director of Dickens and Madson. All Mr Menashe did was admonish him telephonically. He also observed Mr Johnson carrying a Dickens and Madson card which reflected him as a director of the company. Again all he did was reprimand him. He did ^E nothing else. Further, the contract between Dickens and Madson and the MDC (Exhibit 4) is on MDC letterheads. It is addressed to Rupert Johnson in his capacity as a director of Dickens and Madson. The face of the document reads: "Re: Memorandum of Understanding". This is followed by the words "Dear Rupert Johnson" which are handwritten. Mr Menashe initialled page ^F 1 of the document and effected two amendments on ^P 2 of the same document. He then signed on behalf of Dickens and Madson. Mr Menashe would no doubt have noticed that the contract was addressed to Mr Johnson as a director of Dickens and Madson. He would have noticed that the contract was on MDC letterheads and that it was signed by Welshman Ncube. He did not correct the misrepresentation made in the document. Instead, he signed the document. Further Mr Johnson, again writing as a director of Dickens and Madson, remarks in the request for transfer of the money (Exhibit 24):

"To assist with the verification of this transfer and for the benefit of our Bankers in Canada, Messrs HSBC, please would you be good enough to advise a routing reference code or number by return." ^H

2004 (2) ZLR p217

Garwe JP

^A Mr Menashe also admitted accompanying Mr Johnson to the Congo on two occasions during this period. He says he paid his own fare and was largely a spectator. He wanted to find out what the MDC was up to. This trip was never brought to the attention of the Zimbabwean authorities and was only disclosed during cross-examination when the witness was questioned on the contents of the transcript of the audio-tape (Exhibit 13). On balance, the ^B totality of the evidence suggests that Mr Johnson represented himself as part of Dickens and Madson with the knowledge and tacit approval of Mr Menashe.

The second is the role played by Mr Simms. Mr Simms chaired the Montreal meeting posing as a representative of the American Government. In the latter part of the video, he is heard to talk about funding and mentions a figure of ^C US\$6 million. Mr Menashe is heard in the video saying to the accused that work had been done for his party in the United States right up to Congress. Mr Menashe admitted no such work was done and that the meeting was a pretence. Promises of money being raised were part of the pretence. Mr Menashe denied having met Mr Simms before the Montreal meeting or ^D knowing where he can be contacted. He says his presence at the meeting was never discussed but was arranged by Mr Legault. Mr Legault did not give evidence before this court the reason, according to Mr Menashe, being that someone had to remain in the office. Mr Menashe and Tara Thomas agreed that the purpose of the Montreal meeting was to record what was being said during the meeting. The inference is therefore irresistible that Mr Simms was ^E brought in to give an air of authority to the meeting and to show that the Americans were involved in whatever was being discussed. Mr Simms came into the meeting with a file. The accused told the court the file had a map of Zimbabwe on it and this was not disputed. Mr Simms, if that be his real name, was obviously pretending. It is difficult to imagine Mr Menashe not knowing where Mr Simms can be contacted or what his true names are. Mr Menashe ^F must know or is able to find out who Mr Simms is and where he can be found. His denial seems highly improbable. The State has no idea who Mr Simms is or where he can be found. He is unlikely to be a member of "Team America". Brigadier

Bonyongwe in his evidence was of the view that Mr Menashe knows Mr Simms and that he has a definite link with him.

6 The third relates to the second London meeting and the attempt to record that meeting. No proper explanation has been given why a decision was not taken to employ someone with more expertise to do the recording. Mr Menashe told the court he did not know if Tara Thomas was competent to do the recording. She had joined Dickens and Madson in May 2001. Indeed, she admitted she ^h had never done this before and was unable to record part of the meeting

2004 (2) ZLR p218

Garwe JP

because, unbeknown to her, the batteries were flat. Mr Menashe also told the ^a court he does not know how and why Tara Thomas was asked to go to London to record the meeting. He personally did not make the arrangements. He did not discuss with her why she was going there or what had happened at the first meeting. He did not discuss with her what she was expected to do there. He did not discuss with her the murder plot. Tara Thomas in her evidence ^b however says Mr Menashe said the accused was going to say something which could be quite amazing, namely, the assassination of President Mugabe. She says Mr Menashe had told her to record the meeting. It appears to this court that Mr Menashe may have tried to distance himself from the unsuccessful attempt to record the second meeting.

The fourth relates to the circumstances surrounding the transcription of the ^c audio-tape. Mr Menashe's evidence was that Tara Thomas and Elizabeth Boutin occasionally put words together without actually hearing the words. This was contradicted by Tara Thomas who told the court that what they transcribed is what they heard on the diskette. Of significance, however, is the fact that the transcript makes reference to persons and situations Mr Menashe ^d accepts are real. There is reference to Edith and former Zambian President Chiluba's corrupt tendencies. The transcript refers to Kenzo who was shot dead. It is not in dispute that the person shot dead was one Penza. There is then talk of Mwenzi Kongolo who was at the time the Minister of Security in the Democratic Republic of Congo. Mr Menashe accepts that Kongolo was the Minister of Security and that when he and Mr Johnson went to the Congo ^e Mr Johnson wanted to request assistance from Kongolo in recruiting Zimbabwean soldiers. Menashe also admitted that his company acted as consultants to the President of Gambia. There is reference to the Gambia in the transcript. Mr Menashe also admits that during the meeting there was talk of seeing the Director of the CIA or a senior American official and to keep the meeting discreet. This is in the transcript. It is clear that Tara Thomas and ^f Elizabeth Boutin were able to hear and transcribe some portions of the tape. Mr Menashe says he did not listen to the audio-tape or see the transcript. Tara Thomas says he did.

Of some concern is the fact that the audio-tape given to Air Vice-Marshal Mhlanga and subsequently produced before this court was found to be ^g inaudible. Unfortunately, the equipment used by Tara Thomas and Elizabeth Boutin was not made available so that the Court could ascertain whether in fact the tape was audible in places.

The fifth is that up until 23 November 2001, everything that Mr Menashe did in connection with this matter was without the knowledge or sanction of the ^h government of Zimbabwe. The first meeting between Mr Menashe, the

2004 (2) ZLR p219

Garwe JP

^a accused and his colleagues was held at the Heathrow Hilton on 22 October 2001. It was at this meeting that the accused allegedly made the request for the assassination of the President and the staging of a military coup. This was followed by another meeting at the Royal Automobile Club on 3 November 2001. It was that meeting that Tara Thomas audio-taped. Mr Menashe tried to contact Air Vice-Marshal Mhlanga on or about 14 November 2001 but the ^b latter was out of the country. Mr Menashe eventually came to Harare and saw Air Vice-Marshal Mhlanga on 23 November 2001 and brought with him the audio-tape and transcript. It was then that he indicated he had been requested by the accused and other MDC officials to arrange the assassination of the President and the staging of a military coup. For a period of one month Mr Menashe made no contact with the government of Zimbabwe to warn the latter ^c about the request. The convening of the second meeting and the recording of that meeting were done without reference to the Zimbabwe government.

The sixth is that having delivered the audio-tape and the transcript to Air Vice-Marshal Mhlanga and after it was agreed that further evidence of the plot be gathered, Mr Menashe then arranged for Mr Schober to install the necessary ^D devices to record the meeting that was to take place on 4 December 2001. A sum of US\$20 000 was then forwarded to Dickens and Madson by the government of Zimbabwe on 30 November 2001 i.e. a week after the meeting in Harare. This was followed by a further US\$10 000 on 4 December 2001. It is not in dispute the money was intended to meet the cost of procuring additional evidence. It is apparent that out of the total sum of US\$30 000 sent ^E to Dickens and Madson to pay for the procurement of the evidence, a sum of US\$5 000 was given to Mr Schober and the balance of US\$25 000 was retained by Dickens and Madson. The meeting of 4 December 2001 was then secretly video-taped and the original video given to Messrs Magande and Bonyongwe who arrived in Harare on or about 10 December 2001. On 14 December 2001 a further sum of US\$200 000 was transmitted to Dickens and Madson. A ^F consultancy agreement was then signed between Dickens and Madson and the government of Zimbabwe on 10 January 2002. That contract was effective for a year. By August 2002, Dickens and Madson had received a total sum of US\$615 000 from the government of Zimbabwe. At the commencement of the trial in February 2003, discussions for the renewal of the contract were taking place and on 11 March 2003, the contract was renewed for a further period of 12 months on the same terms and conditions. Negotiations for the renewal had commenced two to three weeks before the signing. It is clear therefore that at the time Mr Menashe gave evidence he was providing services to the ^H Zimbabwe government, a fact accepted by Mr Bonyongwe, the Director

2004 (2) ZLR p220

Garwe JP

General of the Department of State Security. Mr Menashe believed he is still ^A owed US\$365 000 although it appears the figure is in dispute.

It also seems highly unlikely that, having spent considerable sums of money before he met Air Vice-Marshal Mhlanga, Mr Menashe did not expect reimbursement. Indeed Brigadier General Bonyongwe remarked that Mr Menashe could not have done all he did for nothing. He flew to London in first ^B class whilst Tara Thomas flew business. They obviously incurred expenses. Thereafter, he flew to Zimbabwe to meet Air Vice-Marshal Mhlanga and then flew back to Canada.

Two other matters need to be mentioned. The first is that the second and third meetings were convened in part for the purpose of recording utterances by the accused. The attempt at the second meeting was not successful. When Mr Menashe flew to Harare to meet Air Vice-Marshal Mhlanga, it was found that there was hardly any evidence on the audio-tape and transcript and a decision was taken that more evidence be collected. The third meeting was then convened. A video was then produced of that meeting.

The second is that on Mr Menashe's evidence he never intended acting on ^D the request he says was made by the accused. He attended the meetings in order to collect evidence of the request.

Regard being had to the role he played in this matter and the fact that he stood to gain financially, his evidence must be treated with circumspection.

Tara Thomas ^E

She is an employee of Dickens and Madson. It is clear from her evidence that she was completely inexperienced in the taping exercise for which she flew with Mr Menashe to London. Her story however about why the tape did not capture all the discussions did not sound credible. In her evidence-in-chief, she told the court she did not check the batteries. Under cross-examination, ^F she told the court she bought new batteries in London because Mr Legault had suggested that she does so in London. Having bought new batteries she did not immediately put them in the tape but instead decided to use the old. It was when she went out about 30 minutes after the commencement of the meeting that she realized the recorder was not working. She then put in the new batteries. This explanation sounded far-fetched and improbable. It appeared ^G to be an attempt to explain why the audio-tape did not capture the whole meeting.

She also appeared hard pressed to explain paras 14 and 15 of her statement to the police. In para 14, she says the accused sought to discuss the transitional period but Mr Menashe asked him to be clear about what was to ^H

2004 (2) ZLR p221

Garwe JP

A transpire to bring about this transition and whether this was after the elimination of President Mugabe. In para 15, she says the accused responded by saying he was not prepared to discuss that issue and appeared upset. She says at that stage the accused got up from the table and asked Rupert Johnson to join him outside. Under cross-examination, she said her statement was incomplete because her memory failed. She also remarked, as did Mr Menashe ^B in similar terminology, that the statement was accurate but incomplete. In the statement she says the accused indicated he was not prepared to discuss that issue and appeared upset. The issue referred to was what was to transpire to bring about this transition and whether this was after the elimination of President Mugabe.

The witness also admitted that there was nothing to suggest that the injury ^C she sustained had anything to do with the Zimbabwe government. That notwithstanding she received US\$8 000 from the Zimbabwe government "as compensation for injuries sustained ... while executing duties assigned ... by Dickens and Madson in fulfillment of its consultancy services to the Government of the Republic of Zimbabwe".

^D There is need to treat her evidence with caution in view of the role she played and her relationship with Mr Menashe.

Chief Superintendent Magande

His evidence was largely common cause. He told the court Mr Menashe was evasive on the identity of Mr Simms. He also admitted there was no evidence ^E of a plot on the transcript of the audio-tape. He further admitted they were aware that what Mr Menashe was being quoted as saying publicly differed from that which was on the tape.

Bernard Schober

His evidence does not call for much comment. He was paid by Dickens and Madson to set up the recording equipment. His travelling expenses to and ^F from Zimbabwe to give evidence were met through Dickens and Madson. On his evidence, he was being paid US\$1 000 per day for the duration of his stay in Zimbabwe. He seemed a good witness but it is clear the picture and audio quality of the video he produced was generally poor. His explanation that surveillance cameras are very small and that the picture he produced was the ^G best in the circumstances was not shown to be incorrect, especially regard being to the fact that the recording was on VHS and the recording in turn was done on long play. Indeed, Mr Chinhoyi confirmed this claim. A significant ^H remark he made was that the technology does exist, perhaps not in Zimbabwe,

2004 (2) ZLR p222

Garwe JP

to remove the background buzzing noise and to get clearer audio. This ^A suggestion was not followed up by the State.

Director-General Bonyongwe

He was subjected to lengthy cross-examination on the work that was performed by Mr Menashe which justified the various payments made by the government. When advised that Mr Schober who installed ^C the recording equipment had ^B only been paid US\$5 000, he told the Court the balance of US\$25 000 may have been used in meeting other expenses. When further advised that Mr Menashe had told the court that the company had not benefited at all he stated that he did not believe Mr Menashe did all that he did for nothing. Mr Menashe's evidence was that all the money was passed along to Mr Schober who installed the listening and recording devices. The witness appeared reluctant to give details of the work done by Mr Menashe before the contract was formally signed in January 2002. He explained that some of the activities fell within the covert area of the department's operations and some of the vouchers related to these activities were destroyed after three months in accordance with the department's internal regulations. He confirmed that the reason why his ^D department entered into a contract with Mr Menashe was because he had produced the video.

He believed that Mr Menashe had definite links with Mr Simms, also known as Schur. Mr Menashe had even promised to get Mr Simms to come to Zimbabwe. It was his evidence that they paid compensation to Tara Thomas because they had been made to believe that her injuries were

connected to the ^E work she was doing for Zimbabwe. His belief that Tara Thomas was entitled to compensation appeared genuine. However considering the evidence given by Tara Thomas it is apparent that his department was misled in this regard.

Air Marshal Perence Shiri

He appeared a good witness and was credible. He admitted meeting members ^F of the MDC on two occasions in January 2002. The discussion centred around the possibility of the witness supporting the accused in the event he won the elections. He denied meeting Giles Mutseyekwa at a meeting held in the office of the Minister of Defence.

Messrs Musango and Nyawasha ^G

The evidence of these two was not really in dispute. They both told the court the video was of poor quality and they experienced difficulty in understanding what was being said. Mr Musango told the court he had to play the tape several ^H

2004 (2) ZLR p223

Garwe JP

A times and there were times he could not say who was speaking. Mr Nyawasha had a difficulty with Mr Legault's accent.

Mr Chinhoyi

He appeared a good witness. He had no reason to lie. On synchronization, he told the court he could not see the lips of the speakers because the picture was too far out and hazy. In other aspects, the movements and gestures by the ^B speakers were consistent with the words spoken.

He described the picture as poor and hazy. It was difficult to see details and the speakers were not always audible. He confirmed surveillance cameras are not meant to provide a good picture.

The Accused

^CIn general, he did not appear confident when questions were put to him in cross-examination and in particular when asked to explain the remarks he made in the video. He reluctantly admitted that there was indeed a discussion between him and the other participants during the Montreal meeting about the elimination of the President and that the word elimination was used in a sinister ^D way. His stance initially had been that the word elimination had been used in an innocuous sense. He told the court that as the meeting progressed it dawned on him that Mr Menashe was using the word elimination in a sinister sense. The accused was also unable to explain why a sum of US\$50 000 was paid from the personal account of Mr Weeks. He called Mr Welshman Ncube who explained that Mr Weeks did so pending clearance of a cheque that had ^E been deposited into the MDC account. If this was a normal business transaction and considering that BSMG operated an account for the MDC, it made little sense for Mr Weeks to take such a large sum of money out of his own personal account and transmit it to Dickens and Madson. If a cheque was awaiting clearance in the MDC account it is not clear why BSMG could not have waited for a few days to allow for the clearance of the cheque and then ^F pay out in the normal way. Alternatively BSMG could have issued its own cheque in anticipation of the cheque deposited being cleared. The explanation given in this regard is unsatisfactory and leaves one with the impression that the whole truth has not been told.

The MDC was represented in Europe by BSMG, a big consultancy and ^G lobbying company. The company also had offices in North America. The accused and his colleagues opted instead to use Dickens and Madson which was relatively unknown. The only reason given was that Renson Gasela vouched for the integrity of Mr Rupert Johnson and that they believed Dickens and Madson would do a better job in North America. The decision ^H to use BSMG raises some suspicion. However one can go no further than that.

2004 (2) ZLR p224

Garwe JP

The accused accepts as largely correct the intelligible portions of the transcript ^A of the video – Exhibit 18. Perusal of the transcript shows that the accused made remarks or statements which are exculpatory on one hand and incriminatory on the other. The court will now proceed to look at these in greater detail. In interpreting the remarks made during the meeting, sight must not be lost of the

fact that Mr *Menashe* was out to collect evidence of a request from the ^B accused. It is not in dispute that the accused was the only person in the conference room who did not know that the discussions were being recorded.

(a) Incriminatory Remarks

- At 8:53:34, Mr Menashe remarks that Mugabe's Government is not going to go away by itself. He then says the MDC represented by the accused, ^C "commits to let us call it whatever you want to call it, the coup d'état or the elimination of the President ... wants Shiri to agree with the way to pursue this ... what chances do we have that Shiri will cooperate?" In response, the accused does not deny that this is the purpose of the meeting. Instead he says "to win an election is another thing in Zimbabwe". He talks of the military being divided on what to do with Mugabe. ^D
- 09:08:01, Mr Menashe says until now you weren't seeing the meaning of the word elimination. There are different interpretations as to the words used exactly. Tara Thomas said the words were "the weight of the word elimination". In response, the accused says, amongst other things, the arrangements of elimination of the President are in a different scenario. He ^E says "we have to work at another strategy to communicate with them, But how do you communicate with them in the event of what is going to happen? ... It is now a new scenario, then we have to relook at that." Under cross-examination the accused admitted the scenario referred to was the illegal removal of the President.
- 09:22:03, Mr Legault says his understanding of the London meeting was ^F that definitive action against President Mugabe was necessary because of the uncertainty of the electoral process. The accused agrees that when he came to the meeting his understanding was that "the second meeting would brief me about the transitional arrangement, what's going to happen if we move towards this ... how then do you move to the next step, ^G and the next step. The next step being a three-phase program, the transitional program, the election process and the post transitional program ... and this meeting was supposed to be talking about, ok, we have moved so far; we can definitely say that Mugabe is going to be eliminated. What is the transitional arrangement that is in place."
- 09:26:39, there is talk of power sharing. The accused asks what the formula ^H

2004 (2) ZLR p225

Garwe JP

^A would entail. He says on their side power sharing is not a problem but he asks whether that will mean that the head of the military will head the government. There is talk of an interim president. The accused then says "in the event of that happening" the army must guarantee that "that they will remain an outside guarantee for enforcing a bi-partisan Government, a transitional Government between ZANU (PF) and the MDC for a certain ^B duration. That duration should ... lay down the basis for a clean election."

- 09:28:27, when asked who is to call for the emergency the accused says "all they need to do is tell the Vice-President that, look, we have got a crisis, we cannot proceed immediately after the President's elimination but we want to form a transitional relationship with the MDC to ensure that ^C conditions are put in place for a free and fair election. We cannot move into free and fair elections under circumstances where the country is not stable because the head of State is gone..."
- 09:30:42, the accused says in his view that would be the most stable way to proceed and it will not raise suspicions. ^D
- 09:31:28, the accused says Perence Shiri must be brought on board not on the question of the elimination of Mugabe, but on the fact that they have to guarantee a peaceful transition.
- 09:37:32, the accused says the most serious concern in Zimbabwe is that if Mugabe goes into the election, then there will be mayhem. He says "that ^E emphasises that moving Mugabe aside creates more opportunities ..."
- 09:43:56, Mr Legault says if Mugabe is taken out before the election you are going to run into some kind of chaotic mess. The accused says "To me that's the fundamental issue ..."
- 09:46:03, in response to an earlier question by Mr Legault that if Mugabe is harmed, there will be chaos and mayhem, the accused says "And that's where I think, the problem is. But all we can pray for is for the military to understand that these are the scenarios that have emerged."

(b) Exculpatory Remarks

- 09:00:58, Mr Menashe asks whether in the event of a breakdown of power, Perence Shiri would support the MDC. The accused says it depends what ^a kind of power breakdown to which Mr Menashe says "The President is eliminated." To this the accused responds "If the President goes, then there is a vice-president: who is supposed to take over in terms of the ^b constitution?"

2004 (2) ZLR p226

Garwe JP

- 09:01:35, when asked by Mr Menashe what they are talking about the ^a accused says "We are talking about an arrangement where if Mugabe goes the Vice-President takes over and within three months there will be elections, that's the constitutional arrangement ."
- 09:01:50, Mr Menashe then says he thought they were talking about "the elimination arrangement, having a transitional government to which the ^b accused responds by saying "How is it going to come about?" When Menashe says "That's exactly the point!" the accused says "Because in terms of the Constitution ..." after which he is interrupted by Mr Menashe who says it looks like they are guilty but they can all talk openly.
- 09:05:08, after further talk of the elimination of the President and a ^c transitional government and Mr Simms refers to \$6 million in government funding and the process involved, the accused remarks "Yes, don't mistake me, I am not opposed to a transitional arrangement, I am saying, practically, how is it going to emerge. I am not opposed to a transitional arrangement, how is it going to emerge, in the event that the President is gone." ^d
- 09:07:39, at this stage, there is a dispute as to what was said before the accused responded. Mr Menashe says there was a question by Mr Legault whether a meeting had been held with people in the current power structure. Indeed there are words to that effect on the tape but they are not very audible. The defence suggested that these words may have been inserted. Whatever the correct position, the accused remarked "The ^e discussion was never about the elimination of Mugabe. It was about the election and the post election outcome." Mr Menashe immediately steps in and says "But now there is a different ^f story". Mr Menashe further says "Because until now you weren't seeing the meaning of the word elimination". The remark by Mr Menashe "But now there is a different story" followed by the further remark "Because until now you were not seeing the weight of elimination" are not entirely consistent with the question raised by Mr Legault whether there had been a meeting with people in the current power structure.
- 09:09:34, the accused then remarks "I think let's not get confused. The circumstances under which the MDC and all the power institutions ^g communicated were based on moving towards an election. So, don't try to arrange, or to set up, these arrangements of elimination of the President in a different scenario. In a different scenario, then, we have to work at another strategy to communicate with them. But how do you communicate with them in the event of what is going to happen? As far as I am ^h

2004 (2) ZLR p227

Garwe JP

^a concerned, the arrangements and discussions so far were based on the election process. It's now a new scenario, then we have to relook at that."

- 09:10:22, Mr Menashe says they had discussed this new scenario but he was now very surprised as this was a completely new scenario. The accused asks "which one" and Mr Menashe comments: "Well Morgan is talking about elections, now he thinks we didn't talk about elections ... ^b He agreed to us on the transitional Government but suddenly we hear he is talking of elections ... we are hearing the backtrack of the situation." In response to this the accused says "I do not think so. I think you got the point wrong."
- 09:11:58, Mr Menashe says they are not hired guns neither are they going ^c to murder Mugabe and then assassinate or eliminate or whatever. He further remarks that this is not what they do for a living. To this, the accused remarked "I am certainly agreeing with you there. The arrangement really is, when we last met at the RAC Club we agreed that the route we were going to take was that if Mugabe goes there will be a transitional arrangement but the method of implementation was not discussed." ^d

- 09:13:33, after Mr Menashe remarks that work has been done up to Congress and to get people “on site for the elimination” the accused then left the room together with Rupert Johnson. It is at this stage Tara Thomas says the accused looked upset. However there are also words to the effect “Let’s stop the process” before the accused walks out.

THE AUDIO-TAPE

This was brought to Harare by Mr Menashe when he came to see Air Vice-Marshal Mhlanga on 23 November 2001. Air Vice-Marshal Mhlanga described the tape as inaudible. Mr Menashe also brought with him a transcript of the tape. It is not in dispute that using normal transcribing equipment available ^F in this country one cannot produce the same kind of transcript as did Tara Thomas and Elizabeth Boutin from the same tape. Tara Thomas told the Court that the transcript was made possible after the audio-tape had been recorded on to a diskette and the diskette in turn played on equipment with equalizer. Unfortunately, the equipment that was used in transcribing the tape was not brought and it is therefore not possible to confirm the truthfulness of Tara ^G Thomas’ evidence in this respect. In fact, the transcript was only made available to the defence after the commencement of the trial largely because the State considered it of no consequence. Indeed, the police officers who gave evidence told the court it was not included in the docket because there ^H was nothing on the audio and there were many gaps in the transcript.

2004 (2) ZLR p228

Garwe JP

That the transcript is a relevant piece of evidence there can be no doubt. ^A Indeed it should have formed part of the investigations. According to Mr Menashe and Tara Thomas, there was a request at the second meeting for the assassination of the President and the staging of a military coup. Tara Thomas accompanied Mr Menashe to London to record the discussion on the tape recorder. The transcript produced by Tara Thomas and Elizabeth Boutin has ^B complete sentences in certain sections and one can follow the discussions that took place in those sections. The court has already noted that the transcript refers to former Zambian President Frederick Chiluba and his alleged corrupt practices as well as other players on the Zambian political scene including Edith and one Penza who was killed. There is reference to the Congo and the Minister of Security Mr Kongolo. The transcript is therefore relevant, ^C containing, as it does, portions which reflect clearly the discussions that took place. What is in the inaudible portions will of course never be known. But to the extent to which the transcript contains meaningful discussions during that meeting, it is relevant.

It is relevant because the State says there were various requests by the ^D accused during that meeting for the assassination of the President and the staging of a military coup. It is not in dispute that the transcript does not in fact contain evidence of such a request. Although the transcript is not complete, the fact that it does not confirm that such a request was made is relevant. A document is not only relevant because it supports the case for the prosecution. It is also relevant if it does not do so or if it contradicts the ^E prosecution witnesses.

In the light of this it was improper for the State to have ignored the transcript or at the very least not to have brought the contents of the transcript to the attention of the defence. The duty of the prosecution to do so in these circumstances is now settled law: see *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S); ^F *S v Mutevera & Anor* HH-112-01. However, in fairness to the investigation team, there appears to have been a genuine but misguided belief that it was not relevant.

THE VIDEO-TAPE AND TRANSCRIPT

Besides the oral evidence given by Mr Menashe and Tara Thomas to the effect ^G that the accused requested for the assassination of the President and the staging of a military coup, the video-tape and accompanying transcript are no doubt important pieces of evidence in this case. Mr Menashe told the court that the meeting in Montreal was recorded in order to provide proof of the criminal intention of the accused.

The video was played several times during the course of the trial. The video ^H

2004 (2) ZLR p229

Garwe JP

A is accompanied by a humming sound almost similar to the sound that one hears on an aircraft in motion. The state witnesses attributed the interference to a central air conditioning system for the entire office block. What was said by the witnesses is audible in some places but not in others. This much is apparent from the transcript of the proceedings which reflects gaps in various places.

There is no doubt that both the picture and audio quality of the video-tape B are poor. The picture does not provide clear focus generally although one can identify the different people who took part in the meeting. The audio quality is certainly poor as there are various inaudible portions in the video. In short the video does not provide a complete record of what was discussed.

The State led evidence from Mr Chinhoyi. Mr Chinhoyi showed the court the C various techniques used in tampering with a tape. He told the court in general poor focus cannot result by mistake especially if there is a monitor. He examined the video-tape in this case and did not see any evidence of tampering. He told the court however that one cannot say so with certainty as there are modern techniques that can be used in such a way as to make alterations undetectable. It was also his evidence that it is easier to tamper with D a poor picture than a picture of good quality. In his opinion the real difficulty with the video is that whilst the picture remains unbroken the sound is interrupted in several places.

Mr Schober in his evidence told the court that technology exists to remove the buzzing sound and thereby enhance the audio sound. This was not E followed up. The result is that there is before this court a video-tape in which some of the discussions during the meeting are audible and others are not. Because of the gaps one cannot say what words followed or how those words might have qualified the words that are audible.

The question that arises is whether the video is admissible.

In his evidence the accused told the court that he used the transcript to "jog" F his memory. His assessment was that generally the audible portions of the tape correctly reflect the discussions that took place in Montreal. There were a few amendments to the transcript by Mr Menashe, Tara Thomas and the accused. Most of the amendments were not in contention. There is some dispute, however, on what was said before the accused uttered the words:

G "The discussion was never about the elimination ..."

In short, therefore, the correctness of the portions that are audible is not really in dispute although the admissibility of the video has been challenged.

The law on the admissibility of video and audio-tape recordings was considered H in *S v Ramgobin & Ors* 1986 (4) SA 117 (N). In my view, that decision correctly

2004 (2) ZLR p230

Garwe JP

reflects the law on this topic. In the present case the authenticity and accuracy A of the video have been established although suggestions have been made that it may have been interfered with. The fact that a tape is inaudible in parts is no reason to require its exclusion, particularly in a case, such as the present, where the accused accepts the accuracy of the portions that are audible. In all the circumstances therefore this court reaches the conclusion that the B video-tape is admissible.

Of significance, however, is the fact that it is common cause that nowhere in the video-tape is there a direct request to Mr Menashe or his company Dickens and Madson to arrange the assassination of the President and to carry out a coup d'etat. Indeed it was for this reason that the State, at the close of the State case, amended the charge and removed all reference to such a request during C the third meeting.

FINDINGS ON THE FACTS

The following are the findings of the court on what happened.

Firstly, on the evidence before the court, Rupert Johnson could not possibly D have been representing the MDC. The documentary evidence available suggests that Rupert Johnson represented himself as a director of Dickens and Madson, with the knowledge of Mr Ari Ben Menashe. The suggestion that Rupert Johnson approached Dickens and Madson in his capacity as a representative of the MDC is not therefore tenable.

Secondly, the transcript of the meeting held at the Royal Automobile Club, ^E though incomplete, does not reflect the request that Mr Menashe says was made for Dickens and Madson to arrange the assassination of the President and the staging of a military coup. The intelligible portions of the transcript reflect discussions on other topics.

Thirdly, it is clear that the third meeting, like the second, was recorded on tape ^F by Dickens and Madson in order to secure evidence of a request by the accused for assistance in arranging the assassination and military coup. Mr Menashe had been told that what he had brought to Harare on 23 November 2001, contained no evidence of such a request.

Fourthly, the video recording is generally of poor quality. The picture appears hazy and somewhat lacking in focus. Though audible in places, the audio ^G quality is generally poor. The transcript of the video confirms that a lot of what was said is inaudible. In short there are gaps and it is not possible to say what was said on those occasions.

Fifthly, it is clear that by the time the video recording took place Dickens and Madson had been paid US\$30 000 out of which sum Mr *Schober* was paid ^H

2004 (2) ZLR p231

Garwe JP

^A US\$5 000. About two weeks later on 18 December 2001 a sum of US\$200 000 was sent to Dickens and Madson by the Government of Zimbabwe.

Sixthly, the audible portions of the video-tape do not reflect a request on the part of the accused for Dickens and Madson to arrange the assassination of the President and the staging of a *coup d'état*. It was for this reason that the State applied to amend the charge following the discharge of Welshman ^B Ncube and Renson Gasela at the close of the State case. In the application, the State says "The evidence of the State witnesses at the trial shows that the accused requested members of Dickens and Madson to arrange for the assassination and *coup d'état* at the first and second meetings. There is no evidence to show that the accused specifically repeated this request at the third meeting in Montreal."

^C Seventhly, the audible portions reflect various statements being made by all the people in attendance. In the majority of cases, questions were put to the accused and he would answer. It is apparent from the video that the accused initially appeared confused and gave the impression he did not know what was being referred to. In later portions of the video, he appears less hesitant and ^D makes a number of remarks, some of them not innocuous.

Eighly, the discussions at the Montreal meeting touched on the transitional period following the elimination of the President, the post election period as well as the funding needed for this purpose. The meeting discussed what would happen in the event the President was eliminated, the possibility of ^E chaos, the role of the army in this situation and the need to engage the army so that they provide stability during the transitional period. There is talk of the need to meet *Perence Shiri*. There is no doubt that the accused took part in this discussion and that the discussions at this stage were anything but innocuous.

WHY MR MENASHE AND TARA THOMAS MUST BE TREATED ^F AS SUSPECT WITNESSES

Allusion has already been made to the need for the evidence of Mr Menashe and Tara Thomas to be treated with caution. On the evidence there can be no doubt that Mr *Menashe* had a financial interest in this case. Tara Thomas was his assistant. She did as instructed. Neither he nor Tara Thomas can be ^G described as impartial. They were out to trap the accused. In *S v Ohlenschlager* 1992 (1) SA 695 (T), it was suggested that in such situations the ordinary principles of co-perpetrator or accomplice should prevail. In short both must be treated as suspect witnesses. The remarks by Holmes JA in *S v Machinga* ^H 1963 (1) SA 692 (A) 693-694 that:\

2004 (2) ZLR p232

Garwe JP

"Whatever the juristic niche into which he may be classified as a witness, ^A his evidence had two things in common with that of an accomplice. First, he had a possible motive to benefit himself by false implication of others, ... Second, by reason of his participation in this crime, he was in a position ... to deceive the unwary by a realistic account of it."

The need for caution in these circumstances was also stressed in *S v Mupfudza* ^B 1982 (1) ZLR 271 (S), 273C where Baron JA remarked as follows:

"There are several types of witnesses who, for one reason or another must be regarded as suspect and whose evidence must be regarded as suspect and whose evidence must be approached with particular caution In all such cases there is potentially a danger of false incrimination, and before a trial court can safely convict on the testimony of such a witness it must satisfy itself that that danger has been excluded ..."

Considering the role played by Mr Menashe before the Government of Zimbabwe, became involved in this matter, the fact that he was engaged by the Government after procuring the video-tape and the extent to which his company has benefited as a result of the contract it signed with the Government there is need for the evidence of both Mr Menashe and Tara Thomas to be treated with caution.

WHAT THE STATE IS REQUIRED TO PROVE

Reference has already been made to the particulars of the amended charge that the accused is facing. The particulars of the charge may be summarised as follows: ^E

- (a) in respect of the meeting of 22 October 2001 that the accused requested Mr Menashe to organize the assassination of President Mugabe and to arrange a military coup.
- (b) in respect of the meeting of 3 November 2001 that the accused again made the same request and thereafter transmitted a sum of \$97 400 being part ^F payment of the fee charged to carry out the plot.
- (c) in respect of the meeting of 4 December 2001 that the accused held a meeting with members of Dickens and Madson as well as Mr Simms and Mr Johnson, at which the elimination of the President and setting up of a transitional government in furtherance of the plot were discussed.

Section 146 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides "that each count of an indictment, summons or charge should set forth the offence with which the accused is charged in such manner and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom ... the offence is alleged to have been ^H

2004 (2) ZLR p233

Garwe JP

A committed, as may be reasonably sufficient to inform the accused of the nature of the charge." In other words, the charge should be framed in such a way that the accused fully understands the nature of the charge he is facing. Although this is elementary, it is necessary to stress once again that a charge must correctly state the basis of the allegation made against an accused person. Unless another offence is a competent verdict, or unless the essential ^B elements of the other offence are included in the essential elements of the offence actually charged, an accused person cannot be convicted of an offence with which he is not charged. Thus, for example, a person charged with theft cannot be convicted of assault even if that offence is proved in evidence. The court will revert to this aspect in due course.

^C In respect of the crime of treason, the position is now established that –

"there are ... as many acts of high treason as there are overt acts; and ... each may constitute a separate offence, in itself, susceptible of forming the subject matter of a separate count ". See *South African Criminal Law and Procedure*, vol II, *Common Law Crimes* 3 ed by J R L Milton at p 38.

^D In practice however, the State often sets out the various alleged overt acts, not as separate counts but by way of particulars of a single count — see *South African Law and Procedure supra* at p 38.

Indeed, it has been suggested that where there are several acts chargeable, it is desirable to group together in one count, with separate paragraphs in date sequence, all those which are of the same character: see Gardiner and ^C Lansdown *South African Criminal Law and Procedure* 6 ed (1957) 1002.

The above remarks are pertinent, regard being had to the fact that although the accused is facing a single count of high treason, three particulars of the offence have been set out by the State in the present case.

The evidence given by Mr Menashe and Tara Thomas may be summarised as follows. At the first meeting held at the Hilton Hotel, Heathrow, on 22 October 2001, the accused in the company of Mr Welshman Ncube and Mr Renson Gasela requested Dickens and Madson to arrange for the assassination of the President and the staging of a military coup. Mr Menashe says they went to the second meeting "to make sure I and everyone else heard correctly". He says on this occasion the request was repeated and, in addition, practical matters to be dealt with in order to carry out the plan were also discussed. During the third meeting, they discussed what would happen after the assassination of the President, as well as the transitional process.

On the basis of this evidence and in the light of the particulars of the charge supplied by the State, the court found, at the close of the prosecution case,

2004 (2) ZLR p234

Garwe JP

that only one overt act had been alleged in the indictment, namely, the request made to Dickens and Madson to arrange the assassination and staging of a military coup. The court held that all three meetings were important and composite elements of the overt act. The second and third meetings were a continuation of the first. On that basis, this court held that only one overt act had been alleged although three meetings had been held between the parties to discuss the request. On reflection, however, it does appear that each request as alleged in the original charge may have constituted a separate overt act. Nothing however turns on whether there was more than one overt act charged in this case. I will revert to this shortly.

The State submitted in argument that if only part of the overt act is proved and that which is proved amounts to treason then a conviction for treason would be proper in the circumstances. This submission must be accepted as correct. In other words if a request had been shown to have been made at any one of the three meetings then the crime of treason would have been committed.

The gravamen of the allegation in the first and second particulars of the amended charge is requesting Mr Menashe to assassinate the President and to organize the coup. Put another way the charge against the accused is that he incited Mr Menashe. A request to another to engage in criminal conduct amounts to incitement – see the remarks of Holmes JA in *S v Nkosiya* 1966 (4) SA 655 (A). An inciter is one who unlawfully makes a communication to another with the intention of influencing him to commit a crime: J M Burchell *South African Criminal Law and Procedure*, vol 1, 3 ed p 39. Although there is reference to a plot in paras 2 and 3 of the particulars to the charge, this appears to refer to nothing more than the request. Indeed the Acting Attorney-General stated during his closing address that the discussion was "in furtherance of the plot constituted by the request".

In respect of the third meeting, the gravamen of the allegation is that there was a discussion "in furtherance of the aforesaid plot".

At this stage, it is necessary to comment on what appears to be a misunderstanding on the part of the prosecution as to the overt act or acts the accused is alleged in the charge to have committed in this case. Although the particulars allege a request, reference has been made during the trial to a conspiracy and a plot. In para 31 of its closing address, the State says the charge is plotting to assassinate the Head of State and to overthrow the Government. However, in para 35 of its closing submissions, the State says the accused incited and sought to arrange the assassination of the President, the carrying out of a military coup and the setting up of a transitional government. The Acting Attorney-General stated that the discussion was in

2004 (2) ZLR p235

Garwe JP

A furtherance of the plot constituted by the request. There is a big difference between a request (i.e. incitement) and an agreement (i.e. conspiracy). A plot has been defined in the *Concise Oxford Dictionary* as a secret plan or scheme. It may also mean a conspiracy. Certainly on a charge as serious as treason the particulars of an overt act of conspiracy must be clearly stated. The particulars must identify the co-conspirators and the agreement they are alleged to have concluded.

Paragraph 2 of the original charge alleged that a memorandum of understanding was faxed to Dickens and Madson and that it was a cover for the unlawful "plot" to overthrow the government.

No further detail of the "plot" was given. No indication was given as to who was involved in the plot. Were the plotters the three accused or was it the three accused and Mr Menashe? The evidence ^c of Mr Menashe was never that there was a conspiracy between him and the accused at any of the meetings. His evidence was that he pretended to go along in order to obtain evidence and did not intend to act on the request. In these circumstances, there cannot therefore be any question of a conspiracy: see *R v Harris* (1927) 48 NLR 330.

^d In the light of all these facts, this court found at the close of the State case that only one overt act had been charged i.e. incitement. The court has already accepted that on reflection each request could have been treated as a separate overt act. The accused's erstwhile co-accuseds were acquitted firstly because the evidence against them was flimsy and secondly because they could not have been convicted, whether or not there was more than one overt act, on ^e the evidence of only one witness, namely Mr Menashe. The allegation that there were discussions in furtherance of the plot was only substituted following the acquittal of the erstwhile co-accuseds at the close of the State case. Consequently it would not have made any difference, so far as the erstwhile co-accuseds were concerned, whether more than one overt act had ^f been alleged.

What the State is required to prove may be summarised as follows. In respect of the first meeting, that there was a request. In respect of the second the same but further that a sum of \$97 400 was forwarded "as part of the fee for the plot". In respect of the third meeting that there were discussions in furtherance of the plot. There is no allegation that there was a conspiracy at the third meeting. ^g The allegation is that there was a discussion in furtherance of "the aforesaid plot" i.e. the plot allegedly hatched during the first two meetings.

The remark made that there is no allegation of a conspiracy at the third meeting requires amplification. At the commencement of the trial, the allegation in ^h respect of the third meeting was that the accused requested members of

2004 (2) ZLR p236

Garwe JP

Dickens and Madson to arrange for the assassination of the President and ^a staging of a military coup. Following the acquittal of the accused's erstwhile co-accused at the close of the State case, the prosecution conceded there was no evidence of such a request. Instead the prosecution sought to amend the charge to allege that there was a discussion between the accused and various other persons at which the elimination of the President and setting up of a ^b transitional government in furtherance of the plot were discussed *and agreed*. The court ruled that since the accused had come to court to answer the allegation that he had requested Dickens and Madson to arrange the assassination of the President and staging of a military coup, the State was not entitled, half way through the trial, to amend the charge to allege that there was an agreement between the accused and the other persons who attended ^c the Montreal meeting. The court found that such an amendment would have been highly prejudicial. Accordingly, the court granted the amendment but the words "and agreed" were struck out. In short therefore the court ruled that so far as the Montreal meeting was concerned the State was not entitled at such a late hour to allege a conspiracy when all along the allegation had been ^d one of incitement.

The court is aware that an overt act may take the form of speaking or writing words. Indeed, in *R v Wenzel* 1940 WLD 269, the court held that a person who writes or speaks in the furtherance of an intent to overthrow or coerce the government would be guilty of treason.

HAS ANY OVERT ACT AND HOSTILE INTENT BEEN PROVED? ^e

It has been noted that the State is relying on three particulars of the charge, each of which in turn relates to each of the three meetings. It is necessary to look at the evidence led in respect of each meeting and thereafter determine the extent to which that evidence proves the act alleged.

Turning to the first meeting that took place on 22 October 2001, the only available evidence is that of Mr Menashe. He says there was a request. There is no other evidence which confirms that this request was made. The court has already found that Mr Menashe is a suspect witness. In all the circumstances it cannot be said there is reliable evidence of a request having been made during the first meeting. Put another way the evidence before this court does ^g not clearly establish that such a request was made.

Coming to the second meeting, in addition to Mr Menashe's evidence, there are other pieces of evidence. There is the evidence of his assistant Tara Thomas. For reasons already given the evidence given by both Mr Menashe and Tara Thomas must be treated with caution. Further, the contract signed at the second meeting does not in any way substantiate the claim that there ^H

2004 (2) ZLR p237

Garwe JP

A was such a request. The contract itself does not say so. To the contrary, it talks of Dickens and Madson representing the MDC in the USA and Canada and lobbying for support of the MDC's programmes and objectives. There is also nothing to suggest that the sum of US\$97 400 transmitted by BSMG was anything other than part of the fee of US\$500 000 charged by Dickens and Madson for lobbying services in terms of the memorandum of understanding. ^B Then there is the transcript of the audio. The transcript however does not in any way confirm that a request was made. Indeed when Mr Menashe met with Air Vice-Marshal Mhlanga and Retired Brigadier Bonyongwe, it was agreed that there was no reliable evidence of a crime having been committed at that stage and that there was need for further evidence to be obtained. In short, there is also no reliable evidence of a request having been made at that meeting. Nor is there any evidence of a "plot" having taken place at that meeting.

Turning to the third meeting, however, different considerations apply. This meeting was video-recorded. It is common cause however that nowhere in the video-tape is there a request by the accused to Mr Menashe to arrange the assassination of the President and to stage a military coup. The court has ^D already noted that the video-tape is not audible in places. The transcript has gaps. In other words, one cannot say what else was said in the portions that are not audible. During the meeting, however, there is clear evidence of a discussion touching on several issues such as what would happen following the elimination of the President, the post-election period, the role of the army and Air Marshal Perence Shiri in particular, etc. The discussions in this regard ^E have previously been commented upon. In addition to the video-tape, the State is also relying on the evidence of Mr Menashe and Tara Thomas both of whom say the accused made the request and that the third meeting discussed the aftermath of the illegal removal of the President. The court has already found that the two are suspect witnesses and that whatever they have told the court must be viewed with caution. Mr Menashe in particular must ^F have been under considerable pressure to get an admission on tape from the accused to confirm his story that there had been a request. It goes without saying that Mr Menashe and the others who knew that the proceedings were being recorded would have steered the discussions in such a way as to induce an admission. Some of the utterances made by the accused particularly at the ^G beginning suggest that there were statements being made that he did not agree with. There were occasions he appeared confused. In the latter part of the discussion however he seemed more at ease and responded to questions and also put questions to the other persons in attendance.

Sight must not be lost of the fact that the allegation in respect of the third ^H meeting held in Montreal is that there were discussions in furtherance of a

2004 (2) ZLR p238

Garwe JP

previous plot. It has already been noted that there were indeed discussions ^A touching on several issues following the removal of the President. The evidence, as has been noted, does not disclose either a request or a plot at either the first and second meeting. In the result, in so far as the third meeting is concerned, the evidence discloses a discussion but there is nothing to suggest that the discussion was "in furtherance of a previous plot". Nor can ^B one say, in the light of the contradictory remarks made by the accused in the video, that the video conclusively proves that a plot had previously been agreed upon and that the discussions during the meeting were in furtherance of that plot.

Is a discussion in these circumstances treasonous? The State submitted that "even a preparatory act done with hostile intent" or "mere signification can ^C be sufficient". Whilst this statement in general terms is correct, the State faces some difficulties.

The first and most serious difficulty is that, contrary to remarks that have been thrown about during the course of this trial, the accused did not come to court to face a charge of conspiracy in respect of the third meeting. The allegation initially was that he made the request at all three meetings.

Only after the ^d discharge of his erstwhile co-accused did the State amend the charge to allege that he and others took part in discussions which were in furtherance of the previous plot.

The second is that, even if it were to be assumed for a moment that the charge is one of conspiracy it is clear that on the authority of *R v Harris supra*, there can be no question of a conspiracy, as there was no intention on the part of ^e Mr Menashe and the others to act on any understanding as this was a trapping exercise.

The third difficulty is that the evidence does not in any event show that there was a conspiracy or a plot at either the first or second meetings. Put another way, there is no evidence of "the aforesaid plot" having taken place at either ^f the first or second meeting.

The fourth is that a mere discussion "in furtherance of the aforesaid plot" is not, in the absence of evidence of an incitement or a conspiracy, treason.

In *R v Labuschagne & Ors* 1941 TPD 271, there were three meetings during which there was a discussion as to whether the parties should participate in acts of treason. The discussions were certainly not innocuous. ^g Greenberg JP, who presided over the trial, remarked on pp 273-5 of the judgment:

"We now come to the third meeting in which the first and third accused are implicated. This meeting, of course, must be taken in its setting in so far as the happenings of the first and second meetings are relevant to a full ^h

2004 (2) ZLR p239

Garwe JP

a understanding of the third meeting. The meeting, as I have said before, was a meeting on a farm outside Potchefstroom. The first and third accused and six or seven soldiers – I think seven is the number – Kennedy and the two brothers Prinsloo, the owners of the farm, were present at that meeting and the first question to be considered is whether there is evidence of a conspiracy on that occasion, taking the facts there in conjunction with what happened before.

^b The evidence shows that a plan was produced by one van Jaarsveld, one of the soldiers. It had been suggested at an earlier meeting that he should get this plan and that it was necessary for their further activities. I omitted to mention that in regard to the acquisition of this plan, it is not proved that the accused who was present when the plan was mentioned knew that this was arranged and therefore he cannot be convicted of complicity in this matter.

But to return to the third meeting, the evidence shows that the plan was produced and that it was studied by all the persons present, including the first and third accused. They all looked at it and the plan was explained to them by van Jaarsveld. There was then a discussion and Kennedy mentioned the proposal that 150 of the people whom he claimed to control and whom he described as 'stormjaers' would attack the camp. It was pointed out by one of the soldiers present that it was out of the question to attempt to attack the camp with 150 men and, I think, the evidence is that this soldier said that 500 or 600 men would be necessary. I am not perfectly clear whether this figure was mentioned by the first accused, but it is clear that the first accused associated himself with the view that 150 ^c men were wholly insufficient for such an attack and that 500 or 600 men would be required.

As far as we can see, nothing further was done; it certainly was not agreed at that meeting that there would be an attack on the camp. Kennedy at an earlier meeting said that the attack had to take place within six weeks. There is however nothing to connect accused No. 1 and No. 3, or accused ^d No. 2 for that matter, with knowledge of that statement.

The first accused was then called upon to deliver what was described as a 'slotwoord' – a sort of benediction – on the meeting, but that does not mean that there was any final decision at that meeting because the evidence negatives this. The evidence does not go so far as to show that the project was dead, but it certainly does not establish that anything was ^e decided or that it was decided to prorogue the meeting and consider the matter at a future date.

I think, therefore, that the evidence does not disclose a conspiracy at that stage and if the evidence does not disclose a conspiracy the accused ^f cannot be convicted either on the ground that they took part in the

2004 (2) ZLR p240

Garwe JP

conspiracy or on the ground that they did not report it. I shall assume that ^a the failure to report may be high treason itself, but in the view I take of the matter it is unnecessary to decide whether the failure to report must be failure to report an intention to commit high treason on the part of other persons or to report treasonable acts which have already been committed. It can be assumed that failure to report past conduct which is treasonable is also treason. The last point would be relevant if there were evidence that ^b

Kennedy or any other person incited the other to commit high treason, but there is no evidence of that. It does not appear to me, as I indicated before, that the mere discussion as to whether the parties will take part in conduct which is high treason amounts to high treason. It may be that part of that discussion in itself would amount to incitement and that this would be criminal, but there is no evidence in the present case that the discussions c which took place involved incitement by any person and, therefore, there was no duty on any person present to report."

In the absence of both incitement and conspiracy, the accused in the above case were acquitted. J R L Milton in *South African Criminal Law and Procedure supra* at p 22 expresses the view that it was unlikely, in any event, that there was sufficient evidence of "hostile intent".

In *S v Banda & Ors* 1990 (3) SA 466 (BGD), at 474F SC, Friedman J remarked:

"Equally important is to note that a mere discussion of the possibility of acts of treason, not resulting in any agreement, nor including any mutual incitement, does not amount to high treason."

In the present matter, there is evidence of a discussion during which the e accused and others talked about what could happen following the elimination of the President. The State conceded there was no evidence of a request at the third meeting. The State alleges that there were discussions "in furtherance of the aforesaid plot". There is no suggestion that there was a conspiracy or an incitement during the discussions. The plot which is alleged to have taken place previously has not been proved. A mere discussion in this context is different from speaking or writing in furtherance of an intent to overthrow the f government as was observed in *R v Wenzel supra*. As further noted in *South Africa Criminal Law and Procedure Vol. II, Common Law Crimes supra* at p 32, without incitement or conspiracy an expression of hostile sentiments will not constitute treason, not because there is no overt act but because there is no hostile intent. g

The fifth difficulty is that, because of the gravity with which the crime of treason is viewed special provisions have been put in place to provide some measure of protection to persons facing such a charge. One of these is the two witnesses rule. The other is that evidence shall not be admitted of any overt act not alleged in the indictment unless to prove some other overt act alleged therein. In other words, if conspiracy has not been alleged in respect of the h

2004 (2) ZLR p241

Garwe JP

A third meeting, can the State now turn around and say there is evidence of a conspiracy in respect of that meeting and therefore the accused should be found guilty of treason on that basis? The Criminal Procedure and Evidence Act forbids this except if the evidence is relevant to prove the request alleged to have been made at the first and second meetings.

Putting aside the above problems for a moment, the totality of the evidence b in this case is such that one cannot say with certainty that the overt act charged in respect of the first and second meetings i.e. incitement has been proved beyond a reasonable doubt or that it has been proved beyond a reasonable doubt that the discussion at the third meeting was in furtherance of a previous plot. The law is settled that where such doubt exists it must be resolved in favour of the accused. No onus rests on an accused person to convince the c court of any explanation he gives. It is sufficient if a court thinks there is a reasonable possibility that it may be true. Even if the explanation given is improbable the court must acquit unless proof beyond a reasonable doubt is adduced: see *S v Chininga* S-21-3;. In this case, the possibility that the version given by the accused could be true has not been discounted. Put another way it cannot be said the State has proved beyond a reasonable doubt that high treason was committed in this case.

In my view, this case aptly illustrates the difficulties that can be associated with a charge of high treason and how vague the crime can be. It may be a moot point whether on a charge that the accused requested another to organize the assassination of a head of State and to arrange a military coup the State would e be entitled to amend the charge to allege that there was a discussion in furtherance of a plot. It is also difficult to conceptualize what "discussions in furtherance of the aforesaid plot" refers to. If by the word plot the State was referring to the request, the accused should simply have been charged with making that request i.e. with incitement rather than with having discussions f "in furtherance of the aforesaid plot". In my view, the allegation against the accused in respect of the third meeting is vague. For this reason, the State has during this trial interchangeably referred to the charge against the accused as incitement or conspiracy. In view of the conclusion that this court has reached it will not however be necessary to make a definite finding on these matters.

In the circumstances the court must return a verdict of not guilty and the ^G accused is accordingly discharged.

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

^H *Atherstone & Cook, accused's legal practitioners*

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Document 32 of 47

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DOMBODZVUKU & ANOR v SITHOLE NO & ANOR 2004 (2) ZLR 242 (H)

2004 (2) ZLR p242

Citation	2004 (2) ZLR 242 (H)
Case No	Judgment No. HH-174-04
Court	High Court, Harare
Judge	Makarau J
Heard	25 October 2004
Judgment	25 October 2004
Counsel	<i>T D Muskwe</i> , for the applicants <i>G Butau-Mucho</i> , for the respondents
Case Type	Urgent application
Annotations	Link to case annotations

Flynote

Criminal procedure — review — grounds for — gross unreasonableness — c does not include ruling on point of law

Criminal procedure — review — incomplete proceedings — interlocutory decision — review of — when High Court will exercise its powers of review

Headnote

When arraigned on charges of corruption, the applicants excepted to the charge, claiming that they were not public officers in terms of the relevant legislation, being employees of CMED (Pvt) Ltd. The presiding magistrate ruled against them, holding that the company was a statutory body as defined in the Prevention of Corruption Act [*Chapter 9:16*]. The magistrate's ruling was brought on urgent review. It was argued that the ^E magistrate's decision was grossly unreasonable and should be set aside.

Held, that the power of the High Court to review criminal proceedings of the magistrates court at any stage of the proceedings in the lower court is not in dispute. Section 29 of the High Court Act [*Chapter 7:06*] grants the High Court extensive power to review the criminal proceedings of the magistrates court. The High Court or a judge of thereof may *mero motu* ^F call for a record and

review the criminal proceedings of the lower court if it comes to the court's or the judge's notice that any such proceedings may not be in accordance with real and substantial justice. The powers conferred on the High Court and its judges by the section can be exercised at any stage of the proceedings. However, while the statute ^g does not place any limitations on the exercise of that power, the court rarely exercises the power in relation to proceedings which are pending before the lower court and will withhold its jurisdiction pending completion of the lower court's proceedings to make for an orderly conduct of the proceedings in the lower court. It would create a chaotic situation if any alleged irregularity or unfavourable ruling on an interlocutory matter ^h

2004 (2) ZLR p243

Makarau J

^a were to be brought on review before completion of the proceedings in the lower court. The High Court's aversion to disrupting the general continuity of proceedings in the lower court assumes ascending importance, especially in cases where no actual and permanent prejudice will be occasioned the applicants. The power is, however, exercised in all matters where not to do so may result in a miscarriage of justice.

^b Held, further, that an incorrect interpretation of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking the decision must go further and show that, on the facts before the court, the decision reached defies all logic and is completely wrong. A different opinion of the law, clearly showing how it was arrived at, cannot be said to defy logic. It may be wrong but may ^c not necessarily be unreasonable. There was nothing irregular in the decision by the magistrate to compel the court to use its review powers at this stage of the proceedings. The magistrate's decision was arrived at after hearing argument from both counsel and it was a carefully considered decision. The decision represented the magistrate's interpretation of the law and it could only be an incorrect decision and ^d not an irregular one. Incorrect decisions are redressed by way of appeal.

Cases cited

Levy v Benatar 1987 (1) ZLR 120 (S)

Makamba v Sithole NO & Anor HH-83-04

Ndhlovu v Regional Magistrate, Eastern Division & Anor 1989 (1) ZLR 264 (H)

Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board and Others 1985 (2) SA 234 (SE)

Tenesi v PSC 1996 (1) ZLR 196 (H)

Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor 1996 (1) ZLR 378 (H)
F

Legislation considered

High Court Act [*Chapter 7:06*], s 29

Case information

T D Muskwe, for the applicants

G Butau-Mucho, for the respondents

Judgment

MAKARAU J: The applicant were arraigned before the first respondent, a regional magistrate in Harare, facing ten counts each of contravening s 4(a)

2004 (2) ZLR p244

Makarau J

of the Prevention of Corruption Act [*Chapter 9:16*]. They both denied the ^a charges. It was alleged against both that on various dates, they, being public officers, did several specified acts that were contrary to or inconsistent with their duties for the purpose of showing favour to persons they were dealing with. Immediately after pleading not guilty, the accused persons filed an exception to the charges, alleging that the charges against them were ^b incompetent as they were not public officials

but were employees of a company incorporated with limited liability in accordance with the laws of the country. The trial magistrate dismissed the exception after holding that the applicants were public officials. In so holding, the trial magistrate held that CMED (Pvt) Ltd is a statutory body as defined in the Prevention of Corruption Act and, as such, its employees are public officials for the purposes of the Act. ^c Aggrieved by this decision, the applicants filed an urgent chamber application for the urgent review of the decision. As the main ground of review, the applicants argued that the decision by the first respondent was grossly unreasonable or was so outrageous in its defiance of logic that no sensible person, applying his mind to it, would have arrived at that decision. ^d

The interlocutory decision by the first respondent was handed down on 24 August 2004. The urgent application before me was filed on 14 October 2004, a period in excess of 30 days having elapsed from the date the decision was handed down. The main trial of the matter is set to resume on 10 November 2004 and it is feared that the applicants will suffer irreparable prejudice should I not interfere at this stage. It has been stressed in this court that a matter does ^e not become urgent as the date of reckoning looms. Rather, a matter is urgent when the facts giving rise to the cause of action arise and the matter cannot wait then. Pleas by legal practitioners that if the matter is not treated urgently because the date of reckoning is fast approaching are misplaced and unimpressive. ^f

In casu, it was tersely stated in the certificate of urgency that the application was filed in October because the record of the matter was not readily accessible. Nothing is said of the delay in the founding affidavit. It is trite that facts giving rise to the urgency of an approach to a judge in chambers are to be placed and found in the founding affidavit. A certificate of urgency is not testimony before the judge but is merely the opinion of the legal practitioner ^g that the matter is urgent, based on the averments made in the founding affidavit. Such trite observations are made herein on account of the recurrence of the error in a number of allegedly urgent applications that have been placed before me and the insistence by legal practitioners in such that "facts" in the certificates of urgency should be construed as evidence before me. ^h They are not.

2004 (2) ZLR p245

Makarau J

^a Although I formed the impression that the matter is not urgent and could have dismissed it on that basis, I proceeded to hear argument on the merits of the matter so that the application would be resolved on its merits for the benefit and convenience of the parties.

The power of this court to review criminal proceedings of the magistrates' court at any stage of the proceedings in the lower court is not in dispute. ^b Section 29 of the High Court Act [*Chapter 7:06*] grants this court extensive power to review the criminal proceedings of the magistrates court. It is specifically provided for in s 29(4) that this court or a judge of this court may *mero motu* call for a record and review the criminal proceedings of the lower court if it comes to the court's or the judge's notice that any such proceedings ^c may not be in accordance with real and substantial justice. The powers conferred on the High Court and its judges by this section can be exercised at any stage of the proceedings.

While the statute granting the review power does not place any limitations on the exercise of that power, this court has in practice rarely exercised the power in relation to proceedings pending before the lower court. In practice, the court ^d will withhold its jurisdiction pending completion of the lower court's proceedings to make for an orderly conduct of court proceedings in the lower court. It would create a chaotic situation if any alleged irregularity or unfavourable ruling on an interlocutory matter were to be brought on review before completion of the proceedings in the lower court. The court's aversion to disrupting the general continuity of proceedings in the lower court assumes ^e ascending importance especially in cases where no actual and permanent prejudice will be occasioned the applicants. The power is, however, exercised in all matters where, not to do so, may result in a miscarriage of justice. See *Ndlovu v Regional Magistrate, Eastern Division & Anor* 1989 (1) ZLR 264 (H); *Levy v Benatar* 1987 (1) ZLR 120 (S) and *Makamba v Sithole NO & Anor* ^f HH-83-04. In the last cited case, this court intervened in an uncompleted trial to set aside the decision of the trial magistrate to put the applicant to his defence in circumstances where there was no *prima facie* case against him. The basis of the court's intervention in that matter was that to allow the matter to proceed would irreparably prejudice the applicant upon whom an unconstitutional onus of proving his innocence had been thrust.

^g *In casu*, Mr Muskwe has craftily sought to attack the decision of the first respondent on the basis that it is grossly unreasonable, as he was keenly aware that to simply label it an incorrect

interpretation of the law would see him out of court. Incorrect decisions are redressed by way of an appeal while irregular decisions may be corrected by way of review.

2004 (2) ZLR p246

Makarau J

A decision is said to be grossly unreasonable if it is completely wrong and is ^A not merely a different way of looking at the issue: see *Tenesi v Public Service Commission* 1996 (1) ZLR 196 (H).

As observed in *Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board and Others* 1985 (2) SA 234 (SE), the onus resting upon a litigant seeking to set aside the exercise of a discretion on grounds of unreasonableness is considerable. In my view, ^B the task is Herculean if it is an interpretation of the law by a judicial officer that is sought to be impugned as being unreasonable. An incorrect rendition of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking it must go further and show that on the facts before the court, the decision reached defies all logic and is completely wrong. A different opinion of the law, clearly showing how it was arrived at, ^C cannot be said to defy logic. It may be wrong but may not necessarily be unreasonable. Garwe J, as he then was, observed in *Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H), not every mistaken exercise of judgment is unreasonable and not every reasonable exercise of judgment is right. ^D

In my view, there is nothing irregular in the decision by the first respondent that may compel me to use my review powers at this stage of the proceedings. The decision by the first respondent was arrived at after hearing argument from both counsel and it was a carefully considered decision. The decision represents the first respondent's interpretation of the law and it can only be an incorrect decision and not an irregular one. The first respondent did ^E consider the relevant provisions of the Act creating the offence and of the Act creating CMED (Pvt) Ltd before making a ruling. She engaged in a logical process. The decision that she arrived at is not far removed from the material that she was dealing with. She did not spin a coin or consult an astrologer to reach at her decision. She was called upon to interpret the meaning of the term ^F "statutory body" as defined in the Prevention of Corruption Act and she rendered her interpretation. The issue before her admitted of only two possible answers. Either the contentions by the applicants were correct or they were not. There was no third possibility. The first respondent reasoned in favour of the one and against the other of the two possible answers. That the applicants are of the view that a different interpretation ought to have been ^G made does not make the decision of the first respondent grossly unreasonable. It is my view that the applicants have fallen into the all too often error of thinking that anyone whom we disagree with is being unreasonable.

At this stage, it appears improper that I determine whether the first respondent's decision is correct on its merits, as I am not sitting as an appeal court. It suffices ^H

2004 (2) ZLR p247

Makarau J

^A in my view to find that it is not a decision that is so outrageous in its defiance of logic that no sensible person applying his or her mind to it would have arrived at.

Although Mr *Muskwe* did not advance this position, it appears acceptable in this jurisdiction to attack decisions of inferior tribunals on the basis of reasonableness *simpliciter* that are not grossly unreasonable: see *Zambezi Proteins (Pvt) Ltd & Ors v Minister of Environment & Tourism & Anor supra*. It is my view that, even if this ground had been raised and advanced in argument, I would not have found the decision of the first respondent to be unreasonable.

On the basis of the foregoing, it is my finding that there is no ground upon ^C which I can review the proceedings of the first respondent.

In the result, the application is dismissed with costs.

Muskwe & Associates, applicants' legal practitioners

^D *Attorney-General's Office*, respondents' legal practitioners

Document 33 of 47**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/BARCLAYS BANK ZIMBABWE LTD v NYAHUMA 2004 (2) ZLR 248 (S)

BARCLAYS BANK ZIMBABWE LTD v NYAHUMA 2004 (2) ZLR 248 (S)**2004 (2) ZLR p248**

Citation	2004 (2) ZLR 248 (S)
Case No	Judgment No. S-86-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Gwaunza JA
Heard	27 September
Judgment	1 November 2004
Counsel	<i>G V Mamvura</i> , for the appellant <i>R T Maganga</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Employment — *appeals under labour legislation — provision that noting of appeal would not suspend determination — amendment of such c provision before appeal heard — accrued rights under previous provision not affected*

Headnote

The appellant bank had noted an appeal to the then Labour Relations Tribunal against a determination of an appeals board that the respondent should be reinstated to the position he formerly held with the bank. At ^D the time, the appeal was noted, s 97(3) of the Labour Act [Chapter 28:01] provided that an appeal would have the effect of suspending the determination appealed against. Before the appeal was heard, the Act was amended. A Labour Court was created. Section 97(3) was amended, to provide that an appeal would now not have the effect ^E of suspending the determination appealed against. The Labour Court refused to hear the appeal, on the ground that the appellant had to reinstate the respondent before the appeal could be heard.

Held, that although the amended section was retrospective, that retrospectivity did not take away the appellant's right to suspend the respondent which had accrued at the time of the amendment. Only those ^F rights that had not accrued at the time of the amendment were affected retrospectively. There was nothing in the language of the amendment that evinced an intention to take away accrued rights such as the appellant's right to suspend the respondent pending appeal.

Case cited ^G

Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S)

Legislation considered

Interpretation Act [Chapter 1:01], s 17(1) ^H

Chidyausiku CJ

Case information

A G V Mamvura, for the appellant

R T Maganga, for the respondent

Judgment

CHIDYAUSIKU CJ: The facts of this case, are common cause. The respondent was employed by the appellant. He was a chief cashier. The appellant brought charges of misconduct against the respondent in terms of its registered code of conduct. The hearing committee found the respondent guilty and dismissed him from employment. He appealed to the Grievance and Disciplinary Committee in terms of the registered code of conduct. The Grievance and Disciplinary Committee dismissed the respondent's appeal. The respondent further appealed to the Appeals Board at the National Employment Council. The Appeals Board allowed the appeal and ordered the reinstatement of the respondent. The appeal was allowed on the basis that the appellant had failed to adhere to the time limits as set out in its registered code of conduct in dealing with the matter.

On 19 September 2001, the appellant noted an appeal to the then Labour Relations Tribunal (now the Labour Court) against the decision of the Appeals Board. The appeal is yet to be heard. While the appeal was pending before the Labour Court, the Labour Relations Act [Chapter 28:01] (the Act) was amended by the Labour Relations Amendment Act No. 17 of 2002 (the Amendment). The appeal was set down for hearing at the Labour Court on 17 September 2003. The Labour Court ordered that before the appeal could be heard the appellant had to comply with s 97(3) of the Act as amended, that is, ^Ereinstatement the respondent to his position of employment. The appellant now appeals against that order of the Labour Court.

As I have already stated, the appellant noted its appeal on 19 September 2001 and the law, as it stood on that day, was that the noting of an appeal would suspend the determination of the decision appealed against. In this case, the ^Frespondent remained on suspension pending the hearing of the appeal. As of that date subsection (3) of s 97 of the Act provided as follows:

"(3) An appeal in terms of subsection (1) shall have the effect of ^Hsuspending the determination or decision appealed against."

However, on 7 March 2003, s 97 was amended by the repeal of subs (3) and the substitution of a new subsection. The new subsection provides that the noting of an appeal did not have the effect of suspending the determination or decision appealed against, it reads as follows:

"(3) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against."

Chidyausiku CJ

Thus, the law that prevailed at the time of the noting of the appeal was reversed ^A by the amendment before the appeal was heard.

The issue for determination by this court is whether the President of the Labour Court was correct in holding that the appellant was required to comply with the amended Act before its appeal could be heard when the appellant had noted its appeal prior to the coming into operation of the amendment. In ^Bcoming to this conclusion the learned President of the Labour Court relied on s 47 of the Amendment. Subsection (5) of that section provides as follows:

"(5) Any proceedings that were commenced in terms of Part XII of the principal Act before the date of commencement of the Labour Relations Amendment Act, 2002, or were pending before the Labour Relations Tribunal on that date, shall be deemed to have been ^Ccommenced in terms of the appropriate provisions of the principal Act as amended by the Labour Relations Amendment Act, 2002, and shall be proceeded with accordingly."

Mr *Mamvura* submitted that the rights of the appellant in this matter accrued on the date that it noted its appeal, namely, 19 September 2001, and those rights ^Dare not affected by the amendment that came into effect on 7 March 2003. He submitted that the appellant's accrued rights are not

affected by s 47 of the Amendment. He further submitted that there is a general presumption against retrospectivity and the taking away of vested rights. In support of his submission, he referred the court to s 17(1)(b) and (c) of the Interpretation Act [*Chapter 1:01*] which codifies the presumption against retrospectivity or the taking away of vested rights. Section 17(1)(b) and (c) provides as follows:

“17. Effect of repeal of enactment

(1) Where an enactment repeals another enactment, the repeal shall not –

- (a) ... F
- (b) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed.”

He went on to argue that on 19 September 2001 when the appeal was noted, the decision of the Appeals Board was suspended and the appellant was not G obliged to reinstate the respondent. As at 7 March 2003 when the law was changed, the appellant had a vested right given to it by s 97(3) of the Act, before the Amendment, not to reinstate the respondent pending the determination of the appeal. Mr *Mamvura* argued that there is nothing in s 47 of the Amendment which takes away that right. He further cited a number of H

2004 (2) ZLR p251

Chidyausiku CJ

A authorities that, in his submission, fortify his contention that statutes are not retrospective in effect unless the words of the Act itself explicitly say so. He cited the case of *Nkomo & Anor v Attorney-General & Ors* 1993 (2) ZLR 422 (S) wherein Gubbay CJ, speaking for the majority of the court, had this to say at 428H-429C:

“It is a cardinal rule in our law, dating probably from Codex 1:14:7, that there B is a strong presumption against a retrospective construction: see *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338G-339G. Even where a statutory provision is expressly stated to be retrospective in its operation, it is not to be treated as in anyway affecting acts and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet C decided, unless such a construction appears clearly from the language used or arises by necessary implication: see *Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 684E-F; *Bellairs v Hodnett & Anor* 1978 (1) SA 1109 (A) at 1148F-G; *Pretorius v Minister of Defence* 1980 ZLR 395 (A) at 401F-G; ... *Adampol (Pty) Ltd v Administrator Transvaal* 1989 (3) SA 800 (A) at 805F-806D. Care must D always be taken to ensure that the retrospectivity is confined to the exact extent which the section of the Act provides: see *Attwood v Minister of Justice & Anor* 1960 (4) SA 911 (T) at 914F; *Lentell v Registrar-General & Anor* (2) 1979 RLR 465 (A) at 470F-G.”

All the cases referred to by Gubbay CJ in the above citation, strongly underpin the presumption against the retrospectivity of statutes.

E Mr *Maganga* did not dispute the existence of the presumption against retrospectivity of statutes. He, however, argued that where the amending statute expressly provides for retrospectivity, then the presumption is rebutted. I accept that this submission is correct. The clear and unambiguous wording of a statute can rebut the presumption against retrospectivity. *Nkomo's case supra*, is authority for that proposition.

F Turning to the facts of this case, I accept Mr *Maganga's* submission that s 97(3), as read with s 47(5), of the Amendment is retrospective. I, however, do not accept Mr *Maganga's* submission that, that retrospectivity takes away the appellant's right to suspend the respondent which had accrued at the time of the Amendment.

G In my view, a proper reading of s 47(5) of the Amendment reveals that it is only those rights that had not accrued at the time of the Amendment that are affected retrospectively. Thus, *in casu*, it is common cause that the appellant commenced the proceedings against the respondent before the Amendment. H At that point in time, that is, at the commencement of the proceedings, the

2004 (2) ZLR p252

Chidyausiku CJ

appellant acquired the potential right of appeal against any order to reinstate ^A the respondent by any of the adjudicating authorities in the course of the litigation between the parties. That right was potential and only accrued upon the noting of such an appeal. It is the potential right that is affected retrospectively by the Amendment and not the right that had then accrued. A careful perusal of s 47, and subs 5 in particular, reveals that the Legislature ^B intended this section to facilitate smooth procedural transition from the Act before the amendment to the amended Act and not to take away vested rights. There is nothing in the language of the Amendment that evinces an intention to take away accrued rights such as the appellant's right to suspend the respondent pending appeal.

The appellant in this case was denied a hearing by the court *a quo* because ^C it had failed to comply with the provisions of the Amendment. In my view, this is a misdirection. The appellant had complied with the law as it then was at the time of the noting of the appeal. To now require the appellant to comply with the law, as subsequently amended, is unjust. This is not a case where a party approaches a court with dirty hands by reason of failure to comply with the ^D law. The appellant complied with the law but the law changed after such compliance. It cannot be said to have approached the court with dirty hands. It is on this basis that the appeal should be allowed with costs.

Accordingly, the order of the court *a quo* is set aside and the Labour Court is directed to hear the appeal. ^E

Sandura JA and Gwaunza JA concurred.

Scanlen & Holderness, appellant's legal practitioners

Muzenda & Manganga, respondent's legal practitioners ^F

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Document 34 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/UNILEVER PLC & ANOR v VIMCO (PVT) LTD & ANOR 2004 (2) ZLR 253 (H)

UNILEVER PLC & ANOR v VIMCO (PVT) LTD & ANOR 2004 (2) ZLR 253 (H)

2004 (2) ZLR p253

Citation	2004 (2) ZLR 253 (H)
Case No	HH-175-04
Court	High Court, Harare
Judge	Omerjee J
Heard	28 October 2004
Judgment	3 November 2004
Counsel	<i>J C Andersen SC</i> , for the applicants <i>P C Paul</i> , for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Delict — *passing off* — requirements to establish claim — need to show c existence of reputation and goodwill — likelihood of deception — similar products, sold to similar clientele, bearing similar trade names

Estoppel — delay in instituting proceedings — does not give rise to estoppel — rights conferred by statute — party cannot be estopped from enforcing statutory rights

Intellectual property — trade mark — infringement of — unauthorised use D of a mark so nearly resembling a registered trade mark as to be likely to deceive or cause confusion — use of similar name in prominent place on label of similar product

Waiver — of rights — delay in instituting proceedings to enforce rights — mere delay does not give rise to waiver — rights conferred by statute — E delay not a waiver of rights

The applicants for many years had been the registered owners of the trade mark “Vim”, which was the name given to a household scouring powder. That powder had been sold in this country for many years. The respondent company, Vimco (Pvt) Ltd, sold several products, among them a scouring F powder. Their scouring powder had the name “Vimco” prominently featured in three places on the container, but in only one was the word joined to the words “(Pvt) Ltd”. The applicants sought an order interdicting the respondent from infringing its trade mark and from passing off its goods as those of the applicants. The defendants, apart G from arguing the merits, also argued that, by delaying the institution of proceedings, the applicants had waived their rights or were estopped from asserting or enforcing those rights.

Held, that if the mark “Vimco” were being used on the label merely to indicate that the product was that of the respondent, it would not be necessary H to have the mark appearing prominently at the top of the label, as the name

2004 (2) ZLR p254

Omerjee J

of the company and its contact details appear at the bottom of the label. A Apart from the mark appearing at the top of the label, there was no other feature which was descriptive of this product and which would sufficiently differentiate the respondent’s product from that of the applicants. The trade mark used by first respondent so nearly resembled the applicants’ registered trade mark as to be likely to deceive or cause confusion. B

Held, further, that where relief is sought on the grounds of “passing off”, a party has to establish a goodwill or reputation acquired or associated with it in connection with the mark or “get-up” copied by another entity. Proof of reputation is a prerequisite to a successful passing-off action. The applicants’ product had been sold in this country continuously for some 37 years, using the same name. Goodwill therefore attached to the C name.

Held, further, that the products in question were both scouring powder. They were marketed at similar outlets and displayed on shelves close to each other, for sale to a wide cross-section of customers. The trade marks were similar. The product was commonly used and purchased by a wide cross-section of consumers in this country. There were no particularly distinctive D features by which the general public would identify the defendant’s product and distinguish it from the applicants’ product. The potential for confusion would appear to be greater when the product is of a common nature, purchased by the average ordinary consumer.

Held, further, that mere delay in enforcing a contractual right, without E anything further, does not give rise to waiver or estoppel. In the case of a right conferred upon a party by statute, the mere failure to enforce such a right cannot be regarded as a waiver of those rights. No party can be estopped from enforcing rights conferred on him by statute.

Cases referred to F

Bako & Anor v Bulawayo City Council 1996 (1) ZLR 232 (S) G

F W Woolworth & Co (Zimbabwe) (Pvt) Ltd v The W Store & Anor 1998 (2) ZLR 402 (S)

Kellogg Co v Cairns Foods Ltd 1997 (2) ZLR 230 (S) G

Legislation considered

Trade Marks Act [Chapter 26:04], s 8(1)

Case information

J C Andersen SC, for the applicants ^h

P C Paul, for the respondents

2004 (2) ZLR p255

Omerjee J

Judgment

^A **OMERJEE J:** The first applicant is a company duly incorporated according to the laws of the United Kingdom and has its principal place of business at Port Sunlight, Merseyside, England. It manufactures and sells a wide range of products, including home care products, personal care products, food and a range of industrial products such as detergents. Its operations are worldwide and outside the United Kingdom, are carried out through subsidiaries. The ^B second applicant is a subsidiary of the first applicant and is a duly registered Zimbabwean company. The latter manufactures and sells in Zimbabwe the same range of products as the first applicant. The second applicant applies to its manufactured products the trade marks of the first applicant, in terms of agreements between the two parties. The second applicant commenced business in Southern Rhodesia (as it then was) in 1947 trading under the name ^C Lever Brothers (Southern Rhodesia) (Pvt) Ltd. It adopted the name Lever Brothers (Pvt) Ltd in 1963 and in 2003, changed its name to Unilever South East Africa (Pvt) Ltd.

The first respondent is Vimco (Pvt) Ltd, a company duly registered 'according to the laws of Zimbabwe. It was incorporated on 23 October 1985, with a view ^D to carrying on the business of general dealers and importers and exporters of laboratory and clinical requirements and commodities which may be bought and sold. The second respondent is cited in these proceedings as an interested party in view of the second applicant's application to this court in terms of s 24(13) of the Companies Act [Chapter 24:03].

The applicants seek an order in terms of the draft order as follows: ^F

1. interdicting the first respondent from infringing the first applicant's registered trade mark No. 615/58 VIM in class 3 and trade mark No. 1114/07 VIM in class 3.
2. interdicting the first respondent from "passing off" its goods by the use of the trade mark "VIMCO".
3. that the first respondent changes its corporate name.
4. that the first respondent pays the costs of this application.

This application is opposed by the first respondent.

The second applicant contends that the first respondent's use of the trade mark "VIMCO" is so similar to the registered trade mark "VIM" as to constitute ^G a violation of the second applicant's rights in terms of s 8(1) of the Trade Marks Act [Chapter 26:04]. Those rights are infringed by —

- "(a) unauthorised use as a trade mark in relation to goods or services in respect of which the trade mark is registered, of a mark identical with ^H it or so nearly resembling it as to be likely to deceive or cause confusion; or ^A

2004 (2) ZLR p256

Omerjee J

- (b) unauthorised use in the course of trade, otherwise than as a trade mark, of a mark identical with or so nearly resembling it as to be likely to deceive or cause confusion if such use is —
- (i) in relation to or in connection with goods or services in respect of which the trade mark is registered; and ^B
 - (ii) likely to cause injury or prejudice to the proprietor of the trade mark."

Since the applicant's case is that "VIMCO" so nearly resembles its trade mark so as to be likely to deceive or cause confusion, it is para (a) of s 8(1) that would be applicable. ^C

In *Kellogg Co v Cairns Foods Ltd* 1997 (2) ZLR 230 (S) at 235G-H, McNally JA dealt with the interpretation of s 8 and said:

"It seems to me that we are plainly concerned with subs (a).

The phrase 'use as a trade mark' is one that has caused difficulty. 'Trade mark' is defined in the Act, in s 2(1). So 'use as a trade mark' means 'use as a trade mark as defined'. ^D

In order to be a trade mark, a mark must be used, in relation to goods (or services), for two purposes, and I summarise:

1. to indicate a trade connection between the goods and the person having the right to use the mark and ..."

The first applicant is the registered proprietor of trade mark No. 615/58 VIM ^E in class 3. The mark was registered with effect from ^F 19 May 1964 and was assigned by deed of assignment dated 26 June 1963 to the first applicant. The first applicant is also the registered proprietor of trade mark No. 1114/67 VIM in class 3 in respect of the following goods:

"Common soap and detergents. Cleaning, polishing, scouring and abrasive preparations included in class 3." The mark was registered with effect from 9 November 1967.

The second applicant was appointed the sole registered user in Zimbabwe of both these registered trade marks on 2 October 1985. It is not in dispute that the word "VIM" is registered as a trade mark name in relation to the product in question. The second applicant is the only entity in Zimbabwe authorised ^G to use the registered trade mark "VIM". The first applicant applies the trade mark "VIM" to cleansing, scouring and abrasive preparations. This product was first manufactured and sold in Zimbabwe by the second applicant in 1969. The product was, and continues to be, advertised using the phrase "leaves nothing but the sparkle". ^H

2004 (2) ZLR p257

Omerjee J

^A In or about 1999, the second applicant became aware that the first respondent was marketing an abrasive household cleaner under the trade mark "VIMCO" The second applicant's product marketed under the trade mark "VIM," is as depicted in the photograph. The two products essentially perform the same function. The first respondent's defence is two fold: firstly, the packaging is different; secondly, the company VIMCO (Pvt) Ltd was incorporated without ^B reference to the applicants' product "VIM".

The first respondent contends that the trade mark "VIMCO" on its label is intended to indicate that the product is produced by the first respondent. It further contends that the trade mark "VIMCO" is not intended to be used to identify the first respondent's scouring powder but rather to distinguish its ^C product from other scouring powders on the market. It can be stated that in actions relating to the infringement of a trade mark, the inquiry relates to the registered trade mark of the respective parties and as to whether the trade marks concerned are such as to be likely to deceive or to cause confusion, thus leading to an infringement.

It is apparent that the mark "VIMCO" appears three times on the first ^D respondent's label and only once does it appear together with the words "(Pvt) Ltd." If the mark "VIMCO" is being used on the label merely to indicate that the product is that of the first respondent, it would not appear necessary to have the mark "VIMCO" appearing prominently at the top of the label, as the name of the company and its contact details appear at the bottom of the label. Furthermore, the trade mark "VIMCO" is being used by the first ^E respondent in respect of scouring powder. Apart from the mark "VIMCO" appearing at the top of the label, there is no other feature which is descriptive of this product of the first respondent and which would sufficiently differentiate its product from the "VIM" product produced by the second applicant. The first respondent's label does not contain any particularly distinctive features ^F which the public would use to identify that product and set it apart from the second applicants' "VIM" product. Both products consists of scouring powder and both are used for the same purpose. Both are sold at similar outlets in similar containers to similar customers.

It is the view of this court, that the trade mark "VIMCO" used by first respondent in the manner depicted on its label for scouring powder, so nearly ^G resembles the second applicant's registered trade mark "VIM", as to be likely to deceive or cause confusion. This court finds that an infringement of the second applicant's registered trade mark has been established. An appropriate order will accordingly be issued.

^H The second applicant further contends that the first respondent has "passed

2004 (2) ZLR p258

Omerjee J

off" its product, being scouring powder, sold under the mark "VIMCO" as ^A being the product of the second applicant. In a matter where relief is sought on the grounds of "passing off", it is settled that a party has to establish a goodwill or reputation acquired or associated with it in connection with the mark or "get-up" copied by another entity. In *F W Woolworths & Co (Zimbabwe) Pvt Ltd v The W Store & Anor* 1998 (2) ZLR 402 (S) at 404D-405B, ^B Gubbay CJ stated as follows:

"These principles were lucidly identified, with reference to leading authorities, in *Caterham Car Sales and Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) where at 947E-948B, Harms JA said:

'The essence of an action for passing-off is to protect a business against a misrepresentation of a particular kind, namely that the business, goods or services of the representor is that of the plaintiff or is associated therewith: see *Capital Estate & General Agencies (Pty) Ltd & Ors v Holiday Inns Inc & Ors* 1977 (2) SA 916 (A) at 929C-D. In other words, it protects against deception as to a trade source or to a business connection: see *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315B. Misrepresentations of this kind ^D can be committed only in relation to a business that has goodwill or a drawing power (Afrikaans: 'werfkrag'). Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business: see *cf A Becker & Co (Pty) v Becker & Ors* 1981 (3) SA 406 (A) at 417A. The components of goodwill are many and diverse: see *O'Kennedy v Smit* 1948 (2) SA 63 (C) at 66; *Jacobs v Minister of Agriculture* 1972 (4) SA 608 (W) at 624A-625F). Well recognised are the locality and the personality of the driving force behind the business (*ibid*), business licences: see *Receiver of Revenue, Cape v Cavanagh* 1912 AD 459), agreements such as restraints of trade: see *Botha & Anor v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) at 211H-I and reputation. These components are not necessarily all present in the goodwill of any particular business. ^F The only component of goodwill of a business that can be damaged by means of a passing-off is its reputation and it is for this reason that the first requirement for a successful passing-off action is proof of the relevant reputation: see *Hoechst Pharmaceuticals (Pty) Ltd v The Beauty Box (Pty) Ltd (in liquidation) & Anor* 1987 (2) SA 600 (A) at ^G 613F-G; *Brian Boswell Circus (Pty) Ltd & Anor v Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A) at 479D; *Williams t/a Jennifer Williams & Associates & Anor v Life-Line Southern Transvaal* 1996 (3) SA 408 (A) at 419A-B, 420B. Misrepresentations concerning other components of goodwill are protected by other causes of action such as claims for injurious falsehoods.' ^H

2004 (2) ZLR p259

Omerjee J

^A I am in respectful agreement with both Harms JA and Gillespie J (see at 103B-104B) that proof of reputation is a prerequisite to a successful passing-off action. Indeed, in this jurisdiction, such a requirement was acknowledged some time ago in *Pick-'n-Pay Stores Ltd v Pick-'n-Pay Superette (Pvt) Ltd* 1973 (1) RLR 244 (G) at 246 *in fine*-247A; *Bon Marché (Pvt) Ltd v Brazier & Anor* 1984 (2) ZLR 50 (S) at 55C-E and 60F-G; *Saybrook (1978) (Pvt) Ltd & Anor v Girdlestone* 1986 (2) ZLR (S) at ^B 189A; although the point of its essentiality was left open in *Kellogg Co v Cairns Foods Ltd* 1997 (2) ZLR 230 (S) at 234G-H as being unnecessary for the resolution of the appeal."

The issue for determination is whether or not the applicant has established that the mark "VIM", in relation to scouring powder, had become distinctive ^C and associated with the applicant.

On the papers filed of record, it is not in issue that the applicants have produced and marketed this scouring powder under the mark "VIM" since 1967. It is not in issue that the second applicant's product is well known amongst members of the general public. It has been sold in this country continuously for some 37 years. Sales of the applicant's product "VIM" have ^D been consistent and have increased in volume over the years. From the aforementioned factors, this court is therefore satisfied that goodwill attaches to the product "VIM" manufactured and sold by the second applicant.

It is necessary now to determine whether or not the first respondent is "passing-off" its product "VIMCO" as that of the second applicant. In other ^E words, has the first respondent misrepresented that its product was, or is, associated with the applicant? The onus in this regard lies on the second applicant. The products, are the subject of the action for "passing off", consist of scouring powder, both of which are used for a similar purpose. Those products of the second applicant and first respondent are marketed at similar outlets and displayed on shelves close to each other, for sale to a wide ^F cross-section of customers. A prominent feature of the product is the trade mark "VIM", in the case of second applicant, and "VIMCO", in the case of the first respondent. It is not disputed that this product is a commonly used product, purchased by a wide cross-section of consumers in this country. The first respondent's label identifies its product as "VIMCO". There are no other particularly distinctive features by which the general public would identify it ^G and distinguish it from the applicant's "VIM" product. The potential for confusion would appear to be greater when the product, as in this case, is of a common nature, purchased by the average ordinary consumer, as

opposed to being a class of product that would attract, as its buyer, a select and discerning category of purchaser.

2004 (2) ZLR p260

Omerjee J

It is accepted that there are some differences in the “get up” of both products. ^A But that factor on its own is of little consequence, when considered against the fact that both products consist of scouring powder purchased by a broad based clientele. It is the considered view of this court that there exists a reasonable likelihood of confusion as between the product of the second applicant and that of the first respondent. The ^B applicant has succeeded in establishing a “passing off” by the first respondent in regard to the product in question.

It must also be emphasised that it cannot be the function of the law to insulate a trader from legitimate competition or to stifle legitimate competition as between competitors. The aim is to achieve a balance between players seeking a share of the consumer or customer base. On the one hand a person has a right ^C to engage in business and to aspire to enhance his business. On the other hand, a trader ought to be afforded protection by the law in regard to his business goodwill and reputation, where such is being undermined by a rival or competitor.

The “passing off” action is recognized at law as affording protection in ^D instances where the actions by a rival are calculated to cause confusion between his goods or business and that of another party where the latter has acquired a reputation or goodwill in respect of certain goods.

The second applicant also seeks an order that the first respondent change its name in terms of s 24(13) of the Companies Act [*Chapter 24:03*], as its name “VIMCO” is likely to mislead the public as being the manufacturer of second ^E applicant’s product “VIM”.

The essence of the second applicant’s case is that the corporate name of the second respondent is being used to market its product “VIMCO”, which clearly resembles the applicant’s product “VIM”.

In the view of this court, the evidence establishes firstly that there has been ^F an infringement of the applicant’s trade mark “VIM” and secondly, a “passing off” by first respondent arising from the use of the trade name “VIMCO”. That being so, an appropriate order for such infringement to cease will be issued. However, it does not follow from that that automatically the court should order that the first respondent must change its corporate name. ^G

The second respondent manufactures and markets a variety of other products under its corporate name. Those products are not the subject of any legal dispute. That being so, it is the view of this court that it would suffice to issue orders as to the cessation of that infringement without having to require the second respondent to alter its registered name. ^H

2004 (2) ZLR p261

Omerjee J

^A The first respondent raises, as a defence, the issue of prescription as the alleged infringement occurred more than three years before the institution of these proceedings. That contention is not well founded. The infringements are of a continuing nature and would only become prescribed three years after their cessation. Accordingly, the defence of prescription cannot assist the first respondent. The latter further contends that, by delaying the institution ^B of proceedings, the applicants have waived their rights or are estopped from asserting or enforcing their rights. Mere delay, without anything further, does not give rise to waiver or estoppel. In *Bako & Anor v Bulawayo City Council* 1996 (1) ZLR 232 (S) at 238B, Gubbay CJ, as he then was, said:

“It has been stated, correctly in my opinion, that delay of itself and without more can never deprive a party of a contractual right, except by prescription.”

^C The learned Chief Justice then went on at 238D to say that:

“Obviously, the delay in enforcing the right to recile from a contract could lead to the other party assuming that the right has been abandoned and in acting upon that assumption to his prejudice.”

In the case of a right conferred on a party by an Act of Parliament, such as the ^D Trade Marks Act, the mere failure to enforce a right cannot be regarded as a waiver of such rights. No party can be estopped from enforcing rights conferred on him by way of an Act.

In the result, there will be an order in terms of the draft order as amended, as follows:

- "1. The first respondent is interdicted and restrained from infringing first applicant's registered trade mark Nos. 615/58 VIM and 1114/67 VIM in class 3 or any other mark which so nearly resembles 615/58 VIM or 1114/67 VIM so as to be likely to deceive or cause confusion in relation to any of the goods for which the first applicant's trade marks are registered. f
 2. The first respondent is interdicted and restrained from using the trade mark VIMCO in relation to any of the goods referred to in para 1 of this order and thereby from passing off such goods as being connected with or related to those of the first and second applicants in relation to any of the goods referred to in para 1 of this order.
 3. The first respondent shall cease all use of the trade mark VIMCO or g any other trade mark, name, or style which is confusingly or deceptively similar to the first applicant's registered trade mark Nos. 615/58 VIM and 1114/67 VIM in relation to any goods referred to in para 1 of this order h
 4. The costs of this application shall be borne by the first respondent."
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Document 35 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/MUSWERE v MAKANZA 2004 (2) ZLR 262 (H)

MUSWERE v MAKANZA 2004 (2) ZLR 262 (H)

2004 (2) ZLR p262

Citation	2004 (2) ZLR 262 (H)
Case No	Judgment No. HH-16-05
Court	High Court, Harare
Judge	Makarau J
Heard	3 November 2004
Judgment	3 November 2004
Counsel	<i>L T Biti</i> , for the applicant <i>S M Guwuriro</i> , for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Family law — husband and wife — property rights — matrimonial property c — house forming part of matrimonial estate but registered in sole name of husband — husband's right to sell such property even without wife's consent d

Property and real rights — immoveable property — house forming part of matrimonial estate but registered in sole name of husband — husband's right to sell such property even without wife's consent

Headnote

The parties to this case, a married couple, had lived in their matrimonial home for many years. The property was registered in the sole name of the husband. Without seeking his wife's approval, he sold the property to another person and moved back to his rural area. The wife refused to join e

him and remained in the house. The buyer sought an order for her eviction, while she sought an order setting aside the sale and declaring her to be co-owner of the property.

Held, that the law regarding the legal relation of a wife to property registered in the sole name of her husband is unsatisfactory and palpably unjust. Whoever has his name endorsed on the deed conveying title is at law *prima facie* recognised as the owner of the land with the most complete and comprehensive control over that land. This individualistic approach is not realistic in a marriage which is the union of two people and, in most cases, the merging of their wealth generation capacities for mutual benefit. It is not uncommon for married couples to jointly acquire ^g property during the subsistence of the marriage and to jointly acquire land in unclear ratios of contribution towards that acquisition. It is not uncommon, as occurred here, that the land will be registered in the name of one of the spouses, usually that of the husband. In a marriage, it is usual to refer to property acquired during the marriage as "joint" property while the marriage subsists. On the termination of the marriage through ^h

2004 (2) ZLR p263

Makarau J

^a A divorce or death, the principles of both family law and the law of inheritance recognise the joint matrimonial estate, which is then distributed as between the spouses, regardless of whose name appeared on the deed conferring title to the land or property. However, the law of property does not recognise the existence of the matrimonial estate. A wife cannot stop her husband from selling the matrimonial home or any other immovable ^b property forming the joint matrimonial estate if it is registered in his sole name, even if she contributed directly and indirectly towards the acquisition of that property. Anachronistic as it is, the legal position at present is the right of a wife to the matrimonial estate, as determined by the principles of family law, are inferior to the rights of her husband in the same property as determined by the principles of the law of property.

Cases cited ^c

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

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

^d *Muzanenhemo & Anor v Katanga & Ors* 1991 (1) ZLR 182 (S)

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

Pretorius v Pretorius 1948 (1) SA 250 (A)

Case information

^L *T Biti*, for the applicant

^E *S M Guwuriro*, for the respondent

Judgment

MAKARAU J: At the hearing of the above matters, I granted consolidation of the hearing of the two applications as they involve the same subject matter and are to be resolved by the application of the same legal principle. After hearing counsel, I granted the application in case No. HC 6217/03 and ^F dismissed the application under case No. HC 8678/03 with costs and indicated that my reasons would follow. These they are.

The facts common to both applications may be summarised as follows:

Doctor and Mrs Makanza married in 1973 and the marriage subsists, although there are unhappy differences between the two. During the subsistence of the ^G marriage, the parties purchased a piece of land commonly known as No. 5 Best Close, Mutare (the property). The property was registered in the sole name of Dr Makanza. The parties took occupation of the property and it would appear that they established it as the matrimonial residence although the papers before me do not clearly state this. Nothing turns on whether the ^H property is the matrimonial residence or not.

2004 (2) ZLR p264

Makarau J

On 25 October 2002, Dr Makanza sold the property to one Godfrey Muswere, ^A the applicant in the first application. After the purchase price had been paid in full, ownership was transferred to the applicant who now holds a deed of transfer in respect of the property. Dr Makanza left the property and relocated to Nyanga, his rural home, where he invited Mrs Makanza to join him. She turned down the invitation on the grounds that she is still employed in Mutare ^B and cannot conceivably commute to and from work from Nyanga. She also refused to vacate the property in favour of Godfrey Muswere, alleging that she should have been consulted and should have given her consent prior to the sale of the property, as she is a co-owner by virtue of her marriage to Dr Makanza and by virtue of her direct and indirect contribution towards the acquisition of the property. She further alleged that the property had been sold ^C at a low price in an effort to defraud her of her entitlement to her true share in the property.

It is, in my view, pertinent to note at this stage that although relations between the two are strained, there are no divorce proceedings pending or contemplated.

The applicant filed the first application, seeking an order ejecting Mrs ^D Makanza and for the payment of holding over damages at the rate of \$50 000 per month from 31 May 2002 to date of eviction. In turn, Mrs Makanza filed her own application, seeking an order that the sale and subsequent transfer to the applicant be set aside and that she be declared and registered as co owner of the property.

In my view, the issue central to the resolution of both applications is the legal ^E relation of a wife to property registered in the sole name of her husband. This issue has dogged this court for decades and has posed difficulties for this court. (See the remarks of McNally JA in *Muzanenhemo & Anor v Katanga & Ors* 1991 (1) ZLR 182 (S)).

It is my view that this issue has caused problems for the courts because the ^F law in place is unsatisfactory and palpably unjust. I am of the further view that the law relating to the rights of a wife to the property registered in her husband's sole name reveals a yawning gap between the law of property and the common law of husband and wife with the former failing to recognise the rights that the latter gives to spouses *inter se*. ^G

Under our law of property, the right of ownership over property of whatever nature confers the most complete and comprehensive control one can have over property. The right of an owner of land, for instance, to sell that land is almost untrammelled, it being subject only to the conditions in the deed conferring title and any other real rights over the property that the owner may have caused to be registered against his or her title to the land. It is also a ^H

2004 (2) ZLR p265

Makarau J

A cornerstone of the law of property that ownership of land is proved by way of registration of title. Thus, whoever has his or her name endorsed on the deed conveying title is at law *prima facie* recognised as the owner of the land with the most complete and comprehensive control over that land.

The individualistic approach and clear cut principles of property law are not realistic in a marriage which is the union of two people and, in most cases, the ^B merging of their wealth generation capacities for mutual benefit. It is not uncommon, for married couples to jointly acquire property during the subsistence of the marriage. It is further not uncommon for married couples to jointly acquire land in unclear, unstated and undefined ratios of contribution towards that acquisition. It is further not uncommon, as occurred in this matter, that the land will be registered in the name of one of the spouses, usually, but ^C not exclusively, the husband and head of the family. Thus in marriage, even where the parties are married without executing an ante-nuptial contract creating community of estate, it is common parlance to refer to property acquired during the marriage as "joint" property while the marriage subsists. Upon the termination of such a marriage through either divorce or death, the ^D principles of both family law and the law of inheritance recognise the joint matrimonial estate, which is then distributed as between the spouses regardless of whose name appeared on the deed conferring title to the land or property.

While the family law and law of inheritance as practiced in this jurisdiction recognise to a large extent the existence of a joint matrimonial estate, brought into being by the fact of marriage and whose distribution depends on the ^E parties' contributions both direct and indirect, the law of property does not. Thus a never-closing gap is created between family law and the law of property

law with one law completely closing its eyes to the rights created by and under the other. Courts in turn then emphasise the rights acquired under property law while restraining the rights accruing under family law to the realms of family ^F relations only.

That there is an unbridgeable gap between family law and property law can be discerned from the remarks of Lord Hodson in *National Provincial Bank Limited v Ainsworth* [1965] 2 All ER 472 (HL) when he remarked that he saw no reason why a wife's personal rights against her husband, which are derived from her status as such, should enter the field of real property so as to clog ^G the title of an owner. The learned Law Lord was therefore confining the rights of the wife to property registered in her husband's name to the four corners of family law and did not see a reason for allowing such rights to adulterate real rights under the law of property. One can think of a number of reasons why ^H a spouse's right to the property registered in their spouse's name should inhere

2004 (2) ZLR p266

Makarau J

in them whatever law is being applied, as it is based on direct and indirect ^A contributions to the matrimonial weal.

It is my view that the remarks of Lord Hodson are reflective of an era where the wife's gender role, as that was the spouse under the spotlight then, especially where she was not gainfully employed, was completely overlooked. Times have changed and in this jurisdiction, courts are enjoined by statute ^B to consider the gender role of spouses when distributing matrimonial estates. The courts have since awakened to the realisation that wives who stay at home work even if there is no income directly accruing to the family from their endeavours as they move from stove to washing line and back.

Despite the changing times, the above remarks by Lord Hodson still hold ^C sway in this court. The remarks were first approved of and adopted by the Supreme Court in *Cattle-Breeders Farm (Pvt) Ltd v Veldman* (2) 1973 (2) RLR 261 (A) and later in *Muzanenhemo & Anor v Katanga supra* and in *Muganga v Sakupwanyana* 1996 (1) ZLR 217 (S), among other cases.

The position in our law is therefore that a wife cannot even stop her husband from selling the matrimonial home or any other immovable property registered ^D in his sole name but forming the joint matrimonial estate: see *Muzanenhemo's case supra*. There must be some evidence that, in disposing of the property, the husband is disposing it at under value and to a scoundrel: see *Muganga's case supra*. Mere knowledge that the seller of the property is a married man who does not have the consent of his wife to dispose of the property is not enough: see *Pretorius v Pretorius* 1948 (1) SA 250 (A). ^E

On the basis of the above, it clearly presents itself to me as the position at law that a wife in the position of Mrs Makanza has no real right in immovable property that is registered in her husband's sole name, even if she contributed directly and indirectly towards the acquisition of that property. Her rights in relation to that property are limited to what she can compel her husband to do ^F under family law to provide her with alternative accommodation or the means to acquire alternative accommodation. Her rights, classified at law as personal against her husband only, are clearly subservient to the real rights of the husband as owner of the property.

While accepting the current position at law, I am of the firm view that the ^G principles of family law that this court is enjoined to apply to restrict the rights of a wife to the realm of personal rights against her husband are anachronistic and have outlived their *raison d'être*. The common law principles that govern the position of the wife *vis-à-vis* matrimonial property registered in the sole name of one spouse developed in the feudal era in England when the feudal lords intended to maximise on the collection of dues and looked to the head ^H

2004 (2) ZLR p267

Makarau J

^A of each household to pay these. Thus, all the property belonging to the wife was deemed to belong to the husband and could be levied for dues in the hands of the husband. The position might have been protective of wives then, but is hardly protective or cognitive of their rights now. The payment of dues to the authorities in the form of taxes of whatever nature has long been non-discriminatory on the basis of gender in our law.

It is thus my view that that there is no sound jurisprudential basis for holding that the rights that a wife has to the matrimonial estate during the lifetime of her husband have inferior content to her rights upon divorce or the death of her husband. The unintended implication of the legal position at present is the right of a wife to the matrimonial estate, as determined by the principles of family law, are inferior to the rights of her husband in the same property as determined by the principles of the law of property. Courts before me have upheld the ruling in the *Ainsworth* case for decades and thus bind me to deny relief to Mrs Makanza.

It is hoped that a future superior court will venture to hold that the bedrock upon which the rights that a wife has under family law to matrimonial property registered in the sole name of her husband rests is outdated and has long outlived its purposes.

It is for the above reasons that I made the orders I did on the turn.

Bere Brothers, applicant's legal practitioners

M V Chizodza-Chineunye, respondent's legal practitioners

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Document 36 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/CHAWATAMA v UNITED TOURING COMPANY 2004 (2) ZLR 268 (S)

CHAWATAMA v UNITED TOURING COMPANY 2004 (2) ZLR 268 (S)

2004 (2) ZLR p268

Citation	2004 (2) ZLR 268 (S)
Case No	Judgment No S-99-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba JA & Gwaunza JA
Heard	7 September
Judgment	4 November 2004
Counsel	The appellant in person <i>C C Mudara</i> , for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Appeal — judgment by consent — no appeal possible c

Employment — appeals under labour legislation — appeal from Labour Court — appeal allowed only on question of law — judgment of Labour Court granted by consent — no point of law raised

Headnote

The appellant and respondent had agreed on a sum to be paid to the appellant ^D as damages in lieu of reinstatement following his dismissal. The Labour Court ordered that damages be paid in the agreed sum. The appellant then noted an appeal to the Supreme Court against the order, on the ground that it did not take into account the effect of inflation on the monetary value of the damages. He did not dispute that the order was granted by consent. ^E

Held, that an appeal against an order given by consent is not possible. Whilst it is possible to have a judgment by consent set aside on the ground, for example, that consent was obtained by fraud or a mistake common to both parties, it is not possible to attack the judgment as being wrong on account of a misdirection on a question of fact or law because no such question would have been a subject of decision by the court *a quo*. ^F

Held, further, that under s 92D of the Labour Relations Act [Chapter 28:01], an appeal lies to the Supreme Court from a decision of the Labour Court on a question of law only. The notice of appeal must specify precisely the points of law in the ruling of the Labour Court on which it is alleged there was a misdirection. That is not possible where the order was given by consent. ^G

Cases cited

Chivero & Ors v Mudzimu Unoyera Apostolic Church 1994 (2) ZLR 371 (S) ^H

Thambi v Stalka NO & Anor 1946 TPD 297

2004 (2) ZLR p269

Malaba JA

Case information

^A The appellant in person

C C Mudara, for the respondent

Judgment

MALABA JA: On 13 October 2003, the appellant ("Chawatama") and Ms *Gurure* who represented the respondent appeared before the Senior President ^B of the Labour Court to have damages in *lieu* of reinstatement of Chawatama to employment with respondent quantified in terms of the order issued on 22 November 2001.

Each party addressed the court on the factors to be taken into account in the quantification of the damages. They then asked to be given until the following day to negotiate an agreement on the quantum of damages. The record of ^C proceedings shows that on the resumption of the hearing on 14 October the following exchanges between each of the parties and the Senior President took place:

"Gurure: I beg leave to submit what we have come up with (document with calculations handed in).

^D Mtshiya (Senior President): Please hand this document to appellant.

Chawatama: I am satisfied with both the back pay and damages.

Mtshiya: It is by consent hereby ordered:

1. That the respondent shall pay the appellant as follows:

(a)	Back pay	\$404 980.72
^E (b)	Damages	<u>\$ 94 350.00</u>
Total		<u>\$499 330.72</u>

2. That the said total sum of \$499 330,72 shall be paid together with interest at the prescribed rate from the date of this order (i.e 14 October 2003) to the date of payment in full. ^F

3. That there be no order as to costs."

The order granted by the Labour Court was in essence a recording of the terms of the agreement between the parties contained in the document handed in by the respondent's legal practitioner. Chawatama has sought to appeal against the order granted on the ground that it did not take into account the effect of inflation on monetary value of the damages awarded by consent ^g without denying the fact that he consented to the terms in which the order was granted. Without an allegation and proof of the fact that his consent was obtained by means of fraud the order remained a consent order.

An appeal against an order given by consent is not possible. In *Thambi v H Stralka NO & Anor* 1946 TPD 297 Roper J held on the facts before him that

2004 (2) ZLR p270

Malaba JA

there could be no appeal against a judgment by consent given under the South African Magistrates Court Act 32 of 1944. He went on to state at p 300 that:

"It is impossible to imagine any circumstances in which a party could appeal against a judgment by consent; he might have good grounds for setting aside or varying such a judgment but he would not and could not appeal against it." ^b

In other words, whilst it is possible to have a judgment by consent set aside on the ground, for example, that consent to it was obtained by fraud or a mistake common to both parties, it is not possible to attack the judgment as being wrong on account of a misdirection on a question of fact or law because no such question would have been a subject of decision by the court. ^c

In this case, s 92D of the Labour Relations Act [*Chapter 28:01*] provides that an appeal shall lie to the Supreme Court from any decision of the Labour Court on a question of law only. A notice of appeal must specify quite precisely the points of law in the ruling of the Labour Court on which it is alleged there was a misdirection. That is not possible where the order was given by consent: see *Chivero & Ors v Mudzimu Unoyera Apostolic Church* 1994 (2) ZLR 371 (S) ^d at 373D.

The appeal is accordingly struck off the roll with costs.

Chidyausiku CJ and Gwaunza JA concurred. ^e

Chitapi & Associates, respondent's legal practitioners ^f

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Document 37 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/MVERE v TANGANDA TEA CO LTD 2004 (2) ZLR 271 (S)

MVERE v TANGANDA TEA CO LTD 2004 (2) ZLR 271 (S)

2004 (2) ZLR p271

Citation	2004 (2) ZLR 271 (S)
Case No	Judgment No. S-130-04
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA & Gwaunza JA
Heard	9 November 2004
Judgment	9 November 2004
Counsel	Ms N Moyo, for the respondent

Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — contract — termination — dismissal — when justified — c conduct by employee incompatible with implied terms of contract

Employment — Labour Court — appeal against decision of Labour Court — grounds for when act of misconduct admitted by appellant

Headnote

The appellant was employed by the respondent company as an accountant. [▯] It was an implied term of her employment that she should preserve official documents in her custody in a complete and regular state. However, she became angry when colleagues were instructed to review her work for the purposes of an audit, so she defaced five monthly bank reconciliation statements which a colleague had signed to indicate he had checked them, by tearing off his signature. Her employer regarded this as serious [Ⓔ] misconduct since it affected the validity of the audit. She was accordingly charged with misconduct in terms of the company's code of conduct, was found guilty and dismissed. She appealed to the Labour Court against her dismissal but the appeal was unsuccessful. She launched a further appeal to the Supreme Court.

[Ⓕ] *Held*, that the question whether the dismissal of an employee is justified is a question of fact dependent upon the extent of the misconduct committed and determined by reference to all the circumstances of the case. Conduct that is inconsistent or incompatible with the fulfilment of the express or implied conditions of a contract of employment will justify dismissal.

[Ⓖ] *Held*, further, that by tearing off colleague's signature from the documents she breached her duty to preserve the integrity of the documents; whatever her intention, her conduct undermined the relationship with her employer and demonstrated her unwillingness to remain bound by the implied conditions of her employment. Her dismissal was justified.

2004 (2) ZLR p272

Malaba JA:

Semble where the Labour Court has decided that an employee's dismissal [Ⓐ] was justified, and the conduct giving rise to the dismissal is admitted, the question for determination in an appeal against the Labour Court's decision is whether the decision was so outrageous in its defiance of logic that no reasonable tribunal could have made it. [Ⓑ]

Cases cited

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285 (CA)

National Foods Ltd v Masukusa 1994 (1) ZLR 66 (S)

Standard Chartered Bank Zimbabwe Ltd v Chapuka S-125-04 [Ⓢ]_C

Tobacco Sales Floors Ltd v Chimwala 1987 (2) ZLR 210 (S)

Case information

Appellant in default

Ms N Moyo, for the respondent [▯]

Judgment

MALABA JA: This is an appeal from a judgment of the Labour Court dated 25 February 2004 dismissing an appeal by the appellant from the decision of the respondent ("Tanganda") to dismiss her from employment on grounds of misconduct. At the time the appeal was heard there was no

appearance for the appellant ("Tracy"). She had, however, filed detailed heads of argument. We proceeded to hear submissions on behalf of Tanganda, at the end of which ^ε we dismissed the appeal with costs and indicated that reasons would follow in due course. These are they.

It is common cause that Tracy was employed by Tanganda as a taxation manager/accountant. She was dismissed from employment on 17 October 2000 after having been convicted of three offences under the Tanganda Tea Company Employment Code of Conduct ("the Code"). The offences she was ^ε convicted of were –

1. Misconduct inconsistent with the fulfilment of the express or implied conditions of one's contract of employment;
2. Wilful disobedience to a lawful order given by the employer; ^ε
3. Wilful and unlawful destruction of the employer's property.

2004 (2) ZLR p273

Malaba JA:

A Tracy unsuccessfully appealed against her dismissal to the appeals committee and thereafter to the Labour Court. In stating the grounds of appeal to this court, Tracy said:

- "1. I feel the Honourable Court erred in granting authority to dismiss when evidence brought by the appellant was not considered.
2. The wrongs done by the respondent to the appellant over ten years ^ε were not considered.
3. Seeking that Tanganda makes good that is for damages suffered."

Paragraph 3 is not a ground of appeal at all. It constitutes a claim for damages that Tracy has not instituted against Tanganda. No more will be said about it. I agree with Ms Moyo that para 1 and 2 raise the same complaint, that ^ε evidence of mitigating factors was not considered.

There is no appeal against the determination that Tracy committed the acts of misconduct that caused her dismissal. That there was a breach of contract by her is therefore common cause. The question for determination is whether the decision of the Labour Court that her dismissal was justified was so outrageous in its defiance of logic that no reasonable tribunal could have made ^ε it. I shall consider whether there was sufficient justification of Tracy's dismissal by reference to misconduct inconsistent with the fulfilment of the express or implied conditions of her contract of employment.

Tracy joined Tanganda in 1990 as a taxation manager. She is an accountant by profession. On 5 September 1997, her job description was amended to ^ε include the control of the processing and reconciliation of receipts and payments via the cash book. It was her duty to ensure that daily financial returns and monthly bank reconciliation statements were prepared timeously. It was an implied condition of the contract of employment that she would preserve official documents in her custody in their complete and regular state. The financial division was headed by the group financial manager, who at the ^ε relevant time was Mrs B Sharples. Reporting directly to Mrs Sharples were the chief accountant, Mr H Matanga, and the senior accountant, Mr O Ndongdzai.

In January 2000, Mrs Sharples instructed Mr Matanga to review bank reconciliation statements prepared by Tracy's department. This followed observations by external auditors in their report to management for the ^ε financial year ending October 1999. Tracy did not accept the idea of Mr Matanga having to review what she considered to be her work. She was uncooperative, prompting Mrs Sharples to write her a letter on 28 February 2000, ordering that she should not obstruct the execution of her lawful ^ε instruction. The letter read, in relevant part:

2004 (2) ZLR p274

Malaba JA:

"Mr Matanga was instructed by me to monitor the procedures being ^ε followed in your section. He reports to me and such reviews are part of his job description. I will not tolerate you obstructing this process. Mr Ndongdzai has been instructed to check all of your journal vouchers and I am hereby instructing you to cooperate with both of these individuals in their endeavours to provide me with what I need. That is my prerogative." ^ε

In June 2000, Mr Matanga checked monthly bank reconciliation statements, starting from September 1999. He affixed his signature on the documents as proof of the fact that the instruction from the group financial manageress had been duly carried out. When Tracy came across the documents bearing Mr Matanga's signature, she tore off the portion with the signature. She tore five bank

reconciliation statements for the months of November and December c 1999 and for February, March and April 2000. Without disclosing that she had torn the documents, Tracy confronted Mr Matanga and asked him why he had checked her work. He told her that the review was in terms of the instruction from Mrs Sharples.

On 27 September 2000, Mr Nyanhete, the internal auditor, was carrying out his duties when he came across the torn bank reconciliation statements. When d he asked Tracy, she admitted having seen the documents but professed ignorance of who could have tampered with them in that manner.

On 28 September 2000, Mr Nyanhete reported to Mrs Sharples that he had discovered bank reconciliation statements with Mr Matanga's signature torn off. At about 2.00 p.m. Mrs Sharples, Mr Matanga and Mr Nyanhete went to e Tracy's office. She was asked by Mrs Sharples about the torn documents. Tracy admitted that she had seen the torn documents but denied any knowledge of who tore off Mr Matanga's signature. Asked why she did not, as head of the department responsible for the security of the bank reconciliation statements, order an investigation into the matter, Tracy stood up and started walking out of the office as Mrs Sharples ordered her not to leave whilst she f was still talking to her. When she got to the corridor, and within the hearing of other employees, Tracy shouted at Mrs Sharples words to this effect:

"What do you want from me? You are always following me and checking my work. I am going to the toilet. Leave me alone."

Probably realising the folly of her outburst of bad temper and having calmed g down, Tracy approached Mrs Sharples in her office and handed her a letter of apology. It is then that Tracy admitted to Mrs Sharples that she had torn off Mr Matanga's signature from the bank reconciliation statements.

Tracy was suspended on full pay and benefits. On 29 September 2000, she was charged with the offences she was later found guilty of having committed h .

2004 (2) ZLR p275

Malaba JA:

A When she appeared before the disciplinary committee to answer the charges of misconduct levelled against her, Tracy did not hide the fact that she deeply resented the idea of Mr Matanga checking the bank reconciliation statements compiled by her department. She said:

"I don't like Matanga's signature on my work because it is my labour and brains that go into it."

B She further retorted:

"Matanga must put his signature on my work. For what reason? So that his ego can be boosted and (he) feels important."

She was nonetheless found guilty of the misconduct and dismissed from employment. In justifying the decision to dismiss her, the disciplinary committee c said:

"Defacing of company documents in an accounting function is viewed as a very serious offence by the company and by its internal and external auditors. Source documents should never be tampered with as things may be removed that are important, such as notes of issues that need to be resolved the following month, or an individual may be trying to cover up d something that they do not want to come to light either fraudulently or innocently ... These defaced documents would inevitably have attracted attention from the external auditors that are imminently due for the annual audit. As a public company reporting to shareholders and the importance of transparent and effective management of, particularly cash, resources, this would cause considerable embarrassment to management and possibly e cast aspersions on the security of cash reporting and controls in all aspects of the accounting operation."

In her appeal to the appeals committee, Tracy asked for forgiveness and alleged for the first time that she had grievances against Tanganda which she wanted taken into consideration in deciding whether her dismissal was justified. She said she had been kept in Grade 10 for six years without f promotion. Other employees had the opportunity of purchasing company vehicles that had been issued to them. It, however, became clear that those benefits were for employees in grades above hers.

In the appeal to the Labour Court, Tracy alleged that she was being victimised because she was perceived as a revolutionary. She reiterated her charge that g she had been kept in Grade 10 for many years in order to deny her benefits enjoyed by employees in higher grades. The learned President of the Labour Court, in upholding the decision to dismiss Tracy from employment, said:

"The appellant has grievances against the company. Unfortunately she fell into the trap of being highly charged. While therefore she may have valid

2004 (2) ZLR p276

Malaba JA:

grievances, the manner in which she has put them across only strengthens A the company's position. There is always a proper way of doing things. In this case the appellant would have been properly within her rights to follow the appropriate grievance procedure if she felt aggrieved by the manner the respondent company was treating her."

The question whether the dismissal of an employee is justified is a question B of fact dependent upon the extent of the misconduct committed and determined by reference to all the circumstances of the case. In *Standard Chartered Bank Zimbabwe Ltd v Chapuka* S-125-04 it was stated that:

"Conduct which is found to be inconsistent or incompatible with the fulfilment of the express or implied conditions of a contract of employment goes to the root of the relationship between an employer and an employee C, giving the former a *prima facie* right to dismiss the latter. In *Clouston & Co. Ltd v Corry* [1906] AC 122 Lord James of Hereford remarked by way of a *dictum* at p 129:

'The sufficiency of justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which D will not justify the determination of the contract of service by one of the parties to it against the will of the other. *On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal*'" (the underlining is mine for emphasis).

See also *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 (CA); *National Foods Ltd v Masukusa* 1994 (1) ZLR 66 (S); and E *Tobacco Sales Floors Ltd v Chimwala* 1987 (2) ZLR 210 (S).

In *Chapuka's* case *supra*, dismissal of a bank manager was found to have been sufficiently justifiable because he had unlawfully and deliberately erased names of the intended payees from the bank cheques in breach of the implied condition of his contract of employment to preserve official documents in his custody in their complete and regular form. F

In this case, it was also an implied condition of Tracy's contract of employment as head of the department to preserve company documents in her custody in their complete and regular state. Once Mr Matanga's signature had been lawfully affixed to the bank reconciliation statements, it became part of the documents. She clearly breached the duty to preserve the integrity of the G documents when she tore Mr Matanga's signature off. Tanganda took the view that the breach was of a serious nature going to the root of the contract of employment.

Tracy's argument was that her conduct had no significant effect on the documents, as she had not intended to commit fraud against Tanganda. She H

2004 (2) ZLR p277

Malaba JA:

A said her intention was to draw attention to the views she held that the instruction that the bank reconciliation statements be reviewed had not been communicated to her in a proper manner. That may have been the case. It is clear from an objective point of view that her conduct undermined the relationship with the employer. It undermined the company's chain of authority. She wanted to act as if she was self-employed.

B In *Chapuka's* case *supra*, the court *a quo* had expressed the opinion that because the intention behind the misconduct was not to defraud the employer his dismissal was not justified. At pp 8-9 of the cyclostyled judgment it was stated that:

"The relevance of the statement by the Tribunal that the intention of C Chapuka in committing the misconduct was not to defraud Standard Chartered and that no prejudice was suffered by Standard Chartered as a result of his acts is open to doubt, because the alleged intention of a fraudulent employee cannot be taken as a standard with which to determine whether an employer acted reasonably in taking the view that the misconduct was so serious in nature as to justify dismissal. The unlawful intention would have been one of the circumstances which put D the employee in the position in which he considered the pursuit of personal interest more important than the honest discharge of his duties to the employer."

Tracy was an accountant and a senior member of staff employed by Tanganda. She must have known that Mr Matanga's signature had been placed on the E documents in the performance of his duties. The work would not have been done for the personal benefit of Mr Matanga. Nor would the

bank reconciliation statements have been prepared for her personal benefit. The documents belonged to the company and it was not for her to decide whose signature should be on them. By her own conduct, she had demonstrated unwillingness to remain bound by the implied conditions of employment.

¶ In *Chimwala's* case *supra* at 219A-B, McNally JA said that evidence of misconduct inconsistent with the fulfilment of the express or implied conditions of a contract of employment entitled an employer to dismiss an employee unless the latter showed that the misconduct "though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so ^g inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted".

Tracy's conduct was clearly serious. It was deliberate in that it was committed in the quietness of the moment. She suggested that the court *a quo* should have found that her conduct was excusable because of the grievances she said ^h she had against Tanganda. The learned President of the Labour Court

2004 (2) ZLR p278

Malaba JA:

considered the fact that the Code had rules setting out procedures for ^a redressing grievances. Tracy was bound to follow those procedures to have her grievances redressed.

There was no obligation arising from the need to have her grievances addressed compelling the commission of the unlawful act of tearing company documents in her custody. The fact that she had grievances against Tanganda ^b did not make the misconduct any less dismissible. The conduct remained one of a sufficiently serious and grave nature, destructive of the trust and confidence fundamental to the continuance of the relationship under the contract of employment.

There was no merit in the appeal and it was therefore dismissed with costs.

Sandura JA and Gwaunza JA concurred.

Coghlan, Welsh & Guest, respondent's legal practitioners

* To be reported in the 2005 (1) ZLR — *Editor*.

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Document 38 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/NMB BANK LTD v SELEMANI 2004 (2) ZLR 279 (H)

NMB BANK LTD v SELEMANI 2004 (2) ZLR 279 (H)

2004 (2) ZLR p279

Citation	2004 (2) ZLR 279 (H)
Case No	Judgment No. HH-176-04
Court	High Court, Harare
Judge	Uchena J
Heard	27 October 2004
Judgment	10 November 2004

Counsel	D Makono, for the applicant L Uriri, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Insolvency — sequestration — act of insolvency — what constitutes — nulla c bona return — writ of execution against movable property only — respondent failing to point out other disposable assets which could satisfy debt — act of insolvency committed

Insolvency — sequestration — provisional order for sequestration — confirmation of — court's discretion — circumstances justifying court D in not confirming provisional order — respondent paying off capital debt and indicating steps being taken to satisfy costs

Headnote

The applicant bank obtained default judgment against the respondent for a debt. A writ of execution against the defendant's movable property was E issued. When the Sheriff attempted to execute the writ, he was unable to locate any movable property belonging to the respondent. The respondent did not point out that he was also the owner of immovable property. The bank, on receiving the Sheriff's *nulla bona* return, applied for the provisional sequestration of the respondent's estate. The application was granted. At the return day, it was argued that the provisional order F was improperly applied for and granted because the warrant of execution was for movables only. It was argued that s 11(b) of the Insolvency Act [Chapter 6:04] was not complied with, as no inquiry was made about the respondent's immovable property.

Held, that by advising the Sheriff that he had no assets which could be used G to satisfy the debt, the respondent placed himself within the provisions of s 11(b), even though the writ of execution was for movables. He had thereby committed an act of insolvency as defined, because he failed to satisfy the debt and failed to indicate to the Sheriff disposable property sufficient to satisfy the debt. The provisional order for H sequestration of the respondent was therefore properly granted.

2004 (2) ZLR p280

Uchena J

Held, further, that under s 15(1) of the Act, the court has a discretion as to A whether or not to confirm a sequestration order, even if the requirements for the confirmation of a sequestration order have been satisfied. As the respondent had since repaid the capital debt and deposited money with the applicant's attorneys to cover the costs, it would be appropriate to postpone the case to give the applicant time to calculate its costs and B to give the respondent an opportunity to clear his indebtedness to the applicant, in which case the provisional order could be discharged.

Cases cited

Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd 1999 (2) ZLR 410 (H) C

Legislation considered

Insolvency Act [Chapter 6:04], ss 11(b) and 15(1)

Case information

D Makono, for the applicant D

L Uriri, for the respondent

Judgment

UCHENA J: The applicant issued summons against the respondent claiming payment of \$50 000 000, plus interest and collection commission. The respondent entered appearance to defend but did not file his plea timeously. The applicant E who was then the plaintiff issued and served on the respondent then the defendant a notice to plead and intention to bar. The respondent again failed to plead within the stipulated time. He was barred. The applicant then applied for default judgment which was granted by this court on 17 August 2004.

The respondent failed to pay. On 27 May 2004, the applicant was granted a writ of execution against the respondent's movable property. F

On 16 June 2004, the Deputy Sheriff Harare served the writ of execution on the respondent at his offices. The Deputy Sheriff recorded the following under remarks:

"Served personally on defendant who advised that he has no assets. The computer is for HDB Management, office desks are for Chitepo Law G Chambers (*nulla bona*)."

When the *nulla bona* return was returned to the applicant's attorneys they applied for a provisional order placing the respondent under provisional sequestration pending the granting of the final order or the discharge of the provisional order. H

2004 (2) ZLR p281

Uchena J

A The return day for the provisional sequestration was 22 September 2004. Despite the advertisement of the provisional sequestration and invitation for objections, the respondent took no steps to oppose the sequestration of his estate. On 22 September 2004, the rule *nisi* was extended and the case was postponed to 27 October 2004.

On 27 October 2004, the respondent and his counsel appeared before me. The B applicant applied for a further extension of the rule *nisi* to 3 November 2004 to give the applicant time to calculate their costs. The applicant disclosed that the capital debt had been paid. The respondent had on 26 October 2004 deposited \$54 000 000 with the applicant's legal practitioners. The capital debt is for \$50 000 000. The extra \$4 000 000 is to cover the applicant's costs. The applicant needs time to calculate their costs and determine whether the C \$4 000 000 deposited with the applicant's legal practitioners is sufficient to cover their costs.

Mr Uiriri for the respondent submitted that the provisional order for the respondent's provisional sequestration was improperly applied for and was improperly granted because the warrant of execution was for movables only. D He submitted that s 11(b) of the Insolvency Act [Chapter 6:04] was not complied with as no inquiry was made on the respondent's immovable property. He relied on Hockly's *Insolvency Law*, 6 ed's comments on "disposable property" on p 27 where the author say:

"The term 'disposable property' means any property which may be attached and sold in execution, even if it is situated in some other locality (*Laver v Otiner* 1953 (2) SA 437 (T). It include both movable and immovable property and also incorporeal assets, such as book debts: see *Mostert NO v van Hirschberg* 1961 (1) SA 146 (O). It does not include immovable property which has been mortgaged, even, it seems, where the value of the property considerably exceeds the amount owing under the mortgage bond: see *Jewari v Secura Investments* 1960 (3) SA 432 (N). But F if the applicant himself is the mortgagee of the immovable property, it is regarded as disposable: see *Western Bank Ltd v ELS* 1976 SA (2) SA 797 (T)

If the sheriff's return of service merely refers to movable property, it does not establish an act of insolvency: see *Amalgamated Hardware & Timber (Pty) Ltd v Wimmers* 1964 (2) SA 542 (T) 544. To avail as an act G of insolvency, the return should refer to all disposable property of whatever description: see *Saber Protors (Pvt) Ltd v Marophane* 1961 (1) SA 759 (W)."

I respectfully agree with the authors and the authorities they refer to, but in H this case one has to consider the Deputy Sheriff's remarks leading to the (*nulla*

2004 (2) ZLR p282

Uchena J

bona) return and the provisions of Section II (b) the Insolvency Act [Chapter A 6:04] hereinafter referred to as the Act.

Section 11(b) provides as follows:

"A debtor shall be deemed to have committed an act of insolvency if –

- (a) B
- (b) A court has given judgment against him and *he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it, or to indicate to that officer disposable property sufficient to satisfy it or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment*" (emphasis added). c

In terms of s 11(b), a debtor is deemed to have committed an act of insolvency if:

- (1) A court has given judgment against him and
- (2) He upon the demand of the deputy sheriff fails to satisfy that debt or
- (3) To indicate to the deputy sheriff executing that judgment sufficient disposable property to satisfy it or d
- (4) If the deputy sheriff's return indicates he could not find sufficient disposable property to satisfy the debt.

The deputy sheriff's return in this case clearly indicates the warrant of execution was personally served on the respondent who advised he had no assets. e

In terms of s 11(b) the debtor has a duty to satisfy the debt upon the deputy sheriff's demand. The respondent in this case failed to satisfy the debt. The debtor also has a duty to indicate to the officer disposable property sufficient to satisfy the debt. In this case the respondent did not indicate any property to the deputy sheriff. f

Disposable property means any property of the debtor which can be disposed of for the purpose of satisfying the judgment debt. This includes any movable, immovable and incorporeal assets the debtor may own.

According to the deputy sheriff's return referred to above, the respondent advised the deputy sheriff that he had no assets. It is my view that by advising g the deputy sheriff that he had no assets which could be used to satisfy the debt the respondent placed himself within the provisions of s 11(b) even though the writ of execution was for movables. I take that view because s 11(b) places the duty to satisfy the judgment debt on the debtor on the deputy sheriff's demand. When the demand was made he said he had no assets and h

2004 (2) ZLR p283

Uchena J

A abstained from indicating any other assets which could be used to satisfy the debt.

If the deputy sheriff had made the demand on someone other than the debtor then the *nulla bona* return could have been confined to the deputy sheriff's failure to find any movable assets. In such a case the respondent's failure to satisfy the debt can only be proved by exhausting the execution procedures. b It cannot be argued that the respondent did not fail to satisfy the debt on the deputy sheriff's demand. He failed to satisfy the debt when he told the deputy sheriff that he had no assets. The respondent who is a legal practitioner should have known that by telling the deputy sheriff that he had no disposable assets he was declaring himself insolvent. The fact that the respondent had no assets which could be disposed to satisfy the debt is supported by the events which c followed the granting of the provisional sequestration on 25 August 2004. In spite of the effect of the provisional sequestration on his profession, the respondent took no action until 26 October 2004. He did not defend himself until he paid on 26 October. This means if the rule *nisi* had not been extend on 22 September at the applicant's request it could have been confirmed d without opposition. This to me means the respondent had no assets and could not defend the action until he was able to pay.

All the applicant for a provisional order of sequestration needs to prove in terms of s 11(b) of the Act is that:

- (a) There is a judgment against the debtor; e
- (b) That the debtor has failed to satisfy the judgment on demand by an officer whose duty it is to execute the judgment or
- (c) That he failed to indicate to the officer sufficient disposable property to satisfy the debt or.
- (d) In the case where the writ of execution is not served on the debtor that f the deputy sheriff has failed to find sufficient disposable property to satisfy the debt.

As indicated earlier the respondent failed to satisfy (b) and (c) above. The provisional order granting the provisional sequestration of the respondent was therefore properly granted. The

respondent was given an opportunity to satisfy the debt or indicate property to satisfy it but he failed to do so.

g In Hockly's *Insolvency Law* 6 ed at page 27 the author's say:

"The demand to satisfy the judgment debt must be made of the debtor or his duly authorized, agent, a demand made to some other party e.g. the debtor's wife does not suffice: *Rodrow (Pty) Ltd v Rosson* 1975 (3) SA 137 (O). h To indicate property, the debtor should tell the sheriff what the

2004 (2) ZLR p284

Uchena J

property is and where it is with enough particularity to enable him to attach and sell it: see *Nathan & Co v Sheanandam* 1963 (1) SA 179 (N). For example, a debtor does not indicate immovable property sufficiently if he merely states that he has property in a particular area or street: see *R v Tewari* 1960 (2) SA 465 (D)" (emphasis added)

In the present case, the warrant of execution was served personally on the b respondent, the debtor, who simply said he had no assets. He does not deny saying that to the deputy sheriff. He simply explained that the property that was in his office did not belong to him. He did not indicate he had other means to satisfy the debt nor did he indicate any disposable property.

Section 11(b) of the Act provides that a debtor who fails to satisfy the debt or indicate disposable property sufficient to satisfy the debt is deemed to have c committed an act of insolvency. It does not state that this only follows after a *nulla bona* return on movables is followed by a *nulla bona* return on immovables. This however would follow from the provision relating to the deputy sheriff's failing to find sufficient disposable property to satisfy the debt. The deputy sheriff can only get to that conclusion after failing to find both movables and immovables. If, however, the debtor tells the deputy sheriff d that he has no assets and explains the ownership of the assets in his possession the deputy sheriff can as happened in this case file a *null a bona* return and the creditor can properly act on it as happened in the case.

I now must determine whether in spite of the respondent paying \$54 000 000 to the applicant's legal practitioners there is need to postpone the case to e 3 November 2004 before the provisional order for sequestration is confirmed as submitted by the applicant's counsel or to have the order discharged as submitted by the respondents counsel.

This court has a discretion on whether or not to confirm a sequestration order even if the requirements for the confirmation of a sequestration order have f been satisfied. In the case of *Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410 (H), Gillespie J at p 414 E-F said:

"Mr *Girach*, for Best of Zimbabwe, urged upon me the discretion inherent in the court to refuse to order liquidation notwithstanding the proven existence of the grounds for liquidation. Such a discretion is deliberately g provided by the use of the permissive 'may' in the enactment providing for the grounds of winding up by the court. Even without this the court would, in the proper case, have the discretion flowing from its inherent jurisdiction to prevent the abuse of its process. These two sources together provide a judicial discretion, based on all the relevant h

2004 (2) ZLR p285

Uchena J

A circumstances of any case, to withhold an order of winding up even if grounds have technically been established."

The learned judge pointed out that the discretion is a narrow one as a judgment creditor is entitled to the winding up save in exceptional circumstances and that the discretion is a "judicial value judgment to be made on the relevant factors."

b At p 415B, the learned Judge said:

"The factors which influence me in this case, assuming the inability to pay its debts had been proven against Best of Zimbabwe, are the following. The inability was temporary. There is no reason to suppose that the safari hotel operation is not a profitable business nor that any liquidity problem is a symptom of serious financial embarrassment within either the holding c or the operating company."

Though this case does not depend on the discretion based on s 206 of the Companies Act [*Chapter 24:03*] as it does not involve a company but the sequestration of an individual's estate under the Insolvency Act, a similar discretion is granted by s 15(1) of the Insolvency Act which provides that:

D "On the return day if the High Court is satisfied that:

- (a) ...
- (b) ...
- (c)

the High Court *may* grant an order placing the estate of the debtor under sequestration" (emphasis added).

In the present case the debtor has since paid the capital debt for which the sequestration order was applied for. He has also deposited \$4 000 000 with the applicant's legal practitioners to cover the applicant's costs. The applicant needs time to calculate its costs then it would not insist on the final order, as indicated in its replying affidavit to the respondent's belated opposing F affidavit. It suggested an alternative to the confirmation of the provisional order.

In my view, the applicant could not have expeditiously calculated its costs as the respondent paid the applicant's legal practitioners on 26 October 2004 and took the applicant by surprise by opposing the application on 27 October. I G used my discretion and heard the respondent though he had been barred. The indulgence was granted because of the effect of the confirmation of the provisional sequestration on the respondent's profession. In view of the indulgence granted to the respondent I have to consider the applicant's replying affidavit to do justice between the parties. The applicant's costs are H for HC 2031/04 and HC 9336/04. In view of the belated payment and opposition

2004 (2) ZLR p286

Uchena J

to what was an unopposed application until the morning of 27 October, the A applicant's request for a postponement for a week is reasonable. The respondent's liability to the applicant has not been cleared. However, his depositing \$4 000 000 towards costs is an indication of his belated ability to pay. He must be given a chance to avoid the confirmation of the provisional sequestration. As indicated earlier in view of the respondent's payment of the B capital debt and depositing against costs, I am inclined to use my discretion in his favour but in a manner which does not prejudice the applicant. There is no allegation of the existence of any other creditor who still needs to be protected by the sequestration order. The circumstances of this case justify the postponement to give the applicant time to calculate its costs and to give the respondent an opportunity to clear his indebtedness to the applicant in C which case the provisional order can be discharged.

The respondent's counsel had urged this court to grant it costs *de bonis propriis* on the basis that the applicant's legal practitioners improperly applied for the provisional sequestration order. In view of my findings based on my interpretation of s 11(b) of the Insolvency Act and the respondent's D failure to pay until 26 October 2004 there is no justification for such an order of costs as the respondent, by failing to pay and declaring that he had no assets, placed himself within the provisions of s 11(b) of the Act.

In the result the provisional order placing the respondent under provisional sequestration is extended to 17 November 2004 to enable the respondent to pay the applicant's costs under HC 2031/04 and HC 9336/04.

E The case is postponed to 17 November 2004.

The respondent shall pay the applicants' costs.

Honey & Blanckenberg, the respondent's legal practitioners F

Gill, Godlonton & Gerrans, the applicant's legal practitioners

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Document 39 of 47

Source:

DOMBOKA v MADHAMU 2004 (2) ZLR 287 (H)**2004 (2) ZLR p287**

Citation	2004 (2) ZLR 287 (H)
Case No	Judgment No. HH-179-04
Court	High Court, Harare
Judge	Makarau J
Heard	1 November 2004
Judgment	10 November 2004
Counsel	<i>C Muringi</i> , for the appellant <i>C Chakwizira</i> , for the respondent
Case Type	Civil Application
Annotations	No case annotations to date

Flynote

Family law — *child* — *custody* — *custody order* — *variation of* — *custodian parent effectively yielding custody to a relation* — *non-custodian c parent seeking custody order in his favour* — *what must be shown*

Headnote

The respondent had been awarded custody of her children following her divorce from her husband, the applicant. She had handed the children over to her mother to look after on an indefinite basis while she went to work overseas. The applicant sought a variation of the custody order, ^D to grant custody to himself.

Held, that the respondent had given up custody of the minor children in favour of her mother and thereby abdicated her responsibilities and rights that the court order granted her. Her surrender of the custody of the minor children to her mother appeared permanent. It was not correct, ^E however, to say that because the respondent had given up custody, then the applicant was entitled to be granted custody of the children. The best interests of the children were paramount.

Held, further, that while the accepted position is that a parent seeking variation of a custody order is required to show on a balance of probabilities that it is in the best interests of the children that they existing ^F order be varied, in cases where the variation is sought on the basis of changed circumstances the onus is to be discharged in a two-pronged attack. Such a parent must show that it is not in the best interest of the children that they remain in the custody of the custodian parent and further that it is in the best interests of the children that custody is awarded to him or her. It is insufficient merely to show a change of ^G circumstances for the worse on the part of the custodian parent. It is not difficult to envisage a situation where, although the circumstances of the custodian have deteriorated from the date of the granting of the order, the court still finds that it is in the best interests of the children that they ^H remain in the custody of the parent whose fortunes are waning.

2004 (2) ZLR p288

Makarau J

In casu, where the applicant had succeeded in showing that respondent, as ^A custodian parent, had surrendered custody to her mother, he had not shown that it was in the best interests for the

children that custody be awarded to him, the application for variation of custody should be dismissed with no order as to costs. ^b

Cases cited

Chikuni v Chikuni 2001 (1) ZLR 189 (H)

Hackim v Hackim 1988 (2) ZLR 61 (S)

Johnson v Johnson 1963 (1) SA 162

Routledge v Heinz 1988 (1) ZLR 252 (H)

Stapelberg v Stapelberg 1939 OPD 129 ^c

Case information

C Muringi, for the appellant

C Chakwizira, for the respondent

MAKARAU J: This is an application for variation of custody of A and R, two ^d minor children aged 10 and 6 respectively. A is a girl and R is a boy.

The applicant and the respondent were divorced by this court on 7 March 2002. It was a term of the divorce order that custody of A and R be awarded to the respondent, their mother with reasonable rights of access in favour of the applicant. ^e

In or about May 2002, the respondent left Zimbabwe for the United Kingdom where she is currently resident. Upon her departure, she gave custody of the minor children to her mother. She has not indicated any intention of taking the children out of the jurisdiction and into her custody in the United Kingdom nor of returning to Zimbabwe to resume custody of A and R.

On 30 October 2003, the applicant filed the above application seeking an order ^f granting him the custody and affording reasonable rights of access to the respondent. In his application, he raised three broad grounds for seeking the variation. Firstly, he alleged that the respondent has abandoned the children. Secondly, he alleged that he has been denied access to the minor children by the grandmother in whose custody the children are and thirdly, that the living ^g conditions of the children have deteriorated to such an extent that it is now affecting A's performance at school.

The application was opposed. It is pertinent in my view at this stage to deal with the issue of the opposing affidavit purportedly filed on behalf of the respondent. The affidavit was deposed to by the respondent's erstwhile legal ^h

2004 (2) ZLR p289

Makarau J

A practitioner on the premise that, when the application was served, the respondent was already in the United Kingdom and could not depose to the affidavit herself. She then gave instructions to her legal practitioner to depose to the affidavit in opposition to the application. With the technological advances made in the world of communication, it is hard to believe that the respondent failed to depose to an affidavit for filing with this court within the ^b time stipulated in the rules or within such other extended time as her legal practitioner could have requested from the applicant and the court. Further and in any event, having put her foot in the door by filing a notice of opposition and an affidavit from her legal practitioner, the respondent could have then filed her own affidavit in replacement of that of the legal practitioner as was indicated in the affidavit of the legal practitioner would be done. This was not ^c to be. The position at the hearing of this matter then remains that a person, who could not positively swear to the facts contained therein, deposed to the opposing affidavit, seeking to place before me facts in competition to those contained in the founding affidavit. I accordingly, placed little probative value on the facts alleged in the opposing affidavit.

^d Returning to the merits of the application, it is in my view beyond dispute that the respondent has given up custody of the minor children in favour of her mother. The situation that the minor children have been placed is different from that obtaining in *Johnson v Johnson* 1963 (1) SA 162 where the limited right of a custodian parent to leave the children with a grandparent was upheld not to be a delegation of the rights of the custodian parent. In useful *dicta* by ^e Kuper J, it was observed at p 166 that:

"Where as in the present case the children are placed with the parents of the custodian spouse, and where the custodian spouse visits the children regularly and where she is satisfied that they are being well cared for and where she is able to remove them whenever she thinks it is advisable to do so, it cannot be said that she has given up any of her rights and obligations and that she has deprived herself of association with the children to which she was entitled."

In recognising the rights of the custodian parent to temporarily part with the physical caring of the children, Kuper J was heavily influenced by the remarks of van der Heever J in *Stapelberg v Stapelberg* 1939 OPD 129 where a ^G custodian parent of precarious circumstances had placed the minor child in her custody with an institution and van der Heever J held that she had not thereby deprived herself of the association with the child that had been granted her by the order of court.

It is apparent that in both cases, the court placed emphasis on the temporary ^H nature of the arrangements and on the fact that both custodian parents

2004 (2) ZLR p290

Makarau J

maintained regular contact with the children and were free at any time to ^A terminate the arrangements.

The soundness of the *ratio decidendi* by van der Heever J and the *dicta* by Kuper J is easy to appreciate when one recognises the wide discretionary powers that a custodian parent has in bringing up the children entrusted to their custody by the court. The scope of this power was discussed by ^B Gowora J in *Makuni v Makuni* 2001 (1) ZLR 189 (H) who upheld the decision by the custodian parent to set up home with the children outside this jurisdiction.

In *casu*, the respondent, as custodian parent has abdicated her responsibilities and rights that the court order granted her. Her surrender of the custody of ^C the minor children to her mother appears permanent. While she may be in regular contact with the children by way of telephone calls, she has clearly divested herself of the right to associate with the children that the court order awarded her. She has given up the right to bring up the children and has given this responsibility to her mother, outside of the court order.

The fact that the respondent has given up custody of the minor children is not ^D however the end of the matter.

The applicant has approached this court for an order of custody in his favour on the incorrect premise that once it is shown that the respondent has given up custody, then he is entitled to be granted custody of the children. The role of this court in matters relating to the custody of minor children is more ^F responsible than the applicant would want it to be. This court does not sit to determine who between the two feuding parents is to be awarded custody of the children of the failed union. The best interests of the parents do not enter the fray. See *Routledge v Hertz* 1988 (1) ZLR 252 (H), where Muchechetere (as he then was), refused to vary access rights granted the applicant who had moved from Bulawayo where the children lived with their father, to Victoria ^F Falls, a distance that she found inconvenient and expensive to travel.)

The approach that this court in considering an application for variation of custody of minor children is well settled: see *Hackim v Hackim* 1988 (2) ZLR 61; *Makuni v Makuni supra* and *Routledge v Hertz supra*. The best interests of the children are paramount. As observed by Dumbutshena CJ in the ^G *Hackim* case, in cases involving the custody of minor children, the court must approach the issue of onus from a broad and wide angle. The onus should be discharged if at the end of the day, the court is satisfied that the best interests of the minor children dictate that it makes the order sought. The learned judge of appeal cautioned against magnifying the onus on the parent seeking ^H

2004 (2) ZLR p291

Makarau J

^A variation but maintained that the best interests of the minor children should remain paramount.

It appears to me that while the accepted position is that a parent seeking variation of the custody order has to show on a balance of probabilities that it is in the best interest of the children that the existing order be varied, in cases where the variation is sought on the basis of changed circumstances, the onus ^B is to be discharged in a two prong attack. In my view, such a parent must show that it is not in the best interest of the children that they remain in the custody of the custodian parent and further that it is the best interest of the children that custody is awarded to

them. It is insufficient, in my view, to merely show a change of circumstances for the worse on the part of the custodian parent. It is not difficult to envisage a situation where although the circumstances of c the custodian parent have deteriorated from the date of the granting of the order, the court still finds that it is in the best interests of the children that they remain in the custody of the parent whose fortunes are waning. It is the role of the court to examine the circumstances of both parents to establish where the best interests of the minor children lie.

d In *casu*, the applicant consented to custody being awarded to the respondent. His circumstances were therefore, not examined by the court to establish whether the best interests of the children could be furthered in his care. It therefore, behoved the applicant to lay his circumstances before this court before an award could be made in his favour. It is not the correct position at law that in all instances where the custodian parent has surrendered custody e to a third party, the non-custodian parent can have custody for the mere asking. I raise this issue because, the applicant in this matter only indicated in his answering affidavit that if granted custody, he intends to take the children with him to the United Kingdom where he has also established residence. His status in the United Kingdom has not been revealed. It is not f indicated in his application whether he is employed and is in a financial position to look after the children. His domestic arrangements are not disclosed and while he is concerned about the schooling of the children, he has not taken this court into his confidence by advising what arrangements he has made for the children to attend school. Before varying its previous order, the court has to be satisfied that adequate and appropriate arrangements g have been made for the care and welfare of the children.

On the basis of the foregoing, while the applicant has succeeded in showing that the custodian parent has surrendered custody of the minor children, he has not shown that it is in the best interests of the children that custody be h awarded to him. The net effect of the facts revealed by this application are to

2004 (2) ZLR p292

Makarau J

leave me with the most unsatisfying position of knowing that the person to a whom this court entrusted the custody of the children has surrendered that trust but there is no one to whom the court may immediately entrust the welfare of the children. It is my view that the facts of this application underscore the need for this court to be equipped to effectively deal with the interests of minor children that the law entrusts to its care as upper guardian. The courts in this b jurisdiction remain with the unenviable and blindfold task of determining the interests of parties who are not before it. The minor children have no voice before this court yet it is their welfare that is being discussed and determined. It is hoped that the need to do justice to minor children will move for reform in this area of the law. The best interests of A and R will remain unknown as they have been lost in the dust created by the fight between their parents c where the father has been so consumed with showing how deficient the mother is he forgot to show how he can best serve the interests of the minor children. Likewise, the mother has been at pains to protect her integrity and overlooked informing the court why the best interests of the children will suffer if their custody is granted to their father. d

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

Kantor & Immerman, applicant's legal practitioners

Sinyoro Muunganirwa & Co, respondent's legal practitioners e

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Document 40 of 47

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QUINNELL v MINISTER OF LANDS & ORS 2004 (2) ZLR 293 (S)

2004 (2) ZLR p293

Citation	2004 (2) ZLR 293 (S)
Case No	Judgment No. S-47-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	27 May 2004
Judgment	11 November 2004
Counsel	<i>W Trengove SC</i> , with him <i>J C Andersen SC</i> , for the applicant <i>Mrs N Matanda-Moyo</i> , with her <i>N Mutsonziwa</i> , for the respondents
Case Type	Constitutional reference
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of c Rights — s 16(1)(b) — right to reasonable notice of State's intention to acquire agricultural land compulsorily — no right thereby given to any specific notice of actual acquisition, nor to time for landowner to wind up his affairs — Land Acquisition Act [Chapter 20:10] — ss 8 & 9*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of d Rights — s 18(9) — right to fair hearing before an impartial court — acquisition of land — State becoming owner in spite of objection being lodged with Administrative Court — right to put case before court not thereby removed*

Constitutional law — *Constitution of Zimbabwe 1980 — s 31E(1) — office of Minister becoming vacant on assumption of office of a "new" President E — meaning — re-election of incumbent President — not assumption of office by "new" President — Minister's office not automatically rendered vacant*

Constitutional law — *Parliament — standing orders — status of — legislation passed in contravention of standing order — not necessarily invalid — F introduction of bill containing same substance as another bill introduced during same session and not withdrawn — later bill introduced without leave but substantially altered during committee stage — legislation not rendered invalid by failure to comply with standing order*

Headnote

The applicant, the owner of a farm which had been compulsorily acquired by G the State, raised among other things the question of the constitutionality validity of the legislation. It was argued that the right under s 16(1) of the Constitution to reasonable notice of the Government's intention to acquire the land was breached by the legislation, as it did not require the H acquiring authority to give notice of when the proposed acquisition is

2004 (2) ZLR p294

to take place, nor did it give the landowner reasonable time to wind up A his affairs. It was further argued that the applicant's rights under s 18(9) of the Constitution, to have a fair hearing before an impartial court were negated by allowing the State to acquire the land even when there was an objection lodged with the Administrative Court.

It was also argued for the applicant that the legislation was invalid, having B been passed in contravention of standing orders of Parliament, and because it was introduced by a person who was not a Minister by reason of his office having been automatically vacated in terms of s 31E(1) of the Constitution when the incumbent President was re-elected and took the oath of office; and on the same basis the acquisition orders had been issued by a person who was not a Minister. C

The third point raised by the applicant was that the legislation was invalid, having been passed in contravention of Standing Order 127 of Parliament, which provides that no bill shall be introduced which is of the same substance as some other bill which has been introduced during the same

session and which has not been withdrawn. The bill under which the ^D legislation was introduced was of the same substance as another bill, but it was substantially amended during committee stage, as a result of which it was substantially different from the previous bill.

Held, per Malaba JA, Chidyausiku CJ, Cheda & Ziyambi JJA concurring, Sandura JA expressing no opinion on this matter, that s 16(1)(b) of the Constitution required that reasonable notice be given of the State's ^E intention to acquire the land, but having received the preliminary notice of the intention of the acquiring authority to acquire his agricultural land for resettlement purposes, the applicant had no constitutional right to be given a reasonable notice of when actual acquisition was to take place. There was also no constitutional right to a reasonable time to wind up his affairs. Once the land is acquired, all rights in the land vest in the ^F acquiring authority; the former landowner's rights are extinguished. The 45-day period given by the legislation to wind up his affairs gave supremacy to public interest over the private interests of the former owners or occupiers of acquired land. It is not enough to highlight the disadvantages experienced by former owners or occupiers in having to wind up their affairs on the acquired land within 45 days from the date ^G of the service of the order of acquisition. In a case of compulsory acquisition of private property, hardships are bound to be suffered by the owners or occupiers of expropriated property, especially agricultural land. ^H

2004 (2) ZLR p295

^A *Held, further, that the the amendment to s 8(1) of the Land Acquisition Act did not take away the right of the owner or occupier, where agricultural land has been compulsorily acquired, to put his case before the Administrative Court when the application for an order confirming the acquisition is heard. That there may be nothing to show for it in a practical sense if the Administrative Court refused to confirm the acquisition, did ^B not detract from the fact that the owner or occupier's right to be heard was not infringed.*

Held, further, per Malaba JA (Chidyausiku CJ, Cheda & Ziyambi JJA concurring, Sandura JA dissenting), that not every assumption of office of President has as its legal consequence the creation of a vacancy in the office of a Minister. It is only to the assumption of office by "a new ^C President" that the framers of the Constitution subjected the creation of a vacancy in the office of a Minister. A person does not become a new President within the meaning of the section because he assumes office of President in a new term. There would only be a "new" President if the incumbent died, resigned or was removed from office or was defeated in ^D an election. The vacation of the office of a Minister on assumption of office of "a new President" was intended to enable him to exercise the freedom to choose his own team of Ministers.

Held, further (per Malaba JA, Chidyausiku CJ, Cheda & Ziyambi JJA concurring, Sandura JA dissenting), that the presentation of a bill in contravention of Standing Order 127 does not in all circumstances have ^E as its necessary consequence the invalidity of the resultant Act. The provisions of the standing order are directory, not peremptory, there being nothing in the language of the order providing that its breach would result in the invalidity of the legislation. The prescription of something to be done in the course of law-making should often be treated as in the nature of a direction to the legislature and not as laying down ^F conditions of validity for legislation.

Cases referred to

Airfield Invstms (Pvt) Ltd v Min of Lands & Ors 2004 (1) ZLR 511 (S)

Biti & Anor v Min of Justice & Anor 2002 (1) ZLR 177 (S)

^G *Clayton & Ors v Heffron & Ors* (1960) 105 CLR 214

CFU v Min of Lands & Ors 2000 (2) ZLR 469 (S)

Davies & Ors v Min of Lands 1996 (1) ZLR 681 (S)

^H *Holland & Ors v Minister of the Public Service, Labour and Social Welfare* 1997 (1) ZLR 186 (S); 1998 (1) SA 389 (ZS)

2004 (2) ZLR p296

Malaba JA

Namoi Shire Council v A-G for New South Wales [1980] 2 NSWLR 639 ^A

Osborne v Commonwealth (1911) 12 CLR 321

Victoria v Commonwealth & Connor (1975) 134 CLR 81

Legislation considered

Constitution of Zimbabwe 1980, ss 16(1)(b), 18(9) & 31E(1) ^B

Land Acquisition Act No. 6 of 2002

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

Case information

W Trengove SC, with him *J C Andersen SC*, for the applicant

Mrs *N Matanda-Moyo*, with her *N Mutsonziwa*, for the respondents ^C

Judgment

MALABA JA: On 4 May 2004, the High Court, with the consent of the parties, referred for determination by this court the following constitutional questions:

- “1. Whether or not the Land Acquisition Amendment Act No 6 of 2002, was not lawfully enacted by Parliament and is therefore invalid and of no force and effect. ^D
Alternatively:
Whether or not the amendments to ss 8, 9 and 10 of the Land Acquisition Act [*Chapter 20:10*] made in terms of the Land Acquisition Amendment Act No. 6 of 2002, are invalid and of no force and effect by reason of being in conflict with ss 11, 16(1)(b), 16(1)(c), ^E 16(1)(d), 18(5), 18(9) and 23(1) of the Constitution of Zimbabwe.
2. Whether or not Mr Patrick Anthony Chinamasa MP ceased to be the Minister of Justice, Legal and Parliamentary Affairs with effect from 1 April 2002.
3. Whether or not Dr Joseph Mutakwese Made MP ceased to be the Minister of Lands, Agriculture and Rural Resettlement with effect ^F from 1 April 2002 and that the s 8 acquisition order signed by him on 29 April 2002 concerning applicant’s farm known as Nyalugwe is invalid and of no force and effect.”

At the hearing of the application, it was indicated that the relief sought by the applicant was an order in the following terms: ^G

- “1. It is declared that the Land Acquisition Amendment Act 6 of 2002 was not lawfully enacted and is consequently invalid and of no force or effect.
2. Alternatively, it is declared that the amendment of sections 8 and 9 of the Land Acquisition Act [*Chapter 20:10*] made by the Land Acquisition Amendment Act No. 6 of 2002, violates sections 16(1)(b) ^H

2004 (2) ZLR p297

Malaba JA

^A and 18(9) of the Constitution and are consequently invalid and of no force or effect.

3. The respondents are ordered jointly and severally to pay the applicant’s costs.”

It will be seen from the relief sought that the allegations that amendments to s 10 of the Land Acquisition Act [*Chapter 20:10*] (“the Act”) contravened ^B any of the provisions of the Constitution of Zimbabwe (the Constitution) mentioned in para 1 of the referral order or that the amendments to ss 8 and 9 violated ss 11, 16(1)(c), 16(1)(d), 18(5) and 23(1) were not proceeded with.

PARTIES

The applicant was the owner of agricultural land known as Nyalugwe Farm ^C situated in the district of Lomagundi (the land). The land became the subject of compulsory acquisition for resettlement purposes under the Act.

The first respondent is the acquiring authority as defined in s 2 of the Act. He caused a preliminary notice of the intention of the State to acquire the land to be published in the *Government Gazette* (GN 322C of 2001) on 29 June 2001. ^D On 29 April 2002, he made an order acquiring the land in terms of s 8(1) of the Act. It was, however, conceded on behalf of the first respondent in

proceedings before the High Court, that the preliminary notice and order of acquisition lacked legal effect because the former had not been served upon the bondholder with interest in the land and in respect of the latter an application to the Administrative Court had not been made not later than 30 days from the date ^ε the order of acquisition was served on the applicant for an order confirming the acquisition as required by s 7(1) of the Act.

The second respondent introduced into Parliament the Land Acquisition Amendment Bill which became Act No 6 of 2002. He is also cited because it is alleged that he was not a "Minister" when he introduced the bill because ^φ under Standing Order 102 only a "Minister" has authority to introduce into Parliament a bill without having obtained prior leave of the House to do so. The allegations were that in terms of the provisions of s 31E(1)(c) of the Constitution the second respondent ceased being a Minister on 1 April 2002 when the President assumed office.

The third respondent was cited in compliance with s 24(6) of the Constitution ^ς to the effect 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 ^η be entitled to be heard by the court on that question.

2004 (2) ZLR p298

Malaba JA

FACTS ^A

The facts and circumstances on which the relief sought by the applicant is based are not in dispute. They start on 8 January 2002 when the General Laws Amendment Bill which was to amend 48 Acts of Parliament was rejected at the third reading stage when the House got divided with 36 votes against and 24 votes in favour of the bill being read a third time. The second respondent later ^β successfully applied for the suspension by the House of Standing Order 127 which prohibits the introduction of a bill of the same substance as another bill which has been introduced during the same session and which has not been withdrawn. On 10 January, the bill was read a third time. It became law on 4 February 2002. ^c

In subs 27(1), the General Laws Amendment Act sought to amend the Land Acquisition Act in the following manner:

"(a) in section 8 —

(i) in subsection (1) by the insertion of the following proviso after proviso

(ii) — ^δ

'(iii) where land is offered for acquisition by the owner in terms of subsection (2), (3) or (4) of section *six A* or subsection (2) or (3) of section *six B* and accepted by the acquiring authority, it shall not be necessary for the acquiring authority to make an order in terms of this subsection, and ^ε such land shall vest immediately in the acquiring authority upon acceptance of the offer as if an order had been made in terms of this subsection.'

(ii) by the repeal of subsection (2) and the substitution of —

'(2) Immediately after making an order in terms of subsection (1) an acquiring authority may — ^φ

- (a) in relation to land other than agricultural land required for resettlement purposes, exercise any right specified in that order if the exercise of that right does not require the eviction of the owner or occupier of the land concerned; and
- (b) in relation to any agricultural land required for resettlement purposes, exercise any right of ownership, including the right to ^ς survey, demarcate and allocate the land concerned for agricultural purposes, without undue interference to the living quarters of the owner or occupier of that land:

Provided that this subs shall not permit an acquiring authority, other than the President or a Minister, to do anything which ^η

2004 (2) ZLR p299

Malaba JA

^A interferes with rights acquired in terms of the Mines and Minerals Act [*Chapter 21:05*] without the permission in writing of the Minister responsible for mines';

(iii) by the insertion after subs (6) of the following section —

- (7) Any owner or occupier of the land concerned or other person who, after an order is made in terms of subsection (1), interferes with the exercise by the acquiring authority of any right in terms of subsection (2) or anything done pursuant to the exercise of such right, without the permission in writing of the acquiring authority, otherwise than in the exercise of rights acquired in terms of the Mines and Minerals Act [*Chapter 21:05*], shall be guilty of an offence and liable to a fine not exceeding twenty thousand dollars or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.’;
- (b) by the repeal of section 9 and the substitution of –
- 9. Eviction of owner or occupier**
- The following provisions shall, subject to subsection (5) of section *seven* and subsections (3) and (4) of section *eight*, apply to the vacation by the owner or occupier of land acquired in terms of this Act –
- (a) in relation to land other than agricultural land required for resettlement purposes, any person who, immediately prior to the date on which an order is made in terms of subsection (1) of section *eight*, owned, occupied, held or used the land to which such order relates shall, if so required by not less than three months’ notice in writing by the acquiring authority, cease to occupy, hold or use that land, and if he fails to do so, he shall be liable to be evicted by order of a competent court;
- (b) in relation to any agricultural land required for resettlement purposes, the making of an order in terms of subsection (1) of section *eight* shall constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land immediately on the date of service of the order upon the owner or occupier, and if he fails to do so, he shall be liable to be evicted by order of a competent court:
- Provided that 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 three months after the date of service of the order.’
- (c) in section 10 in subsection (1) by the repeal of paragraph (a) and the substitution of –
- (a) a copy of the order made in terms of that subsection or, where

2004 (2) ZLR p300

Malaba JA

- no such order was required in terms of proviso (iii) to that a subsection, written confirmation to that effect; and’
- (2) Sections 8, 9 and 10 of the principal Act as amended by this Act shall be deemed to have come into operation on 23 May 2000:
- Provided that where an order in terms of subsection (1) of section 8 of the principal Act was made before the date of commencement of this Act, the date of the notice referred to in paragraph (b) of section 9 of the principal Act, and the date from which the period of three months referred to in the proviso to that paragraph shall be counted, shall be the date of commencement of this Act.”

These are all the provisions of s 27(1) of the General Laws Amendment Bill.

On 27 February 2002, Tendai Laxton Biti, a Member of Parliament belonging to the opposition political party, the Movement for Democratic Change (MDC), brought a constitutional application in which he challenged the validity of the General Laws Amendment Act on the ground that the bill from which it was made had been re-introduced into the House in contravention of the provisions of Standing Order 127. The case is *Biti & Anor v The Minister of Justice & Anor* 2002 (1) ZLR 177 (S). By a majority of four to one the court held that the re-introduction of the General Laws Amendment Bill after its rejection by the House upon a division contravened the provisions of Standing Order 127. The Act was declared invalid and of no force or effect.

On 9 and 10 March 2002, an election to the office of President was held. The term of office of the President was to expire on 1 April. The incumbent President was re-elected and assumed office in the new term on 1 April 2002 after taking and subscribing the oaths of loyalty and office.

On 7 May 2002, the second respondent introduced into Parliament the Land Acquisition Amendment Bill. He used the procedure prescribed by Standing Order 102(2)(i) in terms of which a Minister can introduce a bill on notice of presentation without having sought and obtained the leave of the House. Unlike the procedure on notice of motion for leave, presentation of a bill without leave effectively prevents debate on the substance of the bill as very little information on the bill is given and no question on the propriety of its introduction is asked once the notice of presentation has not been ruled out of order. The bill was presented to the House when the Clerk read its short title at the invitation of the second respondent.

On 8 May, the second respondent moved that the bill be read a second time. He made a brief speech explaining the principle of the bill. He also disclosed to the House that he intended moving amendments and additions to the substance of the bill at the committee stage. The propriety of introducing the

2004 (2) ZLR p301

Malaba JA

A bill was not raised by any of the members of the House at this stage. No objection was made to the introduction of the bill on the ground that it was of the same substance as s 27(1) of the General Laws Amendment Bill which had been introduced into the House during the same session and which had not been withdrawn. Objections to the introduction of the bill on the grounds that it contravened the provisions of Standing Order 127 should have been taken at this stage of the proceedings and before the second reading. It is not the practice to order bills to be withdrawn, after they are committed, on account of any irregularity which can be cured while the bill is in committee.

The bill was read a second time and thereafter went into the committee stage. Here there was heated and extensive debate on the substance of the amendments and additions to the provisions of the bill proposed by the second respondent. Eventually the proposed amendments and additions to the provisions of the bill were agreed to and adopted to stand as parts of the bill, as reflected in the Committee report. The bill with the amendments and additions was read a third time upon a motion put and agreed to. The bill became the Land Acquisition Amendment Act No. 6 of 2002 on 10 May 2002.

The amendments and additions to the provisions of the bill at the committee stage are significant in that their inclusion rendered the bill substantially different from the substance of the provisions of s 27(1) of the General Laws Amendment Bill. It is common cause that at the time of its presentation to the House the former bill was of the same substance as s 27(1) of the latter bill which had been introduced in the same session and had not been withdrawn.

An interesting question was raised on behalf of the respondents whether or not a bill can be described as a bill introduced in the same session and which has not been withdrawn when the Act made from it has been declared invalid and of no force or effect by a court. It has not been found necessary to determine this question because we can proceed on the assumption that the introduction of the General Laws Amendment Bill and the proceedings of the House in respect to it are matters of fact the occurrence of which cannot be denied.

I digress from the narration of the facts to highlight the main differences in substance which made the two bills incompatible at the time the Land Acquisition Amendment Bill became law. The opportunity to occupy, hold or use the acquired land for forty-five days after the service of the order of acquisition was now subject to the right of the acquiring authority to survey, demarcate and allocate the agricultural land required for resettlement purposes as long as these activities did not interfere with the living quarters. Section 27(1) of the General Laws Amendment Bill had required the owner or occupier

2004 (2) ZLR p302

Malaba JA

of agricultural land acquired for resettlement purposes to cease to occupy, hold or use the land immediately on the date of service of the order of acquisition. The Land Acquisition Amendment Bill imposed an obligation on the owner or occupier to vacate the land at the end of forty-five days from the date of service of the order of acquisition subject to the exercise by the acquiring authority of its rights under subss (2), (3), (4) and (7) of s 8.

Section 27(1) of the General Laws Amendment Bill had provided for the eviction by order of a competent court of an owner or occupier who failed to immediately cease to occupy, hold or use the land acquired for resettlement purposes. The Land Acquisition Amendment Bill changed this and created a criminal offence out of the failure by the owner or occupier to cease to occupy, hold or use the agricultural land acquired for resettlement purposes at the end of the prescribed period.

Instead of dealing with the prescription of the time at the expiry of which the obligation on the owner or occupier was to commence, the Land Acquisition Amendment Bill now added, as a subject-matter for legislation, the criminalisation of the failure to comply with the order to cease to occupy, hold or use the land at the expiry of forty-five days from the date of service of the order of

acquisition. The offence was made punishable with a fine not exceeding twenty thousand dollars or imprisonment for a period not exceeding two years or both such fine and such imprisonment. A court was now required, upon convicting the owner or occupier charged with the offence to order his eviction from the acquired land. ^ε

Whilst s 27(1) of the General Laws Amendment Bill had not criminalised the failure by the owner or occupier to vacate the living quarters at the end of three months from the date of service of the order of acquisition, the Land Acquisition Amendment Bill brought it in as a subject-matter of its provisions. The requirement that upon convicting an owner or occupier of the offence of ^φ failing to vacate the living quarters at the expiry of ninety days from the date of service of the order of acquisition a court must order his eviction was an entirely new subject-matter.

Section 5 of the Land Acquisition Amendment Bill also brought in as a new subject-matter for legislation the payment of compensation for any other improvements on or to the land which enhanced its value for agricultural ^ς purposes and with the agreement of the owner, for movables used in connection with the land for agricultural purposes, including irrigation equipment not embedded in the ground, tractors, ploughs, disc harrows, trailers, combine harvesters, pumps not permanently attached to the land, sprinklers, risers and movable storage facilities. ^η

2004 (2) ZLR p303

Malaba JA

^α Section 6 of the Land Acquisition Amendment Bill gave retrospective effect (from 23 May 2000) to the Act. The substance of the Schedule of the Act had not been affected insofar as its retrospective application was concerned by subs (2) of s 27 of the General Laws Amendment Bill in terms of which ss 8, 9 and 10 of the Act were to have retrospective effect from 23 May 2000.

I now continue with the narration of the facts. Before its repeal by Act No. 6 ^β of 2002, 8(2) had provided that the acquiring authority could immediately after making an order of acquisition in terms of s 8(1), exercise any rights specified in that order if the exercise of that right did not require the eviction of the owner or occupier of the land concerned. If the acquiring authority required the eviction of the owner or occupier it was obliged to give him three months' ^ς notice to cease to occupy, hold or use the acquired land and, if he failed to obey the notice, he could be evicted by an order of a competent court.

Whether the owner or occupier was placed under an obligation to cease to occupy, hold or use the land and when that happened depended upon the exercise of executive discretion by the acquiring authority. Whilst the acquiring authority could, in certain circumstances, survey, demarcate and allocate the ^δ acquired land during the period of the three months' notice given to the owner or occupier to cease to occupy, hold or use the land, without undue interference to the living quarters and the activities and operations of the owner or occupier of the acquired land, it could not do so in respect of agricultural land the acquisition of which had been objected to in terms of s 5 and not been authorised or confirmed by the Administrative Court.

^ε The effect of the amendment to ss 8 and 9 of the Act is that the period at the end of which the owner or occupier has to cease to occupy, hold or use agricultural land acquired for resettlement purposes is fixed by statute at forty-five days in respect of the land and ninety days in respect of the living quarters and both periods are made to run from the date of service of the order of ^φ acquisition. The acquiring authority can now exercise the right to survey, demarcate and allocate agricultural land acquired for resettlement purposes, regardless of the fact that an ^ς application for an order confirming the acquisition has been made to the Administrative Court.

In *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors* 2004 (1) ZLR 511 (S), it was held that the fact that the application for an order confirming the acquisition was pending before the Administrative Court was no longer a restriction to the exercise by the acquiring authority of the rights of ownership vested in it by the order of acquisition made and served on the owner or occupier of agricultural land ^η required for resettlement purposes.

2004 (2) ZLR p304

Malaba JA

DETERMINATION OF QUESTIONS ^α

The first question is based on the proposition that the introduction of a bill in contravention of the provisions of Standing Order 127 spells invalidity in the resultant Act regardless of the circumstances and the procedure used to present the bill to the House. Standing Order 127 provides that:

“127. Subject to the provisions of the Constitution, no bill shall be introduced which is of the same substance as some other bill which has been introduced during the same session and which has not been withdrawn.”

Legislative power in Zimbabwe is vested by s 32(1) of the Constitution in the legislature, consisting of the President and Parliament. This plenary power is c in terms of s 51(1) of the Constitution exercised by bills passed by Parliament and assented to by the President. Power is given to Parliament under s 57(1) of the Constitution to make standing orders for the regulation and conduct of its proceedings provided that the standing orders are not inconsistent with the Constitution and any other law. Once made, standing orders have the force of a constitutional provision. d

The contention advanced on behalf of the applicant was that the Land Acquisition Amendment Bill was the same in substance as s 27(1) of the General Laws Amendment Bill which had been introduced during the same session and had not been withdrawn. The argument was that the presentation of the Land Acquisition Amendment Bill was in violation of Standing Order 127. The resultant Act was therefore invalid and of no force or effect. e

I have no difficulty in accepting as a fact that the Land Acquisition Amendment Bill was the same in substance as s 27(1) of the General Laws Amendment Bill. There was, of course, a violation of Standing Order 127, although it was of a technical nature. I do not accept the general proposition that presentation of a bill in contravention of Standing Order 127 in all circumstances spells as its f necessary consequence invalidity in the resultant Act.

Courts do not concern themselves with what happens in Parliament as such, but with its effect on the validity of the enacted legislation. Standing orders are made by Parliament principally to regulate and control its own proceedings. Not every contravention of a standing order would, therefore, have the effect g of invalidating the resultant Act. Breach of a standing order may, by its nature, remain a matter for the internal proceedings of Parliament. In such a case, presenting a bill in breach of a standing order is one thing and enacting a valid law another. The onus is on the applicant to show that invalidity of an Act is the necessary consequence of a breach of the provisions of the standing order h

2004 (2) ZLR p305

Malaba JA

a the construction of which forms the basis of the claim. The determination of the question depends upon the construction of the language of Standing Order 127.

The makers of the standing order could by express language have declared that the happening of an event such as the breach of its provisions shall have as its effect the invalidation of the resultant Act. The court would, in that case, b give effect to the intention of Parliament because what it would be involved in is a judicial examination of the regularity of the legislative procedure by which the statute, the validity of which is impugned, would have been enacted. There would have to be such a defect of constitutional procedure as would result in it being impossible to say that the bill proceeded with became a valid law before a court can declare an Act of Parliament invalid on grounds of c procedural irregularity.

In *Clayton & Ors v Heffron & Ors* (1960) 105 CLR 214 Dixon CJ, McTiernan J, Taylor J and Windeyer J, in a joint judgment, said at p 246:

“In this case, there are two matters with which we are dealing: the legislative power and the procedure for its exercise. The principles of the common d law distinguished sharply between invalid attempts to exercise a legislative power and departures from the prescribed course for its exercise which may not or do not bring invalidity as a necessary consequence. In the end the distinction must be governed by the intention expressed by the legislature conferring the power and prescribing the steps to be taken in the course of its exercise. But commonly, no express declaration is to be e found in a statutory power as to the effect on validity of departures from the procedure laid down. The question is then determined by reference to the nature of the power conferred, the consequences which flow from its exercise, the character and purpose of the procedure prescribed.”

At p 235 of the judgment in *Clayton's case, supra*, the learned Justices stated the principle that it was up to the legislature to make it clear that a breach of f the standing order in question shall have

as its necessary consequence invalidity in the resulting Act:

"... the framers of a Constitution may make the validity of a law depend upon any fact, event or consideration they may choose, and if one is chosen which consists in a proceeding within Parliament the courts must take it under their cognizance in order to determine whether the supposed law ^G is a valid law."

In this case, Standing Order 127 does not have the words to the effect that any law enacted from a bill introduced in violation of its provisions shall be void and of no force or effect. In the absence of such language, the mere fact of a ^H contravention of Standing Order 127 cannot, in the circumstances, of necessity

2004 (2) ZLR p306

Malaba JA

result in the invalidity of Act No. 6 of 2002. The object of Standing Order 127 ^A is to protect Parliament from the embarrassment of having to debate the same matter twice in one session.

The question of the validity of Act No. 6 of 2002 has to be determined by reference to other factors such as the character and purpose of the procedure prescribed. One cannot ignore in the enquiry the fact that the procedure of ^B presenting the bill to Parliament without leave resulted in amendments and additions being made to the bill with the result that when it was passed into law it was substantially different from ^s 27(1) of the General Laws Amendment Bill. One cannot also ignore the fact that as a result of these steps taken in the procedure in the exercise of its legislative power, Parliament did not decide the same matter twice. The result, the prevention of which is the object of Standing ^C Order 127, did not occur from its violation. The contravention remained of a technical or incidental nature having no effect at all on the substance of the law-making process in Parliament.

The court must, of course, take into account the fact that Standing Order 127 is couched in language which imposes a negative duty. It is couched in ^D mandatory terms. Does this mean, as appears to have been accepted by the majority in *Biti's case, supra*, that in every case of breach of Standing Order 127 the intention of the makers thereof is that the resultant Act must be declared invalid? I do not think so. Courts in other jurisdictions faced with the same question have considered the provisions of standing orders as directory rather than mandatory: see *Namoi Shire Council v Attorney-General for New* ^E *South Wales* [1980] 2 NSWLR 639; [1981] 7 *Commonwealth Law Bulletin* 1233.

Constitutional provisions like standing orders which relate to proceedings in the House are generally considered directory. At p 247 of the joint judgment in *Clayton's case supra*, the learned Justices said:

"Lawyers speak of statutory provisions as imperative when any want of ^F strict compliance with them means that the resulting act, be it a statute, a contract or what you will, is null and void. They speak of them as directory when they mean that although they are legal requirements which it is unlawful to disregard yet failure to fulfil them does not mean that the resulting act is wholly ineffective is null and void."

At p 266 of *Clayton's case supra*, Kitto J, who wrote a separate opinion from ^G the other four judges, said:

"It is familiar law that in many contexts legislative prescriptions to be observed in the exercise of powers or authorities or in the performance of functions are to be regarded as directory only, so that if the powers or authorities are in fact exercised or the functions performed without ^H

2004 (2) ZLR p307

Malaba JA

a observance of the prescription, what is done is nevertheless of full legal efficacy. In the case of a legislative body the prescription of something to be done in the course of law-making should no doubt often be treated as in the nature of a direction to the Legislature or to one or more of its constituent elements and not as laying down conditions of validity for legislation."

^B In *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 179 Stephen J said that:

"A directory construction will not assist in securing validity, unless despite the non-compliance which is the occasion for invoking that construction, there may nevertheless be seen to be substantial compliance with the general object at which the statutory provision aims ... If in such ^C a case a directory construction be adopted the extent of non-compliance in the particular case must then be examined to determine whether what has in fact occurred nevertheless gives effect to the general object of the statute."

The procedure used by the second respondent to present the Land Acquisition Amendment Bill into Parliament was not the procedure on notice of motion for ^D leave. *Ersine May Parliamentary Practice* 22 ed suggests that the procedure on motion for leave cannot be used to introduce a bill containing the same substance as some other bill which has been introduced during the same session and which has not been withdrawn. It is clear that the learned authors are not so unequivocal when it comes to the presentation of a bill without leave of the House.

^E The House can be prevented from raising any questions on the substance of the bill until it gets to the committee stage where amendments and additions made to it simply cure the effect of the irregularity that may have been occasioned by its introduction. That is exactly what happened in this case. Although the Land Acquisition Amendment Bill was the same in substance ^F as s 27(1) of the General Laws Amendment Bill at the time it was introduced into the House, the procedure used by the second respondent effectively prevented the House from deciding on the same matter twice. What he did was lawful.

The amendments and additions made to the bill which he proposed at the ^G committee stage and which were later adopted as part of the bill at the consideration of the committee report, produced a bill which was substantially different from s 27(1) of the General Laws Amendment Bill. The enactment of Act No. 6 of 2002 from the Land Acquisition Amendment Bill was not the kind ^H of result the prevention of which is the general object of Standing Order 127.

2004 (2) ZLR p308

Malaba JA

In other words, despite non-compliance with the provisions of the standing ^A order at the time the bill was introduced into the House, there was substantial compliance with its general object.

The violation of Standing Order 127 in this case was, therefore, of a technical nature confined to matters of procedure in the House and with no effect on the validity of the resultant Act. A court must be extremely cautious in such ^B a case before it declares an Act of Parliament invalid on a ground of a technical violation of rules enacted by Parliament principally to regulate and control its own proceedings. According to the principles governing the invalidation of statutes for deviation from the legislative procedure laid down by law, I am of the view that no such invalidity should be held to have resulted in this case. The validity of a law that follows from what Parliament did is one thing. The ^C proceedings of Parliament which could lead to a valid or an invalid law are another.

I agree with the remarks of Griffith CJ in *Osborne v The Commonwealth* (1911) 12 CLR 321 at 337. He said when courts of law are faced with the question whether to declare a statute invalid on the ground of a technical violation or a rule of procedure they should: ^D

“... lean rather to support than to deny the validity of an Act in case of a mere technical or incidental transgression of the injunction not affecting the substance of the legislation and if the provision objected to were capable of two constructions would if possible adopt that which would not invalidate the law.” ^E

On the above principle it is clear that the conclusion must be reached that the Land Acquisition Amendment Act No 6 of 2002 cannot be declared invalid on the ground that the bill from which it was made law was introduced into Parliament in breach of the provisions of Standing Order 127.

SECTION 31E(1)(c) OF THE CONSTITUTION ^F

The validity of Act No. 6 of 2002 was also challenged on the ground that when the second respondent invoked the procedure for presenting its bill without leave under Standing Order 102(2) (i), he was not a Minister and, therefore, had no authority to introduce the bill in that way. Only a Minister can present a bill to Parliament without having sought and obtained leave of the House in terms of Standing Order 102(2)(i). ^G

The contention was that on a proper construction of the provisions of s 31E(1)(c) of the Constitution, when the President assumed office on 1 April 2002 he did so as “a new President” within the meaning of that section. ^H

2004 (2) ZLR p309

Malaba JA

^A Section 31E(1) provides that:

“(1) The office of a Vice President, Minister or Deputy Minister shall become vacant –

- (a) if the President removes him from office; or
- (b) if he resigns his office by notice in writing addressed and delivered to the President; or ^B
- (c) *upon the assumption of office of a new President*" (the emphasis is mine).

If the ordinary and grammatical meaning of s 31E(1)(c) is that the President was a new President on assumption of office on 1 April 2002, then the second respondent was not a Minister when he introduced the Land Acquisition ^C Amendment Bill into Parliament. It seems to me that every person elected as President is required to assume office by taking and subscribing oaths of loyalty and office as prescribed in subss (5) and (6) of s 28 of the Constitution. The purpose of assuming office in the manner prescribed is to have the person bestowed with the executive authority of the State vested in the office of President so that he or she can perform its duties and functions.

^D It is clear, however, that not every assumption of office of President has as its legal consequence the creation of a vacancy in the office of a Minister. It is to the assumption of office by "a new President" that the framers of the Constitution subjected the creation of a vacancy in the office of a Minister. The expression "... of a new President" is descriptive of the assumption of ^E office suggesting that there is an assumption of office by some other person not describable as "a new President" which would not have as its necessary consequence the creation of a vacancy in the office of a Minister.

It may not be possible to give an exhaustive definition of what the word "new" means and implies but ordinarily when it is used to describe a thing, the idea is to contrast the attributes of that thing with those of another of the same kind ^F or class. In *Black's Law Dictionary* 3ed, it is stated on the word "new" that:

"as an element in numerous compound terms and phrases of the law, this word may denote novelty, or the condition of being previously unknown or of recent or fresh origin but ordinarily it is a purely relative term and is employed in contrasting the date, origin, or character of one thing with the corresponding attributes of another thing of the same kind or class."

^G It is clear from the provisions of s 31E(1)(c) that by the time the person assumes the office of President, he is already a new President. The word "new" must, therefore, have been used to contrast one person elected as President from another. A person does not become a new President within the meaning of ^H s 31E(1)(c) of the Constitution because he assumes office of President in a new

2004 (2) ZLR p310

Malaba JA

term as contended by the applicant. A person becomes a President under our ^A Constitution upon being elected as President.

The Constitution specifies four events the happening of which will result in the holding of an election to the office of President. These are the expiry of the term of office; the death, removal or resignation of the President. There is no doubt that in an election to fill a vacancy in the office of the President ^B occurring as a result of his death, removal or resignation "a new President" is elected. So is the case in an election to fill a vacancy caused by the expiry of the term of office of the President in which a person other than the incumbent President is elected as President. "A new President" would have been elected.

That leaves one occasion only when a person elected is not "a new President". ^C That is when the incumbent President is re-elected as President. In my view, his assumption of office cannot be described as an "assumption of office of a new President" within the meaning of s 31E(1)(c) of the Constitution. The attribute he does not share with any of the other people elected as President is that he was the President before the election.

It is also important to consider the meaning of s 31E(1)(c) from the point of view ^D of its purpose. A Minister is a means by which the President performs the duties and functions of his office. It is the President who has the power to appoint a Minister who does what he is asked by the President to do as long as it is lawful. As such, a Minister holds office during the pleasure of the President who can dismiss him at any time. ^E

What this means is that the relationship between the President and a Minister is such that each person assuming office as "a new President" must have the freedom to choose a team of men and women he or she believes will perform the duties and functions of the office efficiently and effectively under his or her direction.

The framers of the Constitution saw it necessary to provide for the vacation ^F of the office of a Minister on assumption of office of "a new President" to enable him to exercise the freedom to choose his own team of Ministers. It was unnecessary to provide for the vacation of the office of a Minister on assumption of office of a re-elected incumbent President because, being the person who would have appointed a Minister, he would have the power to remove him from office. ^G

Mr *Trengove* argued that a re-elected incumbent President becomes "a new President" because he would be assuming the office of President in a new term. If that were the case it would have been unnecessary to use the word "new" in s 31E(1)(c) of the Constitution. A new President is a person who was not ^H

2004 (2) ZLR p311

Malaba JA

^A the President during the term of office the expiry of which would have led to the holding of the election to the office.

Mr *Trengove* also argued that a re-elected incumbent President is also the person referred to in s 28(5)(a) of the Constitution as the "previous President". He can, by contrast, be described as a new President. Section 28(5)(a) of the Constitution provides that where a person is elected as President because the ^B term of office is about to expire he shall assume office "on the expiry of the term of office of the previous President".

The term "previous President" does no more than describe the person the expiry of whose term of office would have led to the holding of the election to the office of President. It also provides the basis for fixing the time when ^C the person elected as President must assume office. If the words were to be given the meaning the applicant seeks to give them, they would apply to both situations of assumption of office of President by a person re-elected and to the one who would have defeated the incumbent President in the election. There is no doubt at all that the latter person is "a new President". His being a new President arises from the very fact that he cannot be called a "previous ^D President" within the meaning of s 28(5)(a) of the Constitution. By the same token, a person re-elected as President who can be described as a previous President for the purposes of s 28(5)(a) cannot be described as "a new President" for the purposes of s 31E(1)(c) of the Constitution. The second respondent was a Minister on the day he introduced the Land Acquisition Amendment Bill into Parliament.

^E I would answer the first question in the negative.

SECTION 16(1)(b)

The contention advanced on behalf of the applicant was that the amendments to ss 8 and 9 of the Act introduced by Act No. 6 of 2002 are in conflict with ^F the provisions of s 16(1)(b) of the Constitution. Section 16(1)(b) of the Constitution provides as follows:

"Section 16. **Protection from deprivation of property**

- (1) Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that – ^G
 - (a) ...; and
 - (b) requires the acquiring authority to give *reasonable notice of the intention to acquire the property*, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition." (the emphasis is mine) ^H

2004 (2) ZLR p312

Malaba JA

Two points were taken on the alleged violation of s 16(1)(b) of the Constitution ^A by Parliament in enacting the amendments to ss 8 and 9 of the Act. The first was that the acquiring authority was not required to give the owner or occupier of agricultural land required for resettlement purposes a reasonable notice of when the acquisition itself was to take place. The second point was that after the acquisition of the land the former owner or occupier is not afforded a ^B reasonable opportunity to wind up his affairs on the acquired land. The period of 45 days at the expiry of which from the date of service of the order of acquisition the former owner or occupier is obliged to cease to occupy, hold or use the acquired land was said to be too short to provide a reasonable opportunity to wind up affairs on the acquired land.

I take the first point. The Constitution directs Parliament to give the power of compulsory acquisition of agricultural land required for resettlement purposes to the executive and specifies what the executive must be obliged to do for the acquisition to have constitutional validity. Section 16(1)(b) of the Constitution authorises the compulsory acquisition of agricultural land required for resettlement purposes under the authority of a law which requires the acquiring authority to give to the owner or occupier of the agricultural land "reasonable notice of the intention to acquire the property" (the underlining is mine). The obligation on Parliament is to pass a law for the compulsory acquisition of agricultural land required for resettlement purposes which contains a provision requiring the acquiring authority to make known to the owner or occupier of the land for a reasonable time of the fact of its intention to acquire his or her land for resettlement purposes. There is nothing in s 16(1)(b) requiring Parliament to provide as a matter for legislation for the compulsory acquisition of agricultural land for resettlement purposes, a requirement on the acquiring authority to give reasonable notice to the owner or occupier of the land of the date when the acquisition was to take place.

Where the Constitution prescribes for Parliament specific matters that a statute should contain, not dealing with a matter which the constitutional provision prescribing the matters to be dealt with under the law in question does not prescribe, cannot constitute a violation of the constitutional provision. The framers of s 16(1)(b) of the Constitution specified in express terms the matters in respect to which Parliament had to legislate for compulsory acquisition of agricultural land for resettlement purposes to be constitutionally valid. The duty of the court in considering the question of violation of s 16(1)(b) of the Constitution is to determine whether or not Parliament provided in the statute for the matters prescribed in that section.

2004 (2) ZLR p313

Malaba JA

A The power of the State to compulsorily acquire private property for public purposes is a power the owner or occupier of agricultural land should know can be exercised in respect of his property at any time provided fair compensation is paid for the acquisition of his rights: see *Davies & Ors v Minister of Lands, Agriculture and Water Development* 1996 (1) ZLR 681 (S) at 692G.

B Having received the preliminary notice of the intention of the acquiring authority to acquire his agricultural land for resettlement purposes, the applicant had no constitutional right to be given a reasonable notice of when actual acquisition was to take place. Nonetheless s 8(1) of the Act, in terms of which the compulsory acquisition of the agricultural land the nature and extent of which would have been described in the preliminary notice, provides that an order of acquisition shall not be made by the acquiring authority before the expiry of 30 days from the date of the publication of the preliminary notice in the *Gazette*.

There is, therefore, a minimum period of 30 days from the date of publication of the preliminary notice of the intention to acquire the agricultural land within which actual acquisition is prohibited. There is a maximum period of two years within which compulsory acquisition can be effected. In prescribing the period of two years to mark the duration of the time within which the preliminary notice published in The *Gazette* in terms of s 5(1) of the Act remained operative, Parliament placed a definite time limit within which the acquiring authority had to act to effect the acquisition of the agricultural land described in the preliminary notice: see *Commercial Farmers' Union v Minister of Lands & Ors* 2000 (2) ZLR 469 (S) at 485D-F.

The applicant decided to challenge the constitutionality of s 8(1) of the Act on the ground that its provisions were in conflict with provisions in s 16(1)(b) of the Constitution. He had to show that what he accused Parliament of having left out of the provisions of s 8(1) of the Act was prescribed as a matter for legislation in s 16(1) of the Constitution. That he failed to do.

The second point was that s 9(1)(b) of Act No 6. of 2002, in requiring the former owner or occupier of the acquired land to cease to occupy, hold or use the land at the expiry of 45 days, violates the provisions of s 16(1)(b) of the Constitution in that it fails to afford the former owner or occupier a reasonable opportunity to wind up his affairs on the acquired land. Once again, how can Parliament be accused of having violated the provisions of s 16(1)(b) of the Constitution in this regard when the matters it is said to have failed to legislate upon are not part of the subject matters specifically required by s 16(1)(b) of the Constitution to be provided for by Parliament in a law under the authority of

2004 (2) ZLR p314

Malaba JA

which agricultural land can be compulsorily acquired for resettlement ^A purposes?

The provisions of s 16(1)(b) of the Constitution do not require Parliament to enact a law requiring the acquiring authority to give the former owner or occupier a reasonable time within which to wind up his affairs on the acquired land. In fact, it says nothing at all about the rights of the former owner or ^B occupier on the acquired land. The concept of reasonable notice is used in s 16(1)(b) of the Constitution in respect of the specific subject of an intention to acquire the property. It cannot, in my view, be extended in its general usage to say the acquiring authority is also required to give reasonable time to a former owner or occupier to wind up his affairs on the acquired land. ^C

The argument is based on the assumption that the former owner or occupier has a right to remain on the acquired land for the purposes of winding up his affairs. If there were such a right, it could only be a statutory creation. A careful examination of s 16(1)(d) of the Constitution suggests that, once agricultural land has been compulsorily acquired for resettlement purposes in terms of the procedure prescribed by the law under the authority of which the acquisition ^D is being effected, rights of ownership immediately vest in the acquiring authority. The acquisition is a single and complete act which takes away the rights and interests of the owners or occupiers in the agricultural land. The real rights are extinguished to the former owner or occupier of the acquired land.

Apart from the right to have the application for an order confirming the ^E acquisition determined by the Administrative Court, the former owner or occupier has no real rights expressed in the form of winding up farming operations on the acquired land. Section 9(1)(b) of the Act imposes an obligation on the former owner or occupier to vacate the acquired land at the end of 45 days from the date of service of the order of acquisition. It does not ^F create a positive right in the former owner or occupier to remain on the acquired land to wind up his affairs.

Forty-five days is the maximum period within which the obligation must be discharged. There is no right created in the former owner or occupier by s 9(1)(b) of the Act to wind up his affairs on the acquired land. The right of occupation of the acquired land is vested in the acquiring authority. The fact ^G that its physical manifestation may still be with the former owner or occupier does not mean that he has the right of occupation of the acquired land.

It is clear that whatever activities the former owner or occupier is able to carry on during the period of 45 days, are subject to the acquiring authority not exercising its rights of ownership including the right to survey, demarcate and ^H

2004 (2) ZLR p315

Malaba JA

^A allocate the acquired land. This suggests that the activities the former owner or occupier may be able to carry out on the acquired land would not be in the exercise of a statutory right because the statute does not give him such a positive right. His activities would be on sufferance of the acquiring authority.

It is, therefore, not possible to accept the argument that the provisions of s 9(1)(b) of the Act No 6 of 2002 do not give the former owner or occupier a ^B reasonable time within which to wind up his affairs on the acquired land when there is no clear right, let alone a constitutional right, vested in him to carry on operations on the acquired land. If a clear right was established, the reasonableness of its duration would then arise as a subject for determination. There is a clear statutory right in the former owner or occupier to occupy, hold ^C or use the living quarters for a period of 90 days without any interference from the acquiring authority from the date of the service of the order of acquisition. This is because the statute imposes a duty on the acquiring authority not to interfere with the living quarters during the period of ninety days from the date of service of the order of acquisition on the owner or occupier of the acquired land.

^D Even if the point taken on behalf of the applicant was to be determined on the basis of an assumption of the existence of rights in the former owner or occupier to wind up his farming operations on the acquired land, it is clear that, in fixing the period at the end of which he was to cease to occupy, hold or use the land at 45 days, the legislature gave supremacy to public interest over the private interests of the former owners or occupiers of acquired land.

^E The agricultural land would have been compulsorily acquired for a public purpose of resettling people on it. The acquiring authority in whom the rights of ownership are vested was given the right

to survey, demarcate and allocate the acquired land to satisfy the public purpose of resettling the landless on the land.

¶ The period of 45 days would have been fixed with the public interest in mind. The question whether or not the period gives the former owners or occupiers a reasonable opportunity to wind up their affairs on the acquired land does not arise in a case in which it is clear that public interest was given supremacy over the private interests of the former owners or occupiers unless the period is so grossly unreasonable as to ground an inference that Parliament failed to ^g act constitutionally in the exercise of legislative powers. That conclusion cannot be reached on the facts of this case.

It is not enough to highlight the disadvantages experienced by former owners or occupiers in having to wind up their affairs on the acquired land within 45 ^h days from the date of the service of the order of acquisition. In a case of

2004 (2) ZLR p316

Malaba JA

compulsory acquisition of private property, hardships are bound to be ^a suffered by the owners or occupiers of expropriated property, especially agricultural land, and it is for that reason that the law recognises that because public interest overrides the private interests of individual landowners or occupiers, they suffer the unpleasant consequences of having to stop farming operations on acquired land in the public interest. ^b

It was also argued that Parliament should have left the question of eviction of former owners or occupiers of acquired land to the exercise of executive discretion by the acquiring authority as was the case before the amendment to s 9 by Act No. 6 of 2002. The answer to this argument is that choice of a method by which Parliament decides to deal with a matter involves policy in which this court has no interest. ^c

I would answer the question on the alleged violation of s 16(1)(b) of the Constitution in the negative.

SECTION 18(9)

The contention was that the amendment to s 8(1) of the Act, so that agricultural ^d land required for resettlement purposes can be compulsorily acquired and the acquiring authority proceed to exercise the rights of ownership such as the survey, demarcation and allocation of the acquired land before confirmation of the acquisition by the Administrative Court, infringed the owner or occupier's right to be heard as enshrined in s 18(9) of the Constitution.

Section 18(9) provides that: ^e

"Subject to the provisions of this Constitution every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

In *Holland & Ors v Minister of the Public Service, Labour and Social Welfare* 1997 (1) ZLR 186 (S), 1998 (1) SA 389 (ZS), this court held that the right to be heard as guaranteed to a person under s 18(9) of the Constitution included a case where a public body is to take a decision which would not only have "prejudicial effect on property and liberty" but also on "the reasonable and legitimate expectations of the aggrieved person" (at 190; 392H of the South African report). ^g

Whether or not the requirements of a "fair hearing" have been met in a particular case depends upon the specific nature of the proceedings. Mrs *Matanda-Moyo* argued on behalf of the respondents that in amending s 8(1) of the Act the legislature did not infringe the applicant's right to be heard before the decision to acquire his agricultural land for resettlement purposes was made. ^h

2004 (2) ZLR p317

Malaba JA

^a The owner or occupier's right to lodge a written objection to the proposed acquisition with the acquiring authority not later than 30 days from the date of publication of the preliminary notice in the *Gazette* remained intact. Written objections are an adequate means by which the owner or occupier of the land can exercise the right to be heard. The right is protected and its exercise made effective by the fact that the acquiring authority cannot make an order of ^b acquisition before the expiry of 30 days from the date of the publication of the preliminary notice in the *Gazette*. The

prohibition against the making of an order of acquisition before the expiry of 30 days from the date of publication of the preliminary notice in the *Gazette* ensures that where a landowner has lodged a written objection to the proposed acquisition the decision to acquire the land is taken after the written objections have been considered.

c The applicant lodged written objections to the proposed acquisition of his agricultural land with the acquiring authority. The fact that an order of acquisition was nonetheless made in respect of his land does not mean that the written objections were not considered. He was given an opportunity to make representations on the proposed acquisition of his land.

d The amendment to s 8(1) of the Act did not take away the right of the owner or occupier where agricultural land has been compulsorily acquired to put his case before the Administrative Court when the application for an order confirming the acquisition is heard. That there may be nothing to show for it in a practical sense if the Administrative Court refused to confirm the acquisition, does not detract from the fact that the owner or occupier's right e to be heard was not infringed by Parliament in enacting amendments to s 8(1) of the Act.

The allegation that the applicant's right to be heard was infringed by the amendments to s 8 of the Act seems to have been prompted by the repeal of s 8(2) thereof which had prohibited the acquiring authority from exercising f rights of ownership, particularly the right to survey, demarcate and allocate the acquired land during the period of three months' notice given to the owner or occupier to vacate the acquired land in respect to which there was a written objection to the acquisition and which acquisition had not been confirmed by the Administrative Court.

The removal of that provision from the Act did not give rise to a constitutional g question of the infringement of a guaranteed right to be heard. It had not been enacted in compliance with a particular constitutional requirement. It was not a requirement under the provisions of s 16 of the Constitution. It only remained binding upon the acquiring authority during the period of the three months' h notice. Yet there was no guarantee that the application for an order confirming

2004 (2) ZLR p318

Malaba JA

the acquisition would have been heard during the period that the restriction a on the acquiring authority's exercise of rights of ownership on the acquired land was in operation. It could not have been imposed for the purpose of protecting the former owner or occupier's right to be heard by the Administrative Court. It must also follow that having enacted the provision in the exercise of the plenary legislative powers Parliament was at liberty to remove it from the b statute without infringing any constitutional right of the former owner or occupier of acquired land.

I would hold that, insofar as the questions referred for determination were to raise a case for the granting of the relief sought, there was no merit in them.

COSTS c

The applicant has been unsuccessful on all the constitutional questions referred for determination. The general rule that costs should follow the result must apply unless there are special circumstances on the basis of which the court, in the exercise of its discretion, may decline to apply the general rule. Mr *Trengove* argued that even if the applicant was unsuccessful his costs, including the costs for two counsel, should be paid by the State because the d questions referred to this court raised matters of national interest.

Mrs *Matanda-Moyo*, on the other hand, contended that the applicant was first and foremost interested in protecting private property from compulsory acquisition. She urged the court to adopt the approach on costs adopted in the line of similar cases referred to in *Attorney-General v Blumears & Anor* e 1991 (1) ZLR 118 (S) at 126F-G and not make an order as to costs. I agree with Mrs *Matanda-Moyo* that although the questions referred for determination involved questions of constitutional importance, they were a result of an application lodged by the applicant with the main object of protecting private property from compulsory acquisition by the State. The costs incurred by the applicant were not incurred in pursuit of a public interest. It would not be f proper to mulct the State with costs for having successfully defended the public interest in the land reform programme from a constitutional attack. There shall therefore be no order as to costs.

I need to say one last thing. The parties asked the court to make an order, by consent, on the two matters relating to the invalidity of the preliminary notice ^g published and the order of acquisition made in respect of the applicant's land. This matter was not referred for determination by this court by the High Court. It means that the High Court is seized with the matter and is the proper court to make the order sought. We must, therefore, decline the kind invitation to obliquely undermine the authority of that court over a matter still properly pending its decision. ^h

2004 (2) ZLR p319

Malaba JA

^a The application is accordingly dismissed with no order as to costs.

CHIDYAUSIKU CJ, CHEDA JA and ZIYAMBI J A concurred.

SANDURA JA: I have read the judgment prepared by MALABA JA but respectfully disagree with it. In my view, the Land Acquisition Amendment ^b Act No. 6 of 2002 ("the Amendment Act") was not lawfully enacted and is, therefore, invalid and of no force or effect. I say so because it was not enacted in accordance with the provisions of Standing Orders 102(2)(i) and 127 of the Standing Orders of Parliament ("the Standing Orders").

The Standing Orders were made by Parliament in terms of s 57(1) of the Constitution of Zimbabwe ("the Constitution"). That section, in relevant part, ^c reads as follows:

"57. Standing Orders

(1) Subject to the provisions of this Constitution and any other law, Parliament may make Standing Orders with respect to —

- (a) the passing of Bills; ^d
- (b) - (d) ..."

The Standing Orders, therefore, have the force of constitutional provisions. Indeed, this is acknowledged by Malaba JA.

Standing Order 127 reads as follows:

"Subject to the provisions of the Constitution, *no bill shall be introduced* ^e which is of the same substance as some other bill which has been introduced during the same session and which has not been withdrawn" (emphasis added).

The applicant's contention was that as the substance of the Land Acquisition Amendment Bill ("the Amendment Bill") was the same as s 27(1) of the General Laws Amendment Bill which had been introduced during the same session ^f and had not been withdrawn, the Amendment Bill was introduced in violation of Standing Order 127. In my view, the correctness of that contention cannot be questioned. It was, indeed, accepted by Malaba JA.

Once it is accepted, as it obviously must be, that the Amendment Bill was introduced in violation of Standing Order 127, *cadit quaestio*. That is the end ^g of the matter. The Amendment Act is invalid and of no force or effect. That is what this court said in *Biti & Anor v Minister of Justice & Anor* 2002 (1) ZLR 177 (S).

It is, indeed, crystal clear from the wording of Standing Order 127 that the introduction of a second Bill of the same substance as another Bill which has

2004 (2) ZLR p320

Malaba JA

already been introduced during the same session but not withdrawn is ^a prohibited or barred. I have no doubt in my mind that ignoring or overlooking such a clear prohibition must be fatal to the resultant Act of Parliament.

I now turn to the provisions of Standing Order 102(2)(i). That Standing Order reads as follows:

"Every bill shall be ordered to be brought in upon motion moved after notice ^b that leave be granted to bring in such bill, unless such bill is brought up by a committee appointed to draft it to give effect to a resolution of the House, in which case such bill shall be read the first time without any question being put: Provided that —

- (i) a Minister may, after having given notice, present a bill without ^c having previously obtained leave."

It was common cause that the Amendment Bill was presented, without having previously obtained leave, by the second respondent. He purported to do so in his capacity as a Minister.

The issue which arises for determination is whether at the time the second respondent presented the Amendment Bill on 7 May 2002, he was a Minister. If he was, the presentation of the Amendment Bill by him, without having previously obtained leave, was proper. On the other hand, if he was not a Minister at the relevant time, he could not present the Bill without having previously obtained leave. ^E

The applicant's contention was that as the second respondent had not taken and subscribed the oaths of loyalty and office in terms of s 31D(2) of the Constitution, pursuant to the President's re-election and assumption of office on 1 April 2002, he had not yet entered upon his office, was not a Minister and could not, therefore, present the amendment Bill without having previously obtained leave. In my view, there is merit in this contention. ^F

However, before considering this issue in some detail I shall set out the relevant constitutional provisions. They are found in ss 28, 31D and 31E of the Constitution.

Section 28, in relevant part, reads as follows:

"28. Qualifications and election of President ^G

(1) – (2) ...

(3) An election to the office of President shall take place within ninety days –

(a) before the term of office of the President expires in terms of s 29; or ^H

2004 (2) ZLR p321

Malaba JA ^A

(b) ...

(4) ...

(5) A person elected as President shall assume office –

(a) where he has been elected in accordance with paragraph (a) of subsection (3), *on the expiry of the term of office of the previous President*; ^B

(b) ...

(6) Before entering upon his office, a person elected as President shall take and subscribe before the Chief Justice or other judge of the Supreme Court or the High Court the oaths of loyalty and office ..." (emphasis added).

^D Section 31D, in relevant part, reads as follows:

"31D Ministers and Deputy Ministers

(1) The President –

(a) shall appoint Ministers and may assign functions to such Ministers ...; and

(b) may appoint Deputy Ministers of any Ministry ...

^D (2) Any person appointed under this section shall, before entering upon his office, take and subscribe before the President or some other person authorized by the President in that behalf the oaths of loyalty and office ...

(3) – (4)..." (emphasis added).

^E And s 31E, in relevant part, reads as follows:

"31E Tenure of office of Vice-Presidents, Ministers and Deputy Ministers

(1) The office of a Vice-President, Minister or Deputy Minister shall become vacant –

a– (b) ...; or ^F

(c) upon the assumption of office of a new President.

(2) – (3) ..."

In my view, the reference in s 31E(1)(c) of the Constitution to "a new President" simply means a newly elected President, whether or not he is an incumbent President who has been re-elected.

^G In this regard, it is pertinent to note that the Constitution does not at all distinguish between the assumption of office by the incumbent President who has been re-elected, and the assumption of office by a person elected as President for the first time. The same rules govern the assumption of office by ^H both.

Malaba JA

In the first place, where an election to the office of President takes place in terms ^A of s 28(3)(a) of the Constitution, i.e. within ninety days before the term of office of the President expires, s 28(5)(a) of the Constitution provides that the person elected as President shall assume office on the expiry of the term of office of the previous President. That applies, not only to a person elected as President for the first time, but also to an incumbent President who has been re-elected. ^B

Secondly, in terms of s 28(6) of the Constitution, before entering upon his office, a person elected as President is obliged to take and subscribe before the Chief Justice or other judge of the Supreme Court or the High Court the oaths of loyalty and office. That applies to an incumbent President who has been re-elected and to a person who has been elected as President for the first ^C time.

And thirdly, in terms of s 31D(1)(a) of the Constitution, the President is obliged to appoint Ministers. There is nothing in that section which exempts from that obligation an incumbent President who has been re-elected.

It was common cause that the presidential election held on 9 and 10 March 2002 was held in terms of s 28(3)(a) of the Constitution, and that the incumbent ^D President was re-elected. That election was held because the President's term of office was due to expire on 1 April 2002.

Pursuant to his re-election, the President assumed office, in terms of s 28(5)(a) of the Constitution, "on the expiry of the term of office of the previous President", which was 1 April 2002. It is significant that the Constitution ^E describes him as "the previous President" when it refers to him in his previous term of office.

In addition, it is pertinent to note that pursuant to the President's re-election and assumption of office the second respondent, and the other members of the Cabinet which was in existence before the President entered upon his office on 1 April 2002, took and subscribed before the President the oaths of ^F loyalty and office in terms of s 31D(2) of the Constitution on 26 August 2002.

In my view, the President obviously appreciated that he was a new President in terms of s 31E(1)(c) of the Constitution.

I am, therefore, satisfied that in terms of s 31E(1)(c) of the Constitution the second respondent ceased to be a Minister upon the assumption of office by ^G the President on 1 April 2002. He could not, therefore, present the Amendment Bill on 7 May 2002 without previously having obtained leave.

Consequently, the Amendment Act was enacted in violation of the peremptory provisions of Standing Order 102(2)(i), and is, therefore, invalid and of no force ^H or effect.

2004 (2) ZLR p323

Malaba JA

^A Having arrived at that conclusion, I do not consider it necessary to deal with the applicant's submissions in respect of the alternative order sought by him, i.e. "that the amendment of ss 8 and 9 of the Land Acquisition Act [*Chapter 20:10*] made by the Land Acquisition Amendment Act No. 6 of 2002 violates ss 16(1)(b) and 18(9) of the Constitution and (is) consequently invalid and of no force or effect."

^B In the circumstances, I would have made the following order:

1. It is declared that the Land Acquisition Amendment Act No. 6 of 2002 was not lawfully enacted and is consequently invalid and of no force or effect.
2. The costs of this application shall be paid by the respondents, jointly and severally, the one paying the others to be absolved.

^C *Stumbles & Rowe*, applicant's legal practitioners

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

Document 41 of 47**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/S v PARADZA 2004 (2) ZLR 324 (S)

S v PARADZA 2004 (2) ZLR 324 (S)**2004 (2) ZLR p324**

Citation	2004 (2) ZLR 324 (S)
Case No	Judgment No. HH-182-04
Court	High Court, Harare
Judge	Bhunu J
Heard	16 November 2004
Judgment	16 November 2004
Counsel	<i>A Musona</i> , with him <i>C Phiri</i> , for the State <i>J Gauntlett SC</i> with him <i>E T Matinenga</i> , for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Court — judge — recusal — grounds for — trial of fellow judge c

Headnote

The judge *mero motu* recused himself of presiding at the trial of a fellow judge, pointing out that where two judicial officers are attached to the same bench as colleagues and one of them is a litigant or an accused, then there is a reasonable ground for the other legal officer to be recused from trying the action. It would be more appropriate that the matter be handled by a retired judge or someone from outside the jurisdiction.

Case cited

SA Motor Acceptance Corp (Edms) Bpk v Oberholzer 1994 (4) SA 808 (T)

Case information

A Musona, with him *C Phiri*, for the State
J Gauntlett SC with him *E T Matinenga*, for the accused

Judgment

BHUNU J: Ladies and gentlemen, being a sitting judge who has been assigned to preside over this case which involves a fellow sitting judge, I have agonised over this matter for a very long time regarding whether or not I should preside over this case. ¶

As you will undoubtedly appreciate, the bulk of my fellow judges, if not all, are in the same predicament.

Previously, I thought that as a professional judge, I would be able to disabuse my mind of any extraneous influences and preside over the matter dispassionately. I however, regret to say that I

have been progressively overwhelmed by the enormity of the task before me as the trial date drew nearer.

I was with Mr Justice Paradza in the liberation struggle. We worked together as magistrates and thereafter he appeared before me as a legal practitioner. We are now fellow judges and colleagues.
H

2004 (2) ZLR p325

Bhunu J

A I strongly feel that this is a case which should perhaps be best handled by a retired judge or someone from outside our jurisdiction.

I am of the view that, whatever my decision is going to be in this case, justice would not be seen to be done and yet justice must not only be done but it must be seen to be done. I therefore feel compelled to recuse myself.

I feel comforted in taking that stance by the decision in the case of *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1994 (4) SA 808 (T). In that case, it was held that:

“Where two judicial officers are attached to the same bench as colleagues and one of them is a litigant or an accused then there is a reasonable ground for the other legal officer to be recused from trying the action.”

c In recusing myself, I feel constrained to point out that neither the State nor the defence has prompted my recusal. The decision is purely mine coming from the depth of my heart and conscience.

I accordingly, recuse myself and withdraw from presiding over this case.

d *Dube, Manikai and Hwacha*, accused’s legal practitioners

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Document 42 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/PHIGIDEMAC CONSULTANTS (PVT) LTD v ZVIMBA RURAL DISTRICT COUNCIL 2004 (2) ZLR 326 (S)

PHIGIDEMAC CONSULTANTS (PVT) LTD v ZVIMBA RURAL DISTRICT COUNCIL 2004 (2) ZLR 326 (S)

2004 (2) ZLR p326

Citation	2004 (2) ZLR 326 (S)
Case No	Judgment No. HH-184-04
Court	High Court, Harare
Judge	Uchena J
Heard	24 September 2003; 14 October 2003; 30 July 2004
Judgment	24 November 2004
Counsel	<i>R M Fitches</i> , for the plaintiff <i>A Gijima</i> , for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Professions and trades — estate agent — practising as such without being registered — company which had no officer or assistant as a registered estate agent — company engaging a quantity surveyor to carry out valuation — company and quantity surveyor practising an estate agent

Professions and trades — quantity surveyor — work of — valuing property D — valuing buildings for purposes of sale — not part of work of a quantity surveyor

Headnote

In terms of s 53(1) of the Estate Agent Act [Chapter 27:05], any business practicing as an estate agent must be under the actual control and management of a principal who is a registered estate agent who is not at ^εthe same time acting as such for another company or on his own. The estate agent is therefore expected to devote his attention to the particular company. The principal must be an executive director of the company. If the principal does not personally conduct the business then that can be done under the control of an assistant who is himself a registered ^εestate agent. None of these requirements were met in respect of the plaintiff.

The plaintiff company claimed against the defendant rural council for the work done in valuing certain of the council's buildings for the purpose of selling them. The plaintiff was not a registered estate agent nor had it an estate agent in its employ. For the valuation exercise, it employed ^εa consultant who was a registered quantity surveyor. The defendant argued that the contract was illegal being in breach of s 48(1) of the Estate Agents Act [Chapter 27:05], which forbids any company to practice or carry on business as an estate agent under any personal names which is not the name of a registered estate agent, who is or was a principal, ^ε

2004 (2) ZLR p327

Uchena J

^A assistant or working partner of the company concerned. While it was the evidence that the plaintiff had no officer registered as an estate agent, the plaintiff argued that, although the work of valuing property was indeed one of the acts encompassed by the phrase "practice...as an estate agent" in s 48(1) of the Act, s 52 thereof excluded a registered quantity surveyor action in the course of his practice as such.

^B Held, that in the absence of any other explanation, the plaintiff was in breach of s 48(1)(b) of the Act. None of the requirements of s 53(1) of the Estate Agents Act were met in respect of the plaintiff.

Held, further, that the consultant who had been employed by the plaintiff was not acting in the course of his practice as a quantity surveyor. In terms of s 2 of the Quantity Surveyors Act [Chapter 27:13], the work of a ^c quantity buildings includes preparing valuations on existing buildings for purposes of mortgages, rentals and insurance. Valuations to advise an owner on the value of buildings for the purpose of selling them are clearly not covered under the work a quantity surveyor can do. The consultant was thus not acting in the course of his practice as a quantity ^D surveyor when he did valuations for the council acting as the company's consultant.

Held, further, that in the result the contract between the parties was void for illegality and that the plaintiff's claim must be dismissed with costs. ^c

Legislation considered

^ε Estate Agents Act [Chapter 27:05], ss 48(1)(b), 52(2), 52(3) and 53(1)

Quantity Surveyors Act [Chapter 27:13], s 2

Rural Councils Act [Chapter 29:13], s 79(3)

Case information

R M Fitches, for the plaintiff

¶ *A Gijima*, for the defendant

Judgment

UCHENA J: On 9 January 2001, the plaintiff wrote to the defendant inviting it to do business with it. On 10 January 2002, the defendant wrote to the plaintiff inviting it to value its properties.

On 12 January 2002, the plaintiff wrote to the defendant accepting the offer ^g and requested for transport, indicating that its fee was 5 percent of the total value of the properties to be valued.

The defendant provided the plaintiff with transport from Kadoma to its ^h properties on a daily basis until the work was completed.

2004 (2) ZLR p328

Uchena J

The plaintiff prepared its valuation report and presented it to the defendant. ^a The defendant did not respond. The plaintiff send a reminder to which the defendant responded by complaining that the plaintiff's valuation was inflated and that, if the plaintiff wished, it could sell the properties at those values on behalf of the defendant.

The plaintiff subsequently sent a letter of demand and finally issued summons ^b claiming \$18 557 550, being five percent of the total valuation of the defendant's properties. The defendant did not concede. It raised the following further defences:

1. Mr Jonasi had no authority to contract on behalf of the defendant.
2. the plaintiff was not qualified to do the valuations. ^c
3. Mr Chakwenya who prepared the report for plaintiff did not take part in the valuations and was not a qualified Estate Agent.
4. the contract was illegal in view of the provisions of s 48(1)(b) of the Estate Agents Act [*Chapter 27:05*], hereinafter referred to as the Act.

The issues to be decided by the court are whether: ^d

- (1) the parties entered into a binding contract.
- (2) the contract was tainted with illegality;
- (3) the amount claimed is permissible in terms of the Estate Agents Act; and
- (4) Mr Chakwenya was qualified to do valuations and participated in the valuation of the defendant's properties. ^e

I will first determine the issues based on law and then if necessary determine the factual issues.

THE CONTRACT

A contract becomes binding when the parties' minds meet on the terms of the contract. In this case, the plaintiff and the defendant clearly agreed on the ^f properties to be valued and the contract price. The defendant took the plaintiff to each of the properties in its own motor vehicles, the plaintiff's staff being led by the defendant's staff.

The plaintiff performed his part of the contract. The defendant should, therefore, in the absence of a valid defence, also perform its part of the ^g contract. The defendant alleges that the agreement never came into existence or is unenforceable as it is tainted with illegality for the following reasons:

- (a) Mr Jonasi had no authority to contract on behalf of the defendant;
- (b) the plaintiff, not being a registered estate agent, contravened s 48(1) of ^h

2004 (2) ZLR p329

Uchena J

^a the Estate Agents Act [*Chapter 27:05*] and therefore, the court cannot enforce an illegal contract;

- (c) the plaintiff's fee of 5 percent of the total valuation is not permissible in terms of Estate Agents Act.

If the plaintiff's conduct is proved to fall under any of (b) or (c) above, then ^a the contract would be unenforceable because of illegality.

MR JONASI'S AUTHORITY

The plaintiff alleged Mr Jonasi, as acting chief executive officer, had authority to act on behalf of the defendant. The defendant, on the other hand, submitted that Mr Jonasi had no authority to contract on its behalf because council never passed a resolution enabling him to act on its behalf.

^c The parties' dispute on this aspect can be resolved by an examination of s 79(3) of the Rural District Councils Act [*Chapter 29:13*] which provides as follows:

"Before a council enters into a contract for the:

- (a) execution for the council of any work which involves the payment by the council of an amount exceeding such sum as may be prescribed; ^d or
- (b) supply to council of any goods or material which supply is likely to involve payment by the council of an amount exceeding any financial year such sum as may be prescribed or
- (c) sale of any property of the council;

^e the council shall call for tenders by notice posted at the office of the council and advertised in two issues of a newspaper.

Provided that:

- (i) In the case of a proposed contract for a sale of any property of the council, the council may:
 - (a) resolve to dispense with tenders; and ^f
 - (b) sell the property concerned by public auction or private treaty
- (ii) *this subsection shall not apply to*
 - (a) ...
 - (b) ... ^g
 - (c) ...
 - (d) ...
 - (e) ...
 - (f) *any contract entered into by the council for the provision of professional service*" (my ^h emphasis).

2004 (2) ZLR p330

Uchena J

This section clearly requires that council should pass a resolution before ^a certain contracts are entered into. It, however, clearly excludes contracts for professional services from that requirement. This means Mr A Jonasi had authority to contract for the defendant without a resolution of council authorising him to do so, as the contract between the parties is for the provision of professional services. ^b

THE ALLEGED ILLEGALITIES

It is trite that the courts will not enforce an illegal contract. The defendant alleges that the plaintiff contravened s 48(1) of the Estate Agents Act. Section 48(1) and (3) provides as follows:

"(1) Subject to this Act; no person shall — ^c

- (a) practice or carry on business as an estate agent, or describe himself or allow himself to be described or hold himself out to be an estate agent, unless he is registered; or
- (b) in the case of a company or partnership, practice or carry on business as an estate agent *under any personal names which is not the name of a registered estate agent who is or was a principal, assistant or ^d working partner of the company or partnership concerned.*

(2) ...

(3) A person who is convicted of contravening subsection (1) or (2) shall be liable to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding three years or to both such fine ^e and such imprisonment ..." (my emphasis).

In terms of s 48(1)(b) no company which is not registered as an estate agent can practice or carry on business as an estate agent under any personal name which is not the name of a registered

estate agent who is or was a principal, assistant or working partner of the company or partnership concerned.

In this case, Mr Chikovero, who is the plaintiff's managing director, is not a F registered estate agent. The plaintiff does not within itself have a registered estate agent. It used a consultant, one Mr Chakwenya. It is clear from Mr Chikovero's evidence that Mr Chakwenya is not an officer of the plaintiff. In the absence of any other explanation, the plaintiff therefore contravened s 48(1)(b) of the Estate Agents Act. G

The plaintiff's counsel submitted that the plaintiff did not contravene s 48 because the definition of "practice as an estate agent" as given in s 2 of the Act, is subject to s 52.

Section 2(2) of the Estate Agents Act provides as follows:

"(2) For the purposes of this Act, practice as an estate agent, subject to H

2004 (2) ZLR p331

Uchena J

A section fifty two, means the doing for payment or reward of any of the following acts –

- (a) in connection with the sale or proposed sale of immovable property belonging to another person –
 - (ii) the bringing together or taking of steps to bring together the parties to the sale or proposed sale; B
 - (iii) the negotiating of the terms of the sale or proposed sale;
 - (iv) acting as auctioneer in connection with the sale or proposed sale;
- (b) the valuing for any purpose of immovable property or any part thereof; c
- (c) the assessing of the rental value of immovable property or any part thereof" (my emphasis).

In the present case, the plaintiff clearly valued the defendant's immovable property for payment or reward.

If the plaintiff is not covered by s 52(3), then its actions fall under the definition D of practicing as an estate agent.

Section 52(3) provides as follows:

"For the purposes of this Act, the following persons shall not be regarded as practicing or carrying on business as an estate agent whilst doing any act referred to in paragraph (b) or (c) of the definition of "practice as an estate agent" in subsection (2) of section two – E

- (a) an architect registered in terms of the Architects Act [Chapter 27:01] *in the course of his practice as such;*
- (b) a member of the Quantity Surveyors Division of the Royal Institute of Chartered Surveyors or the Zimbabwe Institute of Quantity Surveyors *in the course of his practice as such*" (my emphasis).

My understanding of s 52(3)(b), which the plaintiff's counsel relied on, is that the Chartered Surveyor or Quantity Surveyor is excluded from the definition in s 2(2) if he acts in the course of his practice as such. In the present case, Mr Chakwenya was not acting in the course of his practice but was acting as a consultant to the plaintiff. The question which this court has to answer is whether Mr Chakwenya was acting in the course of his practice as a quantity surveyor.

This question can be answered by referring to section 2 of the Quantity Surveyors Act [Chapter 27:13] which defines the work of a quantity surveyor.

Section 2 of the Quantity Surveyors Act provides as follows:

H "work of a quantity surveyor" includes –

2004 (2) ZLR p332

Uchena J

- (a) preparing bills of quantities from drawings for new buildings for A purposes of calling for tenders or for negotiating a building or civil engineering contract;
- (b) administering contracts based on bills of quantities in all matters of cost, preparing and issuing statements for interim payment certificates and preparing the final account; B
- (c) preparing cost estimates for new buildings or alterations to existing buildings other than upon a 'cost per area' basis; and

- (d) inspecting existing buildings, preparing valuations thereon and reporting for purposes of mortgages, rentals and insurance.”

It is clear that the quantity surveyor’s work as in (a) to (c) is not in any way related to what Mr Chakwenya did for the plaintiff. However, the work covered c under (d) includes valuations, but for specific purposes. The quantity surveyor can do valuations for purposes of mortgages, rentals and insurance.

In the present case, the plaintiff was to do valuations to advise the defendant on the value of the properties for the purpose of selling them. This is clearly not covered under the work a quantity surveyor can do. This means Mr D Chakwenya was not acting in the course of his practice as a quantity surveyor when he did valuations for the defendant acting as the plaintiff’s consultant. The work he did is therefore not exempted under s 52(3) of the Estate Agents Act.

This issue cannot be exhausted until one considers the effect of s 53 of the Estate Agents Act to what Mr Chakwenya did for the plaintiff. E

Section 53(1) of the Estate Agents Act provides as follows:

“53(1) A company or partnership may, notwithstanding section *forty eight* practice or carry on business as an estate agent or describe itself or hold itself out or allow itself to be held out as an estate agent if:

- (a) the business of the company or partnership, in so far as it relates to F the practice of an estate agent, is under the direct control and management of a principal who —
 - (i) is a registered estate agent; and
 - (ii) does not act at the same time in a similar capacity for any other company or partnership or on his own behalf; and G
 - (iii) is an executive director in the case of a company or a working partner in the case of a partnership; and
- (b) in every premises where any business referred to in paragraph (a) is carried on which is not personally conducted by the principal referred to in paragraph (a), such business is conducted under the direction of that principal or by an assistant who is a registered estate agent.” H

2004 (2) ZLR p333

Uchena J

A My understanding of s 53(1)(a) and (b) is:

- (1) Any business practicing as an estate agent must be under the actual control and management of a principal who is a registered estate agent who is not at the same time acting as such for another company or on his own. The estate agent is therefore expected to devote his attention to a particular company or partnership. B
- (2) The principal is an executive director of the company or a working partner of the partnership.
- (3) If the principal referred to earlier does not personally conduct the business then that can be done under the control of an assistant who is himself a registered estate agent.

c In the present case, the principal or director of the plaintiff is not a registered estate agent. The plaintiff does not work under the direct control and management of an estate agent. It does not have as its official even an assistant who is a registered estate agent. Mr Chakwenya who is himself not a registered estate agent participated on consultancy basis. He has no other links with the D plaintiff company.

Even if Mr Chakwenya was a principal or assistant within the plaintiff and was a registered estate agent, his involvement with the plaintiff would fail under s 53(1)(a)(ii) in that he was not devoting all his attention to the plaintiff alone. He had his own practice. His involvement would therefore fail in that respect.

In conclusion, it is clear that: E

1. Mr Chakwenya as a quantity surveyor was not entitled to act as an estate agent for the purpose of valuations aimed at determining the value of the defendant’s properties for sale.
2. Mr Chakwenya was not a principal or assistant of the plaintiff. He was a mere consultant. F
3. Mr Chakwenya is not a registered estate agent.
4. Mr Chakwenya’s practice, even if he was a registered estate agent, was not confined to the plaintiff as required by s 53(1)(a)(ii) of the Act.

Therefore, the work done by the plaintiff was prohibited by s 48(1)(b) of the Act as there is no allegation or evidence that the plaintiff was exempted in terms ^G of s 48(1).

The agreement between the plaintiff and the defendant is therefore not enforceable due to its being in contravention of s 48(1) of the Act. In view of this finding, I need not consider the other issues raised as nothing can be ^H served once the contract is found to be tainted with illegality.

2004 (2) ZLR p334

Uchena J

The plaintiff's claim is therefore dismissed with costs. ^A

Wintertons, the plaintiff's legal practitioners

Manase & Manase, the defendant's legal practitioners ^B

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Document 43 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/ZHAKATA v MANDOZO NO & ANOR 2004 (2) ZLR 335 (H)

ZHAKATA v MANDOZO NO & ANOR 2004 (2) ZLR 335 (H)

2004 (2) ZLR p335

Citation	2004 (2) ZLR 335 (H)
Case No	Judgment HH-22-05
Court	High Court, Harare
Judge	Bhunu J
Heard	23 November 2004
Judgment	9 December 2004
Counsel	<i>F Mutamagira</i> , for the applicant <i>S Hwacha</i> , for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Court — High Court — jurisdiction — labour matters — review — no jurisdiction to entertain review in the first instance

Employment — code of conduct — determination made under — review of — must be heard by Labour Court — no jurisdiction in High Court to entertain a review in the first instance

Headnote

- When the High Court sits to review a matter, it sits as court of first instance (*dicta per* Gubbay CJ in *Muchero & Anor v Attorney-General* 2000 (2) ZLR 286 (S) followed). An appeal in the context

of the Labour Relations Act [*Chapter 28:01*] is not an appeal in the ordinary sense. It is a special kind of appeal which encompasses a review, as provided for in s 97 of that Act. The “appeal” in s 89 includes a review. Appeals and reviews in labour matters must be referred to the Labour Court in the first instance and not to the High Court.

Cases cited

Moyo v Ndhlovu 1971 (2) RLR 50 (G)

Muchero & Anor v Attorney-General 2000 (2) ZLR 286 (S)

Tuso v City of Harare 2004 (1) ZLR 1 (H)

Legislation considered

Labour Relations Act [*Chapter 28:01*], ss 89(6) & 97

Case information

G F Mutamagira, for the applicant

S Hwacha, for the respondent

Judgment

BHUNU J: The applicant was dismissed from employment in terms of the Labour Relations Act [*Chapter 28:01*] as amended. He is alleged to have

2004 (2) ZLR p336

Bhunu J

committed an act inconsistent with the fulfillment of the express or implied conditions of his contract of employment and fraud.

He has now approached this court on review complaining of procedural irregularities. The respondents have raised a point *in limine* objecting to this court’s jurisdiction. In *Tuso v City of Harare* 2004 (1) ZLR 1 (H) in interpreting s 89(6) of the Labour Relations Act, [*Chapter 28:01*] as amended, I came to the conclusion that the intention of the legislature was to confer exclusive jurisdiction on the Labour Court in all labour matters. The Supreme Court is yet to determine the correctness or otherwise of that interpretation.

In the interim, the judgment has generated intense heat and legal debate if not controversy. Not surprisingly, counsel for the applicant has launched a spirited if not vitriolic attack on the decision in the *Tuso* case *supra*.

The relevant provisions at issue provide as follows:

“89 Functions, powers and jurisdiction of the Labour Court:

(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.

(2) ...

(6) 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).”

I believe it is trite that a review is an application. If it is accepted that a review is an application, it follows, therefore, that subs (6) excludes the jurisdiction of all other courts in the first instance.

A great deal of energy was expended in trying to persuade the court that when the High Court sits to review a matter, it is not sitting as a court of first instance. Reliance was placed on the dictionary meaning of the term “court of first instance”. Counsel for the applicant would have saved time had he looked at the case of *Muchero v Attorney-General* 2000 (2) ZLR 286 (S) where Gubbay CJ had occasion to remark as follows:

“Quite apart from the non-compliance with rules 257 and 259 of the High Court Rules (applicable to the Supreme Court by virtue of r 58 of the Supreme Court Rules) s 25(3) of the Supreme Court Act [*Chapter 7:13*], *G* denies any person the right to institute a review in the *first instance* before the Supreme Court or a judge of the Supreme Court. Recourse must be had to the High Court.

In the result, this court is left with no option but to declare that the referral to it is incompetent.” ^H

2004 (2) ZLR p337

Bhunu J

^A The above quotation is lucid and self-explanatory. It needs no further elucidation. It puts paid to the argument that when the High Court sits to review a case, it does not sit as a court of first instance.

It was further argued that s 89(2)(iii) of the Labour Act specifically mentions appeals without specifically mentioning reviews. Had the legislature intended to include reviews, then the word “review” would have been specifically ^B mentioned.

Had counsel looked at s 97 of the Act, it would have been apparent that in the context of the Labour Act an appeal includes a review. The section reads in part:

“97 *Appeals to Labour Court*

(1) Any person who is aggrieved by –

(a) ...

(b) a determination made under an employment code in terms of section *one hundred and one* ...

(c) ...

^D may within such time and in such manner as may be prescribed *appeal* against such determination or conduct to the Labour Court.

(2) *An appeal in terms of subsection (1) may –*

(a) address the merits of the determination or decision appealed against; ^E

(b) *seek a review of the determination or decision on any ground on which the High Court may review it;*

(c) *address the merits of the determination appealed against and seek a review on a ground referred to in paragraph (b)*” (my emphasis).

From the foregoing, it is clear to me that an appeal in the context of the Labour ^F Relations Act is an appeal not in the ordinary sense. It is a special kind of appeal which encompasses a review as provided under s 97 of the Act. Thus, nothing can be gained from looking at the ordinary meaning and definition of “appeal” because an appeal in terms of the Labour Act was never intended to be an ordinary appeal. This explains why the law-maker was at pains to give a special definition of the word “appeal” under s 97(2).

^G Thus, the word “appeal” in s 89 is not used in its ordinary and grammatical meaning but as specially defined in s 97(2) of the Act. Looked at from that ^H angle, it means that the word “appeal” in s 89 includes review.

2004 (2) ZLR p338

Bhunu J

That finding leads to the inexorable conclusion that s 89(6) of the Labour Act ^A expressly excludes the jurisdiction of this court in matters of this nature in the first instance.

In *Muchero’s case supra*, it appears to me that the intention of the legislature was that matters of this nature should be first referred to the Labour Court for review before proceeding to the High Court. ^B

In *Tuso v City of Harare*, I dealt fully with the reasons why I feel that this court has no jurisdiction in labour disputes of this nature. Ideally, they should be referred to the appropriate special court created for the purpose.

In *Moyo v Ndhlovu* 1971 (2) RLR 50 (G), the mere fact that the enabling statute provided for an appeal to a special appeal court was held to have ousted the ^C High Court’s review jurisdiction by necessary implication. The headnote reads:

“Held, that the African Affairs Act [Chapter 92] provides for an appeal to a Special Court of appeal on questions of law and that it was a necessary implication of the legislation in question that the jurisdiction of the High Court is ousted when it comes to a question whether the court *a quo* ^D correctly applied the law. Accordingly, the review could not be entertained.”

In providing reasons for his decision, Greenfield J had this to say:

"The African Affairs Act [*Chapter 92*] which constitutes Civil Courts presided over by district commissioners also provides for an appeal to a special court of appeal. The plaintiff therefore had a remedy by way of an ^ε appeal if he was dissatisfied with the decision of the District Officer ... it seems to me that the appeal court referred to is eminently the forum which should be used to dispose of the case if the plaintiff remains dissatisfied with the outcome of the case in the court below...

... we are concerned not with an administrative tribunal but with a court ^ϕ of law, and the legislation constituting this court sets up an appeal court and makes provision for appeals *inter alia*, on questions of law, moreover there is no suggestion of any irregularity *strict sensu*. *It seems to me to be a necessary implication from the legislation in question that the jurisdiction of the High Court is ousted when it comes to the question whether the court a quo correctly applied the law.* ^ς

In the circumstances I am *not prepared to entertain the request for review of the proceedings*, but I direct that copies of this judgment be supplied to the parties, so that the plaintiff can consider whether to make application to the appeal court for an extension of time in which to appeal.

The learned Chief Justice agrees with this judgment" (my emphasis). ^η

2004 (2) ZLR p339

Bhunu J

A I am in respectful agreement with the learned judge's reasoning. In this case, the applicant had a remedy by way of an appeal to the Labour Court, a court specially created to deal with labour disputes on both appeal and review.

[*Editor's note: the remaining portion of the judgment is not germane to this report*]

^θ [The learned Judge concluded:]

Appeals and reviews in labour matters must therefore be referred to the Labour Court in the first instance, for to do otherwise will defeat the whole purpose for which the Labour Court was created.

Even if I were to be proved wrong in holding that the court lacks the necessary jurisdiction the applicant has still not discharged the onus of establishing why ^ς he has not exhausted his domestic remedies.

In the result, I am constrained to refer this matter to the appropriate court created for the purpose.

It is accordingly ordered that:

- (1) this matter be and is hereby referred to the Labour Court for determination. ^δ
- (2) the costs be costs in the cause.

Mudambanuki & Associates, the applicant's legal practitioners

^ε *Dube, Manikai and Hwacha*, the respondent's legal practitioners ^δ

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Document 44 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/MANDIKONZA & ANOR v CUTNAL TRADING (PVT) LTD & ORS 2004 (2) ZLR 340 (H)

MANDIKONZA & ANOR v CUTNAL TRADING (PVT) LTD & ORS 2004 (2) ZLR 340 (H)

2004 (2) ZLR p340

Citation	2004 (2) ZLR 340 (H)
Case No	Judgment No. HH-189-04
Court	High Court, Harare
Judge	Uchena J

Heard	19 November 2004
Judgment	15 December 2004
Counsel	<i>J Colegrave</i> for the applicants <i>L M Ranchhod</i> for the respondents
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Arbitration — *arbitral award — enforcement of — application to court to recognise and enforce award — such application to be in the form of a court application with notice to the other party*

Headnote

The two applicants, farmers in *Nyanga*, contracted with the first respondent. [Ⓐ] He financed their crop of table and seed potatoes, in return for which they undertook to sell their crop to him at agreed prices. In respect of the seed potatoes such a contract is unlawful. It was alleged by the first respondent, denied by the applicants, that a subsequent agreement varied these terms. The matter was referred to arbitration and the arbitrator made an award of certain sums to the first respondent. The applicants did not pay. [Ⓔ] The first respondent purported to register the award with the Registrar of the High Court, whereupon a warrant of execution was issued and the applicants' farm equipment was attached. On an urgent application to stop the third respondent from selling the equipment:

Held, Articles 35 & 36 of the First Schedule to the Arbitration Act, No 6 of [Ⓕ] 1996 require the application for enforcement to be (1) to a judge (2) on notice to the other party. An application to the Registrar, without notice, is insufficient. The warrant of execution was set aside with costs, and the goods were ordered to be returned to the applicants.

Legislation considered [Ⓖ]

Arbitration Act [*Chapter 7:06*], First Schedule, Articles 35 & 36

Case information

J Colegrave for the applicants

L M Ranchhod for the respondents [Ⓗ]

2004 (2) ZLR p341

Uchena J

Judgment

[Ⓐ] **UCHENA J:** The first and second applicants are farmers in Nyanga. In August 2003, they entered into a contract with the first respondent who financed their potato crop for the 2003 to 2004 season. The contract had, as part of its terms, provisions requiring the applicants to grow a certain hectareage of potatoes and to sell the table and seed potatoes they were to grow to the first respondent.

[Ⓑ] It is common cause that the hectareage the applicants were to grow was more than the sizes of the farms allocated to them. The sale of seed potato to the first respondent is prohibited by law. The agreed sale price for the table potatoes was too low compared to the market price.

The first respondent alleges that they entered into another agreement in terms [Ⓒ] of which the applicants were to sell their crop on the open market and the respondent would get fifty percent of the proceeds.

The applicants deny that there was a subsequent agreement. A term of the agreement provided for the referral of disputes between the parties to the arbitration. In terms of that clause, the parties' disputes were referred to the second respondent whom I will hereinafter refer to as the "arbitrator".

▫ The arbitrator made his determination and awarded the first respondent certain sums payable by the first and the second applicants.

The applicants did not pay. The first respondent registered the award with this court and a warrant of execution was issued.

The third respondent attached the applicant's farm equipment. The applicants ^ε have now made this urgent application to stop the third respondent from selling their equipment in execution pending their application to set aside the arbitral award.

Mr *Colegrave*, for the applicants, submitted that there is no order by a judge of this court recognizing the award granted after the first respondent's ^ϕ application for recognition and enforcement.

Mr *Colegrave* also submitted that the registration of the award was irregular as no notice was given to the applicants. He further submitted that the application for registration of the award should be on notice to the other party and be in the form of a court application made in terms of the rules of this court.

Ⓒ He submitted that the basis for setting aside the arbitral award is that the agreement is contrary to public policy, and that the applicants have prospects of success in that application as the agreement for the sale of seed potato to ^η the first respondent is prohibited by law.

2004 (2) ZLR p342

Uchena J

Mr *Ranchhod*, for the respondents, submitted that the arbitral award was ^α properly registered as there is no need to make a formal application. He said the application is made to the Registrar of the High Court who registers it, and can then enforce it. He submitted that there is no need to give notice of such an application to the other party.

The issues to be decided are: ^β

1. is the application for recognition and enforcement of an arbitral award to the judge or to the Registrar?
2. is the notice to the other party a requirement when such an application is made?
3. is the award likely to be set aside for being contrary to public policy? [Ⓒ]

In my view, the determination of the first two issues is capable of resolving the dispute between the parties. If the award was irregularly recognised, then there is nothing to enforce as there is no High Court order authorising enforcement. The irregularity could be due to the incorrect procedure having been used or due to failure to give the applicants notice of the application to recognise the award. [▫]

The first two issues can be resolved by interpreting Articles 35 and 36 of the Arbitration Act [Chapter 7:06].

Article 35 provides as follows:

- "1. An arbitral award, irrespective of the country in which it was made, ^ε shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to the provisions of this article and Article 36.
2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in Article 7 ^ϕ or a duly certified copy thereof. If the award or agreement is not made in the English language, the party shall supply a duly certified translation into the English language" (emphasis added).

My understanding of article 35 is that:

1. an arbitral award can only be recognized and be enforced if the party seeking to enforce it makes an application to the High Court. [Ⓒ]
2. the application shall be subject to articles 35 and 36.
3. the requirements under article 35 are that the application shall be in writing and be accompanied by the following documents:

- (a) a duly authenticated original award or certified copy thereof; and ^h

2004 (2) ZLR p343

Uchena J ^a

- (b) the original arbitration agreement or a certified copy thereof; and
 (c) if the award or agreement is not in English a duly certified translation thereof into the English language.

It seems to me that whoever has to recognize and order the enforcement of the award must be someone qualified to understand the application, the arbitral award and arbitration agreement.

^b A combination of what has to be considered and the need for an application to the High Court suggests that the application should be to a judge and not the Registrar. If the application is to a judge, then it should be in terms of the High Court Rules and notice to the other party would be a requirement.

This issue cannot be resolved without considering the meaning of Article 36 ^c as the application for enforcement has to be in terms of Articles 35 and 36.

Article 36 provides as follows:

“(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only —

- (a) *at the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought* ^d proof that —
- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or ^e
 - (ii) the party against whom the award is invoked was not given proper notice of appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or *not falling within the terms of the submission to arbitration, or it contains* ^f *decisions on matters beyond the scope of the submission to arbitration*, provided that, *if the decisions on matters submitted to arbitration can be separated from those not so submitted that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced*; or
 - (iv) the *composition of the arbitral tribunal or the arbitral procedure* was not in accordance with the agreement of the parties or, *failing such agreement, was not in accordance with the law of the country where the arbitration took place*; or
 - (v) the award has not yet become binding on the parties or has been set aside or suspended by the court of the country in which, or ^h under the law of which, that award was made; or

2004 (2) ZLR p344

Uchena J

- (b) If the court finds that — ^a
- (i) *the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe*; or
 - (ii) the recognition or enforcement of the award *would be contrary to the public policy of Zimbabwe*.

(2) if an application for setting aside or suspension of an award has been ^b made to a court referred to in paragraph 1(a)(v) of this article, *the court where recognition or enforcement is sought may*, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security” (emphasis added).

A reading of Article 36 (1) and (2) clearly indicates that in considering the ^c application referred to in Article 35, the application of a judicial mind is called for. In Article 36(1)(a)(i) the capacity of the party against whom the award is to be invoked and the validity of the law under which the award was made has to be considered. The legislature could not have intended that issues such as these be dealt with by a person who is not a judge, as was urged upon me ^d by the respondent’s counsel. The court also has to consider the validity of the agreement under the law of a foreign country. That obviously requires the attention of a judge and certainly not that of the Registrar.

In terms of Article 36(1)(a)(iii), the court has to consider whether the award is within the terms of the referral to arbitration. This, in my view, calls for a proper application which should be

considered by a judge. ^ε

In terms of Article 36(1)(a)(iv), the court has to consider the composition of the arbitral tribunal and the propriety of the arbitral procedure. This in my view, is not a task for administrative officers in the Registrar's office. It is clearly a task for a judge of this court.

In terms of Article 36(1)(b)(i), the court has to determine whether or not the ^ε subject matter of the dispute is capable of settlement by arbitration under Zimbabwean law. In terms of Article 36(1)(b)(ii), the court has to consider whether or not the arbitration award is contrary to the public policy of Zimbabwe.

These again point to the hearing having to be before the court and not the ^ε Registrar.

Article 36(2) refers to the court hearing the recognition or enforcement application adjourning its decision if the other party has applied for the setting aside of the award. The adjourning of the court's decision suggests a proper court application before a judge. In fact, both Articles 35 and 36 make reference to the application being made to the High Court or the court. ^η

2004 (2) ZLR p345

Uchena J

^α In Order 1 r 3 of the High Court Rules, the word "court" is defined as meaning "the High Court".

The words "court application" means an application to the court in terms of paragraph (a) of subrule (1) of r 226.

The word "registrar" means: ^β

- (c) the registrar of court;
- (d) the deputy registrar who and an assistant registrar who has been designated as a registrar of the court but does not include a deputy registrar or assistant registrar who has been designated as a registrar of the Supreme Court while acting in his capacity as registrar of the Supreme Court. ^γ

In view of these clear definitions of the words "court" and "registrar", I do not see how the words "High Court" and "court" used in Articles 35 and 36 can ever be taken to mean the registrar. The High Court is presided over by judges, therefore the applications referred to in Article 35 and 36 should be applications before a judge and not the registrar. I would therefore accept Mr *Colegrave's* ^δ submissions and reject Mr *Ranchhod's*. Article 36(1)(a) of the Act provides for the party against whom an award is to be invoked requesting the court to refuse to recognize and enforce the award. This suggests the party against whom the award is made must be notified of the application to recognize and enforce the award. When this is considered together with the provisions of Article 35(1) which provides that the award "shall be recognized as binding ^ε upon application in writing to the High Court," there can be no doubt that a proper application in terms of r 226(1) of the High Court Rules 1971 has to be made by the party seeking to register the award. Failure to comply with that procedure is fatal to the recognition and enforcement of the award. It simply means the award has not yet been recognized. It therefore, is not yet enforceable.

^ε In the present case, it is common cause that the purported recognition was by the registrar. Thus there is no court order authorising the recognition and ^ε enforcement of the award. The warrants of execution which were used to attach the applicant's equipment were therefore invalidly granted.

In view of the conclusion, I have arrived at as regards the recognition and enforcement of the award, I need not consider whether or not the applicant's application for the setting aside of the award has prospects of success to warrant the stay of execution applied for by the applicant.

At the end of the hearing counsel for both parties agreed that I grant or dismiss ^η the application in terms of the final order sought as they had exhaustively

2004 (2) ZLR p346

Uchena J

argued the matter before me and there was no need for the application to be ^α confined to the granting or dismissing of the provisional order.

I will therefore grant the applicant a final order as follows:

- (1) that the warrant of execution of property issued by this court on 3 November 2004 under case No. HC 11698/04 be and is hereby set aside. ^b
- (2) that the third respondent be and is hereby ordered to return to the applicants all the property that was attached and removed by him from the custody and possession of the applicants pursuant to the writ of execution that was issued by the court on 3 November 2004.
- (3) That the respondent be and is hereby ordered to pay the applicant's costs. ^c

Toto & Makoni, the applicant's legal practitioners

Hussein Ranchhod & Company, the respondent's legal practitioners ^d

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Document 45 of 47

Source:

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MASON v TIMORE TRADING SERVICES (PVT) LTD & ORS 2004 (2) ZLR 347 (H)

2004 (2) ZLR p347

Citation	2004 (2) ZLR 347 (H)
Case No	Judgment No. HH-191-04
Court	High Court, Harare
Judge	Uchena J
Heard	8 November 2004
Judgment	15 December 2004
Counsel	<i>N Chikono</i> , for the plaintiff <i>Miss R Maunganidze</i> , for the first defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

^c **Company** — director — powers of — disposal of major assets of company — requirement for approval of company in general meeting for such disposal — presumption that company's internal regulations complied with — inapplicability of

Headnote

^d The plaintiff sought enforcement of a contract for the sale of a house. The house was owned by a company of which the two directors were husband and wife. The house was the company's major asset. The husband agreed to the sale but when enforcement was sought the wife said she had not agreed.

Held, that under s 183(1)(b) of the Companies Act [*Chapter 24:03*] the ^e directors of a company are not empowered, without the approval of the company in general meeting, to dispose of the

company's undertakings or of the whole or greater part of the assets of the company. The presumption under s 12(a) of the Act that a company's internal regulations have been complied with would not assist the plaintiff, as this was not a situation dealing with internal regulations. The requirements of s 183 F were peremptory. There having been no such general meeting to authorise the sale of the house, the husband's unauthorised acts were void.

Legislation considered

Companies Act [Chapter 24:03], ss 12 & 183(1)

Case information

g *N Chikono*, for the plaintiff

Miss *R Maunganidze*, for the first defendant

2004 (2) ZLR p348

Uchena J

Judgment

UCHENA J: The plaintiff entered into an agreement of sale with the first A defendant. The contract was for the purchase of a house which belonged to the first defendant.

The first defendant is a company whose directors are Mr and Mrs Samunyai. The sale was purportedly duly authorised as per the agreement of sale. Mr Samunyai who signed for the seller is the first defendant's managing director. A At the trial, it became common cause that there was no resolution by the company authorising the sale of the house.

The facts of the case are common cause. The first defendant, through the second defendant (against whom plaintiff has withdrawn his claim) advertised the house for sale through two estate agents. The plaintiff first tried to buy c the house through Keystone Estate Agents. He failed. He later saw another advert of the same house, this time being advertised by Contact Estate Agents. He made an offer which was accepted after which he and the second defendant signed an agreement of sale.

A director of the first defendant, Mrs Moreblessing Chipare, who is the second defendant's wife, later objected to the sale, alleging that she had not D consented to the sale of the house. Mr Chihambakwe, who gave evidence on behalf of the first defendant, having been given a special power of attorney by Moreblessing Chipare, said that before the sale of the house, s 183 of the Companies Act [Chapter 24:03] (hereinafter called the Act) had not been complied with. This was not disputed by the plaintiff, and his witness, Mr Chadwick, who gave evidence for the plaintiff said he did not see any E resolution authorising the sale of the house. His company took the second defendant's word that he was duly authorised.

The issue to be decided in this case is whether or not the parties entered into a valid F contract of sale.

Mr *Chikono*, for the plaintiff, submitted that the parties entered into a valid contract as Mr Munyai, who was the managing director, signed the agreement of sale. Miss *Maunganidze* for the first defendant, submitted that there was no valid agreement of sale as s 183 of the Act was not complied with.

Section 183(1)(b) of the Act provides as follows:

"Notwithstanding anything in the articles, the directors of a company G shall not be empowered without the approval of the company in general meeting —

(a) ...

(b) to dispose of the undertaking of the company or of the whole or the greater part of assets of the company" (emphasis added). H

2004 (2) ZLR p349

Uchena J

A My understanding of s 183(1)(b) of the Act is that:

1. the directors of a company shall not be empowered, without the approval of the company in general meeting.

2. to dispose of the company's undertakings; or
3. to dispose of the whole or the greater part of the assets of the company.

¶ In this case, Mr Chihambakwe said the sale of the house has the effect of dissolving the existence of the company as the house is the company's major asset. Without the house the company would be dead. The house therefore forms the greater part of the company's assets.

He also said that he searched the company records and found no minutes of the company in general meeting authorising the sale of the house. He also said ¶ that Moreblessing Chipare, the only other director of the first defendant, did not consent to the sale and did not attend the first defendant's company general meeting. No evidence to the contrary was adduced by the plaintiff. Mr Chihambakwe's evidence was not disputed.

The plaintiff sought to rely on presumptions under s 12 of the Act.

▷ The section provides as follows:

"Any person having dealings with a company or someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth that: ¶

- (a) the company's internal regulations have been duly complied with;
- (b) every person described in the company's register of directors and secretaries, or in any return delivered to the Registrar by the company in terms of section *one hundred and eighty seven*, as a director, manager or secretary of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a ¶ director, manager or secretary, as the case may be, of a company carrying on business of the kind carried on by the company ..."

Subsection 12(b) does not apply to this case because it deals with the directors, managers and secretaries having been duly appointed. In this case, the issue is not the appointment of directors. It also deals with the directors and secretaries having authority to exercise the functions customarily exercised ¶ by a director, manager or secretary, as the case maybe, of a company carrying on business of the kind carried on by the company. In this case, the first defendant is not in the business of selling houses but that of providing training. Mr Chihambakwe's evidence is very clear on this. It is therefore clear ¶ that Mr Samunyai could not be presumed to have had authority to sell an asset

2004 (2) ZLR p350

Uchena J

forming the whole or greater part of the company. The sale of the house was ¶ therefore, not a customary function of a director of a company whose business was to provide training services.

It seems to me that the only relevant provision is para 12(a) which presumes that a company's internal regulations have been complied with. However, in this case, we are not dealing with internal regulations but the requirements of ¶ the Companies Act. The requirements of s 183(1)(b) of the Act are not the first defendant's internal regulations. A failure by the first defendant's director to get the approval of the company in general meeting renders his unauthorized acts void, as the Act clearly states that the directors of a company shall not be empowered. This means without approval their actions have no validity. It follows that Mr Samunyai's acts lack validity. He acted without approval ¶ and that should be the end of the inquiry. The provisions of the Act in s 183(1) are peremptory. Therefore, a director is either empowered or not. If he is not, then his acts are void. It is as if he has not acted.

Mr Chadwick said that, in his experience estate agents do not insist on seeing written approval of the company in general meeting when they sell houses on ¶ behalf of companies. This may be so, but it does not change the law. In cases not involving the sale of the whole or greater part of the company's assets, it may not be necessary. However, that practice if it applies to estates agents in general, is a dangerous one as it may as happened in this case cause prejudice to a client who is expected to assume that his estate agent has made proper enquiries before causing him to enter into an invalid contract. ¶

It should also be mentioned that proviso (i) to s 12 of the Act clearly provides that the presumptions are not to benefit a person who has actual knowledge to the contrary or who ought to reasonably have known the contrary. In my view, the plaintiff's agent, the estate agent knew that the resolution of the company in general meeting was necessary. Mr Chadwick's evidence gives ¶ the

impression that he knew the provisions of s 183 of the Act. He ought to have reasonably known that the non-existence of the resolution was fatal to his clients reliance on a contract entered into without the approval of the company in general meeting.

In the circumstances, the contract entered into between the plaintiff and the first defendant is invalid. ^F

Therefore, the plaintiff's claim is dismissed with costs.

Mhiribidi, Ngarava & Moyo, plaintiff's legal practitioners

Ahmend & Ziyambi, the first defendant's legal practitioners ^H

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Document 46 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/POLARIS ZIMBABWE (PVT) LTD v ZAPCHEM DETERGENT MANUFACTURERS CC 2004 (2) ZLR 351 (S)

POLARIS ZIMBABWE (PVT) LTD v ZAPCHEM DETERGENT MANUFACTURERS CC 2004 (2) ZLR 351 (S)

2004 (2) ZLR p351

Citation	2004 (2) ZLR 351 (S)
Case No	Judgment No. S-68-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Ziyambi JA
Heard	1 June 2004
Judgment	16 December 2004
Counsel	<i>R M Fitches</i> , for the appellant <i>J C Andersen SC</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

c Appeal — evidence on appeal — further evidence — when such evidence may be led — undesirability of leading further evidence on appeal — limited circumstances in which such evidence may be led

Delict — passing off — goodwill — right to — product manufactured by one person but sold or marketed exclusively by another person — limited ^D circumstances where trader can acquire goodwill in respect of goods manufactured by another

Headnote

The appellant had been distributing in Zimbabwe detergent powder produced by a company in South Africa the predecessor company to the respondent,. ^E The appellant decided to produce the packaging in Zimbabwe and this was agreed on condition that a disclaimer was used. Later, after

a dispute arose between the parties, the appellant began importing detergent from a different source and packing it in the same boxes which it had used to pack the detergent from the respondent company. The respondent sought and obtained an order from the court restraining the appellant ^F from passing off a product as the respondent's, from using its trademark and get-up and requiring it to deliver up any material bearing the same. The appellant appealed against the order, claiming the respondent had no *locus standi* as it was not the holder of the goodwill in the detergent powder, the owner of the goodwill being the appellant as the exclusive vendor in Zimbabwe. The trial court concluded that the goodwill was ^G held by the manufacturer. The appellant also claimed that the requirements for an interdict had not been met since the respondent had not proved a business reputation, a requirement for goodwill. At the appeal, the appellant sought to introduce evidence, which was available but not led at the previous hearing, that the packaging showed that the appellant ^H was the manufacturer of the product.

2004 (2) ZLR p352

Held, that the owner of goods, or the person who has proprietary rights in ^A the goods, or the assignee of the goods, has the *locus standi* to sue for passing-off if his rights are infringed by the act complained of. A determination as to the ownership of the goodwill in the detergent powders would settle the question of *locus standi*. The only situation in which a trader in the position of the appellant could acquire goodwill ^B in respect of a product which is manufactured by another but sold by itself is where such a person is not a mere conduit for the goods of another but marketed its own product under its own name. This was not the case here, as the packaging indicated that the goods were manufactured by the respondent. There was an infringement of the respondent's rights of ownership of the goodwill in the detergent powders by the appellant, ^C which packed and sold its own detergent powder in boxes carrying a get-up identical to the respondent's. The intention can only have been to deceive the public into thinking that the product contained in the boxes was that manufactured by the respondent..

Held, further, that an application to lead evidence on appeal will only be granted where special grounds exist and where it is clear that such a ^D course will not unfairly prejudice the other side and will enable the court to do justice between the parties. Such an application is never lightly granted and the evidence sought to be led must not with reasonable diligence have been obtainable for use at the trial. Even where the appellant was unaware of the evidence sought to be adduced the appeal ^E court is very reluctant to allow new evidence, even if it is decisive and the appellant was unaware of it before. The particular circumstances of the case need to outweigh the general undesirability of allowing evidence on appeal. *In casu*, the evidence was available at the time of the trial and in possession of the appellant's legal practitioner. There had been no explanation by the appellant as to why the evidence was not produced ^F at the trial, and the appellant had also failed to show that the evidence would materially affect the outcome of the appeal.

Cases cited

Braddock v Tillotsons Newspapers Ltd [1949] 2 All ER 306 (CA) ^G

Cambridge Plan AG & Anor v Moore & Ors 1987 (4) SA 821 (D)

Farmers' Co-op Ltd v Borden Syndicate (Pvt) Ltd 1961 R & N 28 (FS)

Frank & Hirsch (Pty) Ltd v Roopanand Bros 1987 (3) SA 165 (D)

F W Woolworth & Co (Zimbabwe) (Pvt) Ltd v The W Store & Anor 1998 (2) ZLR 402 (S) ^H

2004 (2) ZLR p353

Ziyambi JA

^A *Kearns v Walter Enterprises (Pvt) Ltd* S-160-90

Kinemas Ltd v African Theatres Ltd 1928 WLD 100

Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 255 (S)

Roamer Watch Co SA & Anor v African Textile Distributors 1980 (2) SA 254 (W)

Case information

^B *R M Fitches*, for the appellant

J C Andersen SC, for the respondent

Judgment

ZIYAMBI JA: The appellant, to whom I shall refer as “Polaris”, is a distributor and manufacturer of home care products. Its business consists in the re-packing and distribution of certain home care products as well as the manufacture and distribution of others.

The respondent, (“Zapchem”) is a South African company, which conducts business as a manufacturer of detergent powders. The respondent has been producing two types of detergent powder, known as “ENERGY” and “ENERGY D MICRO” (“the detergent powders”), under the trademark “ENERGY” since 1993 and exporting the product to Zimbabwe through its local agent since 1995.

It was common cause in the court *a quo* that the respondent’s agent in Zimbabwe was New Group (Pvt) Ltd (“New Group”) who would purchase, in ^ε bulk, the detergent powder as well as the accompanying boxes from the respondent, and market them in Zimbabwe. It was also common cause that the appellant and New Group had an agreement in terms of which the appellant would purchase, in bulk, the detergent powders and boxes from New Group, arrange for the packing of the detergent powders into ENERGY boxes and distribute the packaged detergent powders to wholesale and retail outlets in ^ε Zimbabwe.

In 1998, a company called Woodoc (Pvt) Ltd, now known as New-wood Holdings (Pvt) Ltd, (“Woodoc”) took over from New Group the agency for the detergent powders in Zimbabwe. Thus, Woodoc was the sole importer of the detergent powders from the respondent and the appellant was the sole customer of Woodoc in relation to the detergent powders. The appellant ^ε placed orders twice a year with Woodoc and between 1997 and 1999 purchased about eight to ten thousand kilograms of the detergent powders annually.

All went well until September 1999 when the appellant indicated its intention to manufacture the packaging locally, as the cost of importing the packaging ^η from South Africa was proving too high and it was thought that the cost of

2004 (2) ZLR p354

Ziyambi JA

the detergent powders could be reduced if the packaging was locally ^α manufactured. The respondent says it agreed to the local manufacture of the boxes on condition that a disclaimer was placed on the boxes that the detergent powders were:

“Packed in Zimbabwe under the authority of the licensed owners and distributors of Energy products by Polaris Zimbabwe (Pvt) Ltd.” ^β

Thereafter, it supplied the detergent powders to the appellant without the packaging material or boxes.

Although the appellant’s contention was that it did not require the consent or permission of the respondent or its agent, Woodoc, in order to manufacture the boxes locally, the learned judge in the court *a quo* was of the view, correctly ^γ in my judgment, that this dispute of fact was not material to the determination of the issues before him since it was common cause that:

“Polaris manufactured the boxes locally and packed the detergent powder for local sale where Zapchem believed that its conditions had been met and Polaris believed that there was no need to be authorized to produce the boxes locally as in any case, Zapchem was not the registered owner ^δ of the trademark ENERGY in Zimbabwe nor was Woodoc the licensed user of the trademark. What is also not in dispute is that the locally manufactured boxes were a replica of Zapchem’s boxes. The get-up was the same and so was the trademark or trade name.”

It seems that the last order placed by Polaris for the detergent powders and supplied by Woodoc was in September 1999. Once its stocks were finished, ^ε it is common cause that Polaris imported a different detergent powder from Austria, packed it in the same boxes which it had used for packing the detergent powders from Zapchem and sold it to the Zimbabwean customer.

The respondent therefore sought an order in the High Court:

- (1) restraining Polaris from passing off the Austrian detergent powder as ^ε being that of or associated with Zapchem;

- (2) restraining Polaris from using the trademark ENERGY in relation to detergent powder other than the detergent powder manufactured by or with the authority of Zapchem;
- (3) restraining Polaris from using Zapchem's ENERGY get-up or any get-up ^g which is confusingly similar to Zapchem's ENERGY get-up in relation to any detergent powder other than Zapchem's detergent powder; and
- (4) requiring Polaris to deliver up to Zapchem any packaging, advertising or promotional material, business stationery or other documents in the possession of, or under the control of, Polaris bearing the trademark ^h ENERGY or bearing Zapchem's get-up.

2004 (2) ZLR p355

Ziyambi JA

^A The respondent's application was upheld in the court *a quo*.

The appellant appeals on the following grounds:

- "1. That the learned Judge in the court (*a quo*) erred in finding that the respondent had the necessary *locus standi* to institute the application in the court below; ^b
2. That the learned judge in the court (*a quo*) erred in finding that the respondent had goodwill in and to the names or trademarks ENERGY and ENERGY MICRO in Zimbabwe;
3. That the learned judge in the court (*a quo*) erred in finding that the appellant had no goodwill in and to the names of ENERGY and ENERGY MICRO in Zimbabwe; and ^c
4. That the learned judge in the court (*a quo*) erred in finding that the requirements for the granting of an interdict against the appellant had been satisfied in this matter."

Before dealing with the grounds of appeal, it is convenient to deal with an application made by the appellant to lead further evidence on appeal.

^d The appellant sought leave to lead evidence on appeal on the basis that:

"... crucial evidence, material to the matter, which was made available to the appellant's late legal practitioner of record, Mr Brooks, was not produced for examination at the hearing.

These were samples of locally produced boxes which reflect the name of ^e the appellant and not of the respondent as the supplier of the detergent powders."

The application was opposed in principle by Mr *Andersen*, who appeared for the respondent, on the ground that the evidence, if led, would not have a material effect on the judgment.

The cases referred to us by Mr *Fitches* correctly reflect the legal principles ^f applicable in ^g an application of this nature.

Thus, it has been held that such an application will only be granted where special grounds exist and where it is clear that such a course will not unfairly prejudice the other side and will enable the court to do justice between the parties: see *Kearns v Walter Enterprises (Pvt) Ltd* S-160-90.

An application of this nature is never lightly granted and the evidence sought to be led must not with reasonable diligence have been obtainable for use at the trial. And the applicant must prove that the evidence could not with reasonable diligence have been obtained at the trial: see *Farmers' Co-op Ltd v Borden Syndicate (Pvt) Ltd* ^h 1961 R & N 28 (FS) at 31B-C.

2004 (2) ZLR p356

Ziyambi JA

There should be finality to a trial, so a party can only adduce further evidence ^a in exceptional cases in a civil matter. The court will only call for new documentary evidence if it is satisfied that a major injustice would otherwise be done and that the evidence will settle all argument: see *Kearns v Walter Enterprises (Pvt) Ltd supra*. In that case it was said at p 5 of the judgment:

"In the circumstances, we did not wish to set a precedent for litigants to ^b treat the Supreme Court as a second court of first instance, a court in which they can try out the issue again on fresh facts if the first set of facts proves to be inadequate."

Even where the appellant was unaware of the evidence sought to be adduced the appeal court is very reluctant to allow new evidence, even if it is decisive and the appellant was unaware of it before. The particular circumstances of ^c the case need to outweigh the general undesirability of allowing evidence on appeal: see *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* S-233-93; *Braddock v Tillotsons Newspapers Ltd* [1949] 2 All ER 306 (CA) at 311A.

"There are two conflicting principles always operating in these matters. One is that everything should be done to ascertain the truth; the other is that there should be some finality in litigation, and, so far as possible, a reasonable limitation of costs. It is to achieve the latter result that it is necessary for the court to impose some limit to the re-opening of decided issues, even at the risk that injustice may result or that there is the possibility of injustice resulting." ^ε

None of the cases quoted support the appellant's case.

The evidence sought to be led on appeal was available at the time of the trial and in possession of the appellant's legal practitioner. Not only has there been no explanation by the appellant as to why the evidence was not produced at the trial, the appellant has also failed to show that the evidence sought to be led on appeal would materially affect the outcome of the appeal: see the *Leopard Rock Hotel* case *supra*. Applying the above principles therefore, the application must fail.

I turn to consider the merits of the appeal.

The contention advanced on behalf of the appellant was that the respondent did not prove in the court *a quo* that, in respect of the detergent powders, it ^g had acquired a business reputation which is a *sine qua non* in a passing-off action. The appellant also raised before us the issue of the *locus standi* of the respondent. It was alleged that the respondent, not being the holder of the goodwill in the detergent powders, had no *locus standi* to make this application.

A plaintiff in passing-off proceedings must prove that the property in the ^h

2004 (2) ZLR p357

Ziyambi JA

A goodwill, which he seeks to protect, vests in him. See Webster and Page *South African Law of Trade Marks* 3 ed p 428. Reputation is a component of goodwill: see *F W Woolworth & Co (Zimbabwe) (Pvt) Ltd v The W Store & Anor* 1998 (2) ZLR 402 (S), where Gubbay CJ at p 404D-G set out the general principles applicable in passing-off cases as follows:

"These principles were lucidly identified, with reference to leading ^b authorities, in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pvt) Ltd* 1998 (3) SA 938 (SCA) where, at 947E-948B, Harms JA said:

' The essence of an action for passing-off is to protect a business against a misrepresentation of a particular kind, namely that the business, goods or services of the representor is that of the plaintiff or is associated therewith (*Capital Estate & General Agencies (Pvt) Ltd & Ors v Holiday c Inns Inc & Ors* 1977 (2) SA 916 (A) at 929 C-D). In other words, it protects against deception as to a trade source or to a business connection (*Reckitt & Colman SA (Pvt) Ltd v SC Johnson & Son SA (Pvt) Ltd* 1993 (2) SA 307 (A) at 315B). Misrepresentations of this kind can be committed only in relation to a business that has goodwill or a drawing power (Afrikaans: "*werfkrag*"). Goodwill is the totality of attributes that lure or ^d entice clients or potential clients to support a particular business (*cf A Becker & Co (Pvt) Ltd v Becker & Ors* 1981 (3) SA 406 (A) at 417A). The components of goodwill are many and diverse (*O'Kennedy v Smit* 1948 (2) SA 63 (C) at 66; *Jacobs v Min of Agriculture* 1972 (4) SA 608 (W) at 624A-625F). Well recognised are the locality and the personality of the driving force behind the business (*ibid*), business licences (*Receiver of ^ε Revenue, Cape v Cavanagh* 1912 AD 459), agreements such as restraints of trade (*Botha & Anor v Carapax Shadeports (Pvt) Ltd* 1992 (1) SA 202 (A) at 211H-I) and reputation. These components are not necessarily all present in the goodwill of any particular business.

The only component of goodwill of a business that can be damaged by means of a passing-off is its reputation and it is for this reason that the ^f first requirement for a successful passing-off action is proof of the relevant reputation (*Hoechst Pharmaceuticals (Pvt) Ltd v The Beauty Box (Pvt) Ltd (in liquidation) & Anor* 1987 (2) SA 600 (A) at 613F-G; *Brian Boswell Circus (Pvt) Ltd & Anor v Boswell-Wilke Circus (Pvt) Ltd* 1985 (4) SA 466 (A) at 479D; *Williams t/a Jennifer Williams & Associates & Anor v Life-Line Southern Transvaal* 1996 (3) SA 408 (A) ^g at 419 A-B, 420B). Misrepresentations concerning other components of goodwill are protected by other causes of action such as claims for injurious falsehoods'."

In *Kinemas Ltd v African Theatres Ltd* 1928 WLD 100, it was held that the owner of the goods, or the person who has proprietary rights in the goods, ^h or the assignee of the goods, has the *locus standi* to sue for passing-off if his

2004 (2) ZLR p358

Ziyambi JA

or her rights are infringed by the act complained of: see also *Frank & Hirsch (Pty) Ltd v A Roopanand Bros* 1987 (3) SA 165 (D) at 188H-189D and 189H-I; *Roamer Watch Co SA & Anor v African Textile Distributors* 1980 (2) SA 254 (W) at 264D-F; *Cambridge Plan AG & Anor v Moore &*

Ors 1987 (4) SA 821 (D) at 834H-J. A determination as to the ownership of the goodwill in the detergent powders will therefore settle the question of *locus standi*. ^b

It was contended on behalf of the appellant in the court *a quo* that ownership of the goodwill in the detergent powders vests in the appellant by reason of the latter being the exclusive vendor of the detergent powders in Zimbabwe. The learned judge found that Polaris, being not the manufacturer of the goods but merely a trader in them, had not acquired goodwill in respect thereof. At p 10 of the cyclostyled judgment, he remarked: ^c

"The only situation in which a trader in the position of Polaris can acquire goodwill in respect of a product which is manufactured by another but sold by itself is postulated in *Unlawful Competition* (by van Heerden and Neethling) at p 168 where the learned authors state:

'The issue in question frequently enjoyed the attention of the courts in ^d regard to *parallel importation*. A trader who has the sole right to sell and distribute in South Africa a product which is packed by a foreign manufacturer under his own trade name, and who sells and distributes the product completely unaltered without adding anything to the name or get-up, may not sue on the ground of passing-off if a rival trader imports and distributes the same product in the same get-up. Since the trade name and get-up distinguish the manufacturer's business and ^e products, only the manufacturer, and not the distributing agent, acquires the right to the distinctive mark. On the other hand, where such an agent (bare licensee) is not 'a mere conduit for the goods of another' but 'markets its own product under its own name', he in principle has *locus standi* to institute an action for passing off. In this case the bare licensee indeed acquires his own right to the distinctive mark'." ^f

He then went on to find that the goodwill in the detergent powders which was created in Zimbabwe belonged to the respondent. Still at p 10 of the cyclostyled judgment he said:

"In my view, Polaris, though not an agent but outright purchaser of Zapchem's product, is in no different position to the agent or bare licensee ^g referred to in the above passage who does not market the product in its own name. It is a 'mere conduit for the goods of another'. Goodwill cannot exist in the air. It exists in the context of the undertaking which produces the goods to which the force of attraction relates. I am quite satisfied that the goodwill created in Zimbabwe is that of Zapchem as the manufacturer of the detergent power and as successor to Starchem. Polaris did not sell ^h

2004 (2) ZLR p359

Ziyambi JA

^a the detergent powder as its own product or make it apparent in any way that the detergent powder was its own. How then could it have been associated with the detergent powder and the goodwill flowing from its sale in Zimbabwe? All that Polaris did was pack Zapchem's detergent powder into Zapchem's boxes and sell it. Later, it packed the Austrian detergent powder in boxes bearing Zapchem's trade name and get-up and sold it to the public. In this sense it represented that the Austrian ^b detergent powder (which is Polaris's own product for the present purposes) is the detergent powder manufactured by or associated with Zapchem. Polaris clearly passed off its product as that of Zapchem or associated with Zapchem and thereby committed the wrong of passing off."

^c The approach and the findings of the learned judge are, in my view, unassailable.

Accordingly, the respondent, being the owner of the goodwill, and by inference the reputation, in the property, had the *locus standi* to bring the application.

The learned judge's finding set out above has in effect disposed of the first three grounds of appeal. It also disposes, in my view, of the final ground of ^d appeal, namely, that the requirements for an interdict were not met.

The appellant's contention in this regard was that the court *a quo* erred in issuing an interdict, as the respondent had not proved business reputation and an infringement of a right to an existing goodwill.

It was common cause in the court *a quo* that the detergent powders had ^e acquired a reputation in Zimbabwe. The following passage, quoted from p 11 of the cyclostyled judgment, bears this out:

"The issue in this application was, as I have already pointed out, whether the goodwill attached to Zapchem or to Polaris. There was no argument whether or not any goodwill had been created in Zimbabwe. In fact, it was commonly accepted that the detergent powder had acquired a reputation ^f in this country. Having resolved that the goodwill attached to Zapchem, there is no longer any impediment to a finding in favour of Zapchem."

The learned judge having found that the goodwill in the detergent powders vested in the respondent, it goes without saying that there was an infringement of the respondent's rights of ownership of the

goodwill in the detergent ^g powders by the appellant, which packed and sold its own detergent powder in boxes carrying a get-up identical to the respondent's. The intention can only have been to deceive the public into thinking that the product contained in the boxes was that manufactured by the respondent under the name and ^h mark "ENERGY". Accordingly, the learned judge cannot be faulted in his

2004 (2) ZLR p360

Ziyambi JA

conclusion that the appellant had committed the wrong of passing-off. That ^a being so, the interdict was correctly granted.

In the premises, the appeal is without merit and it is hereby dismissed with costs. ^b

Chidyausiku CJ and Cheda JA concurred.

Honey & *Blanckenberg*, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners ^c

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Document 47 of 47

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2004/Volume 2/S v WILLIAMS & ORS 2004 (2) ZLR 361 (H)

S v WILLIAMS & ORS 2004 (2) ZLR 361 (H)

2004 (2) ZLR p361

Citation	2004 (2) ZLR 361 (H)
Case No	Judgment No. HB-160-04
Court	High Court, Bulawayo
Judge	Cheda J
Heard	14 October 2004
Judgment	16 December 2004
Counsel	<i>K I Phulu</i> , for the applicants No appearance for the respondents
Case Type	Application for declaratory order
Annotations	No case annotations to date

Flynote

Legal practitioner — *conduct and ethics* — *duty to attend court when c seized with matter in court* — *when may absent himself*

Headnote

A lawyer who is seized with a matter before the court has a duty to attend throughout the hearing unless he is unable to do so by reason of inability (such as illness) or has the leave of the court. A lawyer who merely absents himself other than in these circumstances risks being charged ^d with misconduct. If the lawyer does not have the proper attire, the appropriate course would be to approach the judge in chambers through the judge's clerk to seek a postponement.

Case information

K I Phulu, for the applicants

£ No appearance for the respondents

Judgment

CHEDA J: The applicants applied for a declaratory order couched as follows:

- "1. That the arrest of the applicants by the police following their march for Mothers' Day be and is hereby declared arbitrary and unlawful. ^f
2. That the applicants paid the fines under duress.
3. That respondent be and is hereby ordered to cause a refund of each of the applicants' fine to each of the applicants.
4. That respondent shall pay costs of this application."

After hearing submissions by Mr *Phulu* for the applicants, I granted the application with my reasons to follow and these are my reasons.

^g The facts of this matter, which are largely undisputed, are that, the applicants are all members of a non-governmental organisation known as Women of Zimbabwe Arise (herein referred to as WOZA). On 10 May 2004, the applicants were arrested for staging a street march procession without the sanction of ^h the regulatory authority i.e. the police. Therefore, according to the respondent,

2004 (2) ZLR p362

Cheda J

the said procession was both unlawful and unauthorised. After their arrest, ^a they were placed in the cells at Zimbabwe Republic Police Central Police Station, Bulawayo. They were later joined in by their legal practitioners and were then charged with contravening s 57(b) of the Miscellaneous Offences Act [*Chapter 9:15*]. They admitted the charges and were each invited to pay deposit fines of \$3 000 each which they duly paid. ^b

The applicants have now challenged their admissions of guilt on the basis that they were not made freely and voluntarily as they were signed under duress. In their application they sought the following relief:

"It is ordered that:

1. A declaratory order be and is hereby issued declaring that: ^c
 - 1.1 That the arrest of the applicants by the police following their march for Mothers' Day be and is hereby declared arbitrary and unlawful.
 - 1.2 The applicants paid the fines under duress.
 - 1.3 The respondent be and is hereby ordered to cause a refund of each of the applicants' fine to each of the applicants. ^d
2. The respondent shall pay costs of this application."

The respondent filed a notice of opposition on 25 July 2003. Attached to the notice is what they termed "grounds of opposition" together with their heads of argument.

The matter was originally set down for hearing on 15 October 2004 but I ordered that it be heard on 14 October 2004 at 10a.m. as an opposed court application. ^e Both legal practitioners were duly notified by my clerk Mr K Sibanda. On the hearing date Mr *Gaibie* for the respondent did not come to court. I was informed by the clerk that he had come earlier to advise the clerk that he was not properly dressed and he went away. Mr *Phulu* for the applicants also confirmed that he had seen Mr *Gaibie* who also advised him that he was not ^f properly dressed and therefore could not attend the court hearing.

Mr *Phulu* made both oral and written submissions. He raised a point *in limine*, being that the respondent's opposing papers did not comply with the rules. As pointed out *supra*, Mr *Gaibie* failed

to appear in court and the only reason given for his failure was through Mr *Phulu*. I therefore, propose to deal with that failure alone. ^G

A legal practitioner has a duty to do his best in the service of his client. He equally has a duty to the court in as far as prosecution of his client's case is concerned before the court. He must at all times remain courteous to both his colleagues and to the court. ^H

2004 (2) ZLR p363

Cheda J

^A A lawyer who is seized with a matter in court has a duty to attend court throughout the hearing unless he is unable to do so by reason of inability (such as illness) or he has the leave of the court. A lawyer who merely absents himself other than in the above circumstances risks being charged with misconduct.

In casu, Mr *Gaibie* merely absented himself without lawful excuse. He was ^B aware that the matter was opposed and is reasonably expected to know that such cases are heard in an open court, but, according to Mr *Phulu*, he appeared without proper attire. The reasonable steps to have been taken in the circumstances would have been for him to approach the judge in chambers through the judge's clerk to seek a postponement. But for him to merely ^C disappear without even appearing in chambers is to say the least very discourteous. These courts can not condone such behaviour by legal practitioners.

On the face of his documents, he did not adequately prepare this matter, in that he failed to comply with the rules of court. However, I am not making a decision on that as he has not been heard for a possible explanation. There was no ^D appearance for and on behalf of the respondent.

In light of his absence without excuse, I find that the applicants must succeed on this technicality.

Accordingly, this application succeeds with costs.

^E *Coghlan & Welsh*, applicants' legal practitioners

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